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COMPETITION LAW IN INDIA: AN OVERVIEW

*C.P. UPADHYAY**

ABSTRACT : Competition Law and Policy is also similar to political democracy as the goal of the both is maximum public welfare. Competition law is primarily based on economic and legal principles. Since last some years competition law has become a subject of central importance. In the era of liberalisation and globalisation it has become imperative for India to set the rules relating to competition in the market to enhance the welfare of the people and to strengthen the economy of the nation. The paper tries to provide a brief history and development of competition law in India. It also explains the concept of competition and various other related issues and challenges in the enforcement of the competition law. Purpose of study is to provide easy and comprehensive understanding of competition law, its application and enforcement.

KEY WORDS : Competition, CCI, Competition Policy, Dominant position, combination, competition advocacy.

I. INTRODUCTION

Competition laws have been described as *Magna Carta* of free enterprise. Competition is engine of free market. Market economy performs better when there is competition in the market. Competition involves a process of business rivalry to meet customer's needs more effectively than competitors[1]. Competition law not only ensures competition in the market, it also checks the practices that are harmful to the competitive process. If market or enterprise is unprotected by the government it may

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1. Safeway PLC and Asda Group Limited (owned by Walmart Stores Inc.) A report on the Mergers in Contemplation, para. 2.88.

cause anticompetitive or monopolistic practices leading to inefficiency in the market. In this way competition may be considered as an act of government which prohibits anticompetitive or monopolistic conducts in the market. Competition is defined as a process that requires numerous participants and decentralisation[2]. They are important to the preservation of economic freedom and free market system.

The basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation o resources in free market economies. Thus there is a need for the competition law as a regulative force to establish effective control over economic activities. Economic rationale behind free market economy is that freely operating markets will result in the most efficient allocation of nation's resources and will bring consumers the widest variety of choices at the lowest possible prices[3]. Competition law forces the market players for providing greater profits through greater efficiency. This leads to a prosperous society in which individual consumers have freedom of choice and can obtain the goods at cheapest price and optimal quality.

Apart from free market system, competition law also has social purposes. During the 19th century both law and economies began to develop theories of competition as a social good. The social purpose rationale for competition law always preferred the preservation of small business over the preservation of free market[4]. It finds its introduction in the passage of Justice Hands. He noted that :

> "It is impossible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. Throughout the history of statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, an organization of industry in small units which can effectively compose with each other"[5].

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2. *United Sates V. Philadelphia Natil Bank* (1962) 374 US 321 (369).
3. Herbert Howenkamp, *Federal Antitrust Policy* : *The law of competition and its practices* (West, 1994) p3.
4. *United States V. Aluminium* Co. of America 148 F2d 416 (2d Cir 1945).
5. *Ibid* at pp. 427, 429.

Competition law has to ensure free, fair and healthy competition in the market. The principal objective of the competition law is to make the market economy better by stopping anti-competitive practices in the market. In order to maintain competitive conditions there should be appropriate competition laws to prevent market abuse and this must be supplemented by competition policy to ensure that all government policies tend to promote competition. In other words, competition law addresses the market failures whereas competition policy seeks to correct the anti competitive outcomes of various government policies and help in development of competitive markets[6].

II. EVOLUTION OF COMPETITION LAW

The concept of monopoly is quite ancient and can be traced back to the civilisations of India and the Roman Empire. The development of competition law started with grant of individual freedom against existing guilds in the Europe in early 18th century. The first traceable event of origin of competition law can be regarded the book of the "Wealth of Nations" by Smith in which he treated competition as the invisible hands which promotes the economy and assist society[7].

Middle period of competition law began with the Standard Oil's pronouncement of the 'rule of reason' approach. Justice Brandeis explained this rule and said that : 'legality of an agreement cannot be determined by so simple test, as whether it restrains competition. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition'[8]. The modern statute controlling cartels and monopolies first appeared in the United States in 1890. This is considered as the first attempt in the drafting of modern competition law, which was an attempt to promote and preserve competition[9]. Although at International level there is no multilateral

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6. Mehta, S. Pradeep. "*Why should consumers be interested in competition law and policy*." accessed on 8 December, 2015.
7. Smith, Wealth of Nation (W. Pickering, 1995).
8. *Board of Trade of Chicago V. United States* (1917) 246 US 231 (238).
9. D.M. Raybould, *Comparative Law of Monopolies* (E. Susan Singleton Ed., 1999) pp 3-4.

agreement on trade and competition policy, the issue is present in many of the provisions of existing WTO agreements[10]. Article 102 of Treaty on the Functioning of European Union prohibits abusive conduct by companies that have dominant position in particular market[11]. In the legislations of various other countries there is reference of abuse of dominant position[12].

After Attainment of independence India adopted the policy consisting of 'command and control' laws. However, widespread economic reforms were undertaken and consequently the march from 'command and control' economy to an economy based on free market principle commenced promoting competition and curbing baneful effects of monopolies are the constitutional imperatives visualised by the framers of Indian constitution. Prevention of concentration of Wealth and means of production to common detriment, control of monopolies and prohibition of monopolistic trade practices are the constitutional imperatives for state policy[13]. The constitution of India guarantees all citizens of India a right to practice any profession or to carry on any occupation, trade or business but all these rights are subject to reasonable restrictions imposed by state in public interest[14]. Thus, it emerged that Parliament has constitutional mandate to impose reasonable restrictions upon enterprises from enjoying unfettered freedom of trade and commerce[15]. Further in performance of its sovereign function[16], India decided to address the issue of competitiveness amongst enterprises when it decided to sign the WTO global treaty on 1st January, 1995.

Government of India constituted a commission named Monopolies Inquiry Commission in 1965 under the chairmanship of K.C. Das Gupta.[17] Inthe basis of report of the committee the government enacted "MRTP

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10. GATS (General Agreement on Trade in Services), TRIPS (Trade Related Aspects of Intellectual Property Rights), TRIMS (Trade Related Investment Measures), Act XVII of GATT, 1994.
11. Wish, Richard and Bailey, David (2012), *Competition Law*, 7th Ed. (New York : Oxford University Press) 173.
12. Clayton Act, 1914 of USA, Competition Act 1998 of UK, The Competition Act 1986 of Canada etc.
13. Article 39(b) and (c) of the Constitution of India.
14. Article 19(1) (g) of Constitution of India.
15. Art. 301 read with Art. 302 and Art. 304(b) of Const. of India.
16. Art. 253 of Const. of India.
17. Other members were : GR Rajagopal, KRP Aiyangar, RC Dutt and I.G. Patel.

Act, 1969"[18]. Act was based on 4 principles : (1) Social justice with economic growth, (2) Welfare state, (3) Regulation of concentration of economic power, (4) Controlling of monopolistic, restrictive and unfair trade practices[19]. After sometime it was noticed that MRTP Act's objectives could not be achieved to the desired extent. MRTP Act was amended in 1984. Other amendments followed from time to time to suit the statuesque. Again MRTP Act was amended in 1991 as a part of new economic reforms set in motion by the government of that day. In the process of liberlisation, privatisation and globalisation a number of changes were introduced in existing policies relating to industrial policy, Foreign Direct Investment, technology imports, government monopolies, import licensing, financial sector and ownership[20]. The Act and the commission lived up to September 2009[21]. The MRTP Act, 1969 was found to be obsolete as it was incompatible with changing circumstances. Around that time a debate started regarding the relevancy of MRTP Act, 1969.

The MRTP Act, became obsolete in the light of international economic developments relating to competition laws. A need was felt to shift the focus from curbing monopolies to promoting competition. It was realised by the government that many provisions of the MRTP Act and judicial pronouncements thereof were not useful in the changing economic and social milieu of India. With the establishment of WTO, the whole international economic environment was changed. In view of the above Govt. of India appointed a high level committee on competition law[22]and Policy to assess some of the likely changes and to suggest a way forward, including legislative framework in this regard. Raghwan Committee submitted its report in May, 2000 and recommended to repeal MRTP Act and to enact a modern comprehensive competition law to meet the challenges of Indian Market[23]. On the basis of the report the competition Act was enacted by Parliament in December, 2002.

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18. Monopolies and Restrictive Trade Practices Act, 1969.
19. Abir Roy, Jayant Kumar *'Competition Law in India'*. P 15.
20. Bhatia, Kanika (2015) '*A study of functioning and performance of competition Communication of India*', published Ph.D Thesis, MDU, Rohatak.
21. CCI started functioning Since, 1st Sept., 1990.
22. Raghwan Committee appointed in 1999.
23. Chaudhary Manas Kumar (2016) "*MRTP Act to Competition Act : The Way Forward*, Vikalp 41, 169."

III. COMPETITION POLICY AND COMPETITION LAW

Competition Policy is defined as "those government measures that directly affect the behaviour of enterprises and the structure of industry."[24]The scope of competition policy is broad and essentially includes all governmental measures that directly affect the conduct and behaviour of enterprises and the structure of industry with the objective of promoting efficiency and maximising welfare. Competition law has a more specific focus and necessarily is more limited in scope. Whereas the former covers a whole array of executive policies and approaches the latter is a piece of legislation enforceable in a court of law.[25]Competition policy is a desirable objective and an useful instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power[26]. Competition law cannot be seen in isolation from development goals of a country. To strengthen the forces of competition in the market both competition law and competition policy are required. The two complement and supplement each other. Before spelling out the competition policy and law the necessary pre requisite is to create a competitive environment. In the absence of proper competitive environment we may find ourselves with a first class competition law but no competition[27]. An effective competition policy is necessary for the creation of globally competitive industries because international competitiveness is determined by the degree of competition among domestic industries. Competition Policy must be evolved to serve the basic goals of economic reforms by building a competitive market economy. Competition law must emerge out of national competition policy[28]. The purpose of any competition law is to provide teeth to competition policy, it provides legal backing to competition policy. Competition law prevents artificial entry barriers and facilitates market access and complements other competition promoting activities.

Free trade and competitive behaviour are necessary condition for efficiency. Trade liberalisation alone is not sufficient to promote

24. supra note 19 at, p-647 (Khemani, R.S. and Mark A. Dutz. 1996).
25. Id, at p-677.
26. Id, at p-645.
27. Suggested by High level committee policy and law (Raghwan committee).
28. See Supra note 19, p-646.

competition and there is a need for a separate competition policy also. Competition policy and liberal trade policy both seeks to achieve economic efficiency by having laws that promote and protect competition. Liberal trade policy seeks to achieve it by removing the barriers to trade[29]. Further there are 2 components of competition policy. The first involves a set of policies that enhance competition in markets, as, liberal trade policy, relaxed foreign investment and economic de-regulation. The second is legislation designed to prevent anti-competitive business practices, as, MRTP Act, Competition Act, etc.

An effective competition policy promotes the creation of a business environment which improves static and dynamic efficiencies and leads to efficient resource allocation. Where this is not possible, it requires the creation of suitable regulatory framework for achieving efficiency[30]. Efficiency is all about maximum utilization and best possible management of scarce resources in society. There are 2 types of efficiency : static and dynamic efficiency. Static efficiency aims at a better output with same input. It is achieved by strong price competition. Dynamic efficiency refers to development of new products. This can be done by ensuring proper reward to the inventor in lieu of developing and disclosing the invention to public. Again static efficiency may be of two types : allocative and productive efficiency. Allocative efficiency deals with optimal allocation of resources and productive efficiency deals with optimal production of resources[31]. The competition policy in developing economies should support the overall development path of any economy emphasizing static and dynamic efficiency goals[32].

There can be no analysis of competition policy in the modern economy without considering the effects of regulations on competition. Many economists say that the effect of anti competitive regulations is greater than effect of anti competitive practices on competition. This consideration has given rise to the concept of comprehensive competition

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29. Id, at p667.
30. Id, p648.
31. Id, p7.
32. Singh A. (2002 Sept. 18) competition and competition policy in emerging markets : International and development dimensions (G-24, discussion paper series, paper No. 18) New York and Geneva.

policy which includes all government policies, as trade policy, industrial policy, tax policy and labour policy[33].

IV. COMPETITION LAW AND OTHER REGULATORY AUTHORITIES

Regulatory regimes were enforced in many countries in the 60's and 70's with economic deregulation countries have taken measures to eliminate public monopolies and to open competition in strategic sectors such as telecommunications, electricity, airlines, railway etc. There has been increasing trend towards introduction of completion in the economic activities of many countries. India had a strong regulatory regime till 1991, when certain measures and policies ushered in as a part of the liberalisation and globalisation process and economic reforms. It is recognized that for a variety of reasons competitive markets may not exist or yield desirable results. Hence, it was thought that crucial economic sectors cannot be left unregulated and some form of intervention in the market process was needed.

These interventions may be classified in 2 categories – Sector regulators came into existence to restore efficiency in particular market for specific sectors like TRAI for telecom sector, SEBI for financial sector, RBI for monetary sector, IRDA for insurance sector etc[34]. There are regulators in professional services like Chartered Accountants, Advocates and Medical Practitioners. Regulation is considered as surrogate to achieve competitive outcomes. Regulation is considered as surrogate to achieve competitive outcomes. Regulation tells the firms what they have to do. They have narrow focus[35]. This is a centrised process. Second competition law seeks to create an entitlement for competition. It is a decentralized process and is useful in correcting problems created by imperfect competition. Competition Act, 2002 creates proactive obligation on the CCI to promote competition in the market place. It is the duty of CCI to eliminate practices haurg adverse effect on competition and ensure freedom of trade carried on by other participants, in market in India[36].

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33. Anant TCA & Singh Jaivir (2006) "*Control government policies : Interface with competition policy objectives*" in Mehta, S. Pradeep.
34. J.B.S. Chauhan , *Indian competition law*, JILI Vol 54, No. 3, July- Sept. 2012.
35. See Supranote 33.
36. Sec. 18 of the Competition Act, 2002.

Sector regulators are often criticised on a number of grounds. They approach the issues from their technical stand point rather than considering the effects on social welfare. Single regulators may not adequately take account of requirements of efficiency while multiple regulators may lead to concerns related to regulatory overlaps. The other trouble with overlapping jurisdiction is that different regulators have varied powers to enforce and punish[37].

Sector regulation is clearly in the executive domain with the regulator examining issues of technology, costs and process in the regulated industry.

Competition authority is empowered to regulate production, supply or consumption to promote competition. It is an adjudicatory process where authority on its own or on receipt of complaints acts on anticompetitive practices. The relationship between competition and regulation is complex because of absence of legal provisions relating to co-ordination betweenthe two competitionact has a kind of supremacy of the legislation over other statutes[38]in competition enforcement while seeking a kind of harmonious symbiotic working with other enactments[39].

The conflict of jurisdiction of CCI with other regulatory authorities is bound to happen. In this regard a policy framework and guideline by the competent authority will be required in near future for co-ordination and co-operation of regulatory authorities with competition authority[40].

V. JOURNEY OF COMPETITION LAW : MRTP ACT TO COMPETITION ACT

Initially India adopted and followed the policy of 'command and control' but later on it marched from command and control economy to an economy based on 'free market principles'. Promoting competition and curbing the effects of monopolies is one of the constitutional imperatives which was visualised by the framers of Indian constitution. The prevention of concentration of economic power to the detriment of

37. See Supranote 33, at p-96.
38. See Sec. 60 of the Competition Act, 2002.
39. Id. Sec. 62.
40. See Supra note34, at p-322.
41. Art. 39(b) and (c) of the constitution of India.

the public, control of monopolies and prohibition of monopolistic trade practices are the constitutional imperatives for state policy[41]. Government of India appointed K.C. Das Gupta Committee[42]to inquire into extent and effect of concentration of economic power and to suggest legislative and other measures necessary in the light of such enquiry. On the basis of report of this enquiry commission MRTP Act, 1969 was passed. The act was passed for the purpose of prevention of concentration of economic power to the common detriment and to control monopolies and to prohibit MTP, RTP and UTP. MRTP Act was comprehensive in nature and it was drafted in such a manner that it had the character of a charter of economic liberty aimed at preserving free and unaffected competition as the rule of the trade. An interesting feature of the statute is that it envelopes within its ambit fields of production and distribution of both goods and services[43].

With the passage of time it was noticed that MRTP Act's objectives could not be achieved to the desired extent. In June, 1977 the government a high poweredcommittee to consider and report the required changes in the statute.[44] Consequently by the amendment of 1984 RTP, UTP and MTP were included in the MRTP Act, There was again major amendment in MRTP Act in 1991. This amendment was a part of the new economic reforms set in motion by the government of that day. By this amendment MRTP Act was made applicable to public sector undertakings whether owned by the government or by statutory corporations. In the mean time unfair trade practices were removed from the new law and transferred to the consumer protection act, 1986. It is not able that consumer protection act also have provisions for awarding compensation.

The replacement of MRTP Act, 1969 by the competition act, 2002 is a natural corollary to economic liberalisation and opening up of trade to competition. After establishment of WTO the whole international economic environment was changed. Pursuant to this government of India set up an expert group on interaction between trade and competition policy. The

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42. K.C. Das Gupta (Chairman) and 4 other members constituted Monopolies Inquiry Commission.
43. See Dr. S. Chakravarthy, *India : Pros and Cons of Competition*, 25 Intel Business Law 457(1997).
44. Sachchar Committee.
45. See report of Expert Group, Ministry of Commerce, Govt. of India, 1999.

expert group recommended the need for an appropriate competition law to protect fair competition and to check anti-competition practices[45]. Considering the above factors and realising the need for a new competition law, a high powered committee headed by Mr.SVS Raghvan was constituted to advise a new competition law for the country[46]. The committee recommended repealing of MRTP Act and enacting of a modern competition law to meet the challenges of trade liberalisation[47].

Coupled with the recommendations of Raghvan Committee and the constitutional mandate[48], Parliament enacted competition act, 2002 in December, 2002. The necessity of passing of competition Act may be examined by the observations of the Govt. of India while passing the competition law.

"India has in the pursuit of globalization responded to opening up of its economy, removing controls and resorting to liberalisation. As a natural consequence of this the Indian market has to be geared to face competition from within the country and outside. The MRTP Act 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift the focus from curbing monopolies to promoting competition"[49].

The latest competition law of India is a civil legislation and mandates the commission to abide by the principles of natural justice[50].

Main objective of the Act as stated in the preamble is- (i) to prevent practices having adverse effect on competition, (ii) to promote and sustain competition in markets, (iii) to protect the interests of consumers and (iv) to ensure the freedom of trade carried on by other participants in markets[51]. To achieve its objectives the CCI was established in October, 2003 to ensure fair and healthy competition in economic activities in the

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46. Raghvan Committee was appointed in 1999.
47. Report of the Committee on Competition Policy and Law.
48,. Art. 301 read with Art. 302 and 304(b) empower the Parliament to enact the law to reasonably restrict freedom of trade in the country.
49. The Competition Act, 2002, p-1 (Introduction).
50. Section 36(1) and 36(2) of the Act.
51. Competition Act 2002, Retrieved 3 March, 2016 from http//www.cci.gov.in/sites/default/files/cci-pdf/competionact2002.pdf.

country for faster and inclusive growth and development of the economy. The CCI is empowered to order remedial measures including the prohibitory direction to cease and desist, impose penalties, award compensation and pass other appropriate orders as it may deem fit[52]. The act also provides for penalties for contravention of the orders, failure to comply with directions or furnishing of false information or suppression of material information etc[53].

The act intends to curb any activity that could harm consumer welfare or freedom of any individual to freely and fairly compete in the market. The regulatory provisions of the act may be divided in 3 categories: (a) to prohibit horizontal and vertical anti-competitive agreements between the enterprises[54]i.e. cartelizing behaviour of the firms (b) to prohibit abuse of dominant position by an enterprise[55] (c) to regulate the combinations which cause adverse effect on competition in India[56] i.e. mergers and acquisitions. The act has been amended thrice in the years 2007, 2009 and 2017. The amendment of 2007 provided for two separate institutions namely competition commission of India (CCI) and the Competition Appealate Tribunal (COMPAT). Pursuant to the amendment of 2009 all the pending cases and investigations with MRTP commission were transferred to the COMPAT and CCI and the MRTP Act was repealed. According to amendment of 2017 with effect from 26th May 2017, the COMPAT has ceased to exist. The appealate jurisdiction under the act would now be exercised by the National Company Law Appealate Tribunal (NCLAT)[57].

VI. COMPETITION COMMISSION OF INDIA

Administration and enforcement of the competition law requires an administrative set up. This administrative set up should be more proactive than reactive for administration of completion policy. The completion act

52. Competition Act, 2002, Sec. 28.
53. Ibid, See 42-A.
54. Ibid See 3.
55. Ibid See 4.
56. Ibid See 5.
57. NCLAT Constituted U/S 410 of Companies Act 2013, shall be the appealate tribunal for the purpose of this act.

2002 provides for the establishment of completion commission of India also known as CCI to prevent the malpractices that adversely affect competition. It promotes and sustains the competition in the market as well as protects the interests of consumers[58]. CCI has emerged as an assertive market regulator in India similar to regulators in other developed jurisdictions. It has made an indeliable impact on the industry by imposing heavy fines. Apart from the power to heavy huge monetary penalties CCI also has the power to modify the terms of an agreement, declare agreements to be void, to change the manner of conducting business operations of a market participant. Further CCI also has the power to lift the corporate veil and impose personal liability of officers incharge of companies. The CCI has been entrusted with various powers to curb the problem of anti competitive practices. In case of contravention of provisions of Section-4, the commission may institute an enquiry either *suo- moto* or on the basis of information from any person or reference by central or state government[59].

Under examination of such contravention if it finds that there exists a prima facie case it may direct the Director General to conduct an investigation into the matter. But if it finds that there is no prima facie case, it may close the matter by passing such order as it deems fit[60]. Where after inquiry that action of an enterprise in a dominant position is in contravention of Sec-4 it may pass all or any of the following orders : (i) to discontinue such abuse of dominant position, (ii) to impose penalty as it may deem fit[61], (iii) direct for the division of enterprise abusing dominant position[62], (iv) to restrain any party from carrying on such act until conclusion of such inquiry[63].

The CCI is empowered to enforce Indian competition law against foreign entities whose actions have 'appreciable adverse effect' on competition in the relevant Indian market[64]. In fact it has come to be

58. Sec. 18 of Completion Act, 2009.
59. Ibid, Sec. – 19.
60. Ibid, Sec. 26.
61. Ibid, Sec. 27.
62. Ibid, Sec. 28.
63. Id, Sec. 33.
64. Id, Sec. 32.

recognised in almost all competition law regimes. The CCI has power to issue the interim relief during the course of proceedings[65]. The power to grant interim relief will be exercised by the CCI only when there is a violation of the provision of the act or there is an imminent danger that such anti competitive action will be undertaken. The Supreme Court of India in relation to interim order under Sec-33 opined that powers of interim relief should be exercised sparingly and under compelling and exceptional circumstances[66].

One of the major fallacies of the MRTP Act is that it did not contain any express provision for application of the act outside India. But on the other hand competition act, 2002 expressly provides for the extra-territorial application of Indian Competitive Law. Any anti competitive activity taking place outside India but having adverse effect on competition in the relevant market in India shall be subjected to the application of this act[67]. CCI is empowered to enquire into any agreement, abuse of dominant position or combination having adverse effect on the competitiveness of the relevant Indian market. It marks a significant departure from the earlier law of the land. However cross border enforcement of competition law is different from simple implementation of domestic laws. CCI while pursuing an investigation across borders, communicate and interact with other foreign authorities and eventually some form of solution will have to be carved out wherein the competitive interests are preserved. If an entity violates Indian competition law outside India, the CCI will have to pursue enforcement measures across borders[68].

VII. CONCLUSION

Earlier MRTP Act 1969 was not only in adequate but also obsolete in certain respects. The main objective of the competitive law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition by and large have been accepted all

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65. Id, Sec. 33.
66. CCI V. SAIL (2010) 10 SCC 744.
67. Ibid, Sec. 32.
68. J.B.S. Chauhan, "*Indian Competition Law: Global Context*", JILI Vol. 54, July-Sept. 2012.

over the world as guiding principle for effective implementation of competition law.

CCI plays a major role to ensure competition in the market. But some issues are needed to be addressed like complaint mechanism, reference by government, investigation by DG. In this background it is submitted that some modifications are required for effective working of CCI and healthy competitive in the market. It is important to note that proliferation of competition law has taken place irrespective of the stages of economic development of country. Reasonably competition law may be stated as "new wine in a new bottle" not as "old wine in a new bottle.

COMPELLED DOWRY AND CRIMINAL JUSTICE IN INDIA

PRADEEP KUMAR SINGH*

ABSTRACT : Social problems always create serious challenges in various references for society and members of society. Some social problems are so complicated and serious that it not only cause problems itself but also further begets some other social problems. Compelled Dowry is one such complicated and serious social problem which has devoured life of countless women and their parents, and further, spoiled their family life. Compelled dowry begets problem of infanticide, foeticide, girl child discrimination, bribery and corruption. It has demoralizing effect, and further creates criminogenic effects in the society which ultimately complicates the challenges before criminal justice system. Compelled Dowry related problem is always attempted to be dealt with formal social instrumentality particularly by using criminal justice system but problem has remained unchecked. For dealing social problem like dowry, it is needed that there should be use of both, formal and informal social instrumentalities. Criminal justice system by punishing persons involved in practices of compelled dowry attempts to check the problem immediately but its main role is to strengthen informal social instrumentality against the compelled dowry. Criminal justice system by taking actions against compelled dowry makes striving to create standard in members of society particularly youth and this aspect of criminal justice forms most effective tool for tackling social problem of compelled dowry and related offences . In this paper criminal law relating to compelled dowry shall be analysed.

KEY WORDS : Causation, Cruelty, Dowry, Dowry death, Presumption, Social problems, Society.

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I. INTRODUCTION

Objective behind establishment and continued existence of state and criminal justice system is to make free, peaceable, amicable, progressive and developing society in which members of society do not have fear of victimization by crime commission. It is considered that even before origin of society when people were living in state of nature which was pre-society era, even then wrongful acts, which are now declared as crimes by man-made law, were committed and such wrongful acts were causing serious havoc. Such speculation appears to be true on the basis of observance of behaviour of various animals, and social groups without proper development of modern instrumentalities. It is believed that people in pre-society era had willingness to get protection against such wrongful acts, formed society. Society, thereby, has heavier responsibility to protect people against wrong-doings and to make life of people completely free from problems and wrong-doings. Society has undertaken responsibility to protect society and members of society; for bearing this responsibility formal and informal instrumentalities are developed by the society. Informal instrumentalities are basic and mainly on it success of tackling crime and criminality depends. Informal instrumentalities developed for the aforesaid purposes are social thinking, social philosophy, values, norms, culture, social solidarity, social pressure, religion, custom, tradition, morality etc. formal instrumentalities developed by society to deal with wrong-doings are law, state and criminal justice system. Informal instrumentalities provide strength to the formal instrumentalities and in its turn formal instrumentalities reinforces informal instrumentalities. When both the instrumentalities developed by society function properly to cooperate to form solidarity, and develop through consonance with complete devoid of contradictions, only then problem of crime, criminal and criminality may be effectively dealt with. Social informal instrumentalities are considered more important than formal instrumentality and success of later in achieving goal depends on former. When these instrumentalities are in contradiction then crime cannot be coped and problem becomes most complicated and serious one, criminal justice system fails in dealing with the problem. Usually such contradiction arises when for some useful cause social instrumentality developed some institution, it may have served well but with passing time some improper developments might have taken in such institution which is not

abolished or reformed in suitable manner. Criminal justice system attempts to eradicate it but social behaviour permits, in such situation it becomes most devastating problem unable to be effectively tackled unless social informal instrumentalities prohibit or reform the social institution in consonance with criminal justice considerations. Dowry system is one such problem which is not only challenge for criminal justice system but also poses serious challenge for whole sober and civilized considerations of society. Dowry is not only serious social problem posing grave challenge before the humanity but also mother of various other such serious social problems. Due to dowry problem various social evils in existence and form web of social problems; some examples of such social problems existing due to the dowry are – corruption, infanticide, foeticide, cruelty, cruelty, dowry death, girl child discrimination, mal-nourishment and under-nourishment of girl child, child marriage, mis-match marriage etc. in criminal law dowry in itself is not crime but various activities relating to dowry are declared as crime like forced dowry, cruelty and dowry death. Previously dowry was practiced whole through the world but now in developed country dowry system has come to an end or has not remained problematic but it is still problem in developing and under-developed societies particularly in South Asia and Africa. In India extent and seriousness of dowry is alarmingly increasing requires for concerted actions in reference to formal and informal social instrumentalities.

II. MEANING OF DOWRY

Dowry related activities are social problems in Indian society and presently have posed greater crisis in Indian society. In ancient period the system of dowry was highly appreciated and had social objectives also. It was given very prominent space in religious ceremony associated with solemnization of marriage particularly in Hindu religion; with passing time all the communities observed in one form or other. In ancient period woman had no inheritance right for parental property, dowry was one measure by which some money or other valuable things were given by parents and other relatives to form *stridhan*, thereby property of woman concerned. With marriage husband and wife were entering in *grihastha aashrma* and now they had to bear house-hold responsibilities and to meet it, amenities were provided through dowry given by parents and other relatives. Girl child born, she was cared and look after by parents

but with marriage she was separating for whole life and becoming member some other family, thereby parents were compelled by their love and affection to give some gift on the occasion of marriage. Society in ancient period made institution of dowry with greater objectives and it was much beneficial for society at that time, thereby it was given space in religious ceremonies associated with marriage also. But with passing time dowry institution deviated from its pious objectives and from voluntary dowry, it became compelled dowry; from *stridhan*, it became easy money for husband and in-laws; from establishing household, it became destroying household, and from giving life, love and affection, it became measure for taking lives, causing brutality and giving sobbing. '*Dowry*' term originated from Latin root term '*Dotare'* which means 'to endow or portion out'. Now days whenever name dowry is taken, it refers to cruel institution of compelled dowry. In common parlances and societal considerations dowry term refers to payment of money or valuable thing from bride side to groom side. In some communities particularly in matriarchal communities money or valuable things are given form groom side to bride side and it is commonly called as bride-price. But in legal parlances such differentiation is not made; in Dowry Prohibition Act for both kind of payment of money or valuable things whether from bride side or groom side, are referred as dowry. In legal perspective 'Dowry' is inclusive for dowry and bride-price both. Dowry may be movable or immovable property given by one party of marriage to another party to marriage. Generally dowry is given from wife or her relative to husband or his relatives. Dowry is practiced in patrilineal societies; in such societies wife moves to husband family. Giving dowry in ancient period was one measure to compensate husband family for lifelong responsibility creation. The Encyclopaedia Britannica observes about dowry:

> "Dowry, the money, goods, or estate that a woman brings to her husband or his family in marriage. Most common in cultures that are strongly patrilineal and that expect women to reside with or near their husband's family (patrilocality), dowries have a long history in Europe, South Asia, Africa, and other parts of world."

Dowry is always connected with culture of the society concerned. dowry is traditionally used as measure to lure husband and his family for marriage :

> "Traditionally, a woman's family offered a dowry to potential husbands in order to make the match more attractive to the man and his family. The word dowry can actually mean "payment", but it can also refer to whatever property or savings a woman herself brings into a marriage."

Law Commission defined dowry:

> "Dowry means money or other thing estimable in terms of money, demanded from the wife or her parents or other relatives by the husband."

Dowry is money or valuable thing demanded or given or taken in reference to marriage of woman with man and does not have any connection with legally recognized demand or claim. Section 2 of the Dowry Prohibition Act 1961 (herein after referred as DPA) defines dowry in gender neutral term and it is inclusive for dowry and bride price both. There are two related system of payment of money in marriage- 1. Money and valuable things are given from relatives of bride and/or bride to relatives of groom and/or groom. In society it is commonly called dowry. Whenever dowry term is used, it refers to this kind of payment of money in connection of marriage. Generally, it is practiced in patriarchal societies. 2. In some societies particularly in matriarchal societies money and valuable things are paid by groom side to bride side; such system is referred as bride-price. Dowry defined in Section 2 of Act 1961 is inclusive for dowry and bride price both. Section 2 Dowry Prohibition Act defines dowry:

> "In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly –
>
> (a) By one party to marriage to the other party to the marriage; or
>
> (b) By the parents of either party to marriage or by any other person, to either party to marriage or to any other person.

At or before or any time after marriage in connection with the marriage of the said parties but does not include dower or *mahar* in the case of persons to whom the Muslim personal law (*Shariyat*) applies."

Section 2 Dowry Prohibition Act (DPA) defines dowry in gender neutral

term whether dowry is given by bride side or groom side; if it is dowry then it will be covered by definition of dowry and case may be dealt under this Act. Further, definition of dowry is religious community neutral also; this Act is applicable over all religious communities, whenever any person is found indulge in dowry related activities, law contained under this Act shall be strictly applicable regardless of his religious considerations. But at the same time care is taken that provisions contained Dowry Prohibition Act should not affect religious faith of any community, therefore, in definition it is clearly mentioned dower means *mahar* is not dowry; *mahar* is important part of Muslim marriage. In Hindu religion various gifts make part of marriage those are not affected by this Act as Section 3 (2) DPA read with Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules 1985 protects voluntary and customary nature gifts given within economic capacity of giver. Before 1986 Dowry Prohibition Act was having very limited applicability and it was not addressing very serious aspect of dowry and dowry related problems. Before amendment in 1986 in definition dowry was defined in reference dowry related aspects at or before marriage. But it is fact more serious problem arises when dowry demands are made after the marriage which is during continuance of marriage. In definition after marriage expression was not mentioned, therefore, dowry related laws were not applicable for dowry related problem after solemnization of marriage. Such handicap was affecting the whole pursuit of effective dealing with dowry related problems and thereby unable to protect innocent women and nearly related persons. to deal with dowry related problem occurring after solemnization of marriage By Act 43 of 1986 amendment was made in Section 2 DPA and in definition of dowry expression 'or at any time after the marriage' was added. Due to this change in definition dowry related laws are applicable before, at the time of and after the marriage. Before 1984 amendment dowry was defined in reference to property or valuable thing given as consideration of marriage. Such definition much restricting efficacy as it was always complicated issue to prove that whether such valuable thing given was consideration of marriage or not. In 1984 by Act 63 of 1984 definition of dowry was amended and it was made as valuable thing given 'in connection with the marriage of the said parties, but does not include' and this amendment gives wider sweep to concept of dowry thereby applicability of dowry related laws, now it is

sufficient to show connection between any valuable thing given is connected with marriage. In *Satvir Singh v. State of Punjab*[1] Supreme Court observed:

> "Thus there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is "at any time" after the marriage. The third occasion may appear to be an unending period. But the crucial words are "in connection with the marriage of the said parties". This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with marriage of the parties. There can be many other instances for payment of money or giving property as between spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in some societies. Such payments are not enveloped within ambit of "dowry"..."

III. CAUSES OF COMPELLED DOWRY

Dowry is social problem and therefore a single cause cannot be assigned for its continued existence and becoming more and more serious problem with passing time. Dowry is social problem and it is committed due to economic causations therefore etiology of crime is varied and complex one. One main reason is greed; persons in modern society which is based on philosophy to enjoy one-self have insatiable greed. Every person wants to have and enjoy every physical commodity without doing anything but on the cost of some other person and in such situation greedy persons find distorted dowry system as easiest method for the aforesaid. Desires for commodities are increasing and further more and more commodities are becoming available, thereby, dowry is becoming more and more serious one. Another reason is safety and security of bride. In our society family is patriarchal family in which bride leaves her family and shifts in family of groom; parents have willingness that their daughter should be accepted with warmth and have proper respect in the in-laws house, for this purpose dowry is given beyond capacity considering dowry

1. AIR 2001 SC 2828

payment may safety and respect to the daughter, and further, parents of bride fears for safety and security of their daughter and for this purpose they give more and more dowry. Social pressure and prestige is also responsible for dowry problem. Social pressure always compels for marriage in the same caste in which number of suitable groom may be lesser, thereby demand may be much more for suitable groom and because of this reason extent of dowry becomes more alarming one. Now days money has become marker of prestige and reputation; person gets more dowry or gives more dowry, he may have more prestige, such kind of notion also causes increase in seriousness of problem. Extent of dowry increases and further, claims are made for exaggerated dowry amount given or taken. Such false claims cause increase of temptations for more and more dowry. Women are usually engaged in secondary subsistence activities while man in primary subsistence activities. Primary subsistence is considered more crucial, it is earning and/or producing things necessary for survival while secondary subsistence is using material obtained through primary subsistence activities and make them consumable. For example agriculture activities are primary subsistence activities and using agricultural products to make food is secondary subsistence. Secondary subsistence activities have no monetary value and always considered as burden over person engaged in primary subsistence activities. Therefore, person engaged in primary subsistence are compensated by person involved in secondary subsistence activities. This is also one important reason for continued dowry problem existence. One main reason is religious considerations also that it is considered as religious duty to give and take dowry, and further, this problem becomes more acute as observance of dowry giving and taking as custom in the society.

IV. INTERNATIONAL LAW

Section 2 of Dowry Prohibition Act defines dowry in gender neutral term, and further, it is fact that in some communities particularly matriarchal society with matrilocal residence bride price is paid but it is social reality that dowry is paid from the bride side to groom side which causes grave hardship for girl child and her parents. Social reality clearly refers to gender considerations in the dowry problem. International law contained in treaties, conventions and declarations directs state members to take effective and proper steps for gender equality and eradication of

gender biased problems and violence. Charter of United Nations in its preamble itself uses '*We the people*'; this term itself clear that man and woman are equal, and if they are equal why women should be treated differentially and dowry is demanded. Universal Declaration of Human Rights (UDHR) in Article 16 proclaims that woman has '*...equal rights as to marriage, during marriage and at its dissolution*'. UDHR has clearly emphasised on equality between wife and husband in marriage during continuance or dissolution; in such situation demand and taking of dowry from wife can never be appropriate. Covenant on Civil and Political Rights (CCPR) in Article 3 directs State members to ensure equality in civil and political rights of man and woman particularly free and full consent of intending spouses, thereby forced marriage and child marriage may not be permitted. Dowry and dowry related violence have roots in culture, and value notions of society which teach about superiority of man and provide him economic independence, control and value adding while for woman all these are completely opposite. To properly deal with dowry and dowry related problems it is necessary to reform gender biased cultural notions. Article 5 of Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) directs state members to make efforts to modify the social and cultural patterns of conduct to eliminate wrongful acts commission:

> "State Parties shall take appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women…"

Declaration on the Elimination of Violence Against Women (DEVAW) 1993 carefully analyses regarding reasons behind violence against women and recognizes that without knowing causation, the problem cannot be properly tackled. In its preamble part declaration observes:

> "…that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to prevention of

> the full advancement of women is one of the crucial social mechanism by which women are forced into subordinate positions compared with men."

Article 2 of Declaration on the Elimination of Violence Against Women (DEVAW) 1993 specifically mentions dowry related violence as a major violence issue against women and Article $ of Declaration imposes responsibility on state to make attempt for effective dealing with violence against women and state cannot be permitted to rationalize such violence on the basis of custom, tradition or religious considerations:

> "States should condemn violence against women and should not invoke any customs, traditions or religious consideration to avoid their obligation with respect to its elimination. State should pursue by all appropriate means and without delay a policy of eliminating violence against women…"[2]

International legal instruments manifest world community opinion, and further, direct municipal legal regime to enact effective law and enforce the legal instruments in proper manner.

V. COMPELLED DOWRY AND RELATED OFFENCES IN INDIA

Constitution is most superior law of the land; all other laws are required to be in accordance with constitutional provisions and underlying directives. Whenever any statutory provision is violative to constitutional provisions and directives, court may declare the statutory law as unconstitutional. In Constitution of India in Part III, Part IV, and Part IV-A provisions are given to protect woman interests, avoid prejudices and inequality to woman, and ultimately attempts are made to reform socio-cultural-economic considerations of society to deal with root cause of wrong-doings and violence against women. Article 14 declares and Art 15 (1) specifies that every person is equal; it is regardless situation whether person is man or woman. But at the same time social reality existing at the time being is accepted which requires special law to eradicate prejudices, differential treatments, and violence which ultimately requires special treatment, thereby, Article 15 (3) of Constitution permits for making special laws for protection of woman. Directive Principles of State Policies

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2. Article 4 of Declaration on the Elimination of Violence Against Women (DEVAW) 1993

provided in Part IV of Constitution of India particularly contained in Articles 38 and 39 of Constitution imposes responsibilities on State to function for justice imparting. Fundamental Duties contained Part IV of Constitution directs citizenry to renounce practices derogatory to the dignity of women. For due observance of constitutional directives, legislature has enacted penal Acts to effectively deal with violence against women. Most derogatory and problematic violence committed against women are dowry related.

For dealing with dowry and dowry related problems a special penal statute, Dowry Prohibition Act 1961, is made which prescribes stern punishments. In addition to special penal statute Indian penal Code also consists of some specific penal provision to deal with dowry related violence, and further, general penal provisions contained in Indian Penal Code remains applicable for those dowry related violence which are not covered by specific penal provisions. Special procedures are prescribed in special penal statute, Dowry Prohibition Act 1961, and further, specific procedures are prescribed in this regard in Criminal Procedure Code and Indian Evidence Act besides the applicability of general procedures. Criminal justice system in India prescribes measures for effective dealing with compelled dowry problem and to protect society from a major challenge. If this major challenge of compelled dowry is properly accomplished, it may also be helpful in tackling other problems which beget due to compelled dowry problem.

(i) Giving, Taking, Demanding, Abetting and Advertising Dowry

Dowry and dowry related problems are day by day becoming more and more serious in nature, extent and seriousness affecting the whole society; even after sufficient statutory law, problem has remained unaffected with ever-increasing and serious proportion in all references. Dowry badly affects society but at the same time cultural and values of society permits continuance of dowry system. This type of situation creates complications and such problem remains unaffected and unshackled. On one hand society is seriously affected, formal social measures are attempting to deal with the problem by declaring problem as a serious problem while on the other hand society itself permits and informal social measures protect and permits.

Dowry Prohibition Act 1961 (DPA) is special penal law enacted to

deal with dowry related problems. Commonly, a person without detailed and proper information considers that dowry as such is crime but proper analysis of provisions contained in Dowry Prohibition Act specifies that compelled dowry means forced dowry is crime. Dowry demand, abetting, advertising and receiving compelled dowry are offence. Giving and receiving dowry without due observance of rule of preparation of list and non-observance of law in this regard are offences. But willingly giving dory is not an offence and it is permissible with condition of proper observance of provisions and rules provided under Dowry Prohibition Act. It is but natural situation that parents of daughter may be naturally willing due to love and affection to give some gifts to daughter and it may be similar situation for relatives also. Further, parents and relatives of groom also may be similar situation. In such situation declaring dowry in itself crime may be completely unnatural and inhuman. Voluntary dowry giving and forming *stridhan* is not problem and further when ancient tradition and social considerations are analysed, it may come out that socially permitted dowry which also formed part of culture, religion and social values were completely relates to voluntary giving dowry and forming part of *stridhan*. Problem is caused by compelled dowry means forced dowry, now with passing time when emphasis of life philosophy has shifted to enjoyment of physical commodities, fine human considerations are dwindling, and society and social considerations are given lesser importance then voluntary dowry forming part of *stridhan* has completely vanished and its place has been taken by distorted cruel and barbaric system of dowry that is compelled dowry enriching greedy bride and his relatives. There is need to sternly dealt with all the aspects relating to compelled dowry. In Dowry Prohibition Act 1961 and Indian Penal Code compelled dowry and its related aspects are declared as offence but voluntary giving gifts with due observance of law is permitted.

Section 3 declares certain aspects of giving and taking dowry as crime. When section 2 is read with Section 3 of Act it comes out that dowry is divided in two parts permitted dowry and prohibited dowry. It is natural relatives of bride particularly parents may be willing to give some gifts to their daughter in marriage; its prohibition may not be appropriate therefore it is permitted if in marriage gifts are given within the economic condition of person giving it and list of such gift is prepared according to rules prescribed in Dowry Prohibition (Maintenance of Lists

of Presents to the Bride and Bridegroom) Rules 1985. Section 3 DPA provides:

> "(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than five years and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more;
>
> Provided that the Court may, for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than five years.
>
> (2) Nothing in sub-section (1) shall apply to or in relation to –
>
> (a) presents which are given at the time of marriage to the bride without any demand having been made in that behalf;
>
> Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;
>
> (b) Presents which are given at the time of marriage to the bridegroom without any demand having been made in that behalf;
>
> Provided that such presents are entered in a list maintained in accordance with the rules made under this Act;
>
> Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given."

Section 3(1) DPA declares giving, taking and abetting Dowry as prohibited acts and punishable offences but this provision has to be read with Section 3 (2) DPA. Section 3(2) prevails over Section 3(1) DPA; in Section 3(2) conditions are given on satisfaction of which dowry giving and taking does not come u/s 3 (1) DPA. The whole analysis of Section 3 DPA clears that Section 3(2) DPA provides provisions regarding

permissible dowry and it is decided on the basis of satisfaction of certain conditions which are regulatory measures, and further, on this basis it is decided that dowry is voluntary dowry, and furthermore, it comes in record that what dowry was given which may be used for determination of *stridhan* for the purpose of Section 6 DPA. Section 3(1) when read with Section 3(2) makes clear that Section 3(1) DPA deals with compelled dowry which is declared as offence. Hereby, aspects relating to dowry can be put in two categories – permissible and prohibited. For protection available under Section 3(2) DPA it is necessary that list of dowry items prepared by person to whom it was given according to rules given in Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules 1985 accordingly list has to be prepared at the time of receiving of presents or soon after it but as soon as possible. List must be prepared in writing in which brief description of gift, approximate value, by whom given and to whom he is related whether with bride or bridegroom. The prepared list is signed by both bride and groom and if any one cannot sign then he or she has put thumb impression. In Section 3(2) DPA clearly it is mentioned and it is mandatory that presents are given without any demand, it clarifies that Section 3(2) provides protection only for voluntary dowry; whenever demand is made, dowry shall always be compelled dowry. Demand of dowry is always prohibited and declared as punishable offence u/s 4 DPA. When present is given from bride side to bridegroom side then compulsory provision is given that present must be of customary nature and it is not beyond the economic capacity of giver of gift. In DPA generally provisions are given in gender neutral terms but here social reality is accepted that compelled dowry is imposed on parents and other relatives of bride, therefore, provision is provided that when dowry is from bride side to groom side then it must be of customary nature and within monetary capacity of giver. Protection of Section 3(2) DPA is available for presents 'given at the time of marriage'; at the time of marriage is wider enough to include some ceremonies making part of marriage but made just after solemnization of marriage. Giving and taking dowry not covered u/s 3(2) DPA is compelled dowry and it is punishable u/s 3(1) DPA. Generally, in India for traditional offences only maximum punishments are mentioned in the penal provisions and judge has discretion to award extent punishment up to such prescribed maximum punishment. Dowry is ancient tradition but then there was no concept of

compelled dowry, it was given only voluntarily, dowry as crime is modern development and therefore, compelled dowry is modern criminality which is put in category of socio-economic crime. For modern criminality that is socio-economic crimes, for the purpose of creation of minimum deterrence, minimum and maximum both extents of punishments are prescribed in penal provisions and judge award any extent of punishment from minimum punishment which may be up to maximum punishment; here in this case minimum punishment is mandatory and up to maximum court has discretion. But in case of compelled dowry punishment prescribed in Section 3 (1) DPA is exceptional one. In Section 3 (1) DPA giving, taking and abetting dowry are declared as offence and provisions as discussed clear that all aforesaid are provided in reference to compelled dowry; for such offences only minimum punishments are prescribed and maximum limits are not mentioned, and further, minimum punishments are kept at higher side, and furthermore, imprisonment and fine both are mandatory. Such prescription punishment in Section 3 (1) DPA is provided for creation of maximum deterrence. Section 3 (1) DPA prescribes punishment that the offender may be punished with imprisonment which shall not less than five years, and fine which shall not be less than fifteen thousand rupees or equal to the amount whichever is more.

Everything relating to forced dowry is declared as crime giving, taking, demanding, advertising and abetting dowry are offences. Direct or indirect demand of dowry from parents or relatives of bride or bridegroom is offence punishable under section 4 DPA for which prescribed punishment is imprisonment not less than six months which may extend up to two years and fine which may extend up to ten thousand rupees. Demand dowry is initial step towards compelled dowry and at this stage declaration clarifies seriousness of problem and further determination of criminal justice system to tackle the crime in all the situations, make nip in bud, and further, create complete deterrence in the mind of wrong doers, thereby he may not dare even to demand dowry. But it creates one problem; generally in dowry cases evidences are readily not available, some evidences may be available for giving and taking dowry some evidences may be but for demand of dowry generally, evidences are not available, therefore, prescription of punishment for demand of dowry is more susceptible for misuse and abuse by vested interests.

Dowry Prohibition Act makes striving to deal with dowry problem

by taking actions against every aspects relating to dowry problem. In Section 4-A DPA there is complete prohibition on giving advertisement in reference to dowry. Section 4-A DPA not only declares person giving advertisement for dowry as offender but also printer, publisher and circulator are declared as offenders. Section 4-A DPA has wider coverage over advertisements relating to marriage; it is completely immaterial whether directly or indirectly lure for dowry is given in advertisement then penal provisions contained in this section may be attracted. Offence under Section 4-A DPA is punishable with six months imprisonment which may extend up to five years imprisonment or with fine which may extend to fifteen thousand rupees. Agreement for some legal cause may be valid and may make enforceable contract. Dowry agreement, if made, is for commission of offences, therefore always it will be illegal but to make clearer in Section 5 of Dowry prohibition Act 1961 provisions declare any agreement for giving and taking dowry is void. In Indian society right from ancient period concept was given that all the gifts given at the time marriage has to form *stridhan* but this whole tradition, culture and values have been completely distorted by greedy person for their vested interest and determined that dowry belongs to husband and his relatives. Need is to deal sternly against distorted concept of dowry which making very complicated and serious social problem which is responsible for taking lives of innumerable brides and their parents. If rule is properly made and enforced that if dowry is given, it will belong to bride and she can have control over it then criminal minds shall not think to take dowry because it will not be beneficial for them, they will not be in situation to enjoy dowry commodities, and further, they will be punished also. Whenever dowry is paid whether permitted or prohibited one, Section 6 DPA declares that dowry shall belong to wife. In our society from very ancient period dowry has been considered as *stridhan*; this concept is continued in section 6 DPA also. Section 6 DPA clarifies that dowry belongs to bride; if any person, husband or his relatives, received dowry, he must within prescribed period transfer to the bride otherwise such person keeping dowry is committing offence and liable for stern punishment prescribed in Section 6 DPA. In Section 6 DPA three months time is prescribed for transfer of dowry amount and commodities to bride; when dowry was received before marriage then within three months of marriage, when dowry was received at the time of marriage or after

marriage then within three months from date of receiving of dowry, or when bride is minor then within three months of becoming her major, the dowry must be handed over to bride according to this time frame. Within stipulated time in the section 6 dowry amount should be given to bride and during period when any other person is holding it, he is keeping in trust for the woman. On expiry of stipulated period amount of dowry or valuable thing is not given to bride, person has committed crime u/s 6 of Act.

Always allegations are made of misuse of provisions dealing with dowry; to check this problem balance is made, thereby, proper space should be available to take action by law enforcement agencies and at the same time protection of innocent persons. Section 8 declares that arrest can only made with warrant or order of magistrate; police officer cannot use power u/s 42 Criminal Procedure Code 1973 (hereinafter referred as Cr. PC); for other purposes offences shall be cognizable offence and powers under Code shall be available to police officer. Section 8 DPA declares that offence is cognizable except for arrest without warrant and matters referred u/s 42 Cr P C. in case of cognizable offence police officer has two powers arrest without warrant and investigation without direction. Investigation by police officer does not make problem to accused and also to society at large; in it there is no stigmatization effect; it is more beneficial for society and also for criminal justice system that such serious matters should be investigated without loss of time and offenders committing such serious problem should be identified and convicted only then distorted practices may be checked and good and peaceful society may be formed. Arrest of the person has stigmatizing effect, persons who file false cases for dowry demand they want to affect the reputation of sober and civilized person by getting them arrested and lodged in jail for some days; this kind of practice needed to be checked; therefore in section 8 DPA provisions are given which has taken away police power to arrest without warrant. Whenever need for arrest would arise, Judicial Magistrate only can take decision. Section 8 DPA is crucial provision for protection of common innocent citizenry. Particularly in case allegation of dowry demand, generally evidences are lacking, in such situation Section 8 DPA may provide protection from unnecessary arrest, thereby, it may protect reputation and prestige of innocent person. Section 7 DPA provide trial competency for offences under Dowry Prohibition Act to Metropolitan Magistrate in metropolitan area and in other areas to

Judicial Magistrate first class. Magistrate can take cognizance on police report, on his own knowledge, or complaint by aggrieved person or parent or relative, or recognized welfare organization or institution. In section 7 DPA restriction is imposed on taking cognizance, thereby, any vested interest cannot file complaint, and due to it an important check is imposed on misuse of very important legislation to protect society from serious evil. State has to play active role for eradication of evils of dowry and for it responsibility is imposed u/s 8-B DPA on state to appoint Dowry prohibition Officers with responsibility to take proper actions for enforcement of law relating to dowry prohibition and achievement of aims of the Act.

(ii) Cruelty

Dowry problem affects at three stages of married life –before marriage, at the time of marriage and after marriage. Most barbaric and problematic dowry related problem is caused by demand of dowry, after solemnization of marriage during continuance of marriage. Social consideration is that after marriage woman must live in husband's house even when most brutal acts are committed there. Wife cannot come out of in laws house otherwise she may have bad name and further her parents' prestige and reputations are affected. She is economically dependent also and if she has children then never she may think to come out of in laws house. Parents are much fear for her safety in others house, therefore as when they get information that dowry demand is made usually without any complain pay. It is fact with greed that whenever demand is attempted to meet, demands become unending and also extent increases with every demand. The whole handicapped situations are utilized by greedy and mean persons, bad treatments are given which may be physical or mental, and it may be act committed positively or neglecting her. Such acts are declared as punishable offence u/s 498 –A Indian Penal Code (hereinafter referred as IPC) and name of offence is given as cruelty. Section 498-A IPC provides:

> "Whoever, being the husband or the relative of the husband of a woman subjects such woman to cruelty, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> Explanation – For the purposes of this section, "cruelty" means –

(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) Harassment of the woman where such harassment is with a view to coercing her or any other person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Cruelty is defined in Explanations given with Section 498-A IPC. Main provision given in the section specifies two things – firstly who may be offender and secondly, what punishments are prescribed for commission of cruelty. The section 498-A IPC is enacted to provide protection to wife against bad treatment given to her by husband and his relatives. In this section offender is always husband or/and his relatives. In our society social, cultural and religious directions are given for respect of women in the family and also out of the family but reality are well established by cases reported to police and court that situation complete contrary; women in the family itself may be in danger due to greedy husband and his relatives. It is not simple crime but most serious as it is committed at the place, house, where a person feels protected, and further, committed by those persons who are considered as her protectors. In 498-A IPC offence is punishable by imprisonment which may extend up to three years and also with fine. Cruelty defined through Explanation (b) of Section 498-A IPC specifically and expressly covers acts of cruelty committed for dowry demand. It is specific cruelty that is cruelty for dowry demand; whenever expressly dowry demands are made and for that harassment is committed then cruelty falls in this category. Harassment term is wider but particularly it refers to psychological problem causing. Explanation (a) deals with general cruelty and it may be physical or psychological. In dowry problem whenever husband and in laws are not making express demand for dowry then act of cruelty may come in explanation (a) which is difficult to prove because for it requirements are given that act committed by offender should be willful, sufficient to drive woman to commit suicide, or cause grave injury or danger to life, limb or health (mental or physical). When there is express demand then Explanation (b) will be applicable and there harassment for dowry demand

may be sufficient but problem is real that how and by which evidences dowry demand may be proved, everything is happening within four walls. Problem is more acute when there is no express demand and cruelty committed is falling under Explanation (a) of section 498-A IPC then various things willful conduct, grave act commission as to drive for suicide or serious injuries are needed to be proved.

In case of cruelty greater problem is non-filing of complaint in genuine case and filing of complaint in non-genuine cases. With filing of complaint it is known to wife and his parents that marriage will come to end. Thereby, wife remains in matrimonial house even after suffering greater hardships of cruelty commission against her. In Schedule I of Criminal Procedure Code cruelty punishable under section 498-A is shown as cognizable on information given to officer in charge of police station by the aggrieved person or by person related to her by blood, marriage or adoption or by officer in this regard appointed by State government. Hereby, police officer can lodge FIR and initiate investigation in case of cruelty when information of commission of such offence is given by wife or her nearly relative or officer appointed by Government. Generally information is not given in genuine cases. Whenever marriage tie breaks even after cruelty commission in society reputation, family name and prestige of wife and her parents are affected. Wife is economically dependent and if she has children then she is concerned future children also. The whole aforesaid situations affect her decision to file case against cruelty commission. Even if she files case with police officer, officer considers that it is family disputes and generally he does not take matter seriously and make proper investigation. Offence is committed within four walls thereby generally evidences are not available. In Section 198-A CrPC puts restriction on taking of cognizance of case of cruelty; it prescribes that Magistrate can take cognizance firstly, on police report for which schedule I of Code specifies that it is possible when FIR is filed by wife or nearly related person or authorised officer, and secondly, on complaint filed by aggrieved person or her nearly related persons (father, mother, brother sister or father's or mother's brother or sister or, with the leave of court, by any other person related to her by blood, marriage or adoption. Such restriction on initiation of investigation and taking of cognizance is provided to prevent interference of strangers in family but it affects the action also against guilty persons for committing

such heinous acts. Further, whenever husband and his relatives find some problem by filing of case or identify that evidences are suggesting probable conviction and sentence infliction, they offer for compromise which due to social pressure and further, desire to live in the family atmosphere of love and affection, usually offer is accepted and compromise is made but again situation does not change due to greed of husband and her relatives. Evidences are completely absent, for dowry death there are presumption clauses but for cruelty there is no presumption clause.

Usually provisions relating to dowry and related offences are misused particularly with a view that husband his relatives may be arrested and they may lose their reputation and prestige. To protect persons from arrest and prevent misuse of arresting power amendment has been made in Section 41 CrPC and Section 41-A has been added in CrPC. The aforesaid provisions direct police officer for not to arrest the accused without warrant when he is accused for cognizable offence punishable by imprisonment for a term up to seven years. In this kind of case police officer should issue notice u/s 41-A CrPC. In *Arnesh kumar v. State of Bihar*[3] case Supreme Court observed that in light of Section 41 and 41-A CrPC accused for lesser serious of cognizable offences particularly for allegation of cruelty, police officer should not be arrested but notice to participate in investigation should be issued. In case accused does not observe the direction given in notice then accused may be arrested without warrant. In this case, wife filed FIR against husband and his family members for commission of cruelty for dowry demand. Husband filed application for anticipatory bail but petition was rejected by High Court and then accused filed appeal before Supreme Court. Supreme Court observed that if arrest relating provisions are properly used then largely there may not be much demand for anticipatory bail. Court decided that offence Cruelty is punishable with three years imprisonment, thereby, Section 41 CrPC does not permit for arrest of accused except in exceptional circumstances.

(iii) Dowry death

Cruelty ultimately results into culpable homicide of woman or suicide by her. When cruelty for dowry demand is committed by which wife dies and it happens within seven years of marriage then such culpable

3. AIR 2014 SC 2756

homicide is called as dowry death. But it does not mean culpable homicide committed after seven years of marriage will not be offence; that will be offence under general provisions dealing with culpable homicide. In dowry related offences main problem is lack of evidences; to cure this problem a new offence is created for which presumption clauses in Section 113-A and 113-B Indian Evidence Act are provided, and further, definition of offence of dowry death in Section 304-B IPC itself is based on presumption provision. Generally in definition of offence presumption clause for commission of crime is not mentioned but dowry death is exception to it. Heinous crime of culpable homicide is posing serious problem; offences are committed in planed manner with planning and usually shown as accident occurrence in house; further, offence is committed within four walls; thereby evidences are completely lacking except medical evidence obtained through post-mortem of dead body. To check problem of any crime it is necessary that conviction rate should be proper that as and when person has committed crime, he should be convicted and he should be sentenced, only then crime problem may be checked. Lack of evidences problem is attempted to be cured by providing presumption clauses. Presumption clause is actually shifting of burden of proof and it is rule of evidence. But in case of dowry death in addition to presumption clauses in sections 113-A and 113-B Evidence Act,[4] in substantive law in definition of dowry itself u/s 304-B presumption clause is given. It is indicative for problem before criminal justice system that is complete lack of evidences in the case of most heinous crime committed in reference to dowry demand. In cruelty victim is alive and she may give the evidences but in

4. When within seven years of marriage wife committed suicide and it is proved that husband and his relatives committed cruelty with her while she was alive then presumption clause u/s 113-A IEA shall be applicable and court may presume abetment of suicide by husband and his relatives. Here for this section cruelty may be for dowry demand or in any other reference. Presumption u/s 113-A IEA is applicable in reference to offence u/s 306 IPC for suicide committed by wife within seven years of marriage due to cruelty committed by husband or his relatives. When unnatural death of woman is caused within seven years of marriage and evidence for commission of cruelty for demand is available against husband and/or his relatives then Section 113-B IEA is applicable for holding presumption that such death was dowry death and it was committed by such person who committed cruelty.

dowry death victim is no more, usually death is given form of accident, and further, husband and his relatives try to cremate dead body as soon as possible then no evidence may be available. Dowry death is committed within four walls with detailed planning. Law is made, stern punishments are prescribed and presumption clauses are created but even after that it is very difficult to prove the case. To become dowry death and thereby for application of presumption clauses, there are some necessary requirements provided in Sections 304-B IPC, 113-A and 113-B Indian Evidence Act; those are - death was unnatural death, committed within seven years of marriage, cruelty was committed, cruelty was committed in reference to dowry demand, cruelty was committed soon before death means cruelty should have connection with dowry demand and death of woman. Section 304-B IPC provides:

> "(1) Where the death of woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused death.
>
> Explanation – For the purposes of this sub-section, "dowry" shall have the same meaning as in Section 2 of Dowry Prohibition Act 1961 (28 of 1961.
>
> (2) whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

To prove all these requirements for attracting presumption clauses, there is no further presumption clause application but all the ingredients in this regard like cruelty, cruelty for dowry demand, cruelty was caused soon before death of deceased and unnatural death within seven years of marriage are needed to be proved by evidences, all these things happened within four walls in planned manner, only one person, deceased person, was there who may give evidence but she is now no more; now in such situation those requirements cannot be proved and thereby presumption clauses cannot be attracted. Law is made, many presumption clauses are

given but ultimately to enforce this law is under greater hardships in this case, only medical evidences may be available through post mortem, therefore in Section 174 CrPC it is mandatory for investigating officer to get postmortem of dead body of woman died unnatural death within seven years of marriage. In Section 176 CrPC in case of dowry death in addition to investigation it is compulsory that executive magistrate competent for inquest shall make inquiry. Only for unnatural death of within seven years of marriage, death will be treated as dowry death and presumption clauses will be applicable. Time limit is kept as whenever any dowry demand and resultant injuries are committed probably soon after marriage; presumption clauses and change of course of normal procedure is not considered proper; to deal with major problem for certain period it may be provided but should not be for longer period. Therefore, to restrict application of presumption clause for limited period unnatural death of wife within seven years is treated as dowry death and beyond this period unnatural death of wife may be dealt under general penal provisions. Presumption may be misused, and further, because of it proving case may not be responsibility of prosecution but disproving case by accused will be serious burden on accused; this kind of situation may not be just, therefore to put check various things are needed to be proved by prosecution against accused, these requirements are not simple but amounting to proving of whole case like death was unnatural death, time duration that was within seven years of marriage, circumstances of commission of homicide that was commission of cruelty, motive of commission of death was dowry demand, proximity of act of cruelty for dowry demand and consequence of unnatural death was caused, hereby, prosecution has to prove everything generally required to be proved in criminal case. Presumption in case of dowry death is regarding who committed dowry death, for it Section 304-B IPC, 113-A and 113-B Indian Evidence Act prescribe that Court shall presume it was dowry death and committed by husband and his relatives. In *Sher Singh v. State of Haryana*[5] Supreme Court observed:

> "keeping in perspective that parliament has employed the amorphous pronoun/noun "it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of

5. AIR 2015 SC 980

> interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed' has to be read down to mean "presumed". Neither life nor liberty can be emasculated without providing the individual an opportunity to disclose extenuating or exonerating circumstances…therefore, the burden of proof weighs on the husband to prove his husband to prove his innocence by dislodging his deemed culpability, and that has to be preceded only by prosecution proving the presence of three factors, viz. (i) the death of a woman in abnormal circumstances (ii) within seven years of her marriage, and (iii) that the death had a live link with cruelty connected with any demand of dowry. The other fact is that the husband has indeed a heavy burden cast on his shoulders in that his deemed culpability would have to be displaced and overturned beyond reasonable doubt…"[6]

In criminal justice system presumption of innocence of accused till his guilt is proved beyond reasonable doubts, is basic principle and because of this reason prosecution has responsibility to produce evidences before the court, and thereby, burden of proof lies on prosecution. Deeming situation for commission of crime by accused means presumption of guilt is exceptional situation to the criminal justice system in India. This kind of exceptional rule is used when problem is most serious but evidences are not available as it is in case of dowry death punishable u/s 304-B IPC. Dowry death is most extreme situation of compelled dowry. Deeming clause is used for proving dowry death but there is need to afford protection to accused also to prove his innocence, therefore, presumption is made as rebuttable presumption and for attracting rebuttable presumption various basic ingredients in Section 304-B IPC. In case of *Ashok Kumar v. State of Haryana*[7] Supreme Court observed:

> "…Once the prosecution proves its case with regard to the basic ingredients of Section 304-B, the court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption

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6. *Id* at p. 990
7. AIR 2010 SC 2839

> can be drawn by the court keeping in view the evidence produced by the prosecution in support of the substantive charge under Sec. 304-B of the Code.

Of course, deemed fiction would introduce a rebuttable presumption and the husband and his relative may, by leading their defence and proving that the ingredients of Section 304-B were not satisfied, rebut the same…"

In dowry death presumption is applicable on proving various requirements only for unnatural death is dowry death and regarding who committed death. Proving dowry death is very difficult as evidences are completely lacking further in addition to that to attract provisions relating to dowry death, it is necessary to prove cruelty, cruelty was for dowry demand and cruelty was committed soon before death means causation between cruelty and unnatural death must be established, which are very difficult task as it may be understood by fact that only proving cruelty is difficult and that is when victim is still alive, here in case of dowry death not only cruelty but also various things relating to cruelty have to be proved that is when victim is not alive even her body may have been cremated and thereby evidences of physical cruelty from body may not be available.

For dowry death it is necessary that cruelty committed with deceased must be for dowry demand. Dowry demand at any time is not sufficient to attract the provisions under Section 304-B IPC; it is necessary that cruelty for dowry demand must be 'soon before her death'. In *Maya Devi v. State of Haryana*[8] police officer received telephonic call from some stranger regarding dead body lying in one quarter in *Rohtak University Campus*. Police reached the spot and also father of deceased woman reached there after receiving information about the incident. Father identified dead body as his daughter. Father of deceased lodged FIR against husband and in laws of his daughter alleging of cruelty for dowry demand and then dowry death. Police submitted charge-sheet on completion of investigation. Case was tried by Court of Session which acquitted two brothers of husband of deceased. Trial court convicted and sentenced all other accused persons. Appeal was filed before High Court which upheld the whole decision except life imprisonment was modified to rigorous imprisonment for ten years. Now accused filed appeal before the Supreme

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8. AIR 2016 SC 125

Court which dismissed appeal and upheld decision of High Court. Supreme Court gave observation that 'soon before death' does not mean only immediately before the death but period is relative. This expression in Section 304-B IPC refers to proximity between cruelty for dowry demand and unnatural death of woman. Supreme Court observed:

> "It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304-B is to be invoked. But it should have happened "soon before her death". The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasise the idea that her death should, in all probabilities, have been aftermath of such cruelty or harassment…"[9]

In Section 304-B IPC for attracting provisions of dowry death only unnatural death is sufficient when all other ingredients of section are proved. It does not make any difference whether death of the person is accidental or suicidal or homicidal; only requirement is death of woman is 'otherwise than under normal circumstances'. In *Maya Devi v. State of Haryana* Supreme Court observed:

> "Section 304-B IPC does not categorise death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. Finally, any death occurring "otherwise than under normal circumstances" can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of Section 304-B IPC are fulfilled, any death (homicidal or suicidal or accidental) whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called "dowry death" and the woman's husband or his relatives "shall be deemed to have caused her death". The section

> clearly specifies what constitutes the offence of dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death."[10]

In criminal cases always emphasis is given for prompt FIR lodging but in dowry death case Supreme Court has accepted that in such case FIR is lodged by parents or other nearly related person, he may be shocked and in mental agony, therefore some delay in informing police may be natural. In *Sahebrao v. State of Maharashtra*[11] father of deceased bride was informed by groom family that his daughter is seriously ill but after reaching the spot he found his daughter was dead and no one from groom family was present there. Police officer also received information about incident, he reached the spot and asked father to give statement for lodging FIR but father told that he was not mentally in such situation to give any statement. Father reached police station on the next day and it was delay of about 30 hours. Supreme Court decided that in such case delay in lodging FIR is natural; father may be in mental agony of lose of his daughter, delayed FIR will not affect the prosecution case. But when delay in lodging FIR is inordinate delay without any plausible reason, it will affect case and create serious doubts regarding genuineness of case. In *Manoj Kumar Sharma v State of Chhatisgarh*[12] wife of appellant-accused committed suicide and after it about with delay of five years brother of deceased filed FIR and alleged for commission of her dowry death. Father of deceased gave his deposition that his daughter was subjected to cruelty for the demand of dowry. During the period of five years after death of deceased neither her father nor her brother raised suspicion of dowry death and cruelty. Supreme Court decided that delayed FIR creates doubt and directed for drop of proceeding against appellant accused.

It is well established rule that when for any offence minimum punishment is prescribed, offender is not released on probation under Probation Offenders Act (POA) or u/s 360 CrPC. Minimum punishment is mandatory punishment; whenever offender is convicted it is compulsory

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9. *Id* at p. 132
10. *Id* at p. 138
11. AIR 2006 SC 2002

and mandatory that offender shall be inflicted with at least minimum sentence prescribed for the offence which may be extended up to maximum sentence prescribed for the offence. Thereby, in case of offences with minimum punishment, whether it is fine or imprisonment, with conviction, sentence infliction is mandatory, therefore, offender cannot be released on probation.[13] In case of *State through SP, New Delhi v. Rattan Lal Arora*[14] and *Shyam Lal Verma v. Central Bureau of Investigation*[15] Supreme Court decided that Probation of Offenders Act is not applicable when offence is punishable with minimum sentence. Offences under Dowry prohibition Act are punishable by minimum punishment but Supreme Court in *Mohd Hasim v. State of UP*[16] directed that offender of these offences may be considered for release on probation. In this case trial court convicted and sentenced accused persons u/ss 3, 4 DPA and 323, 498-A IPC. Supreme Court observed that in Section 3 and 4 Dowry Prohibition Act firstly minimum punishments are prescribed but then after court is permitted eve to impose lesser punishments after recording adequate and special reasons. Thereby, these provisions permits

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12. AIR 2016 SC 3930
13. Probation is granted to an offender with prospect of reformation. Main objective of criminal justice system is to prevent commission of crime and it is better achieved when criminality is properly dealt with and persons in society are properly socialized and become good citizen. Further, person who has already opted for criminal career due to improper socialisation, if, he has prospect of reformation, it may be better way to deal with him and prevent commission of crime that he should be resocialised, and thereby, reformed to become good citizen. In this case instead of sentence infliction convicted person is released on probation of good conduct. But in some offences particularly in case of socio-economic offences for sake of creation of minimum deterrence penal law prescribes minimum punishment. Prescription of minimum deterrence in itself self explanatory that infliction of sentence is mandatory; as soon as person is convicted, it is completely mandatory that person shall be punished, at least by minimum punishment prescribed for offence which may be extended court up to maximum sentence prescribed for offence. Thereby, in case offence with minimum punishment it is implicit that offender cannot be released on probation.
14. AIR 2004 SC 2364
15. (2014) 15 SCC 340
16. AIR 2017 SC 660

court to even impose nil punishment, it shows that Sections 3 and 4 Dowry Prohibition Act do not actually prescribes minimum punishment, therefore, for these offences Probation of Offenders Act shall be applicable but matter of probation should be decided as per requirements given in Section 4 and 6 POA. Supreme Court remitted the case to appellate court (Court of Session) to decide in accordance with law considering facts and circumstances of case in entirety.

VI. CONCLUSION

Compelled dowry and related offences are declared as serious crimes in India. For dealing with compelled dowry and related offences penal provisions and criminal procedures are provided in special penal statute and general penal statutes both. In general penal statutes specific penal provisions and procedures are provided besides applicability of general penal provisions and criminal procedures to tackle the aforesaid crimes. Giving and taking dowry has been permissible in Indian society since ancient period. Social instrumentalities have permitted and also in religious ceremonies associated with marriage necessary rites are associated permitting and also requiring observance of dowry related customs. But such permissibility of dowry by societal instrumentalities particularly religious rites related to marriage is for voluntary dowry. In modern society when enjoyments of physical commodities are emphasised, money has become marker of prestige and reputation, people prefer for easy money then in such situations older traditions are badly affected and distorted by greedy persons. Voluntary dowry system has completely distorted by greedy persons and it has transformed in compelled dowry. Compelled Dowry is social problem and it is committed due to economic causations therefore etiology of crime is varied and complex one. The main cause of compelled dowry is greed; such persons have insatiable greed. Every person wants to have and enjoy every physical commodity without doing anything but on the cost of some other person and in such situation greedy persons find distorted dowry system as easiest method for the aforesaid. Now whenever term dowry is used, generally, it is taken to refer compelled dowry. Compelled Dowry system is one such problem which is not only challenge for criminal justice system but also poses serious challenge for whole human considerations; it is heinous crime against humanity. Compelled Dowry and related offences are not only serious social

problems posing graver challenges before the humanity but also mother of various other similar serious social problems. Compelled dowry has demoralizing and criminogenic effect which provides fertile soil for criminality which may be causation for traditional crimes and socio-economic crimes both. Dowry Prohibition Act 1961, prescribes stern punishments for compelled dowry. All related aspects to compelled dowry are declared as serious punishable by stern punishments. In addition to special penal statute Dowry Prohibition Act, Indian penal Code also consists of some specific penal provision to deal with dowry related violence, and further, general penal provisions contained in Indian Penal Code remains applicable for those dowry related violence which are not covered by specific penal provisions. Special procedures are prescribed in special penal statute, Dowry Prohibition Act 1961, and further, specific procedures are prescribed in this regard in Criminal Procedure Code and Indian Evidence Act and these are in addition to applicability of general procedures. Everything relating to forced dowry is declared as crime giving, taking, demanding, advertising and abetting dowry are offences. In compelled dowry and related offences greater problem is non-filing of complaint in genuine case and filing of complaint in fake cases, and further, in dowry related offences evidences are generally not available. Furthermore, societal considerations of putting pressure on women to remain in matrimonial house and whenever they come out from it due to dowry demand or other related crime commission, reputation and prestige of women are affected. Distorted societal considerations regarding acceptability of dowry giving and taking on the basis of demand, considering cruelty acts as private family dispute, and did not considering secondary subsistence activities as important as primary subsistence, are responsible for continued and increasing problem of compelled dowry and related offences in India. Unless societal considerations are not changed, penal provisions may remain ineffective. To tackle problem of compelled dowry and related offences, it is necessarily required that informal social instrumentalities and formal social instrumentalities should work together, thereby, strengthen to each other; only then serious problem of compelled dowry may be tackled.

PASSIVE EUTHANASIA IN INDIA WITH SPECIAL REFERENCE TO BRAIN-STEM DEATH : EMERGING ISSUES

*VINOD SHANKAR MISHRA**

ABSTRACT : In liberal society, control over one's body is seen as an expression of freedom. There is no doubt that no fundamental right is absolute but any restriction imposed on life and liberty has to be reasonable. The concept of passive euthanasia is linked to right to die with dignity. Those suffering from terminal illness or incurable diseases are often subjected to persistent pain and suffering. There is no cure. Moreover, medication and treatment only prolong pain and suffering. The concept of passive euthanasia entails withholding of medical treatment meant for artificially prolonging life. There is also possibility of misuse and abuse of concept of passive euthanasia. Organ Transplantation Act, 1994 has for the first time given legal recognition to "Brain stem death" in India. This will now enable doctors to withdraw life-sustaining aids including respirators from patients, thus enabling the quick recovery of cadaver organs. Whether passive euthanasia is legally permissible? If so, under what circumstance and what precautions are required while permitting it. This paper explores this question and also highlights legal issues related to Passive Euthanasia and Brain stem death.

KEY WORDS : Passive Euthanasia, Active Euthanasia, Brain Stem Death, Advance Medical Directive, Right to Die with Dignity.

I. INTRODUCTION

We love life and yet court death. That is paradox of human

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predicament. This paradox of human predicament coupled with developments in science and technology has altered the concept of life and death. The word 'Euthanasia' is a derivative from the Greek words ''*eu'* and '*thanatos*' which literally mean "good death". It is otherwise described as mercy killing. The death of a terminally ill patient is accelerated through active or passive means in order to relive such patient of pain or suffering. It appears that the word was used in the 17th century by Francis Bacon to refer to an easy, painless and happy death for which it was the physician's duty and responsibility to alleviate the physical suffering of the body of the patient. The House of Lords Select Committee on 'Medical Ethics' in England defined Euthanasia as "a deliberate intervention undertaken with the express intention of ending a life to relieve intractable suffering"[1]. The European Association of Palliative Care (EPAC) Ethics Task Force, in a discussion on Euthanasia in 2003, clarified that "medicalised killing of a person without the person's consent, whether non-voluntary (where the person in unable to consent) or involuntary (against the person's will) is not euthanasia: it is a murder. Hence, euthanasia can be voluntary only"[2].

The core point of distinction between active and passive euthanasia is that in active euthanasia, something is done *to* end the patient's life while in passive euthanasia, something *is* not done that would have preserved the patient's life[3].

Passive euthanasia is further classified as voluntary and non-voluntary. Voluntary euthanasia is where the consent is taken from the patient. In non-voluntary euthanasia the consent is unavailable on account of the condition of the patient for example, when he is in coma. Today, a person who is in a persistent vegetative state, whose sensory systems are dead, can be kept alive by ventilator and artificial nutrition for years. Heart may be stopped in open-heart surgery but the patient can be kept

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1. N M Harris *'Euthanasia Debate*', *Journal of the Royal Army Medical Corps* 147(3):367-70,2001 available at https://www.researchgate.net/publication/11592035_The_Euthanasia_Debate visited on 2.11.2018
2. Available at https://www.eapcnet.eu/eapc-groups/archives/task-forces-archives/euthanasia/ArtMID/1195/ArticleID/471/euthanasia-and-physician-assisted-suicide-a-view-from-an-eapc-ethics-task-force visited on 2.11.2018
3. Gert B., Culver C.M. 'Distinguishing between active and passive Euthanasia', available at - https://pubmed.ncbi.nlm.nih.gov/3082503/ visited on 2.11.2018

alive artificially. In scientific parlance, the body is treated as dead on life the' brain-stem' becomes dead. Once brain-stem is dead, the brain cells cannot be regenerated and, *it* is at that stage person is treated as dead[4]

i). Concept of Brain Stem Death

It is difficult to precisely define "death". For centuries, the law has defined death as the apparent extinction of life as manifested by the absence of heart beat and respiration. Section 46 of the Indian Penal Code says that "death denotes the death of human being, unless the contrary appears from the context". Similarly, section 2 (b) of the Registration of Births and Deaths Act 1969 defines death as "Permanent disappearance of all evidence of life at any time after live- birth has taken place". These definitions are not in tune with the modern concept of "brain death"[5]When a person can be said to be dead? It was answered by the Supreme Court of India by saying that "one is dead when one's brain is dead". Brain death is different from PVS[6]. Then it was concluded: "Hence, a present day understanding of death as the irreversible end of life must imply total brain failure such that neither breathing nor circulation is possible any more"[7]. Brain stem death[8] is a clinical syndrome defined by the absence of reflexes with pathways through the brain stem - the "stalk" of the brain which connects the spinal cord to the mid- brain, cerebellum and cerebral hemispheres -in a deeply comatose, ventilator-dependent, patient. Identification of this state carries a very grave prognosis for survival, cessation of heartbeat often occurring within a few days although it may continue for weeks or even months if intensive support is maintained[9].

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4. See 196th report of Law Commission available at lawcommissionofindia.nic.in/ report196, March2006, visited on 3.11.20018
5. Vinod Shankar Mishra, "*Transplantation of Human Organs and Tissues in India and the Law: An Overview*", vol. xxxvi, Cochin University Law Review, 113, 2012 5a. See section 2 (d) of the Transplantation of Human organs and Tissues Act, 1994.
6. A persistent vegetative state (PVS) is a disorder of consciousness in which patients with severe brain damage are in a state of partial arousal rather than true awareness. After four week in a vegetative state (VS) the patient is classified as persistent vegetative state.
7. https://lawcommissionofindia.nic.in/reports/report241.pdf visited on 2.11.2018
8. Available at http://en.wikipedia.org/wiki/Brain_stem_death visited on 2.11.2018
9. A Code of Practice for the Diagnosis and Confirmation of Death. Academy of Medical Royal Colleges, 70 Wimpole Street, London, 2008

This aspect of ‘brain stem death’ was first mentioned by Thomas J. in the context of withdrawal of artificial respiration and nutrition in Auckland Area Health Board Case[10] and his judgment received praise from the House of Lords in Airedale NHS Case[11]. The House of Lords stated in Airedale that a patient may be unconscious, unable to see or hear or speak or have any sensory capacity but as long as the brain-stem, which controls the reflective functions of the body is able to make the heartbeat and allow breathing to go on and digestion to take place, the person is not considered to be clinically dead.

The concept of brain death[12] as defining death is widely accepted[13]. Most countries have published recommendations for the diagnosis of brain death but the diagnostic criteria differ from country to country[14]. Some rely on the death of the brainstem only[15] others require death of the whole brain including the brain stem[16]. However, the clinical assessments for brain death are very uniform and based on the loss of all brainstem reflexes and the demonstration of continuing cessation of respiration – i.e., apnea

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10. Auckland Area Health Board vs. Attorney General: 1993(1) NZLR 235
11. *Airedale NHS vs. Bland*: 1993(1) AII ER 821 (HL)
12. The oft-quoted definition in Black’s Law Dictionary Suggests, Death as: The Cessation of life; the ceasing the exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital function consequent thereon, such as respiration, pulsation, etc. “Black’s Law Dictionary 488 (4th ed., rev. 1968) This definition saw its echo in numerous other texts and legal case law. This includes many American preceding-such as Schmidt v. Pierce 344 S.W. 2d 120, 133 (Mo. 1961) (“Black’s Law Dictionary, 4th Ed., S.W. 2d 120,k 133 (Mo. 1961) (“Black’s Law Dictionary, 4th Ed. Defines death as ‘the cessation of life; the ceasing to exist”); and Sanger v Butler 101 S.W. 459, 462 (Tex. Civ. App. 1907) (“The Encyclopedic Dictionary, among others, gives the following definitions of [death]: “The state of being dead; the act or state of dying; the state or condition of the dead.
13. Laureys, S. (2005), *Science and society: death, unconsciousness and the brain. Nature Review Neuroscience* 6, 899-909
14. Haupt, W.F. and Rudolf, J. (1999). European brain death codes: a comparison of national guidelines. J Neurol. 246, 432-437
15. Medical Royal Colleges and their Faculties in the United Kingdom (1976). Diagnosis of brain death. B.M.J. 2, 1187-1188
16. Medical Consultants on the Diagnosis of Death (1981). Guidelines for the determination of death. Report of the medical consultants on the diagnosis of death to the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research,. JAMA 246,2184-2186.

testing[17] – in a persistently comatose patient[18].

Although guidelines are available in many countries to standardize national processes for the diagnosis of brain death, the current variation and inconsistency in practice make it imperative that an international consensus is developed[19]. An international consensus on the determination of brain death is desirable, essential, and long overdue[20]. It is interesting to note that the Organ Transplantation Act, 1994 has for the first time given legal recognition to "brain death" in India. This will now enable doctors to withdraw life-sustaining aids including respirators from patients, thus enabling the quick recovery of cadaver organs. It will make a large number of organs available for transplantation besides cutting short the agonizing vigil of relatives of the patient already dead for all practical purposes; it will also conserve our scarce medical resources[21].

Even in the case of "brain death", the Act lays down that no organ may be removed from the body of the person concerned unless such a death is certified by a board of medical experts. This board will comprise the registered medical practitioner in charge of the hospital where death has occurred, an independent specialist and a neurologist or a neurosurgeon nominated by the in-charge and the doctor treating the patient provided that where a neurologist or a neurosurgeon is not available, the registered medical practitioner , being a surgeon or a physician and an anesthetist or intensives subject to the condition that they are not members of the transplantation team for the concerned recipient and to such conditions as may be prescribed[22].

It may be pointed out transplantation of Human organs Act, 1994

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17. Wijdicks, E.F. (2001). The diagnosis of brain death N Engl J Med 344, 1284-2186
18. http://www.coma.ulg.ac.be/inform/brain_death.html
19. Wijdicks, E.F. (2002). Brain death worldwide: accepted fact but no global consensus in diagnostic criteria. Neurology 58, 20-25
20. Available at http://bja.oxfordjournals.org/content/108/suppl_1/i6.full,visited on 2.11.2018
21. Vinod Shankar Mishra, '*Transplantation of Human Organs and Tissues in India and the Law: An Overview",*(2012) vol. xxxvi, Cochin University Law Review, 113,
22. Section 3(6) (III) and Section 24(2b) of The Transplantation of Human Organs (Amendment) Act, 2011

permits withdrawal of life support system in case of Brain stem death duly certified by medical board. One can say that recognition of concept of 'Brain stem death' has propelled the demand for legalizing the concept of 'Passive Euthanasia' in India. Whether passive euthanasia is legally permissible? If so, under what circumstance and what precautions are required while permitting it. This paper explores this question and also highlights legal issues related to passive euthanasia and brain stem death. In following pages, an attempt is made to explore the historical background of passive euthanasia.

II. PASSIVEE UTHANASIA–A BACKGROUND

The 17th Law Commission of India took up the subject for consideration at the instance of Indian Society of Critical Care Medicine, Mumbai which held a Seminar attended by medical and legal experts. It was inaugurated by the then Union Law Minister. The Law Commission studied a vast literature on the subject before the preparation of report.

In the introductory chapter, the Law Commission also clarified: ''In this Report, we are of the view that 'Euthanasia' and 'Assisted Suicide ' must continue to be offences under our law. The scope of the inquiry is, therefore, confined to examining the various legal concepts applicable to 'withdrawal of life support measures' and to suggest the manner and circumstances in which the medical profession could take decisions for withdrawal of life support if it was in the 'best interests' of the patient. Further, question arises as to in what circumstances a patient can refuse to take treatment and ask for withdrawal or withholding of life support measure, if it is an informed decision. "[23]

Passive Euthanasia has been advocated by the Law Commission of India in the 196th Report both in the case of competent patients and incompetent patients who are terminally ill. In the case of incompetent patients, the attending medical practitioner should obtain the opinion of three medical experts whose names are on the approved panel and thereafter he shall inform the Patient (if conscious) and other close relatives. Then he shall wait for 15 days before withholding or withdrawing

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23. Government of India Law Commission of India Passive Euthanasia – A Relook Report No 241 AUGUST 2012 available at https://lawcommissionofindia.nic.in/reports/report241.pdf visited on2.11.2018

medical treatment including discontinuance of life supporting systems. This 15 days ' time was contemplated with a view to enable the patient (if conscious) or relatives or guardian to move an original petition in the High Court seeking relief declaratory that the proposed act or omission by the medical practitioner /hospital in respect of withholding medical treatments is lawful or unlawful. High Court will then give a final declaration which shall be binding on all concerned and will have the effect of protecting the doctor or hospital from any civil or criminal liability.[24]

Hence, the concept of passive euthanasia alleviates way for reducing the pain and suffering of patients afflicted from terminal illness or incurable disease.

In the following pages, an attempt is made to highlight the role of the Supreme Court to give legal recognition to passive euthanasia

i) SUPREME COURTS DECISION IN ARUNA'S CASE (2011)

The case of *Aruna Ramachandra Shanbaug*[25] is the first case in India which deliberated at length on 'euthanasia'. Aruna Shanbaug was in Persistent Vegetative State (PVS for short) for more than three decades (37 years) at Edward Memorial Hospital, Bombay and the Court found that there was a little possibility of coming out of PVS. However, the Court pointed out that she was not dead. She was abandoned by her family and was being looked after by staff of KEM Hospital in which she worked earlier as staff nurse.

The Supreme Court, while making it clear that passive euthanasia is permissible in our country as in other countries, proceeded to lay down the safeguards and guidelines to be observed in the case of a terminally ill patient who is not in a position to signify consent on account of physical or mental predicaments such as irreversible coma and unsound mind.

It may be recalled In Gian Kaur's case[26], the Supreme Court approvingly referred to the view taken by House of Lords in Airedale case on the point that Euthanasia can be made lawful only by legislation. It may be noted that in Gian Kaur case although the Supreme Court has quoted with approval the view of House of Lords in Airedale case. It has

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24. Ibid
25. (2011) 4 SCC 454
26. (1996) 2 SCC 648

not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support".[27]

The Supreme Court made it clear in Aruna Case by saying that "In our opinion, if leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person, there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab property of the patient".[28] Proceeding to discuss the question whether life support system should be withdrawn and at whose instance, the Supreme Court laid down the law with prefacing observations which as follows: "There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection[29].

The Supreme Court went on to add that:

> we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject [30] (i) A decision has to be taken to discontinue life support either by the parent or the spouse or other close relative or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient. (ii) Even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale case.[31] The Supreme Court justified its decision by saying

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27. Supra note 23
28. Supra note 25 at 519
29. Ibid
30. Supra note 28
31. *Airedale N.H.S.Trust v. Bland* (1993) 1 All ER 821 (CA and HL)

that[32]:

> "We cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. In our opinion, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, we cannot leave it entirely to their discretion whether to discontinue the lift support or not. …. This is in the interest of the protection of the patient, protection of the doctors, relatives and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of *Parens Patriae* which is well-known principle of law".[33]

In this context, two cardinal principles of medical ethics stated by the Supreme Court are patient autonomy and beneficence.[34] Explaining these two terms, the Supreme Court observed: "Autonomy means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous, the patient should be competent to make decision and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a living will, or the wishes of surrogates acting on his behalf (substituted judgment) are to be respected. The surrogate is expected to represent what the patient may have decided has she been competent, or to act in the patient's best interest.[35]Further, beneficence is acting in what (or judged to be) in the patient's best interest. Acting in the patient 's best interest means following a course of action that is best for the patient, and is not influenced by personal convictions, motives or other considerations .... ''[36]

The Supreme Court then observed that Article 226 of the Constitution

32. *Aruna Ramachandra Shanbaug v Union of India* (2011) 4 SCC 454, 519
33. Ibid
34. Supra note25 at 482
35. Ibid
36. Ibid

gives ample powers to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff seeking permission to withdraw the life support to an incompetent patient[37].

Appreciating the role of the Indian Supreme Court Marc Bosmans says that It is extremely important that although the Indian law does not consider passive euthanasia, the Supreme Court verdict in favour of conditional passive euthanasia for terminally-ill patients, demonstrates that the creative contribution of the judiciary can adapt a legislation that does not follow the social and cultural evolution.[38]

It may be noted that Marc Bosmans has not supported the mercy killing. However, he recognized the importance of mercy killing by saying that it seems to be a marvelous example of an extremely delicate moral and religious item where the points of view of different people (even in the same environment) are extremely opposite the one to the other.[39]

It is relevant to mention in this context that the Law Commission of India in its 210th Report has recommended the repeal of Section 309 of Indian Penal Code so that the attempt to commit suicide could be decriminalized.[40] As long back as 1971, the Law Commission in its 42nd report pleaded for obliterating Section 309 from the Statute Book.[41] In *Aruna Shanbaug Case*[42], the Supreme Court opined that although Section 309 of the IPC has been held to be constitutionally valid in the Gian Kaur case, the time has come where it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in depression and hence he needs help rather than punishment."[43]

One can find that recognition of passive euthanasia by the Supreme Court propelled the demand for legalizing active euthanasia. V.R. Jayadevan

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37. Supra note 25 at 522
38. Marc Bosmans,'Film Guzaarish and the Case Aruna Shanbaug: Human Rights and the Influence of Cultural and Religious Principles on the Interpretation and Effectiveness in Europe and India', vol. xxxvi, Cochin University Law Review, p-71-72, 2012
39. Ibid
40. www.lawcommissionofindia.nic.in 42nd report (1971)
41. www.lawcommissionofindia.nic.report241.pdf (210)
42. Supra note 25
43. Id at 512

pleads for ushering in an era of active euthanasia.[44] He has supported his argument by saying "the trend of the decisions of both the US and English courts reveals that the common law systems continue to prescribe active euthanasia as an offence. At the same time, many realize that active euthanasia is gaining relevance in the modern world. The objections to legalizing active euthanasia are based on religious principle, professional and ethical aspects and the fear of misuse. But, it cannot be forgotten that it was by overruling similar objections that abortion was legalized and later raised as an ingredient of the right to privacy. It is submitted that just like abortion, the modern societies demand the right to assisted suicide."[45]

III. PASSIVE EUTHANASIA AND LAW COMMISSION OF INDIA : MAKING OF A LAW

The question now is whether Parliament should enact a law on the subject permitting passive euthanasia in the case of terminally in patients– both competent to express the desire and incompetent to express the wish or to take and informed decision. If so, what should be the modalities of legislation?

i) 241st Report of Law Commission on Passive Euthanasia : A Step Forward

The Government of India referred this question to the Law Commission of India. In the letter dated 20 April 2011 addressed by then Hon'ble Minister, after referring to the observations made by the Supreme Court in Aruna's Case, requested the Commission "to give its considered report on the feasibility of making legislation on euthanasia taking into account the earlier 196th Report of the Law Commission."

Justice P.V. Reddy submitted its report (no. 241) on Passive Euthanasia in August 2012. .One can find that Law Commission's (241st Report) accepted the view of the Supreme Court in Aruna Ramachandra and observed:

> On taking stock of the *pros and cons*, this Commission would

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44. V.R. Jaydevan, "Right of the Alive [who} but has no Life at all – Crossing the Rubicon from Suicide to Active Euthanasia" (2011) 53 JILI 437, 471
45. Ibid.

> like to restate the propriety and of legality of passive euthanasia rather than putting the clock back in the medico-legal history of this country.[46]

The main difference between the recommendations of the Law Commission and the law laid down by the Supreme Court lies in the fact that the Law Commission suggested enactment of an enabling provision for seeking declaratory relief before the High Court whereas the Supreme Court made it mandatory to get clearance from the High Court to give effect to the decision to withdraw life support to an

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46. Supra note 41. The major recommendations of law commission were as under:

1 Passive euthanasia, which is allowed in many countries, shall have legal recognition in our country subject to certain safeguards, as suggested by the 17th Law Commission of India and as held by the Supreme Court in Aruna Ramachandra's case [(2011) 4 SCC 454]. It is not objectionable from legal and constitutional point of view.

2. A competent adult patient has the right to insist that there should be no invasive medical treatment by way of artificial life sustaining measures/treatment and such decision is binding on the doctors/hospital attending on such patient provided that the doctor is satisfied that the patient has taken an 'informed decision' based on free exercise of his or her will. The same rule will apply to a minor above16 years of age who has expressed his or her wish not to have such treatment provided the consent has been given by the major spouse and one of the parents of such minor patient.

3. As regards an incompetent patient such as a person in irreversible coma or in Persistent Vegetative State and a competent patient who has not taken an 'informed decision ', the doctor's or relatives' decision to withhold or withdraw the medical treatment is not final. The relatives, next friend, or the doctors concerned / hospital management shall get the clearance from the High Court for withdrawing or withholding the life sustaining treatment.

4. The High Court shall take a decision after obtaining the opinion of a panel of three medical experts and after ascertaining the wishes of the relatives of the patient. The High Court, as *parens patriae* will take an appropriate decision having regard to the best interests of the patient.

5. Provisions are introduced for protection of medical practitioners and others who act according to the wishes of the competent patient or the order of the High Court from criminal or civil action. Further, a competent patient (who is terminally ill) refusing medical treatment shall not be deemed to be guilty of any offence under any law.

6. The procedure for preparation of panels has been set out broadly in conformity with the recommendations of 17th Law Commission. Advance medical directive given by the patient before his illness is not valid.

7. Notwithstanding that medical treatment has been withheld or withdrawn in accordance with the provisions referred to above, palliative care can be

incompetent patient. The opinion of the Committee of experts should be obtained by the High Court, as per the Supreme Court's judgment whereas according to the Law Commission's recommendations, the attending medical practitioner will have to obtain the experts' opinion from an approved panel of medical experts before taking a decision to withdraw/ withhold medical treatment to such patient. In such an event, it would be open to the patient, relations, etc. to approach the High Court for an appropriate declaratory relief.

IV. LEGAL STATUS OF PASSIVE EUTHANASIA: POST ARUNA RAMACHANDRA SHAUNBAUG (2011) CASE

The International Human Rights Documents enumerates several entitlements which are acknowledged to be integral to a free and meaningful existence. The State or medical practitioner would not be accused of taking away the life when the law merely provides assistance to the patient to allow his life devoid of essential attributes to wane by withdrawal of medical care and procedures. What the State is forbidden from doing is interfering with the autonomy of a person when the autonomy makes sense. However, when the patient is not in a position to make sense of his autonomy and is not in a position to wish death or prefer the life denuded of its basic and essential attributes, the intervention by the judicial organ of the State to sanction passive euthanasia cannot be said to be hostile to

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extended to the competent and incompetent patients. The Governments have to devise schemes for palliative care at affordable cost to terminally ill patients undergoing intractable suffering.

8. The Medical Council of India is required to issue guidelines in the accordance with the provisions referred to above, palliative care can be extended to the competent and incompetent patients. The Governments have to devise schemes for palliative care at affordable cost to terminally ill patients undergoing intractable suffering.

9. The Medical Council of India is required to issue guidelines in the matter of withholding or withdrawing of medical treatment to competent or incompetent patients suffering from terminal illness.

10. Accordingly, the Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2006, drafted by the 17th Law Commission in the 196th Report has been modified and the revised Bill is practically an amalgam of the earlier recommendations of the Law Commission and the views/directions of the Supreme Court in Aruna Ramachandra Case.

the concept of sanctity of life of the patient concerned.

What is the doctor's duty and does the content of the right in Art. 21 preclude the doctor and the patient from facilitating passive euthanasia?

One is tempted to quote the observation of the Supreme Court. The Court said that the patient undergoing terrible suffering and worst mental agony does not want his life to be prolonged by artificial means. She/he would not like to spend for his treatment which is practically worthless. She/he cares for his bodily integrity rather than bodily suffering. She/he would not like to live like a 'cabbage' in an intensive care unit for some days or months till the inevitable death occurs. He would like to have the right of privacy protected which implies protection from interference and bodily invasion. As observed in Gian Kaur's case[47], natural process of his death has already commenced and he would like to die with peace and dignity. No law can inhibit him from opting such course. This is not a situation comparable to suicide, keeping aside the view point in favour of decriminalizing the attempt to suicide. The doctor or relatives cannot compel him to have invasive medical treatment by artificial means or treatment[48].

What is the proper approach to the case of an incompetent patient, such as a patient who may be in a PVS or irreversible coma? Or in case of brain stem death? Should (involuntary) passive euthanasia be allowed in that case? Will the discontinuance of life-prolonging treatment by artificial measures result in violation of article21.

As the patient is not in a position to exercise the right of self-determination, should artificial life-support be thrust on him throughout the span of his short life? Should he be in a worse position because he cannot express, communicate?

Further, article 21 does not forbid resorting to passive euthanasia even in the case of an incompetent patient, provided that it is considered to be in his best interest, on a holistic appraisal. The doctors' duty to make assessment and the High Courts' duty to take stock of the entire situation are directed towards the evaluation of best interest which does not really clash with the right of life under Art 21.

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47. Supra note 26
48. Id at 660, 661

The scope of Article 21 which was initially confined to arbitrary deprivation of life and personal liberty, was extended to positive rights to enable an individual to live with dignity. In *Gian Kaur's Case,* the Constitution Bench of Supreme Court laid down the proposition that the right to life does not include the "right to die". In this respect, it was pointed out that the analogy of the nature of rights in Article 19 of the Constitution e.g., freedom of speech includes the freedom not to speak, cannot be applied to the right under Article 21. The Court held that the right to death, if any, is inherently inconsistent with the right to life. The Court however emphasized that right to life under Article 21 would include the right to live with human dignity up to the end of natural life which includes within its ambit a dignified procedure of death.[49]

In Aruna Shanbaug Case[50] , the Supreme Court, stated that "We have carefully considered paragraphs 24[51] and 25[52] in Gian Kaur's case[53] and we are of the opinion that all that has been said therein is that the view in Rathinam's case[54] that the right to life includes the right to die is not correct. We cannot construe Gian Kaur's case[55] to mean anything

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49. Ibid
50. Supra note25
51. Protagonists of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of Sanctity of 'life' or the 'right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of ''right to life' therein includes the 'right to die'. The 'right to life' including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.
52. A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced.
53. Supra note26
54. P.Rathinam v. Union of India (1994) 3SCC394
55. Supra note 53

beyond that. In fact, it has been specifically mentioned in paragraph 25 of the aforesaid decision that "the debate even in such cases to permit physician assisted termination of life is inconclusive" . Thus, it was obvious that no final view was expressed in the decision in Gian Kaur's case[56] beyond what had been mentioned above[57].

The Supreme Court concluded that a vivid reading of Para 104 of Aruna Shanbaug demonstrates that the reasoning in Para 104[58]is directly inconsistent with its own observation in Para 101.[59]

The Supreme Court was of the view that in Gian Kaur Case, the Constitution Bench held that euthanasia could be made lawful only by legislation (Para 21 & 101). Whereas in Para 104[60], the Bench contradicts its own interpretation of Gian Kaur in Para 101[61] and states that although this court approved the view taken in Airedale, it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g., a person in coma or PVS. When, at the outset, it is interpreted to hold that euthanasia could be made lawful only by

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56. Ibid
57. Supra note25 at 487
58. Para 104-"It may be noted that in Gian Kaur's case although the Supreme Court has quoted with approval the view of the House of Lords in Airedale's case, it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialization, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method."
59. Para 101- The Constitution Bench of the Indian Supreme Court in Gian Kaur vs. State of Punjab 1996 (2) SCC 648 held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two judge Bench decision of the Supreme Court in P. Rathinam vs. Union of India 1994(3) SCC 394. The Court held that the right to life under Article 21 of the Constitution does not include the right to die (vide para 33). In Gian Kaur's case (supra) the Supreme Court approved of the decision of the House of Lords in Airedale's case (supra), and observed that euthanasia could be made lawful only-by-legislation.
60. Supra note 58
61. Supra note 59

legislation where is the question of deciding whether the life support should be discontinued in the case of an incompetent person e.g., a person in coma or PVS.

The Supreme Court took the stand that although the Constitution Bench in Kaur (supra) upheld that the 'right to live with dignity' under Article 21 will be inclusive of 'right to die with dignity', the decision does not arrive at a conclusion for validity of euthanasia be it active or passive. So, the only judgment that holds the field in regard to euthanasia in India is Aruna Shanbaug, which upholds the validity of passive euthanasia and lays down an elaborate procedure for execution the same on the wrong premise that the Constitution Bench in Gian Kaur (Supra) had upheld the same.

In view of the inconsistent opinions rendered in Aruna Shanbaug and also considering the important question of law involved which needs to be reflected in the light of social, legal, medical and constitutional perspective, it becomes extremely important to have a clear enunciation of law. The Supreme Court of India found the question of law involved required careful consideration by a Constitution Bench of the Court for the benefit of humanity as a whole. Accordingly, the Supreme Court referred[62] this matter to a Constitution Bench of the Court for an authoritative opinion[63].

The Five Judge Constitution Bench of the Supreme Court[64] of India held that passive euthanasia is permissible and the right to live with dignity

62. *Common Cause (A Registered Society) v. Union of India (2014) 5SCC338*

63. *Common Cause (A Registered Society) v. Union of India (2018) 5 SCC 1*

64. *In Common Cause (A Registered Society), a writ petition, under Article 32 of the Constitution of India, was filed by Common Cause-a Society registered under the Societies Registration Act, 1860, praying for declaring 'right to die with dignity' as a fundamental right within the fold of 'right to live with dignity' guaranteed under Article 21 of the Constitution and to issue direction to the Union of India, to adopt suitable procedures, in consultation with the State Governments wherever necessary, to ensure that the persons with deteriorated health or terminally ill should be able to execute a document, viz, 'my living will & Attorney authorization' which can be presented to hospital for appropriate action in the event of the executants being admitted to the hospital with serious illness which may threaten termination of life of the executants or in the alternative, issue appropriate guidelines to this effect and to appoint an Expert Committee consisting of doctors, social scientists and lawyers to study into the aspect of issuing guidelines regarding execution of 'Living Wills'.*

also includes the smoothening of the process of dying in case of a terminally ill patient or a person in Persistent Vegetative State with no hope of recovery and observed[65] that:

> "A failure to legally recognize advance medical directives may amount to no-facilitation of the right to smoothen the dying process and the right to live with dignity. Further, a study of the position in other jurisdictions shows that Advance Directives have gained lawful recognition in several jurisdictions by way of legislation and in certain countries through judicial pronouncements. Though the sanctity of life has to be kept on the high pedestal yet in cases of terminally ill persons or PVS patients where there is no hope for revival, priority shall be given to the Advance Directive and the right of self-determination. In the absence of Advance Directive, the procedure provided for the said category hereinbefore shall be applicable.[66]When passive euthanasia as a situational palliative measure becomes applicable, the best interest of the patient shall override the State interest".[67]

V. ADVANCE MEDICAL DIRECTIVE

The Black's Law Dictionary defines an advance medical directive as, "a legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate. A living will, on the other hand, is a document prescribing a person's wishes regarding the medical treatment the person would want it he was unable to share his wishes with the health care provider.

The Bench has laid down the principles relating to the procedure for execution of Advance Directive and provided the guidelines to give effect to passive euthanasia in both circumstances, namely, where there are advance directives and where there are none, in exercise of the power under Article 142 of the Constitution.

The Supreme Court went on to explain the Advance Medical Directive

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65. Supra note 63 at 135,136

66. *Common Cause (A Registered Society) v. Union of India (2018) 5 SCC 1,136*

67. Id at 136

and observed:

> "In our considered opinion, Advance Medical Directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity. The said directive, we think, will dispel many a doubt at the relevant time of need during the course of treatment of the patient. That apart, it will strengthen the mind of the treating doctors as they will be in a position to ensure, after being satisfied that they are acting in a lawful manner. We may hasten to add that Advance Medical Directive cannot operate in obstruction. There has to be safeguards. They need to be spelt out."[68]

The Supreme Court enumerated them as under[69]:-

(a) The Mechanism

i) Who can execute the Advance Directive and how?

The Advance Directive can be executed only by an adult who is of a sound and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the document. It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information. It should have characteristics of an informed consent given without any undue influence or constraint; it shall be in writing clearly stating as to when medical treatment may be withdrawn or no specific medical treatment shall be given which will only have the effect of delaying the process of death that may otherwise cause him/her pain, anguish and suffering and further put him/her in a state of indignity.

ii) What should it contain?

(i) It should clearly indicate the decision relating to the circumstances in which withholding or withdrawal medical treatment can be resorted to. (ii) It should be in specific terms and the instructions must be absolutely clear and unambiguous. (iii) It should mention that the executor may revoke the instructions/authority at any time. (iv) It should disclose that the executor has understood the consequences of executing such a

68. Supra note 66 at 129
69. Id at 129 -134

document. (v) It should specify the name of a guardian or close relative who, in the event of the executor becoming incapable of taking decision at the relevant time, will be authorized to file consent /to refuse or withdraw medical treatment in a manner consistent with the Advance Directive. (vi) In the event that there is more than one valid Advance Directive, none of which have been revoked, the most recently signed Advance Directive will be considered as the last expression of the patient's wishes and will be given effect to.

iii) How should it be recorded and preserved?

The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by Judicial Magistrate First Class, hereinafter, JFMC, so designated by the concerned District Judge. The witnesses and the jurisdictional JMFC shall record their satisfaction that the document has been executed voluntarily and without any coercion or inducement or compulsion and with full understanding of all the relevant information and consequences. The JMFC shall preserve one copy of the document in his office, in addition to keeping it in digital format. The JFMC shall forward one copy of the document to the Registry of the jurisdictional District Court for being preserved. Additionally, the Registry of the District Judge shall retain the document in digital format. The JMFC shall cause to inform the immediate family members of the executor, if not present at the time of execution, and make them aware about the execution of the document. A copy shall be handed over to the competent officer of the local Government in the Municipal Corporation or Municipality or Panchayat, as the case may be. The aforesaid authorities shall nominate competent official in that regard who shall be the custodian of the said document. The JMFC shall cause to handover copy of the Advance Directive to the family physician, if any.

(b) When and by whom can it be given effect to?

i) Role of treating physician

In the event the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and cure of the ailment, the treating physician, when made aware about the Advance Directive, shall ascertain the genuineness and authenticity thereof from the jurisdictional JMFC before acting upon the same.

ii) Terminal illness/ No hope for recovery

The instructions in the document must be given due weight by the doctors. However, it should be given effect to only after being fully satisfied that the executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the executor is incurable or there is no hope of him/her being cured.

iii) Satisfaction of treating physician

If the physician treating the patient executor of the document) is satisfied that the instructions given in the document need to be acted upon, he shall inform the executor or his guardian/ close relative, as the case may be, about the nature of illness, the availability of medical care and consequences of alternative forms of treatment and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, has cogitated over the options and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.

(c) Constitution of Medical Board by Physician or Hospital

The physician/hospital where the executor has been admitted for medical treatment shall then constitute a Medical Board consisting of the Head of the treating Department and at least three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years who, in turn, shall visit the patient in the presence of his guardian/close relative and form an opinion whether to certify or not to certify carrying out the instructions of withdrawal or refusal of further medical treatment. This decision shall be regarded as a preliminary opinion.

(d) Constitution of Medical Board by the Collector

In the event the Hospital medical Board certifies that the instructions contained in the Advance Directive ought to be carried out, the physician/ hospital shall forthwith inform the jurisdictional Collector about the proposal. The jurisdictional Collector shall then immediately constitute a Medical Board comprising the Chief District Medical Officer of the concerned district as the Chairman and three expert doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in

the medical profession of at least twenty years (who were not members of the previous Medical Board of the hospital). They shall jointly visit the hospital where the patient is admitted and if they concur with the initial decision of the Medical Board of the hospital, they may endorse the certificate in carry out the instructions given in the Advance Directive.

i) Medical Board constituted by the Collector to ascertain the wishes of executor

The Board constituted by the Collector must beforehand ascertain the wishes of the executor if he is in a position to communicate and is capable of understanding the consequences of withdrawal of medical treatment. In the event the executor is incapable of taking decision or develops impaired decision making capacity, then the consent of the guardian nominated by the executor in the Advance Directive should be obtained regarding refusal of withdrawal of medical treatment to the executor to the extent of and consistent with the clear instructions given in the Advance Directive.

(e) Conveying of Decision of Medical Board to JMFC

The Chairman of the Medical Board nominated by the Collector, that is, the Chief District Medical Officer, shall convey the decision of the Board to the jurisdictional JMFC before giving effect to the decision to withdraw the medical treatment administered to the executor. The JMFC shall visit the patient at the earliest and, after examining all aspects, authorize the implementation of the decision of the Board.

(f) Revocation by the Executor

It will be open to the executor or evoke the document at any revocation stage before it is acted upon and implemented.

(g) What if permission is refused by the Medical Board?

i) Filling of petition under Article 226

If permission to withdraw medical treatment is refused by the Medical Board, it would be open to the executor of the Advance Directive or his family members or even the treating doctor or the hospital staff to approach the High Court by way of writ petition under Article 226 of the Constitution. If such application is filed before the High Court, the Chief Justice of the said High Court shall constitute a Division Bench to decide upon grant of approval or to refuse the same. The High Court will be free

to constitute an independent Committee consisting of three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years.

ii) Constitution of Medical Board by the High Court

The High Court shall hear the application expeditiously after affording opportunity to the State counsel. It would be open to the High Court to constitute Medical Board in terms of its order to examine the patient and submit report about the feasibility of acting upon the instructions contained in the Advance Directive.

iii) High Court to consider the best interest of the patient

The High Court shall render its decision at the earliest as such matters cannot brook any delay and it shall ascribe reasons specifically keeping in mind the principles of "best interests of the patient".

(h)Revocation or in-applicability of Advance Directive

i)Withdrawal of Advance Medical Directive in writing

An individual may withdraw or alter the Advance Directive at any time when he/she has the capacity to do so and by following the same procedure as provided for recording of Advance Directive. Withdrawal or revocation of an Advance Directive must be in writing.

ii) Change of circumstances

An Advance Directive shall not be applicable to the treatment in question if there are reasonable grounds for believing that circumstances exist, which the person making the directive did not anticipate at the time of the Advance Directive and which would have affected his decision had he anticipated them.

iii) Vague and Ambiguous Advance Medical Directive

If the Advance Directive is not clear and ambiguous, the concerned Medical Board shall not give effect to the same and, in that event, the guidelines meant for patients without Advance Directive shall be made applicable.

iv) Communication to Medical Board constituted by Collector for non-implementation of Advance Medical Directive

Where the Hospital Medical Board takes a decision not to follow an

Advance Directive while treating a person, then it shall make an application to the Medical Board constituted by the Collector for consideration and appropriate direction on the Advance Directive.

(i) Procedural Safeguards

i) Certificate of Medical Board constituted by the Hospital

In cases where the patient is terminally ill and undergoing prolonged treatment in respect of ailment which is incurable or where there is no hope of being cured, the physician may inform the hospital which, in turn, shall constitute a Hospital Medical Board in the manner indicated earlier. The Hospital Medical Board shall discuss with the family physician and the family members and record the minutes of the discussion in writing. During the discussion, the family members shall be apprised of the pros and cons of withdrawal or refusal of further medical treatment to the patient and if they give consent in writing, then the Hospital Medical Board may certify the course of action to be taken. Their decision will be regarded as a preliminary opinion.

ii) Constitution of Medical Board by the Collector

In the event the Hospital Medical Board certifies the option of withdrawal or refusal of further medical treatment, the hospital shall immediately inform the jurisdictional collector. The jurisdictional Collector shall then constitute a Medical Board comprising the Chief District medical Officer as the Chairman and three experts from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years. The Medical Board constituted by the Collector shall visit the hospital for physical examination of the patient and, after studying the medical papers, may concur with the opinion of the Hospital Medical Board. In that event, intimation shall be given by the Chairman of the Collector nominated Medical Board to the IMFC and the family members of the patient.

iii) Visit of Judicial Magistrate First Class at the earliest

The JMFC shall visit the patient at the earliest and verify the medical reports, examine the condition of the patient, discuss with the family members of the patient and, if satisfied in all respects, may endorse the decision of the Collector nominated Medical Board to withdraw or refuse

further medical treatment to the terminally ill patient.

iv) High Court to constitute Medical Board in case of difference of opinion of Medical Boards

There may be cases where the Board may not take a decision to the effect of withdrawing medical treatment of the patient on the Collector nominated Medical Board may not concur with the opinion of the hospital Medical Board. In such a situation, the nominee of the patient or the family member or the treating doctor or the hospital staff can seek permission from the High Court to withdraw life support by way of writ petition under Article 226 of the Constitution in which case the Chief Justice of the said High Court shall constitute a Division Bench which shall decide to grant approval or not. The High Court may constitute an independent Committee to depute three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years after consulting the competent medical practitioners. It shall also afford an opportunity to the State counsel. The High Court in such cases shall render its decision at the earliest since such matter cannot brook any delay. Needless to say, the High Court shall ascribe reasons specifically keeping in mind the principle of "best interest of the patient". Further, "It is appropriate to cover a vital aspect to the effect the life support is withdrawn, the same shall also be intimated by the Magistrate to the High Court. It shall be kept in a digital format by the Registry of the High Court apart from keeping the hard copy which shall be destroyed after the expiry of three years from the death of the patient."

The Supreme Court made it clear that directions and safeguard with regard to Advance Medical directive shall remain in force till Parliament makes legislation on the subject.

VI. PASSIVE EUTHANASIA AND BRAIN STEM DEATH: EMERGING ISSUES

One can find that passive euthanasia is being carried out in number of hospitals in India often, doctors treating such patients where there is no hope of recovery or total brain failure such that neither breathing nor circulation is possible any more, inform the relative/friend/guardian of the patient about futility of any further treatment. Further, legal recognition to 'brain stem death' will now enable doctor to withdraw life sustaining aids including respirators from patients, facilitating quick recovery of

cadaver organs. The mandatory presence of a neurosurgeon to declare brain death was present in the amended Act (THOA) 1994 and necessary changes were made in the form to certify the brain death under section 3(iii) of THOA, 1994 as amended in 2011 and form 10 of 2014, rules. It is ironical that neurologist or neuro surgeon is replaced by general physician or even a registered medical/practitioner.

It is important to note that definition of brain death vary from country to country and this will cause problems in inter-country donations i.e. related to transplantation of Human organs. It has been conceded that at least the case for passive euthanasia is made out, certain moral dilemma with regard to withdrawal of life support system and uncertainly related to definition/criteria for Brain Stem death would still remain. At times, a physician would be filled with profaned ethical uncertainties when a person is suffering from terminal illness or incurable disease or unbearable fear and suffering, the moot question is whether to allow such person to exercise his right to die with dignity and peace or to remember Hippocratic Oath to protect the best interest of patients. This is directly linked to the issue of premature withdrawal of life support system. Apparently allowing passive euthanasia linked with Brain Stem death for Transplantation of human organ is not only against the prevailing universal ethical values like peace freedom, equal rights and human dignity, but also against the humanity at large.

It has been said that one of the limitations of contemporary debates on euthanasia is that they don't take into consideration "Certain socio-economic concerns that must necessarily be factored into any discourse".[70]

Sanjay Nargal explains this by saying "In a system where out of pocket payment is norm and health care costs are booming, there has to be a way of differentiating a plea made on genuine medical grounds from one that might be an attempt to avoid financial ruin. This may not be easy for any court or institution. Further, 'Appropriate Authority and Judiciary' which are proactive in granting such permission, will also need to look at 'vested interest' that are forcing futile but costly treatment in a health care system that aims to profit through any means."[71]

70. Supra note 66 at 178

71. Sanjay Nargal, "Euthanasia cost factor is a worry" Time of India, March 13, 2011 available at htt://www.timesofindia.com

It has been argued that 'there is still a need for more research that include patients' view and compelling factors which facilitates the norm of passive euthanasia.[72]

VII. CONCLUSION

Humanism and welfare of the people is essence of constitutionalism. Constitutionalism is about limits and aspirations. Life and human dignity are inseparable. Further, good health is essential for both the right to life and human dignity. The capacity for the enjoyment of the right to life as well as human dignity by a person is significantly diminish if health of such person is poor. Individual liberty aids in developing one's growth of mind and assert individuality.

The law of the land as existing today is that a physician is not permitted to cause death of another person by administering lethal drug even if the objective is to relieve the patient from unbearable pain and suffering.

The right of the patient who is incompetent to express his view is protected under Article 21 of the Constitution. The withdrawal of life support system/treatment with deliberate intention of causing patient death has facilitated the evolution of passive euthanasia.

In case of brain stem death, the 'best interest' principle be applied and such decision be taken by specified competent medical experts/doctors and be implemented after providing a cooling period to enable an aggrieved person to approach the Court of Law.

Coming to An Advance Medical Directive, it is an individual's advance exercise of his autonomy on the subject of medical intervention that he wishes to allow upon his body at a future date, when he may not be in position to specify his wishes. The purpose and object of advance medical directive is to express the choice of a person regarding medical treatment in an event where he loses capacity to take a decision. The right to execute an advance medical directive is nothing but a step towards right to die with dignity.

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72. A chapel, et.al 'what people close to death say about euthanasia and assisted suicide: A qualitative study- Journal of Medical Ethics, available at https://www.ncbl.nlm.nih.gov

On the bright side, the concept of passive euthanasia and its application in case of brain stem death illustrates the right to die with dignity as Fundamental right. Moreover, the application of passive euthanasia substantiates the acceleration of natural process of 'death'.

It may be noted that Supreme Court[73] has made it clear that Advance Medical directive shall remain in force till Parliament makes a law in this regard.

In this context, it must be remembered that Supreme Court has invoked concepts like Sanctity of life, right to self-determination, autonomy of life and best interest of patient. While doing so, it has also balanced these rights by laying down proposition that no fundamental right is absolute.

One can appreciate the activism of the Supreme Court wherein the court has laid down guidelines for Advance Medical Directive in exercise of its power under Article 142 of the Constitution. It appears that the court has conceded 'Advance Directive' as tool to deliver complete justice under Article 142 of the constitution.

Advance Directives are not unique to end life care. These have also been granted legal validity under the Mental Health Care Act, 2017. Under this Act, one can find that a person can make an advance directive specifying how they would like to be care for and traced for their mental illness. The said directives come into effect whenever the person ceases to take the capacity to make mental health care and treatment decisions.

One can discover that most cases of withholding or withdrawing treatment for terminally ill patients are currently decided out of the court but still there is a silver lining. Advance Medical Directive would have to be executed in presence of three witnesses and authenticated by a judicial Magistrate First class, who is empowered to grant such permission after perusing reports of Medical Boards.

Coming to misgiving and left outs, the large area of practice of medicine is largely unregulated in India. A patient who is in coma, who is not brain dead may be declared as 'brain dead' by medical board for retrieval of organ and its transplantation into a recipient.

Even in the case of passive euthanasia, once the consent of guardian is obtained, the patient is allowed peaceful exist. However, in hospital

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73. *Supra note 66 at134*

records, it is recorded as 'natural death'. The procedure/mechanism laid down by the Supreme Court is not followed in letter and spirit.

One can find that the constitutional Courts (HC and SC) have become 'Centre of Gravity' to decide the 'best interest of patient'. It is interesting to note that the Supreme Court has permitted Advance Medical Directive with reference to withholding or withdrawing life support system. However, the initiative of the Supreme Court is diluted by the Medical treatment of terminally ill patients (protection of patients and medical practitioner) Bill, 2016. Clause 11 of this Bill considers Advance Directive or medical power of attorney to be void and not binding on any medical/ practitioner. In Common Cause Case[74], Justice Sikri took note of Bill of 2016 and recommended deletion of Clause 11 of the Bill of 2016 on the ground that 'it does not constitute fair, just or reasonable procedure and violates right to life guaranteed under Article 21 of the Indian Constitution'. Further, the proposed mechanism for developing and implementing Advance medical Directive is cumbersome and it requires a fairly complex process involving numerous stake holders like Medical Boards, Collectors, Judicial Magistrate First Class and Concerned High Court. The involvement of number of administrative authorities and experts would compromise the autonomy or right to self-determination of the patient.

One can notice that a large number of poor persons are compelled to give their consent for embracing death due to lack of financial resources and absence of State Funded Health Care System. Unregulated and unaffordable private health care leaves no choice for terminally ill or a person suffering from incurable disease or incapable of giving consent. Moreover, the Supreme Court has limited the scope of Advance Medical Directive to the withdrawal of medical treatment only.

The journey from Rathinam to Common Cause clearly indicates the need for extensive reform in health care system. Further, if one is inflicted by a infectious disease, Society or inactive State can compel a hopeless individual to embrace death.

The Supreme Court has candidly accepted that 'Indian society is emotional and care oriented'[75] but at the same time lamented that 'Unfortunate low level of ethical standards to which over society has

74. Supra note73
75. Supra note 26

descended, its raw and widespread commercialization and rampant corruption'.

In the light of above statements or observations, it is recommended that Parliament must enact a law to replace the Supreme Court's guidelines that govern passive euthanasia in general and Advance Medical Directive in particular.

Further, the said legislation shall incorporate safeguards related to recognition of brain stem death. It is ironical that transplantation of human organs Act, as amended in 2011 along with rules framed in 2014 makes way for misuse/abuse of the Act to certify a death as brain stem death. The amended Act facilitates it by diluting the composition of Medical Board. One can find, in ICU or at the time of emergency, in absence of a neurologist, a registered Medical practitioner can become a member of Medical Board which provides certificate for brain stem death.

It may be emphasized that 'brain stem death' is not yet recognized legally by many countries. There is a likelihood of non-application of the stringent criteria laid down by the Supreme Court in case of a person who is suffering from terminal illness or incurable disease. Moreover, the Supreme Court itself deplored the widespread commercialization and rampant corruption in Indian society.

It is recommended that stringent criteria shall be framed for certifying 'brainstem death'. It is relevant to mention that some States like Maharashtra have framed guidelines for certifying Brain stem death.

To sum up in words of Dr. Christian Barnard: "Death is not always an enemy often it achieves what medicine cannot achieve. It stops suffering." ■

REVISITING THE LAW OF SEDITION IN INDIA : NEED FOR REFORM

*DHARMENDRA KUMAR MISHRA **

*ANSHU MISHRA ***

> "…..I would rather die having spoken after my manner, than speak in your manner and live…..[1]."
>
> – Socrates

> Section 124 A, under which I am happily charged, is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. ………………………………, so long as he does not contemplate, promote, or incite to violence. But the section under which mere promotion of disaffection is a crime. ……………………………………. therefore, to be charged under that section, I have endeavored to give in their briefest outline the reasons for my disaffection.
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> – Mahatma Gandhi[2]

ABSTRACT : Common Law crime 'treason' has been considered one of the serious crimes almost in all colonial jurisdictions. Basically, it is a violation of allegiance to the

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1. Statement of Socrates cited in *Apology* by Plato
2. Mahatma, vol. II, (1951) pp. 129-33, this speech is taken from Selected Works of Mahatma Gandhi, vol. VI, *The Voice of Truth*, Part-I, *Some Famous Speeches*, p.14-24; Great Trial, (18.03.1922)

community[3] refers to an overt act of betrayal, whereas sedition is somewhat similar to the treason, and it is used against speech that stirs up opposition to the established authority of the State. Sedition has been said to precede treason by a short interval. However, the time is long past when mere criticism of the government was sufficient to constitute an offence of sedition. In the modern days, the right to utter honest and reasonable criticism and appraisal of all functioning of the government is a source of strength to a community rather than a weakness. A fair criticism of existing system even the expression of a desire and free speech seeking different governance altogether is a common phenomenon of liberal democracy. Hence, the language defining Sedition law in India be not read *litera legis*, it should be construed in changing context and in the light of the explanations appended. The present paper aims to offer a plausible conceptual account and revisits conflicting judicial interpretations of the statutory provisions and re-thinks the manner in which these provisions have been employed and jurisprudentially developed to restrain free speech.

KEY WORDS : Sedition, Treason, Misdemenour, Freedom of Speech & Expression, Constitution of India, Indian Penal Code

I. INTRODUCTION

The provision, relating to the law of sedition, is based on the principle that every State,[4] whatever is its form of Government, has to be armed with the power to punish those who by their conduct jeopardize the safety and stability of the State or disseminate such feelings of disloyalty, as have the tendency to lead to the disruption of the State or to public disorder among the people. The very existence of the people of the State will be in

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3. who enters in any kind of association, intelligence group, offensive or defensive league, against the person, authority and majesty of the king, either by themselves or together with other potentates, republics, and foreign communities or their ambassadors, from outside or inside of the kingdom, and this directly or indirectly, by themselves or an intermediary person, in written or verbal form.

4. State, political organization of society, or the body politic, or, more narrowly, the institutions of government, the state is a form of human association distinguished from other social groups by its purpose, the establishment of order and security; its methods, the laws and their enforcement; its territory, the area of jurisdiction or geographic boundaries; and finally by its sovereignty

jeopardy, if the Government, established by law, is subverted. This has been a foundational mooring to proscribe seditious act and describing it as an offence in authoritarian States. In English Law, there has been no such offence as sedition but there are offences of seditious words, seditious libel, and seditious conspiracy, whose connotations have changed over time, though not necessarily accompanied by or lead to open violence and that they consist in the display of dissatisfaction with the exciting Government[5].

In the beginning, the offence was said to have been committed when someone by his statement or conduct had attacked the Government or governmental institutions in a manner as to create a feeling of disaffection or disloyalty. It was not necessary to prove the statement amounted to an incitement to disorder or revolt against the Government or that the speech was such that it could lead to such disorder or revolt. However, now the nature of the offence has totally changed. Intention to promote violence has now become the main ingredient of the sedition. Generally, it consists of speaking words with a seditious intention. Under the Common Law, treason was a complex concept; it was difficult to define and needed to be viewed from many perspectives, much depending on the context. Treason concerns with the ethical, moral, political, and legal dimensions. Sedition is a crime directed against the very existence of the State itself and therefore peculiarly odious[6].

It is an offence against the State, under the Indian Penal Code, 1860(hereinafter referred to as the Code), though may have the same ultimate objective as treason and refers generally to the offence of

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5. James F. Stephen, *A History of the Criminal Law of England*, vol. II, p 298 (London: Mac Million & Co., 1883); Under English law the seditious conduct has been enumerated under the following five heads :

   (1) to excite disaffection against the King, Government or Constitution or against the Parliament or the Administration of justice;

   (2) to promote, by unlawful means, any alteration in Church or state;

   (3) to incite disturbance of the peace;

   (4) to raise discontent among the King's subjects; and,

   (5) to excite class hatred.

6. Law Commission of India, 42nd Report, Chapter 1, Para 1.1, (1971)

organizing or encouraging opposition to Government[7] in a manner such as- by speech or writing that falls short of the more dangerous acts constituting treason[8]. In England, the interpretation given to the Sedition is as under[9]:

> "Nothing is clearer than the law on this head – namely, that whoever by language, either written or spoken incites or encourages other to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. The word "sedition" in its ordinary, natural signification denotes a tumult, an insurrection, a popular commotion, or uproar; it implies violence or lawlessness in some form……."

Thus, treason is a crime of betraying a nation or sovereign by an act considered dangerous to its security. It involves two elements- 'an intention to betray i.e. may take either of two forms. Levying war or adhering to enemies and an overt act, whereas, sedition may be defined generally in various ways. It is an act of insurrection against constituted authority, a turmoil caused by dissension partisan, hatred or discontent authority; it includes conduct consisting of speaking, writing, or acting against an established government or seeking to overthrow it by unlawful means resistance by lawful authority; conduct tending to treasons but without an overt act.[10]

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7. Government is the soul of the State; it implements the will of the community. Government is defined as, 'the system of policy in a State, or that form of fundamental right and principles by which a Nation or a State is governed or the machinery by which the sovereign power in a State expresses its will and exercises its functions"-*Black's Law Dictionary* p. 824; Government is a body of person or persons that constitute an authority of a political unit or organisation-*Webster Third New International Dictionary* at p. 983; the Section 17 of *the Indian Penal Code*,1860 denotes the term 'Government' as the Central Government and Government of States. The term has been similarly defined under Section 3(23) of the General Clauses Act, 1897, as Central Government and any State Government. In *Ram Nandan v State*, AIR 1959 Alld 101, it has been observed that the Government means the system of the government or the Institutions consisting of the President and the Governors acting with the advice of their Council of Ministers and not the accrual persons holding the office of the President and the Governors and the Ministers advising them.
8. Encyclopaedia Britannica, Vol. 22, p196
9. *Rex v Aldred*, (1909) 22 CCLC 1
10. *Webster Third New International Law Dictionary*, Vol. III p. 2054;

II. SEDITION LAW : ORIGINATING PRINCIPLE AND FOUNDATIONAL MOORING

The offence of Sedition, occurs in chapter IV of the Indian Penal Code, headed 'Of offences against the State', is species of offence against the State, was not an invention of the British Government in India, but has been known in England for centuries. Every State must have power to punish those who imperil the Government by their acts. In India, the offence of Sedition, although was suggested by the first Draft Bill of the Code, 1937-39[11] to be inserted in the then prospective penal code,[12] but for unaccountable reasons, it could not be finalised[13]. Section 124-A could be inserted in the Code, 1860, only after a period of 10 years, i.e. in 1870 by *the Indian Penal Code (Amendment) Act*, 1870[14], and by Section 4 of

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11. Section 113 of the Draft Bill of the Indian Penal Code, 1837-39 reads as fallows:

    Whoever by words whether spoken or intended to be read, attempts to excite feelings of disaffection to the Government established by law in the territories of East India Company, among any class of people who live under the Government, shall be punished with imprisonment for a term which may extend to three years, to which fine may be added or with fine.

    Explanation: Such a disapprobation of the measures of the government as is compatible with a disposition to render obedience to the lawful authority of the government and to support the lawful authority of the government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments, of the measures of the government, with the intention of exciting, only this species of disapprobation, is not an offence within this clause."

12. Under Section 53 of the Charter Act 1833 the first Indian Law Commission was appointed in 1834 under the chairmanship of T. B. Macaulay, and on the requirement of the government the commission submitted Draft of Indian Penal Code on 2nd May, 1837. The Draft Bill was presented to the British Parliament but it could only be passed in 1860 and got the Royal assent in the same year and became an Act known as Indian Penal Code 1860.

13. R. B. Tewari, '*The Law of Sedition in India*,' published in E*ssays on Indian Penal Code* (1962) under the auspices of the I.L.I., New Delhi, p. 135.

14. Section 5 of *the Indian Penal Code (Amendment) Act* XXVII of 1870 reads as fallows:

    Section 124-A, Exciting Disaffection: "Whoever by words, either spoken or intended to be read, or by signs, or by visible re presentation or otherwise, excites or attempts to excite feelings of disaffection to the government established by law in British India, shall be punished with transportation for life or for any term to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

    Explanation: Same as explanation under section 113 of the Draft Bill of Indian Penal Code-see Supra note 11.

the Criminal Law (*Amendment*) *Act,* 1898. The former amendment inserted the section with the heading 'exciting disaffection' and was replaced and new section under the heading of 'Sedition' with three explanations was substituted.[15]After Independence, the words like 'Her Majesty', 'British India' and 'transportation for life' were also omitted by the Indian Independence (Adoption of Central Acts and Ordinances) Order, 1948, and Adoption of Laws Order, 1950 and the Section 124-A took the present existing form[16].

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15. Section 4 of *the Criminal Law (Amendment) Act,* IV of 1898 reads as fallows :

    The difference between the provisions of the two Amendment Acts, 1870 and 1898 were following:

    (i) In the former case the offence was designated "Exciting Disaffection" while in the latter case it was designated as "Sedition".

    (ii) In the former case the offence was for exciting or attempting to excite feelings of 'disaffection while in the later case beside disaffection, 'hatred' or 'contempt' are also included.

    (iii) In the former case the offence was against the government established by law in British India, while in the later case it was against Her Majesty' was also made punishable.

    (v) Formerly section had only one explanation while in the later case it contained three explanations;

    At the time adding two explanations 2 and 3, the then Select Committee in its report observed :

    > "We have added explanation 3 to make it clear that the criticism on the action of government is not confined to cases in which it is sought to bring about an alteration of what has been done. For example, suppose the Government makes an appointment which is considered objectionable, that appointment may be criticised although the criticism may not have in view the cancellation of the appointment. We have made consequential amendments in the Explanation 2 to make the language or the two explanations uniform."

16. The Section 124-A reads as follows:

    Sedition: "Whoever by words, cither 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 which fine may be added, or with imprisonment which may extend to three years to which fine may be added, or with fine.

    Explanation 1: The expression "disaffection" includes disloyalty and all feeling of enmity.

    Explanation 2 : Comment expressing disapprobation of the measures of the Government with view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section,

It is worth mentioning that the word sedition has, nowhere, been used in the inner text of the Section 124-A of the Code. It is written in the marginal note of the Section.[17] It's not an operative part of the Section; it merely provides the name with which the offence is defined in the section.[18] The Section explains the essence of the offence of sedition. In *Kedarnath Singh v. State of Bihar*,[19] B. P. Sinha, C J, while delivering majority judgment, quoted the definition of the term 'sedition' as given by Fitzgerald J. in an old English case, *Reg. v. Alexander Martin Sullivan*,[20] and observed:

> 'Sedition is a crime against a society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition itself is a comprehensive term, and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquility of the state; and leads ignorant persons to endeavour to subvert the government and the laws of the empire. The objects of the sedition, generally, are to induce discontent and insurrection and stir up opposition to the government, and bring the administration of justice into contempt, and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create a public disturbance, or to lead to civil war, to bring into hatred or contempt the sovereign or the Government, the laws are the constitution of the realm, and generally all endeavors to promote public disorder.[21]

Explanation 3: Comments expressing disapprobation of the administrative or other action of the government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section".

17. Marginal Notes, an intrinsic aid to construction, do not carry authority of law; it is a poor guide and indicates the object of the Section- *Chandler v DPP* [1964] AC 763
18. *Emperor v. Sadashive Narayan Bhalerao*, (1947) PC 82
19. (1962) 2 SCR 769
20. (1868) 11 Cox CC 44 at 45
21. Supra Note 19 at 794; Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained...... as to satisfy reasonable men that is their intention..... Sir Maurice Gwyer C J in

What is sedition? The word 'sedition is derived from Latin word '*seditio*', which literally means 'a going outside' or departing from established authority and norms. It emerged as an offence against the State as a part of the 17th century laws on treason. The present views, in somewhat restricted form, are similar to the views stated in *R. v Burns*,[22] wherein Cave, J referred to the law of sedition as defined by Stephen[23]. Walter Gellhorn has defined 'Sedition' as follows:

> 'The crime of sedition consists of advocacy by word of mouth, publication, or otherwise which incites discontent and contempt for the present form of Government, causing persons to flout its laws and tending to destroy the Government itself. It includes advocacy which incited to overthrowing the existing Government, by force and violence, to bring into contempt the form of Government, its public officers, its military forces, flags, and other symbols[24]'.

He further suggested that no overt act is required for the commission of sedition. Mere advocacy alone which is likely to incite is the essence of the crime[25].The essence of the offence of sedition defined as a conduct which has, either as its object or as its natural consequence, the unlawful display of dissatisfaction with the government or with the existing order of the society[26]. The most detailed modern discussion of sedition is to be found in a Canadian case[27], where Kellock J. reviewed the authorities in some detail; in his judgment the Court said:

> 'As is frequently mentioned in the authorities, probably no crime has been left in such vagueness of definition as that

Niharendra Datta Majumdar v. *Kingh Emperor* [1942], Vol. 5, Federal Law Journal 47.

22. (1886) 16 Cox CC 355, in the case, the defendants were charged that they had published, uttered, etc. the false, wicked, seditious and inflammatory words against the Queen, Her Crown and dignity, on the other hand, the defendants were charged with conspiracy for speaking seditious words.
23. Stephen's *Commentaries on the Laws of England*, 19th ed. vol. I V p 133
24. W. Gellhorn, *States and Subversion*, p 397
25. Ibid
26. Harri's *Criminal Law*, 22nd ed. p 131, It is to note that if the seditious matter is in permanent form, it is seditious libel otherwise it is simply called sedition.
27. *Boucher v R.* [1951] 2 D.L.R. 369

with which we are here concerned, and its legal meaning has changed with the years.[28]'

The concept is somewhat different in the Code.[29]In India, under Section 124-A of the Code, the expression 'brings or attempts to bring hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India' has been used which conveys three important effects of the speech and expression i.e. hatred, contempt, and disaffection. The words 'hatred' and 'contempt' are not synonymous. The words 'hatred' implies an ill-will, while the word 'contempt' implies a low opinion. Hatred and contempt are the state of mind in relation to an object. One shuns an object of hatred, but an object of contempt may be the subject of pity. One may pity but wish well an object of contempt, but one usually wishes evil or one hated.[30]The word 'disaffection' has been defined in a number of Indian[31] and English cases.[32] Disaffection, as judicially recognized, is a political distemper and not a mere absence or negation of love or good will. It is a positive feeling of aversion, which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, it secretly seeks to alienate the people and weaken the bond of allegiance, and prepossess the minds of the people with avowed or secret animosity to government, a feeling which tends to bring the government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or to support the laws of the realm and promote

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28. *Ibid*, p. 382
29. Denys C. Holland: 'Equality before the Law', *9 Current Legal Problems,* vol. 8,(1), p74, (1955): "The English Law, introduced in England and in colonies, was not the same. In English Law the first of the offence was an intention to excite violence while it was not so meant in the colonies.
30. H. S. Gour, *Penal Law of India*, 8th ed. p 901
31. Infra, Notes 68, 70, 73, 74, 75
32. *Merivals* v *Carson* (1887) 20 QBD 275, *Bowma* v *Secular Society Lmt.* (1917) AC 406, where courts observed : every latitude must be given to opinion and prejudice and then an ordinary set of men with ordinary judgment must say that any fair man would have made such a comment on the work...... mere exaggeration or even gross exaggeration would not make the comment cenfair. However, wrong opinion expressed may be in one point of truth or however prejudiced the writer, it may still be within the prescribed limit; The worlds as well as the acts, which to endanger society differ from time to time in proportion as society is stable or insecure in fact or is believed by its reasonable members to be open to assault, (respectively).

discontent and public disorder.[33] In *Queen Empress v. Ram Chandra Narayan*[34], Ranade, J observed:

> that 'disaffection is a positive feeling of aversion which is akin to disloyalty, defiant insubordination of authority, or when, it is not defiant makes man indisposed or obey or support the laws of the realm and promote discontent and public disorder'.[35]

III. SEDITION AND THE PARAMOUNT TEST

Undoubtedly, the provision of sedition in India has been borrowed from English law under which the seditious libel is considered to be a misdemeanour. The Madras High Court had held that the intention is the essence of the offence.[36] Regarding the intention in sedition, it is well settled that the essence of crime of sedition consists in the intention with which the language is used, and that such intention has to be judged primarily by the language used. In arriving at its conclusion as to the intention of the accused n making a speech, the court must obviously have regard to the class of audience to which, and the circumstances in which, the speech was made, and must then decide as to the probable effect of the speech. The speech must be read as whole, in free, fair and liberal spirit and that one should not pause upon an objectionable sentence hereor a strong word there. Public disorder or reasonable anticipation of public disorder is gist of the offence.

Thus, the essence of sedition is the intention of the offenders of creating hatred or contempt or exciting or attempting to excite disaffection towards the Government established by law[37], and it can be judged by the language used and the conduct shown by the accused.[38] For ascertaining the intention, it is necessary that the intention should not be gathered from an isolated and stray passengers here and there, but from a fair and free and generous perusal of the contents of the whole of the speech or writing,[39] which may be qualified by the context and general effect on the

33. V. B. Raju, *Commentaries on Indian Penal Code*, 2nd ed. p 410
34. (1897) ILR 72 Bom 152
35. Ibid at 163
36. 1948 MWN. 35
37. *Wallace Johnson v King* [1940] AC 231
38. Supra Note 30
39. 8 Cr LJ 281 at 283

minds of the public.[40] Thus, the gist of criminality in relation to an offence of sedition is a guilty intention of the accused because explanations 2 and 3 appended with the section 124-A of the Indian Penal Code are to disclose that a fair and honest comments and measures of the government not accompanied by any lawlessness or violence causing disaffection towards the constitutionally established government in India.[41]

IV. SEDITION : A POLITICAL OFFENCE

Sedition is an inherently political and politicised offence. More particularly, it has been classified in the category of purely political offences, since it affects the peace and security of the State without containing any element of ordinary offence. Sedition laws, however, remain perturbing form in any liberal-democratic perspective because they inevitably serve the interest of the existing authority. The two reasons are mainly responsible to make the offence of 'sedition' as a political offence in India. *Firstly*, the initiation for prosecution depends on the discretion of the government or political considerations and no court can take cognizance of any offence punishable under Chapter VI of the Code, except with the previous sanction of the government.[42] *Secondly*, the offence is of such a nature as to disturb the public for which every

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40. *Jiwan Singh And Ors v King Emperor*, AIR 1925 Lah 16
41. See, Supra note 13,where the statement of the Select Committee for inserting the two Explanations 2 & 3 in the Section 124-A, has been given.
42. Section 196 , *the Code of Criminal Procedure*, 1973 reads:
"(1). No Court shall take cognizance of-
(a) any offence punishable under Chapter VI or under Section 153A, Section 295A or sub-section (1) of Section 505 of Indian Penal Code (45 of 1860), or
(b) a criminal conspiracy to commit such offence, or
(c) any such abetment, as is described in section 108 A of the Indian Penal Code (45 0f 1860), except with the previous sanction of the Central Government or the State Government.
(1A). No Court shall take cognizance of-
(a) any offence punishable under Chapter VI or under Section 153B, Section 295A or sub-section (2) or sub-section (3) of Section 505 of Indian Penal Code (45 of 1860), or
(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or the State Government or of the District Magistrate; Object and reasons for the replacement of Article 19(2) by the Constitution (First Amendment) Act 1951 for the provision of public order.

republican government is determined to maintain peace and to control which is established by law.[43] Iqbal Ahmad, C J in *Mufti Fakhrul Islam* v. *Emperor*[44] observed:

> 'though it cannot be said that language current in the political controversy of a country can never be made the subject of a charge of sedition for some may turn upon the occasion on which it is used, the context in which it occurs and on the surrounding circumstance of the case, but ordinarily it should be difficult to find a charge of sedition upon idea, sentiments and expressions which have become part and parcel of normal political life of the country and which do not excite people to disorder'.[45]

The ultimate object of sedition is a violation of public peace, or at least such course of measures as evidentially endangers it,[46] yet it does not aim at direct and open violence against the laws or subversion of the Constitution. Manipur High Court in *Sagolsem Indramani Singh And Ors v. State of Manipur*[47] declared that the word 'sedition' includes all those practices, whether by word, spoken or in writing, which disturb the tranquility of the state and lead ignorant persons to subvert the Government and the laws of the Country. Section 124-A, does not necessarily involve any creation of disorder.[48]

V. LAW OF SEDITION AND THE CONSTITUTION OF INDIA

Sedition is often approached as a constitutional issue, rather than a part of strictly criminal laws, because it restricts and represses free speech in general and political speech in particular. In eighteenth and nineteenth centuries liberal democracy insists for government by consent, and where Constitution guarantees freedom and equality, the sedition laws are incompatible with democracy, and it guarantees of free political speech. It is entirely paradoxical to democratic government. As regards to the constitutional validity of Section 124-A of the Code, it has hitherto been

43. (1943) ALJ R 168
44. Ibid.
45. Ibid.
46. Rollin M. Perkins, *Criminal Law* (1957), p380
47. 1955 Cri LJ 184
48. Ibid

in a state of uncertainty. Some of the High Courts like Punjab[49] and Allahabad[50] had taken the view that with the commencement of the Constitution, Section 124-A has become void but Patna High Court[51] had held that the Section is valid. Punjab and Haryana High Court in *Tara Singh v. State*,[52] examined the constitutional validity of Section 124-A of the Code, and declared that no doubt, Section 124-A curtails the freedom of speech and expression enshrined under Article 19(1) (a) of the Constitution of India and it is not within the permitted ambit of the restrictions under Article 19(2). The Court observed:

> 'India is now a sovereign democratic state. Government may go and be caused to go without the foundations of the state being impaired. A law of sedition though necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about.'[53]

The Constitution, thus, requires a line to be drawn in the field of public order or tranquility marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind[54].

The Allahabad High Court in *Ram Nandan v. State*[55] also declared that Section 124-A of the Code infringes fundamental right to freedom of speech and expression, and is *ultra vires* of the Constitution. So far as the term 'in the interest of public order' is concerned provided under Article 19(2) of the Constitution, it cannot save the Section from being so. Public order is a comprehensive term and is synonymous to public peace, safety, and tranquility.

However, in *Kedarnath Singh v. State of Bihar*,[56] the Supreme Court took note of the conflicting interpretations given by the High Courts and

49. *Tara Singh v State* AIR 1951 Punj 27
50. *Ramnandan v State* AIR 1959 All 101
51. *Debi Soren v State*, AIR 1954 Pat 254
52. Supra note 49
53. Ibid
54. Ibid
55. Supra Note 50
56. Supra Note 19, in the instant case, the appellant *Kedarnath Singh* was prosecuted

reviewed some earlier judgments.[57] *First*, Sadashiv case, where the actual incitement or an attempt to excite the feelings of disaffection towards the government irrespective of any effect on public order was held, and *second,* Mazumdar case, where it was also held that the provisions of Section 124-A, IPC are attracted only when the excitement of feelings actually leads to the public disorder. After a keen perusal of both cases, the Supreme Court pointed out that while the Section would be constitutional if the other interpretation is adopted. Relying on the principle – *ut res magis valeat quam pereat*, the Court observed:

> "The freedom of speech and expression in Article19 (1) (a) of the Constitution is not absolute. The right is available only, unless and until the exercise of the right is not violative of the restrictions imposed by Article 19(2) of the Constitution of India.[58]

This decision, actually, rather to embrace the long-cherished desires of the people to get the absolute right to freedom of speech and expression, has created a confusion between the concept of liberty and security. Subba Rao, J as regards to the relation between liberty and security in the case of Ram Manohar Lohia[59] observed that the relation should be direct. Kedarnath's case[60] fails on this point. Secondly, in *Ramesh Thapar* v *State of Madras*[61], Supreme Court has held that many acts prejudicial to public order and safety would not be grave enough to endanger the security or the foundations of the State and the Constitution and do not permit to impose the extreme measures that restrain freedom of speech and expression.

So far as the question of sedition,[62] as one of the ground for

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for his speech delivered on May 26, 1955 at Barauni in District Monger in Bihar. The Constitutional point at issue was whether his arrest for his seditious speech under Section 124-A of *the Indian Penal Code* was within the ambit of permissible legislative power under Article 19(2) of the Constitution?

57. *Emperor v. Sadashiv Bhalerao,* AIR 1947 P.C. 82, *Niharende Dutta Mazumdar v. King Emperor,* (1942) FCR 38
58. *Supra* note 19 p. 969
59. *Superintendent, Central Prison Fatehgarh v Ram Manohar Lohia,* (1960) SCJ 567
60. *Supra* note 14
61. AIR 1950 SC 124
62. Article 13 (2) of the Draft Constitution

restriction on the freedom of speech and expression and Section 124-A of the Code be deleted from the statute book and be made a separate statute to that effect, is concerned to the proper solution. It requires to go back to gather the intention of the legislators who were ardent supporters in the Constituent Assembly was in favour of the deletion of the word 'sedition' from the Draft Constitution in which sedition was one of the grounds for imposing restrictions on the exercise of the freedom of speech and expression. When the matter was brought for debate in the Constituent Assembly, Dr. K. M. Munshi warned if the word "sedition" is not deleted, an erroneous impression would be created that we want to perpetuate Section 124-A under the Code. Consequently, the word 'sedition' was dropped and substituted by the words which undermines the security of State or tends to overthrow the State." Intimating the need for deletion of the word 'sedition' from the statute, it was stated in the debate of the Constituent Assembly:

'The public opinion has changed considerably since and now that we have a democratic government, a line must be drawn between criticism of the government which should be welcomed and incitement which would undermine security or order on which the civilian life is based, or which is calculated to overthrow the state. Therefore, the word sedition has been omitted. As a matter of fact the essence of democracy is criticism of government.'[63]

On the very point Patanjali Shastri, J in 1950, just after the commencement of the Constitution in Thaper's case,[64] delivering judgment for the majority of the court, observed:

> 'Deletion of the word "sedition" from the Draft Article 13(2) shows that criticism of government exciting disaffection or bad feeling toward it is not be regarded as a justifying ground for restricting the freedom of expression and of the Press, unless it is such as to undermine the security or tend to overthrow the state.'[65]

Further, in 1954, the Press Commission of India[66] also in its report

63. CAD, 2, vol. VII Pp731-32 (4-11-1948 to 8-1-1949), Fourth Reprint 2003
64. *Supra* note 62
65. Ibid at 127.
66. Indian Press Commission Report (1954) p 403

recommended to repeal Section 124-A of the Indian Penal Code and to insert a new section 121-B with the provisions 'expressions which incite persons to alter by violence the system of Government with or without foreign aid,' but this recommendation was not considered fit to restrict the freedom of speech and expression when it was not promoting public disorder.

VI. JUDICIAL DETOUR OF INTERPRETATIONS FROM BANGOBASI TO KEDAR NATH

It would noteworthy to cite certain judicial pronouncements where interpretation of the Section has led the courts to reach conflicting conclusions both in pre-independence and post- independence era, and the freedom of free speech was not allowed to favour the accused. *Queen Empress v. Jogendra Chandra Bose And Ors*[67], the first case reported on the subject was decided by the Calcutta High Court in 1892. Sir Comar Pethram, CJ while explaining the law of Sedition in India, said before the jury that the word 'disaffection' had a wider connotation and observed:

> 'Disaffection means a feeling contrary to affection, in other words dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the words is so distinct that I feel it hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the person to whom they are addressed a disposition not to obey the lawful authority of the government or to subvert or resist that authority, if he does so, with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the

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67. (1892) ILR 19 Cal 33, In the case the accused were charged u/s 124-A and 500 of the Indian Penal Code for attempting to excite feelings of disaffection towards the Government established by law in British India and with defaming the government of India by publishing certain articles in *Bangobasi*, a weekly vernacular newspaper having a large *Mofussil* circulation, on 28th March, 16th May and 6th June, 1891. The case is famiously known as Bangobasi case.

> section though no disturbance is brought about by his words or any feeling of disaffection, in fact produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the government and to hold it up to the hatred and contempt of the people and that were used with the intention to create such feelings.'[68]

The second case is a celebrated case on the subject decided by the Bombay High Court in *Queen Empress v Bal Gangadhar Tilak and Keshav Mahadeo Bal*[69] where Strachey J. agreed with the views of Sir Comar Petheram, CJ in Bangobasi case,[70] that disaffection means simply the 'absence of affection', in the course of his charge to the jury explained the law to them as follows:

> 'It includes hatred, enmity, dislike, hostility, contempt and every form of ill-will to the government. "Disloyalty" perhaps the best general term, comprehends every possible form of bad feelings to the Government. The amount of intensity of the disaffection is affection ……………………………….. his act would doubtless fall within Section 124-A and would probably fall within other sections of the public code. But, even if ……………………….. excite feelings of enmity to the Government, that is sufficient to make him guilty under the section'.[71]

Strachey, J further explained that he was aware that some distinguished persons had thought that there could be no offence against

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68. Ibid
69. (1893) ILR 22 Bob 112, The accused Bal Gangadhar Tilak, who was an editor, proprietor and publishers of the *'Kesari'* Newspaper, and K. M. Bal, acting Printer and Manager, both were charged for exciting or attempting to excite feelings of disaffection towards the British India Government through the publications of certain articles in the aforesaid Newspaper under the caption-*Shivaji Utterances*" being very lengthy published from Bombay) of June 15, 1897. The jury by majority of six to three found Tilak guilty of the offence of sedition. Later, on conviction, he applied for leave to appeal to the Privy Council. The application was heard by the Full Bench of the High Court. But, Court found the case not fit for appeal.
70. *Supra* note 68
71. *Supra* note 70 p 114.

the section unless the accused either counsels or suggests rebellion or forcible resistance to the government. He was of the opinion that the view was absolutely opposed to the expressed words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings and not inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt.

In *Queen Empress v. Ram Chandra Narayan And Ors*,[72] Farrah, CJ quoted Murray's Dictionary, where "disaffection" an adjective was almost always employed in the special sense as to mean 'friendly to the government or the constituted authority". Disloyal and as noun disaffection' was interrelated as 'absence of alienation of affection or kindly feeling-dislike hostility" especially "political alienation or discontent, a spirit of disloyalty to the government or existing authority.' An attempt to excite feelings of disaffection to the government is thus equivalent to an attempt to produce hatred of government as established by law to excite political discontent and alienate the people from their allegiance. In *Queen Empress v Amba Prasad* John Edge, CJ clarified that Disaffection means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government and 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the

72. (1897) ILR 22 Bom 55, where the accused was convicted under S. 124-A for publishing the seditious material- Preparation for becoming independent—"Canada is a country in North America under the British rule, the people of which have now become intolerant of their subjection to England. Though they are subject to the British people, they are not effeminate like the people of India. It is not their hard lot to save themselves for filling the purse of Englishmen. They are not obliged to pay a pie to England. Their income from Land revenue and taxes are expended for their own benefit. Trechy enact their own laws independently and appoint their own officers except one or two who are sent from England. If ever this nominal dependence they have become impatient and are now busy making efforts to through it off.... They have appointed a committee to frame an independent constitution for themselves.This committee has issued a notification of their aims, copies of which have been distributed even in India In this notification they have clearly stated their intention of throwing off the English yoke and establishing a Government of their in own. There is also strong unity am vast them.... There are no people on earth who are so effeminate and helpless and those of India. We have become so callous and shameless that we do not feel humiliation, while we are laughed at by all nations for losing such a vast and gold like country as India. What manliness we can exhibit in such a condition is itself evident, in a weekly newspaper "Pratod" on 17th May, 1897

Government.[73]

In *Re Amrita Bazar Patrika, Ltd*.[74] where two articles – '*To whom does India Belong*';[75] and '*Arrest of Mr. Gandhi-More Out ranger'*[76] were published and the Government of Bengal acting under the powers conferred on it by Section 4(1) of the Press Act 1910, ordered that the security of Rs 5000 already deposited by the publisher of the paper, and all copies of Amrit Bazar Patrika issued on 10th and 12th April, 1919 respectively wherever found, be forfeited to His Majesty and the allegation *inter alia* that "the said issues of said newspaper were seditious. The court in the case[77] observed:

> 'the intention is the core subject of criminal proceedings for direct sedition against persons under Section 124-A or indirect sedition under Section 153-A of the Code, and not for the forfeiture of the security given and the document issued by a printing press. The court further said that in judging articles charged as seditious, due allowance should be made for oriental modes of thought and expression, and for high flown classical language. In determining whether

73. (1898) ILR 20 All 55
74. (1919) ILR 47 Cal 190
75. To Whom Does India Belong?:"England having acquired India forgot all her noble and solemn pledges and formed it out to one thousand British officers headed by the Secretary of State for India. India really belongs to these officers, British officers, and to England in name. The three hundred and fifteen millions in India are governed by them at their sweet will, and on principles which are absolutely despotic and some of them in British and barbarous. The result is that Indian and the British Empire in re decaying and India has become the property of a handful of Englishmen. In short, these Anglo-Indian officers numbering a little over one thousand are in the position of lease holders of India. They serve the nerves first than their mother country. As for the Indian, they were of course, according to their selfless statements, created by heave only to minister into their comforts and material prosperity. Thus they expelled the Indian from all offices in the higher services and they increased their own pay."
76. Arrest of Mr. Gandhi —more Outrage: "The whole tenor of the article and particularly of the "passage the masses have at last been roused to realise that the reign of law is gone and people can be shot down at the sweet will of the executive" are in the opinion of the Governor in Council likely and have a tendency directly or indirectly by iterance, suggestion, implication or otherwise, to bring into hatred the Government established in British India and excite disaffection towards the said Government.
77. Supra Note 74

> the intention with which any words were spoken, any document was published, or any agreement was published, or any agreement was made, was or was not, seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.'[78]

The constitutional validity of Section 124A of the Code was challenged before the Supreme Court in the case *of Kedar Nath Singh v. State of Bihar*[79]. The Constitution Bench of the Supreme Court has upheld the validity of Section 124A and drew a line between the terms, 'the Government established by law' and the persons for the time being engaged in carrying on the administration. The Court observed:

> 'Government established by law' is the visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in Section 124-A has been characterised, comes, under Chapter VI relating to offences against the State. Hence any acts within the meaning of Section 124-A which have the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence'[80].

In *Smt. P. Hemlatha v The Government of Andhra Pradesh*[81]*,* the Andhra Pradesh Court has observed that the intervention of the government through suppression of speech and expression whether too late or premature are matters within the exclusive domain of the Government, over which the courts cannot have any material in the nature of things to

78. Ibid at p 192.
79. Supra Note 19
80. Ibid
81. AIR 1976, AP 375

sit in the judgment. The pernicious effect of the seditious utterances is to be measured not through the yardstick of actuality but of potentiality and tendency. judging by that standard we find the needed proximity between the utterances and the danger to the security of the state and not otherwise.

Nevertheless, the post-Kedarnath development is not good enough. Now, the cases are initiated on the dubious ground of seditious activities. No plausible judicial interpretations[82] give a clear dictum for implementing or amending the sedition laws.

VII. CONCLUSION

The socio-political scenario of India has considerably been changed. India is a democratic republic. Where free discussion, comment, and criticism either at public meetings or in the press and media are permissible to make the Government answerable to the people in terms of all political issues or party questions, public acts of the government servants, and proceedings of the Court of Justice and no restrictions are to be put upon the expressions used in such a discussion etc. Therefore, the provision of Section124-A be construed without colouring one's mind. The court has to apply the sedition law in its true sense and to embark on any discussion as to how it can be modified in anticipation of any political, constitutional or legal change for a vibrant democrcy.

The scope of the section 124-A should be construed in consonance with democratic norms, spirit, notions and traditions which have been provided by the Constitution to which we the people of India owe our allegiance. In progressive society like India, the continuance of section 124-A of the Code is an anachronism in relation to a democratic set up. In the existing circumstances when the country is making headway towards the egalitarian society, there is need to amend the section, which demonstrates an unwanted attitude of authoritarian rule which has been a target of us Indians since long to abolish and root out from the country.

82. *Raghubir Singh v. State of Bihar* AIR 1987 SC 149*; Balwant Singh And Anr.* v. *State of Punjab*, 1995 (1) SCR 411; *Bilal Ahmed Kaloo v. State of Andhra Pradesh* AIR 1997 SC 3438*; Nazir Khan And Ors. v. State of Delhi* AIR 2003 SC 4427*; Indira Das v. State of Assam 2011 (3) SCC 380; Dr. Vinayak Binayak Sen v. State of Chhattisgarh* 2011 (266) ELT 193 (Chhattisgarh)*; Shreya Singhal* v. *Union of India AIR* 2015 SC 1523*; Kanhaiya Kumar v. State (NCT of Delhi)*, (2016) 227 DLT 612*; Common Cause And Anr. v. UOI* (2016) 15 SCC 269*; V.A. Pugalenthi v. State,* MANU/TN/3657/2017

The Constitution, thus, requires a line to be drawn in the field of public order or tranquility marking off, quite, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance. The greater importance is of safeguarding the community from incitements to overthrow the institutions by force. The imperative is to preserve inviolate the constitutional values and rights, and to maintain the opportunity for free political discussion in healthy environment. To this end, the Government be responsible to the will of the people and any changes, if desired, may be obtained by peaceful means. Unfortunately, Section 124-A tenaciously still exists despite all attempts made by successive generations to reconsider it. The continuing presence of the offence of sedition must be recognized as somewhat incongruent, even archaic, in any democracy. In modern days, sedition laws are often justified on very narrow grounds, and with extremely subverting the existing democratic regime. Sedition laws, however, remain perturbing from any liberal-democratic perspective because they inevitably serve the interests of the existing authority[83].

Furthermore, freedom of speech and expression may be limited if the exercise of such freedom purports to procure an alteration of law and/or government outside the constitutional framework, or produces extra-legal change which undermines the process of rational deliberation that is the *a priori* value of a democratic system.[84] The Law Commission of India has revisited the section and forwarded recommendations and papers at various times.[85] Nevertheless, at this point the observation of

83. Jaclyn Ling-Chien Neo, Seditious in Singapore! Free speech and the offence of Promoting Ill-Will and Hostility between different Racial Groups, *Sing. J. L.S.,*(2011), p356
84. Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982) p 190
85. The Law Commission of India while revising the whole Indian Penal Code has submitted its report in 1971 and suggested in its 42nd report on Indian Penal Code to the following changes in Section 124-A of the Code:

> "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, excites or attempts to excite, disaffection towards the constitution, or the government or Parliament of India, or the government or legislature or any state, or the administration of justice, as by law established, intends or knowing it to be likely thereby to endanger the integrity or

Oliver W. Holmes and Louis D. Brandeis JJ is worth mentioning, who were proponents of the "marketplace of ideas," and advocated for minimal intervention of the State into market forces and suggested their staunch application of the right to free speech on the grounds that it is essential to the maintenance of government, and not a threat to it[86]. However, Russell says that:

> 'although one has a right to discuss any grievances, he has to complain of, he must not do so in a way to excite tumult and that if his utterance goes beyond containing no more than a calm and quiet discussion, allowing something for a little feeling in his mind, it is petty seditious libel. He refers to certain decisions and criticices according to which it is seditious to publish any matter tending to possess the people with an ill opinion of the Government'[87].

If one's aim is to nurture patriotism, such rhetoric seems to be a far and more effective tool than the implementation of oppressive laws. At the end, it would be praiseworthy to quote a verse of Manu[88] :

सत्यं ब्रूयात् प्रियं ब्रूयान्न ब्रूयात् सत्यमप्रियम्। प्रियं च नानृतं ब्रूयादेष धर्मः सनातनः।।

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security of India or of any state, or to cause public disorder, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine"; Commission has submitted consultation paper on Sedition Law on 30th August 2018 also

86. dissenting judgement in *Abrams v United States*, 250 US 616, 630 (1919), see, supra Note 32
87. *Treatise on Crime*,10th ed. Vol. I, p 145
88. "Speak the truth, speak pleasantly, do not speak the truth in an unpleasant manner, Even if pleasant, do not speak untruth, this is the path of eternal righteousness,"- *Manusmriti*, 4:138; He shall say what is true; and he shall say what is agreeable; he shall not say what is true, but disagreeable; nor shall he say what is agreeable, but untrue; this is the eternal law- Medhâtithi's *Commentary* (*Manubhâcya*); Harsh words, calumny, hack-biting, lying, useless talk, cruel words are the six defects of speech; also speaking before a person of the defects of his country, family, caste, learning, arts, appearance, conduct, character, dress, body, livelihood; words productive of anger and fear, etc., etc.' —Devala, *Aparârka,* p. 174family, caste, learning, arts, appearance, conduct, character, dress, body, livelihood; words productive of anger and fear, etc.,' —Devala, *Aparârka,* p. 174

PALLIATIVE TREATMENTS RESULTING INTO LIFE SHORTENING AND HOMICIDE : A PLEA FOR DEFENCE OF NECESSITY

*AKHILENDRA KUMAR PANDEY**

ABSTRACT : Life is of supreme value and it is to be preserved. In due course, life with dignity has been recognized. Death - the cessation of life is also a part of life and it has to be dignified. The emergence of Palliative Care as a branch of medical jurisprudence basically intending to alleviate pain and suffering of terminally ill patient also intends to seek the dignified death of the patient. In palliative care, the physician, at the request of the patient, administers analgesic/sedative which may probably shorten the life and this consequence is known to the physician. The life of several terminal patients is shortened and death is hastened due to administration of large dosage of analgesics and sedatives. The criminal law attracts such act on the part of physicians within its ambit and imposes liability for homicide despite the sincere intention being to mitigate the pain and not to cause death. The requirement of causal relationship and for intention as guilty mind the dominant intention test is to be resorted. Taking the help of double effect doctrine, this paper seeks to analyze the issue by arguing to absolve the physician accused from liability on the basis of necessity

KEY WORDS : Palliative care, Accelerating death, Necessity, Dominant intention, Principle of double effect.

I. INTRODUCTION

Preservation of human life is acknowledged as a supreme value. Since ages this dominant value finds place in criminal law with minor

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variations. Over the years, it is being observed that this absolute principle has been interpreted in such a manner that the inner value of human life is no more limited to animal life rather it has assumed the dimension of life with dignity. In other words, the sanctity of life is not being seen as to require that the human life be saved at all cost; rather, now a days, it has taken within its fold the consideration of life quality laying emphasis on personal autonomy and dignity as death and the way one dies is regarded as a part of autonomous and dignified life. The recent trend in medical jurisprudence has shown a greater humanity and sensitivity towards the writhing conditions of terminally ill persons. An attempt has been made in this paper to analyse the issue of death of a terminally ill person where he was subjected to palliative care by medical persons resulting into speedy death or life was shortened but death came without much suffering. Ordinarily, the causing of death creates liability for homicide but where the physician administers analgesics or sedatives with an intention to provide relief and thereby life span is shortened[1], may also be brought within the ambit of homicide. This paper intends to bring the cases of death in palliative care by administering analgesics/sedatives under the defence of necessity. For this purpose the paper has been divided in five parts. While Part I is introductory, Part II seeks to discuss the concept of palliative care and the magnitude of estimated deaths in various jurisdictions, Part III deals with the conditions requisite for creation of liability for homicide and in Part IV the possible defences under criminal law, particularly, the Indian Penal Code have been analyzed and an argument for bringing the case of life shortening due to palliative care on the ground of necessity has been has been made and conclusion is in Part V.

II. PALLIATIVE CARE[2]

Ideally, man wants to die peacefully and without much pain in known ambience and in presence of his family members. It may not however be a situation in all cases where the final stage of life passes without pain. At the time of death man may suffer from bodily pain, shortness of breath along with other types of discomfort. The cancer patients, particularly,

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1. This is different from Euthanasia and Assisted Suicide
2. This Part of work is based on the work of Sumner, L.W. entitled Assisted Death: A Study in Ethics and Law, (2011) Oxford University Press

in advance stage experience severe pain. The medical science has developed a branch commonly known as 'Palliative Care'. It is an approach which seeks to improve the quality of life of patients and their family members facing the problems associated with life threatening illness, through the prevention and relief of suffering by means of early identification and assessment and treatment of pain and relieve suffering due to pain and other problems – physical, psychological and spiritual. Palliative care is usually managed by analgesics and sedatives. In order to relieve a cancer patient from pain, the World Health Organization (WHO) has proposed an 'analgesic ladder'. This treatment ladder starts with a weaker non – narcotic to stronger opioids.[3] The dosage and frequency is calibrated according to need of the patient but usually it is kept at minimum level. Nevertheless, some cancer patients at the end of their life experience such a pain which cannot be effectively managed by administration of good analgesics; in such cases the dose of analgesics/sedatives is to be increased to 'such' an extent where the patient loses the consciousness of suffering. The sedatives are also calibrated as per the need of the patient intended for complete unconsciousness either for intermittent or continuous period. But it is called 'sedation terminal' only when unconsciousness is deep and continuous till the point of death.

A. Study on Effect of Analgesics and Sedatives: The Rammelink Commission

The Dutch government in 1990 constituted a commission of inquiry headed by Professor Jan Rammelink to investigate various practices under the general heading of Medical Decisions concerning the End of Life (MDELs). Though the principal focus of the Commission was on euthanasia and assisted suicide, the Commission also worked on the assumption that in some cases large dose of analgesics were being administered to patient having the full knowledge of risk that its administration will hasten the death. The Commission submitted its report in 1991 and the report is commonly known as Remmelink Report.

The Commission defined MDEL as to cover all decisions by physicians concerning course of action aimed at hastening the end of life of the patients or courses of action for which physician takes into account

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3. Fohr, Susan Anderson, The Double Effect of Pain Medication: Separating Myth From Reality, Journal of Palliative Medicine (1998) Vol. 1 No. 4 pp. 315-328

the probability that the end of life of the patient is hastened. The Commission, inter alia, provided data on the incidence of end – of – life pain management practices which it defined as the intensifying of alleviation of pain and/or symptoms taking into account the probability that his action will hasten the end of life or in part with the purpose of hastening the end of life of the patient.

The Remmelink Commission found that out of all deaths in Netherlands in 1990 the number of deaths for alleviation and/or symptoms taking into account a probable shortening of life was 17.5% and in subsequent studies this number went up to 24.5% during 2005. The death due to administration of analgesics was considerable in number, the Commission noticed.

B. Study of Effect of Analgesics and Sedatives in other Jurisdictions

The Australian physician defining alleviation of pain and symptoms with opioids as the administration of doses large enough so that there was a probable life shortening effect concluded that 30.9% of Australian deaths for the period under investigation was due to the administration of analgesics/sedatives. The studies in Belgium and United Kingdom showed death of 18.5% and 32.8% respectively. A similar study based on Rammelink Commission methodology was conducted in six countries of European Union, namely, Belgium, Denmark, Italy, the Netherlands, Sweden and Switzerland and found that the share of all deaths for the period in question arising due to alleviation of pain and symptoms with possible life threatening effect varied from 19% in Italy to 26% in Denmark. In India no such study has been conducted, though there are about more than 500 palliative care centres with Indian Society of Palliative Care but without any national policy on pain and palliative care.[4]

III. HOMICIDE

Homicide – committed on oneself or otherwise, offends both against God and the King's interest in the life of his citizens. Blackstone has noted that :

4. Himanshu Sharma et al, End – of - life- care: Indian Perspective (2013) 55 (Suppl 2) pp. 293 – 298; See also Donald G. McNeil Jr. In India, a Quest to Ease the Pain of the Dying, The new York Times, September 11, 2007

> The law of England wisely and religiously considers that no man hath a power to destroy life, but by commission of God, the author of it: and as the suicide is the guilty of a double offence: one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has thus therefore ranked this among the highest crime, making it peculiar species of felony….[5]

While Plato and Aristotle have also suggested that homicide/suicide is an offence against the God or the State[6], the Roman Stoics, on the other hand, tended to condone suicide as a lawful and rational exercise of individual freedom[7] and even wise in the cases of old age, disease or dishonor. Some have gone to the extent of saying that it is doctor's duty to lessen, or even end, the suffering of their patients.[8]

Section 299 of the Indian Penal Code creates liability for culpable homicide and includes the elements of *mens rea* and *actus reus*. While it stipulates 'intention' or 'knowledge' as mental element, the physical element is death primarily based on the cause and effect relationship. The cause and effect relation may be direct or proximate but not too remote. The Explanation 1 attached to Section provides that the person who accelerated the death shall be deemed to cause death. The question may arise whether the administration of analgesics to patient be regarded as a 'but for' cause or the disease be regarded as a 'but for' cause. In case, the disease be treated as a cause of death, the liability of the physician for administering analgesic resulting into shortening or hastening of death cannot be taken into account. It may, thus, be argued that there was no causal connection between the act and the consequence. Moreover, the criminal liability is created on the ground of social expediency irrespective of immorality or morality involved in the act. It is one of the duties of the physician to relieve or reduce the pain of patient, and in doing so he did

5. Blackstone, Commentaries on the Law of England (1769) Vol. 4 at 189
6. See, Velasquez, M.G., Defining Suicide (1987) Issues in Law and Medicine 37 at 40
7. See, David Hume, Essays on Suicide and Immortality of the Soul: The Complete 1783 Edition (Unpublished)
8. See, Depaule, L. (1974)Human Rights Journal 464 at 467

not intend to breach the provisions of law though he was aware that the death of the patient is likely to be hastened by the administration of analgesics and sedative. It nay be submitted that the expediency requires that the physician attending a patient in palliative care may not be held guilty unless his clear intention to cause the death is established. Similarly, so far as the guilty mind is concerned, there is a difference between' intention to cause death' and 'intention to relieve the patient from pain and suffering' though the physician was aware that administration of drugs would shorten the life of the patient but it was given with sole intention to improve the quality of remaining life, that is, to relieve the patient from pain.

The concept of 'dominant intention'[9] may be relied upon in dealing with the death of terminally ill person where death was hastened due to administration of analgesics/sedatives. One may have concrete and dominant intention. At times, concrete intention may drive away the abstract intention and on other occasion abstract intention may do so and the dominant intention may be kept aside.[10] The cases of Ahler[11] and Steane[12] are examples where the concept of dominant intention was resorted to by the court while discussing the criminal liability. In *Ahlers'* case[13], after the declaration of World War I in 1914, the accused who was a German Consul assisted the German nationals in returning home. It was held that the accused intended to do his duty as a consul and did not intend to aid the King's enemies. In *R v. Steane* case[14] the appellant was a British Radio announcer and living in Germany during World War II. With his family under threat he was forced to broadcast on Radio for Nazis. After the war was over and he returned to Britain, he was charged with 'doing acts likely to help the enemy with the intent to assist the enemy'. The accused was found guilty at trial court but on appeal to the Criminal Court of Appeal, it was held that the 'intent to broadcast' and

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9. Sinnasamy Selvanayagam (1951) 15 Cal WN 1 (PC); See also, Giribala Shau v. Prova Misra 1974 Cri LJ 172 (Cal) per Talukdar, J.,
10. See, Dworkin, Ronald, A Matter of Principle, (1985), Harvard University Press, pp. 50-52
11. (1915) 1 KB 616
12. (1947) 1 All ER 813
13. Supra note 11
14. Supra note 12

the 'intent to assist the enemy' are different. The statute emphasizes on intention to assist the enemy and did not intend to assist enemy by such broadcast. The court opined that it cannot be presumed that merely by doing the action the accused intended to help the enemy. The accused was thus acquitted. Similarly, in *Sinnasamy Selvanayagam v The King (Ceylon)*[15], the accused was prosecuted under the Ceylon Penal Code for the offence of criminal trespass. The provision of criminal trespass under Ceylon Penal Code is similar to that of the Indian Penal Code under Section 441 requiring the intention to insult, intimidate or annoy. The accused remained in possession of the house and refused to vacate the same despite the lawful order of the court. The accused was aware that the owner of the house would be annoyed. It was held that the dominant intention of the accused was simply to remain in possession of the premise and not to annoy the owner and thus acquitted. In India also the court has applied the dominant intention test.[16]

The common law right of patients to refuse to consent to medical treatment or to demand that treatment which commenced, be withdrawn or discontinued has been recognized in some jurisdictions particularly in Canada[17] and the United States.[18] These jurisdictions have recognized even in those cases where the withdrawal or refusal of treatment may result into death.[19] The House of Lords in *Airedale NHS Trust v. Bland*[20], authorized the withdrawal of artificial feeding from a 17 year old boy who was in permanent vegetative state as a result of injuries suffered in a riot, on the consent of his parents. The persistent vegetative state was found not to be beneficial either to the patient or his parents. The House of Lords opined that the principle of sanctity of life was not absolute and

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15. (1951) Ac 83
16. Giribala Shau v. Prova Misra 1974 Cri LJ 172 (Cal)
17. See, Ciarariello v. Schacter (1993) 2 SCR 119
18. See, Cruzen v. Director of Misspuri Health Department (1990) where it was recognized that the right to refuse life sustaining medical treatment is an aspect of liberty interest protected by 14th Amendment. Interestingly the Court also took the view that when the patient was unconscious and thus unable to express his/her consent, the State was justified in requiring evidence that withdrawal of treatment was in fact what the patient would have requested had he/she been conscious and competent.
19. Nancy B. v. Hotel – Dieu de Quebec (1992) DLR 385
20. (1993) 1All E R 821

the withdrawal of artificial feeding did not violate the principle of sanctity. Lord Goff by way of obiter had observed:

> The established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs, despite the fact that he knows that an incidental effect of the application will be abbreviating the patient's life.[21]

In *R (Burke) v. General Medical Council*,[22] where the issue was not the administration of analgesic drugs to a congenital degenerative brain condition patient suffering from spino -cerebellar ataxia multiple sclerosis rather the issue was the circumstances in which the Artificial Nutrition and Hydration (ANH) could be withdrawn; though the patient, capable of understanding, had wished to be fed and hydrated. The Court of Appeal was of the view, by way of obiter, that the best interest of the patient is to be decided by the doctor and the wishes of the patient has to be accepted; the doctor would have no defence if he interrupted life sustaining treatment despite the patient's express wish to be kept alive..

The natural death has to come sooner or later. Every killing is a sort of acceleration of death. The analgesics to terminal cancer may accelerate the death and, in principle, the victim was already suffering from a fatal disease makes no difference for this purpose. The British Court in *Dyson*[23] case observed:

> The proper question to have been submitted to the jury was whether the prisoner accelerated the death by the injuries which he inflicted in…For if he did the fact that the child was already suffering from meningitis from which it would in any event have died before long, would afford no answer.[24]

The doctrine of double effect was applied in R. v John Bodkin *Adams*[25], where the accused was a general medical practioner and was

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21. Id at 868
22. (2006) QB 273
23. (1908) 2 KB 454
24. Id at 457 per Lord Alverstone, CJ
25. (1957) Crim LR 365

suspected serial killer. He administered sedatives to patients who were terminally ill and suffering from severe pain resulting into accelerating death Justice Devlin directed the jury that there is no special defence justifying a doctor in giving drugs which would shorten the life in case of severe pain. If life was cut short by a week or months it was just as much murder as if it were cut short by years. A ray of hope emerged from the following observation of Devlin, J.:

> But that does not mean that a doctor aiding the sick or dying has to calculate in minutes or hours, or perhaps in days or weeks, the effect on the patient's life of the medicine which he administers. If the first purpose of medicine – the restoration of health – can no longer be achieved, there still much for the doctors to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering even if the measures he takes may incidentally shorten life.[26]

The Supreme Court of Canada in *Rodriguez v. Attorney General of Canada & the Attorney General of British Canada*[27] was to address the issue where the appellant, a 42 year old lady suffered from amyotrophic lateral sclerosis (commonly known as ALS – a nervous system disease that weakens muscles and impacts physical function) and her condition was rapidly deteriorating and was likely to lose the ability to swallow, speak, walk and even move without help. She was to lose capacity of breathing without a respirator and was to be confined to bed. Her life expectancy was estimated to be 2 to 14 months. The appellant did not wish to die as long as she was having capacity to enjoy life. But, the appellant at the same time also wished that a qualified physician be allowed, when she was not able of enjoy life on her own, to end her life. The appellant applied to the Supreme Court of British Columbia for passing an order that the law which prohibited[28] the giving of assistance to commit suicide be declared invalid as it violated the Constitution Act, 1982. It was thus a case of physician assisted suicide. But this case may be of some importance in the present context. Justice Sopinka making distinction assisted suicide and the case of drug administration to alleviate

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26. Id.
27. (1993)3 SCR 519
28. Section 241 (b) of the Canadian Criminal Code

pain and suffering, observed:

> The administration of drugs designed for pain control in dosages which the physician knows will hasten death constitutes active contribution to death by any standard. However, the distinction drawn here is one based upon intention – in case of palliative care the intention is to ease pain, which has the effect of hastening death, while in the case of assisted suicide, the intention is undeniably to cause death …a doctor should never refuse palliative care to a terminally ill person only because it may hasten death. In my view distinctions based up on intent are important, and in fact form the basis of our criminal law.[29]

IV. DEFENCES

The physician giving analgesics which hastens or is likely to hasten the death of the terminal cancer patient is entitled for any defence recognized under the penal law or not deserve mention in part. The criminal law generally recognizes consent as a defence and necessity to exonerate the accused from liability.[30] The analysis of provisions relating to consent and necessity under the Indian Penal Code, 1860 is thus desirable.

A. Consent

Section 87 to 89 of the Indian Penal Code recognizes consent of a person above the age of 18 years as a defence under certain circumstances. Sections 87 of the Indian Penal Code though recognizes the defence on the ground of consent but consent cannot be a defence in a case where the act is intended to cause death or grievous hurt or it is known to the doer that the act is likely to cause death or grievous hurt to the person giving consent. The benefit of this Section thus cannot be extended where the physician giving palliative care for relieving the patient from severe pain administered analgesics knowing that the medicine was likely to shorten the life of the patient despite the consent of the patient

29. Supra note 27
30. See, Williams, Glanville, A Text Book of Criminal Law, Second Indian Reprint (2003); Card, Cross and Jones, Criminal Law, 18th Edition, (2008); Smith and Hogan's Criminal Law, 13th Edition (2011)

for the administration of such drug alleviating pain. Section 88 of the Penal Code absolves the accused from liability if the act was done in good faith with the consent of the person for his benefit; but the act done by the accused should not be intended to cause the death of the person giving consent. Further, the consent may be given by the parents or the guardian of child or the man of unsound mind for the benefit of such person who was not capable of discharging consent due to infancy or otherwise; but again the consent by parent or the guardian cannot be given for intentionally causing the death of such child or man of unsound mind.[31] However, there may be a situation where the act without consent may absolve the person from criminal liability. When the act was done in good faith for the benefit of the person who was incapable of giving consent due to certain reason (for example, the person was in unconscious state), the person doing the act may be absolved.[32] The Indian Penal Code also recognizes consent as a limited defence where the offence of murder is reduced to culpable homicide provided the person who gave the consent was above 18 years of age and took the risk to suffer the harm.[33] The liability of the physician who decided to alleviate the suffering of the terminal patient having the knowledge that the life span of the patient by administration of analgesics/sedative was likely to be shortened is not entitled to complete exoneration on the ground of consent either of the patient himself or the guardian as intentionally causing death or knowledge that the act was done with a view to prevent death. However, consent may be a limited defence lessening the degree of culpability to culpable homicide/ or manslaughter.

B. Doctrine of Necessity

A difficult situation may arise where one may be able to choose between two courses. One course may involve breaking the criminal law and, the other course may involve some evil either to himself or the other of such a magnitude that may appear to justify for violation of criminal law. In this regard the defence of necessity can be said to be based on the doctrine of double effect.

The extent of necessity has not been delineated with certainty under

31. See, Section 89 of the Indian Penal Code, 1860
32. Section 92 of the Indian Penal Code, 1860
33. See, Exception 5 of Section 300, Indian Penal Code, 1860

criminal law. Sir James Stephen was skeptic about principle of necessity. Commenting upon the law of necessity in England Stephen opined that the law so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient. However, his opinion on the doctrine of necessity was that it is just possible to imagine cases in which the expediency of breaking law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand, and must be adjudicated by the jury afterwards. Glanville Williams suggested that in English law the doctrine of necessity is recognized and particularly under the criminal law. Williams has argued that the peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision.

In 1550 Serjeant Pollard of Exchequer Chamber observed:

> …in every law there are some thing which when they happen a man may break the words of law, and yet not break the law itself; and such things are exempted out of the penalty of law, and the law privileges them although they are done against the letter of it, for breaking the words of law is not breaking the law, so as the intent of law is not broken. And therefore the words of the law of nature, of the law of this realm and of other realms and the law of God will also yield and give way to some acts and things done against the words of the same law, and that is, where the words of them are broken to avoid greater inconveniences.…[34]

Section 81 of the Indian Penal Code incorporates the defence on the ground of necessity. In order to attract the defence of necessity, the act done should be without criminal intention though the doer was having the knowledge that the act undertaken by him was likely to cause harm but it was done with a view to prevent or avoid other harm to person.[35] In

34. Reniger v. Fogossa 1552 1 Plow 1 at 18 as referred in Smith and Hogan, Criminal Law, 5th Edition (1983)
35. Section 81 reads as: Act likely to cause harm, but done without criminal intent, and to prevent other harm: Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it is done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

    Explanation: It is a question of fact in such a case whether the harm to be

situation where a terminal patient is under severe pain on account of disease was given analgesics which was known to the physician that it was likely to shorten the life of the patient but was administered not with an intention of causing harm rather to prevent or avoid severe pain, the application of necessity doctrine appears to be justified.

The administration of analgesics or sedatives by the physician brings double effect.[36] First, it relieves the patient from pain by rendering the patient unconscious and secondly, it probably hastens death of such patient. The doctrine of Double Effect is to be analyzed on the basis of following four conditions:[37]

1. The act cannot be morally wrong or intrinsically evil;
2. The bad effect cannot cause a good effect;
3. The agent cannot intend bad effect; and
4. The bad effect cannot outweigh the good effect; there is a proportionate reason to tolerate the bad effect.

In view of aforesaid conditions, we may assume that one of the effects 'relief from suffering and pain' is good or, alternatively, does not involve any intrinsic evil and the other effect i.e. death is bad. The doctrine of double effect may indicate that the administration of sedative is permissible if three conditions are satisfied. First, in administering the treatment the physician intended/aimed at good effect rather than its bad effect. Second, the bad effect was not brought by good effect; or in other words, the bad effect was not the cause of good effect; and thirdly, there is a proportionately reason for bringing about the bad effect.

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prevented or avoided was of such a nature and so imminent so as to justify or excuse the risk of doing the act with knowledge that it was likely to cause harm.

36. The history of the principle of Double Effect dates back to St. Thomas Acquinas, though he did not use this term of double effect but he used the concept justifying killing in self defence. In doing so, he recognized the bad effect (death of the assailant) and the good effect (preservation of victim's life). St Acquinas justified the killing of the assailant to save one's life on the ground that an act may be right and wrong , it may morally be good or bad. The bad effect cannot outweigh good effect.

37. See, Nicholas J. Kockler, The Principle of Double Effect and Proportinate Reason AMA Jour. of Ethics (2007; 9 (5) pp. 369 -374).

V. CONCLUSION

Life is to be preserved. It is the first concern but the death is inevitable. The manner and time of death is however not known. Man has inherent desire to die in peace and without much suffering. At the time of death man experiences severe pain and suffering and this is more acute in the case of terminal cancer patient. Sometimes such patients in his conscious state request for administration of analgesics/sedatives so that the pain and suffering could be alleviated. One of the duties of the physician is also to relieve the patient from pain knowing the probable consequence that the death may either be accelerated or death may be hastened, administers the pain relieving sedative to terminal patient. Such an act attracts the criminal liability of homicide. The act of physician under such circumstances cannot be regarded as the but for cause of death rather the but for cause is the disease of such terminal patients and, therefore, there was no causal relationship between the act and the consequence of death. The guilty mind in the form of intention is to be viewed on the basis of dominant intention test, that is, whether the intention was to cause the death or it was to ameliorate the pain and suffering of the patient which accelerated the death of such terminal patient. It is submitted that the defence of necessity should be interpreted in the light of double effect principle. The evil/bad or the death was brought not because of the god act of the physician who with an intention of relieving pain has administered analgesic/sedatives to the terminal patients. It is further submitted that a national policy on palliative care in India is desirable.

RE-DEFINED RIGHT TO PRIVACY: *K S PUTTASWAMY* JUDGMENT

J. P. RAI*

ABSTRACT : Privacy is an inherent and inalienable human right which is inseparable to the dignity of an individual and must not in any case be violated except with the due process of law. Law is not static, it is ever-changing and dynamic and therefore, the right of privacy is a developing right. Notwithstanding the passions, emotions, annoyance, despair, ecstasy, euphoria, coupled with rhetoric, exhibited by both sides in *K S Puttaswamy* case, the Court while giving its judgment on the issues involved, showed a posture of calmness coupled with objective examination of the issues on the touchstone of the constitutional provisions.

KEY WORDS : Right to Privacy, Life and Liberty, Rule of Law, Democracy, Reasonable Expectation, Public Interest.

I. INTRODUCTION

Privacy is a natural need of a man to establish individual boundaries and to restrict the entry of others into that area. Synonymous with autonomy, it has colonised traditional liberties, become entangled with confidentiality, secrecy, defamation, property, and the storage of information. Privacy is a culturally limited concept. It varies with the times, the historical context, the state of culture and the prevailing judicial philosophy. The customs related to privacy differ greatly from culture to culture, from situations to situations and from social system to social system. The question 'what is privacy' has therefore, remained a problem for those who have made an attempt to define it.[1]

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1. Simmel Arnold, Privacy, 12 International Encyclopedia of the Social Sciences,

The development of the concept of privacy has gone a pace rapidly with the recent scientific and technological developments and has raised the spectre of new and frightening invasion of privacy of another home without his consent or even knowledge. Owing to these developments, a person's house is no longer inviolate or immune from wire-tapping, eavesdropping and bugging with the aid of sophisticated devices.

The modem state collects all types of information about individuals and stores them often in computerized form. In such a situation two types of difficulties may be envisaged. One relates to the apprehension of the individual that the authority may publish it. The other relates to the danger of supply of such material by the authority to strangers. In both cases, the consent of the individual is not obtained before any eventual publication. The concerned individual may come to know about it only after the publication.

The Law Commission of India 42nd Report (1971) on 'Indian Penal Code'[2] examined various aspects of right to privacy and recommended for insertion of a new chapter to be called "Offences against Privacy" to substitute the existing Chapter XIX making unauthorized photography and use of artificial listening or recording apparatus and publishing such information listened or recorded as offences[3]. Again, the Law Commission of India 156th Report (1997) on 'Indian Penal Code'[4] stated that right to privacy is a vast subject and its scope has been widened considerably under Article 21 of the Constitution by the Supreme Court under its various decisions.[5] The Commission admitted that on studying the matter of privacy as extended under Article 21 of the Constitution and also in the

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481 (1968) For the first time, the expression 'privacy' was used by Justice Thomas Cooley in 1888, describing it the right to respect for private life s the right to be let alone. A couple of years later, in 1890 Samuel D. Warren and Louis D. Brandeis (The Right to Privacy, 4 Harvard Law Review, 193 (1890) cultivated the notion with the initial analysis of the concept of privacy.

2. Available at https://lawcommissionofindia.nic.in/1-50/Report42.pdf, visited on March 21,2018
3. *Ibid,* Chapter 23, pp.336-340
4. Available at https://lawcommissionofindia.nic.in/101-169/Report156Vol1.pdf, visited on March 23, 2018
5. *Ibid,* Vol.1, p.340

various reports of foreign law commissions, it would recommend that these offences cannot appropriately be incorporated in the IPC. Therefore, it stated that the recommendation of its 42nd Report to include 'Offence against Privacy' is deleted and that a separate legislation should be there to comprehensively deal with such offences against privacy.[6] The National Commission to Review the Working of the Constitution[7] made recommendation to add Article 21 B in the Constitution providing that every person has a right to respect his private and family life, his home and his correspondence and nothing in this clause shall prevent the state from making any law imposing reasonable restrictions on the exercise of the right conferred.

India has in the early times followed the common law principles, giving protection to individuals in specific areas of interests such as defamation, breach of confidence and trespass. This has long been regarded as insufficient. The first step in India giving some directions in the area of privacy was in *Nihal Chand* v. *Bhagwan Dei,*[8] in which the High Court recognized the independent existence of privacy as emerging from customs and traditions of people. Gradually, the Apex Court in several decisions[9] determined the existence of this right to some degree. In this paper, an attempt has been made to critically analyse the impact of *K S Puttaswamy* judgment over the recognition and realization of privacy as a right.

II. RIGHT TO PRIVACY: INTERNATIONAL PERSPECTIVE

The United Nations embraced privacy as an integral part of human rights in 1948,[10] very soon followed by the European Convention on Human

6. *Ibid*, p. 341
7. Report available at https://legalaffairs.gov.in/ncrwc-report, visited on March 22, 2018
8. *Nihal Chand* v. *Bhagwan Dei,* AIR 1935 All.1002
9. *M.P. Sharma* v. *Satish Chandra, Distt. Magistrate, Delhi,* 1954 SCR 1077 and *Kharak Singh* v. *State of U.P,* AIR 1963 SC 1295
10. Article 12, Universal Declaration of Human Rights, 1948, available at https://www.un.org/en/universal-declaration-human-rights/#:~:text=Article%2012.,upon%20his%20honour%20and%20reputation., visited on April 14, 2018

Rights, 1950[11] and the International Covenant on Civil and Political Rights 1966,[12] which has given privacy international recognition.

(a) United Kingdom

In the Human Rights Act, 1998 (HRA)[13], for the first time, privacy was incorporated as a right under the British law. In *Campbell* v. *MGN Ltd.*[14], the House of Lords held that if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified. In *Murray* v. *Big Pictures (UK) Ltd*[15], it was held that the question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher. *R* v. *The Commissioner of Police of the Metropolis*[16] was a case concerning the extent of the police's power to indefinitely retain biometric data associated with individuals who are no longer suspected of a criminal offence. The Court held that the police force's policy of retaining DNA evidence in the absence

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11. Article 8, European Convention 1950, available at https://www.echr.coe.int/documents/convention_eng.pdf, visited on April 16, 2018
12. Article 17, International Covenant on Civil and Political Rights 1966, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, visited on May 15, 2018
13. Available at https://www.legislation.gov.uk/ukpga/1998/42/contents, visited on March 14, 2018
14. [2004] 2 AC 457. In this case a well-known model was photographed leaving a rehabilitation clinic, following public denials that she was a recovering drug addict. The photographs were published in a publication run by MGN. She sought damages under the English law through her lawyers to bring a claim for breach of confidence engaging Section 6 of the Human Rights Act.
15. [2008] 3 WLR 1360. In this case, a photographer had taken a series of photographs of a writer's infant son, which were later published in a newspaper. The issue was whether there was misuse of private information by taking photographs. See also *PJS* v. *News Group Newspapers Ltd* [2016] UKSC 26.
16. [2011] UKSC 21

of 'exceptional circumstances' was unlawful and a violation of Article 8 of the European Convention on Human Rights.

(b) United States of America

The development of the jurisprudence on the right to privacy in the United States of America shows that even though there is no explicit mention of the word 'privacy' in the Constitution, the courts of the country have not only recognised the right to privacy under various amendments of the Constitution but also progressively extended the ambit of protection under the right to privacy. The 'reasonable expectation of privacy' test developed by the Supreme Court has been relied on subsequently by various other jurisdictions while developing the right to privacy.

As early as 1886, in *Boyd* v. *United States*[17], the US Supreme Court held that any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It was observed that this right emanated from "penumbras" of the fundamental constitutional guarantees and rights in the Bill of Rights, which together create "zones of privacy".[18] In *Roe* v. *Wade*[19], the Court ruled that right to privacy under the Due Process Clause of the Fourteenth Amendment extended to a woman's decision to have an abortion, but that this right must be balanced against the state's interests in regulating abortions. In *Smith* v. *Maryland*[20], the Court adopted the "reasonable expectation of privacy"[21] test. In *Lawrence* v. *Texas*[22], the

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17. 116 US 616 (1886). The question was whether compulsory production of a person's private papers to be used in evidence against him in a judicial proceeding, is an unreasonable search and seizure within the meaning of the Fourth Amendment.
18. *Griswold* v. *Connecticut,* 381 US 479 (1965). In this case, the Court invalidated a state law prohibiting the possession, sale, and distribution of contraceptives to married couples, for the reason that the law violated the right to marital privacy.
19. 410 US 113 (1973)
20. 442 US 735 (1979). In this case it was held that installation and use of a 'pen register' was not a "search" within the meaning of the Fourth Amendment, and hence no warrant was required.
21. The inquiry normally embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy? Whether the individual has shown that he seeks to preserve [something] as private? The second question is whether the individual's subjective expectation

Court, validating same sex sexual activity legal, held that the State cannot demean existence or control destiny of such people by making private sexual conduct a crime. It is a promise of the Constitution that there is a realm of personal liberty, which the government may not enter. Modern cell phones contain "the privacies of life" for many Americans with all they contain and all they may reveal. So, in *Riley* v. *California*[23], the Court unanimously held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional.

(c) Canada

Although the Canadian Charter of Rights and Freedoms of 1982[24] does not explicitly provide for a right to privacy, certain sections[25] of the Charter have been relied on by the Supreme Court of Canada to recognize a right to privacy. In 1983, the Privacy Act was enacted to regulate how federal government collects, uses and discloses personal information.[26] In *Hunter* v. *Southam Inc*[27], the Court held that the purpose of Section 8 is to protect an individual's reasonable expectation of privacy but right to privacy must be balanced against the government's duty to enforce the law. On the reasonable expectation of privacy, in *Her Majesty, The Queen* v. *Walter Tessling*[28], it was held that the totality of circumstances needs

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of privacy is one that society is prepared to recognize as reasonable? Whether the individual's expectation, viewed objectively, is "justifiable" under the circumstances?

22. 539 US 558 (2003)
23. 1 573 US (2014)
24. Available at https://laws-lois.justice.gc.ca/pdf/const_e.pdf, visited on April 05, 2018
25. Section 8 of the Charter provides that, "Everyone has the right to be secure against unreasonable search or seizure."
26. *In Lavigne* v. *Canada* (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, the Supreme Court of Canada recognised the Privacy Act as having a "quasi-constitutional" status, as it is "closely linked to the values and rights set out in the Constitution". The Court also stated that the "The Privacy Act is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society".
27. [1984] 2 SCR 145. In this case, the Combines Investigation Act had authorized several civil servants to enter the offices of Southam Inc and examine documents. The company claimed that this Act violated Section 8 of the Canadian Charter. The Court unanimously held that the Combines Investigation Act violated the Charter as it did not provide an appropriate standard for administering warrants.
28. 286 (2004) SCC 67

to be considered with particular emphasis on both the existence of a subjective expectation of privacy and the objective reasonableness of the expectation.

III. EVOLUTION OF RIGHT TO PRIVACY IN INDIA

(a) Constitutional Law Perspective

The basic and civil liberties of the people are protected under the charter of Fundamental Rights in Part III of the Constitution of India but privacy has not been given any separate constitutional status.[29] In our country, the sole-credit goes to the judiciary but this concept is quiet in primitive stage of its development. Shortly after independence, in a case challenging the constitutionality of search and seizure provisions, the Supreme Court dealt a blow in *M. P. Sharma* v. *Satish Chandra, Distt. Magistrate, Delhi*[30], to the right to privacy in India, holding that "when the Constitution makers have thought fit not to subject [search and seizures] to Constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right." Notwithstanding this early setback, five decisions by the Supreme Court in the succeeding decades have established the Right to Privacy in India as flowing from Article 19 and 21.

In the case *Kharak Singh* v. *State of Uttar Pradesh*[31], the Court concluded that Constitution contained no explicit guarantee of a 'right to privacy', it read that the right to personal liberty under Article 21 includes 'right to dignity', if interpreted expansively but *Govind* v. *State of Madhya*

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29. Udai Raj Rai, *Fundamental Rights and Their Enforcement*, PHI Learning Private Limited, Ed. 2011, p.40
30. AIR 1954 SC 300
31. AIR 1963 SC 1295, where the appellant was being harassed by police under Regulation 236(b) of the UP Regulation, which permits for domiciliary, visits at night, the Supreme Court held that the Regulation 236 is unconstitutional and violative of Article 21. *Justice Subba Rao* equated personal liberty with privacy and observed that concept of liberty in Article 21 was comprehensive enough to include privacy and that a person's house, where he lives with his family is his castle and that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his right to privacy.

Pradesh[32], is regarded as being a setback to the right to privacy jurisprudence. Making observations on the right to privacy under the Constitution, the Court held that too broad a definition of privacy will raise serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty, the right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from them, it could not be absolute. It must be subject to restriction on the basis of compelling public interest. But the law infringing it must satisfy the compelling state interest test.[33] This case is important since it marks the beginning of a trend in the higher judiciary to regard the right to privacy as "not being absolute". From *Govind* onwards, 'non-absoluteness' becomes the defining feature and the destiny of this right.

This line of reasoning was continued in *Malak Singh* v. *State of Punjab & Haryana*[34], where the Supreme Court held that surveillance was lawful and did not violate the right to personal liberty of a citizen as long as there was no 'illegal interference' and it was "unobtrusive and within bounds". In *State of Maharashtra* v. *Madhukar Narayan Mardikar,*[35] the Court protected the right to privacy of a prostitute. It was held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy. Later on, right to privacy was declared to be implicit in right to life and personal liberty and as a "right to be let alone" in *R. Rajgopal* v. *State of T.N.*[36] In *People's Union for Civil Liberties* v. *Union*

32. (1975) 2 SCC 148. Here, the court was evaluating the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided for police surveillance of habitual offenders which including domiciliary visits and picketing of the suspects. The Supreme Court desisted from striking down these invasive provisions holding that, "It cannot be said that surveillance by domiciliary visit would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead a criminal life that are subjected to surveillance."
33. Available at https://main.sci.gov.in/judgment/judis/6014.pdf, visited on April 14, 2018.
34. AIR 1981 SC 760
35. (1991) 1 SCC 57
36. AIR 1995 SC 264. Justice B.P. Jeevan Reddy observed that a citizen has right to safeguard the privacy of his own, his family, marriage, procreation, motherhood,

of India[37], the Court held that telephone tapping by the government under Telegraph Act amounts to violation of Article 21 and once the mentioned facts in a given case attracts the facet of privacy, Article 21 can be invoked since privacy is a part of right to life and personal liberty and this right can be deprived of only by the procedure established by law. This case made two important contributions to communications privacy jurisprudence in India - the first was its rejection of the contention that 'prior judicial scrutiny' should be mandated before any wiretapping could take place. Instead, the Court accepted the contention that administrative safeguards would be sufficient. Secondly, the Court prescribed a list of procedural guidelines, the observance of which would save the wiretapping power from unconstitutionality.

Another dimension of right to privacy was added in the case of *Mr. X* v. *Hospital Z*,[38] where the Court held that right of privacy may arise out of a particular specific relationship. Doctor-patient relationship is a matter of confidence and therefore doctors are morally and ethically responsible to maintain the confidentiality of such existing relationship. In such situation, revelation of confidential information will result in invasion in privacy right which may sometimes clash with another person's right to be informed. This right however is not absolute and may be lawfully restricted for the prevention of crime, disorder, health, morals and rights of others.[39] In *State* v. *Charulata Joshi*[40], the Court held that freedom of press is not an absolute right. The press must first obtain the

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child bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise or laudatory or critical and if he does so, he will be violating the right to privacy. The above mentioned rule is subject to an exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon the public records. This is for the reason that once a matter becomes a matter of a public record, the right to privacy no longer subsists and it becomes legitimate subject for the comment by press and media among others.

37. (1997) 1 SCC 301. Right to privacy is not mentioned in the Indian Constitution but the roots of the privacy can be traced under Article 21 and telephonic conversation is a part of confidential information and tapping such private communications is a contravention of right to privacy and this right can be taken away only by the procedure established by law.
38. (1998) 8 SCC 296
39. *Ibid*.
40. (1999) 4 SCC 65

willingness of a person sought to be interviewed and no Court can pass any order if the person to be interviewed expresses his unwillingness. In *Sharda* v. *Dharmpal*[41], the Supreme Court held that whenever there is clash between two fundamental rights, the right which advances public interest and morality will prevail. The Supreme Court decision in *Smt. Selvi* v. *State of Karnataka*[42] was a welcome development in respect of protection of privacy, in which the Court held that narco, polygraph and brain mapping tests can no more be, conducted on anyone, either an accused or a suspect, without his/her consent. The forcible administration of these tests was "an unwarranted intrusion into the personal liberty" of those facing criminal offences. The concept of privacy was further elaborated in *Ram Jethmalani* v. *Union of India*[43], wherein it was held that right to privacy is an integral part of right to life and this is a cherished constitutional value, and it is important that human beings should be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.

Right to privacy was declared subject to public safety in the case of *Avishek Goenka* v. *UOI*.[44] The Court had also held that illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. However, the right of privacy may not be absolute and in exceptional circumstances, particularly when authorised by a statutory provision, the right may be infringed.[45] Although, the Court in *Suresh Kumar Koushal* v. *NAZ Foundation*[46] held that Section 377, IPC, criminalising any form of "carnal intercourse", does not suffer from any vice of unconstitutionality but in *Navtej Singh Johar* v. *Union of India*[47], the Court held Section 377, IPC unconstitutional, it violated the constitutional rights to privacy. In *National Legal Services Authority* v. *Union of India*[48], the Court held that gender

41. (2003) 4 SCC 493
42. (2010) 7 SCC 263
43. (2011) 8 SCC 1
44. AIR 2012 SC 2226
45. *Ramlila Maidan Incident* v. *Home Secretary, UOI*, (2012) 5 SCC 1; *Sharda* v. *Dharmpal*, AIR 2003 SC 3450; *Bhavesh Jayanti Lakhani* v. *State of Maharashtra*, (2009) 9 SCC 551
46. AIR 2014 SC 563
47. (2018) 10 SCC 1
48. (2014) 5 SCC 438

identity is fundamental to and an essential component for the enjoyment of civil rights by the transgender community. Self-determination of identity has been held to be an essential facet of Article 21.

Right to privacy took completely different turning in *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*[49], popularly known as *Aadhaar* case where the Supreme Court unanimously declared that privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the Constitution, but also arises in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III of the Indian Constitution. The detailed critical analysis of the impact of this judgment over right to privacy has been made at the later part of this paper.

(b) Statutory Law Perspective

(i) Law of Torts - In India, the right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognized.[50]

(ii) Indian Telegraph Act, 1885 - Section 5(2) of the Act[51] permits interception of messages. Occurrences of any public emergency or in the interest of public safety are the sine qua non for the application of the provision of Section 5(2).[52]

(iii) Indian Easement Act, 1882 - A right of privacy falls under

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49. (2017) 10 SCC 1. In this case , a scheme propounded by the Government of India popularly known as "Aadhaar Card Scheme" and under this scheme Government was accumulating the personal information related with biometric and demographic data and such confidential information was about to be used for various beneficial purposes provided by the Government. This scheme was challenged through bunch of petitions and it was contended that collection of private information of individuals, is a violation of right to privacy since Government had all personal information of every citizen of this country and there was a suspicion about misuse of such covert information by the Government. This case attained immense attention because of raising the significant question about the fundamental status of right to privacy.
50. *R. Rajagopal* v. *State of Tamil Nadu*, AIR 1995 SC 264.
51. Available at https://dot.gov.in/act-rules-content/2430, visited on May 10, 2018
52. *People's Union for Civil Liberties* v. *Union of India*, AIR 1997 SC 568; See also *R.M. Malkani* v. *State of Maharashtra*, AIR 1973 SC 157

illustration (b) of Section 18 of the Indian Easements Act, 1882[53]. The right of privacy in regard to house cannot be claimed on the basis of natural modesty and morality.[54]. It is not every infringement of privacy which is actionable. It must be shown that there has been substantial and material infringement of privacy.

(iv) Indian Evidence Act, 1872 - There are provisions[55] under the Evidence Act which protect the privacy interests of an accused person in view of the presumption of innocence under the law. The privacy of communication and official secrecy have been protected from disclosure as special privilege.[56] The privilege of communication is also available to certain categories of professionals like barrister, attorney, pleader or vakeel.[57] The privilege of confidential communication is not only available to the aforesaid categories of professionals but it is equally available to the client.[58] In cases, where the privilege is available in respect of any title-deed or documents from production, the same privilege has been made available to the other person who is in possession of such deed or document.[59]

(v) Indian Penal Code, 1860 - There are many punishable provisions in Indian Penal Code for protecting person's privacy. Disclosure of the identity of the rape victim is punishable under section 228A[60]and when women are engaging in private act such as bathing, sex etc. where

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53. Illustration (b) of Section 18 of the Indian Easement Act, 1882 reads as follows: (b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portion of A's house which are ordinarily excluded from observation. and B acquires a like easement with respect to A· s house.
54. *Ghulam Mohd*. v. *Aziz Sheik*h, AIR 1976 J&K 49. The mere fact that the lady members of the family of the plaintiff observe *purdah* will not disentitle him to claim a mandatory injunction against the defendant on the ground that his right of privacy has been invaded
55. Sections 24, 25, 26 and 29, Indian Evidence Act, 1872
56. Sections 121, 122, 123, 124 & 125, Indian Evidence Act, 1872
57. Sections 126 & 127, Indian Evidence Act, 1872
58. Section 129, Indian Evidence Act, 1872
59. Sections 130 & 131, Indian Evidence Act, 1872
60. Section 228A, Indian Penal Code, 1860

she would usually have the expectation not being observed by anyone, if this is happened by men than he will be punished.[61] Sections 377[62], 497 (Subject to *Joseph Shive* V. *Union of India*, 2018 SCC online SC 1676) and 499-502 deal with unnatural offences, adultery and defamation offences respectively. Any attempt to insult the modesty of woman just by word, sound, gesture or exhibition is severely punishable.[63]

(vi) Criminal Procedure Act, 1973 - There are provisions like Sections 51(2) [64] and 53(2)[65] which try to safeguard the privacy of the female. The provision relating to the recording of confessions and statements in Section 164 also makes a stipulation with a view to protect the privacy of a person. A statement of a witness or a confession made by an accused is not admissible in evidence unless the provisions of Section 164 are strictly followed.[66] Section 164A deals with medical examination of rape victim providing that without consent of rape victim examination would be vitiated and unlawful.[67] The provisions of Section 165 are mandatory for the conduct of a search by a police officer.[68] Section 327 deals with Trial *in camera*, means protect person's privacy at any stage of proceeding by the court.[69]

(vii) Family Law - The privacy of family finds mention in some statutes. Hearing in camera in certain marriage and divorce statutes like Section 22, Hindu Marriage Act, 1955[70]; Section 33, Special Marriage Act, 1954[71]; the Parsi Marriage and Divorce Act, 1936[72] and Section 53

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61. Section 354C, Indian Penal Code, 1860
62. Subject to *Naz Foundation,* AIR 2014 SC 563 & *Navtej Singh Johar, (2018)10 SCC 1 Cases*
63. Section 509, Indian Penal Code, 1860
64. Section 51(2), Criminal Procedure Code, 1973 states that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.
65. Section 53(2), Criminal Procedure Code, 1973 states that whenever the person of a female is to be examined under this Section, the examination shall be made only by, or under the supervision of a female registered medical practitioner.
66. Section 164, Criminal Procedure Code, 1973
67. Section 164A, Criminal Procedure Code, 1973
68. Section 165, Criminal Procedure Code, 1973
69. Section 327, Criminal Procedure Code, 1973
70. Section 22, Hindu Marriage Act, 1955
71. Section 33, Special Marriage Act, 1954
72. The Parsi Marriage and Divorce Act 1936 (Amending Act of 1988).

of the Indian Divorce Act, 1869 may be said to have the aim of privacy.[73]

(viii) Right to Information Act, 2005 - Emerging right to information has come into sharp conflict with the right to privacy under the Right to Information Act, 2005[74]. In *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi*[75], the Court held that the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India.[76]

(ix) Information Technology Act, 2000 - The Act makes a provision to protect the information secured from any electronic record, book, register, correspondence etc. from disclosure to any other person and makes it a punishable offence.[77] Section 43A of the IT Act attaches liability to a body corporate, which is possessing, handling and dealing with any 'sensitive personal information or data'[78] and is negligent in implementing and maintaining reasonable security practices resulting in wrongful loss or wrongful gain to any person.

(x) HIV & AIDS Act, 2017 - The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 contains many provisions for protecting privacy of HIV patients.[79]

Thus, to conclude, it may be observed that the right to privacy in India is, at its foundations a limited right rather than an absolute one. This limited nature of the right provides a somewhat unstable assurance of privacy since it is frequently made to yield to a range of conflicting

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73. Paras Diwan, Law of Marriage and Divorce, 3rd Ed., Universal Law Publishing Co. Pvt. Ltd. (1997) at 851 & 852
74. Section 8, Right to Information Act, 2005
75. (2012) 13 SCC 61
76. *Ibid,* at page 74 (para 23)
77. Section 72, Information Technology Act, 2000
78. 'Sensitive personal information or data' is defined under Rule 3 of the Sensitive Personal Data Rules to include information relating to biometric data.
79. Sections 8, 9, 11, 39, Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017

interests - rights of paternity, national security etc which happen to have a more pronounced standing in law.

IV. TRIANGULAR PARADIGMS OF RIGHT TO PRIVACY

The Constitutional Privacy jurisprudence has been derived from a triangular understanding of Privacy- Zonal, Relational and Decisional[80]. The Zonal form of privacy was recognised in *Govind* v. *State of Madhya Pradesh*[81], where it was noted that any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. However, the scope of the zonal paradigm is yet to be decided. There has been no clear demarcation made between the protected and unprotected activities under this right. Due to the absence of any set standards for application of a zonal right to privacy, it is to be decided on a "case-to-case" basis as held in the *Govind* decision.

In contrast to the Zonal paradigm, the Relational paradigm focuses on persons rather than places.[82] This aspect of right to privacy protects a set of associations from any arbitrary state interference, because of the fundamental interest all individuals have, in controlling the nature of their intimate associations with others.[83] However, even this paradigm of privacy rights lacks clarity in its scope and application. The Court in *Suresh Kumar Koushal* v. *NAZ Foundation*[84] held that Section 377 of the Indian Penal Code, criminalising any form of "carnal intercourse", does not suffer from any vice of unconstitutionality. However, in *State of Maharashtra* v. *Bharat Shanti Lal Shah*,[85], the Court held that a statute can authorise the interception between two individuals even when it is a direct violation

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80. Thomas, Kendall, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443-48 (1992); Yoshino, Kenji, *Sodomy Laws: Law of the Bedroom*, BOSTON GLOBE (Mar. 23, 2003)
81. AIR 1975 SC 1378
82. Andrew Koppel Man, *The Right to Privacy*, Art. 6, University of Chicago Legal Forum (2002). See also *Directorate of Revenue* v. *Mohd. Nisar Holia,* AIR 2009 SC 1032
83. *Ibid.*
84. AIR 2014 SC 563
85. (2008) 13 SCC 5

of their right to privacy, if the procedure authorizing such violation is just, fair and reasonable and not arbitrary or oppressive. It has been noted that any act claimed under the relational form of privacy should be *firstly*, principally and fundamentally private and intimate in nature and *secondly*, in accordance with the law of the land.[86]

The Decisional paradigm is the most intricate form of privacy right. It upholds the right of every individual to make decisions regarding the sphere of private intimacy and autonomy[87]. The Court, in the case of *Hinsa Virodhak Sangh* v. *Mirzapur Moti Kureshi Jamaat*[88], has time and again upheld the decisional right to privacy of individuals and has even gone to the extent of upholding an individual's decision to take vegetarian or non-vegetarian food as a paramount personal affair protected under the right to privacy. However, the mere existence of such a right does not protect it from State's scrutiny. The right to have individual autonomy in personal and intimate decisions does not entail a right to any specific opinion, which is not in compliance with the law of the land.

V. RIGHT TO PRIVACY AND *K.S. PUTTASWAMY* JUDGMENT[89]

It is popularly said, "Data is the new oil".[90] The government mandated unique identification (Aadhaar card) to be produced almost everywhere

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86. Abhinav Chandrachud, *The Substantive Right to Privacy: Tracing the Doctrinal Shadows of the Indian Constitution*, (2006) 3 S.C.C. (Jour.) 31.
87. *National Coalition for Gay & Lesbian Equality* v. *Minister of Justice*, 1999 (1) S.A.L.R. 6 (CC).
88. AIR 2008 SC 1892
89. *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*, (2017) 10 SCC 1
90. To get into the genesis of this statement, we need to go back in time, when mineral oil was the most lucrative commodity and almost every nation was running for it. Data has replaced oil to become the most valuable commodity in the 21st-century. This is evident from the fact that 5 of the most valuable companies in the world, namely, Amazon, Google, Apple, Microsoft, and Facebook belong to the data sector. When we observe the two commodities closely, we understand that data and oil are very similar. As crude oil found in the world is unusable in its raw form and needs to be refined and filtered using different processes to produce Petroleum, Diesel, Kerosene, gasoline and the like, similarly, raw information also needs to be processed and analyzed for converting it into different kinds of usable data namely, health information, geo location information, financial information, browsing information, professional and employment-related information and the like.

as a valid identity card and other such identity cards were held not to be accepted. Moreover, government also collected data[91] for the identification through private agencies and having no guarantee of its protection because India has no such Data Protection Law so as to ensure the data privacy of its citizens. Initiative in spearheading the attack on the *Aadhaar* was taken by filing Writ Petition in 2012, at the time when *Aadhaar* scheme was not under legislative umbrella. In 2016, with the passing of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, other writ petitions were filed challenging the *vires* of the Act. All the writ petitions assailed *Aadhaar* scheme primarily on the ground that it violates right to privacy which is a facet of fundamental rights enshrined in Article 21 of the Constitution.

It was criticised that *Aadhaar* is a serious invasion into the right to privacy of persons and it has the tendency to lead to a surveillance state where each individual can be kept under surveillance by creating his/her life profile and movement as well on his/her use of *Aadhaar*. Petitioners were demanding scrapping and demolition of the entire *Aadhaar* structure which was anathema to the democratic principles and rule of law, which is the bedrock of the Indian Constitution. As per the petitioners, this was an inroad into the rights and liberties of the citizens which the Constitution of India guarantees. It is intrusive in nature. At its core, *Aadhaar* alters the relationship between the citizen and the State. It diminishes the status of the citizens. Rights freely exercised, liberties freely enjoyed, entitlements granted by the Constitution and laws are all made conditional, on a compulsory barter. The barter compels the citizens to give up their biometrics 'voluntarily', allow their biometrics and demographic information to be stored by the State and private operators and then used for a process termed 'authentication'. According to them, by the very

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91. Data can be broadly classified into public data and personal data. Public data is that which is accessible to the public at large, such as, Court records, birth records, death records, basic company details. On the other hand, private data is personal to an individual/ organization and cannot freely be disseminated by anybody without the prior permission of the subject. It includes financial details, family details, browsing details, preferences, psychological characteristics, locations and travel history, behavior, abilities, photographs, aptitudes, and the like. It could also be a combination of these features or even inferences drawn from the refined data.

scheme of the Act and the way it operates, it has propensity to cause 'civil death' of an individual by simply switching of *Aadhaar* of that person.

The nine-judge bench unanimously delivered judgment holding that privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the Constitution, but also arises in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III of the Indian Constitution.

Overruling *M. P. Sharma*[92] and *Kharak Singh* [93] cases, which contained observations that the Indian Constitution does not specifically protect the right to privacy, the Court held that privacy is intrinsic to life, liberty, freedom and dignity and therefore, is an inalienable natural right. Privacy includes at its core, the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture.

The judgment made it clear that privacy is "not an elitist construct"[94]. The judgment, while holding that there is an intrinsic relationship between development and freedom, declared that development consists of expansion of people's freedom. While rejecting the submission that privacy is a privilege for the few, the Court held that it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.

The judgment came down heavily on *Suresh Kumar Koushal* v. *Naz Foundation*[95], declaring that the test of popular acceptance does not furnish

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92. *M.P. Sharma* v. *Satish Chandra*, *Distt. Magistrate, Delhi*, 1954 SCR 1077
93. *Kharak Singh* v. *State of Uttar Pradesh,* AIR 1963 SC 1295
94. Available at https://scroll.in/article/848346/not-an-elitist-concern-supreme-court-rejects-argument-that-privacy-must-be-forsaken-for-welfare, visited on Nov.16, 2018
95. AIR 2014 SC 563

a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution. LGBT rights are not so-called but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.[96]

The Court held that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21[97]. It also held that the *Aadhaar* scheme, which is backed by the statute, i.e. the Aadhaar Act also serves legitimate State aim *(K.S. Puttaswamy* v. UOI, decided on Sept. 26, 2018). This judgment discusses in detail the scope and ambit of right to privacy. A close reading of this judgment brings about the following features :

(a) Privacy has always been a natural right: The correct position in this behalf concludes that (a) privacy is a concomitant of the right of the individual to exercise control over his or her personality. (b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. (c) The fundamental right to privacy would cover

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96. Supra note 94.

97. https://www.scconline.com/blog/post/2018/09/27/aadhar-act-2016-constitutional-not-violative-of-right-to-privacy-linking-of-aadha-with-mobile-phone-number-bank-account-not-mandatory-sc/#:~:text=Justice %20Sikri%20stated%20all%20matters,%2C%20i.e.%2C%20the%20Aadhaar%20Act., visited on Oct 10, 2018

at least three aspects – intrusion with an individual's physical body; informational privacy and privacy of choice. (d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity. [98]

(b) The sanctity of privacy lies in its functional relationship with dignity: Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place.[99] Further, privacy is a postulate of dignity itself. Also, privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen. [100]

(c) Privacy is intrinsic to freedom, liberty and dignity: The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution.[101]

(d) Privacy has both positive and negative content: The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.[102]

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98. Dr. D.Y. Chandrachud, J., paras 40, 46 & 318; S.A. Bobde, J., para 415; R.F. Nariman, J., para 521 & S.K. Kaul, J., paras 574, 625 of *Puttaswamy* case (2017).
99. Available at https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy, visited on Nov. 25, 2018
100. Dr. D.Y. Chandrachud, J., paras 127, 322 & 323; S.A. Bobde, J., paras 407 & 409; F. Nariman, J., para 525; S.K. Kaul, J., paras 618 & 619; Chelameswar, J., para 375 of *Puttaswamy* case (2017)
101. Dr. D.Y. Chandrachud, J., para 127; S.A. Bobde, J., para 416; R.F. Nariman, J., para 482 of *Puttaswamy* case (2017)
102. Dr. D.Y. Chandrachud, J., para 326 of *Puttaswamy* case (2017)

(e) Informational Privacy is a facet of right to privacy: The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an all-encompassing presence. Every transaction of an individual user leaves electronic tracks without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities.[103]

(f) Right to privacy cannot be impinged without a just, fair and reasonable law: It has to fulfil the test of proportionality i.e. existence of a law; must serve a legitimate State aim; and proportionality.[104]

VI. CONCLUSION

Privacy as a whole is a fundamental human right which is inherent to all, having natural legal authority. Worldwide, this right is provided but its violation by state authorities, police, or other public or private agencies is a big problem. Violations of privacy on several occasions particularly, data privacy and informational privacy nowadays is a serious humanitarian concern. It is said that the future world will be under the control of data which is going to be the new gold of the era. So it is the matter of extreme importance and concern for the whole international human community to come forward and enact a special international norms to protect the data of individuals and municipal governments must also enact an effective and rigid law on this matter to counter all kinds of privacy intrusions whether it is domestic or international, whether it is by an individual or any agency or even by government itself, in order to secure healthy democratic polity.

103. Dr. D.Y. Chandrachud, J., paras 300 & 328; S.K. Kaul, J., para 585 of *Puttaswamy* case (2017)

104. Dr. D.Y. Chandrachud, J., paras 310 & 325; S.A. Bobde, J., para 426; R.F. Nariman, J., para 526; S.K. Kaul, J., para 638; Chelameswar, J., paras 377, 379 & 380 of *Puttaswamy* case (2017)

THE MEANING AND APPLICATION OF THE WORD 'HINDU': A VEDANTIC, JUDICIAL AND STATUTORY RESPONSE

*GHULAM YAZDANI**

ABSTRACT : Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion. The meaning and scope of the word "Hindu" occurring in Hindu Religious legislations about its meaning or what is meant by the term "Hindu" occurring in the different legislations. In a judicial exposition in the M. Muraleedharan Nair case of the term 'Hindu' by the Kerala High Court, to the effect that only those persons who believe in idol worship are Hindus, leaves the impression by implication that those not believing in idol worship are outside the fold of Hinduism. In contrast to this judicial pronouncement, political statements of certain nationalist leaders tend to expand the scope of the term 'Hindu' when they say that all Indians including Muslims, Christians, Jews and Parsis are also Hindus. In the wake of these developments, a close look at the existing legal literature on the subject seems to be an interesting study. This paper therefore envisages a cursory but analytical and critical study of the subject in the light of juristic textual, judicial and legislative materials.

KEY WORDS : Hindu, Hinduism, Religion, Statutory Provisions.

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I. INTRODUCTION

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress.

A judicial exposition in the M. Muraleedharan Nair case[1] of the term 'Hindu' by the Kerala High Court, to the effect that only those persons who believe in idol worship are Hindus, leaves the impression by implication that those not believing in idol worship are outside the fold of Hinduism. In contrast to this judicial pronouncement, political statements of certain nationalist leaders tend to expand the scope of the term 'Hindu' when they say that all Indians including Muslims, Christians, Jews and Parsis are also Hindus. In the wake of these developments, a close look at the existing legal literature on the subject seems to be an interesting study.

The historical and etymological genesis of the word "Hindu" has given rise to a controversy amongst Ideologists; but the view generally accepted by the scholars appears to be that the word "Hindu" is derived from the river Sindhu otherwise known as Indus which flow from Punjab. It is that part of the great Aryan race which emigrated from central Asia through the mountain passes into India, and settled first in the districts the near the river Sindhu. This theory says that Aryans probably called themselves *"Sindhus*". The Persian pronounced this word as 'Hindu' and gave it as a name to the Indians. From 'Hindu' as so used they derived, for the land, the word 'Hindustan'.

Going by the historical assumptions, 'Hinduism' as a single religion can be related back to very early times. It is not used in any ancient

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1. See, *M. Muraleedharan Nair* v. *State of Kerala and Ors*, AIR 1991 Ker 25

religious scriptures, including Hindu religious scriptures[2]. The use of the word 'Hindu' in Indian languages is of medieval origin being derived from the ancient Persian word 'Hind,(Sindh) for Sind, hence the Greek 'India'. That there is no alternative Sanskrit or indigenous term to define a person who held beliefs that are today held by Hindus, e.g., an Indian, who was not a Buddhist or a Jain living in AD 400, shows that the concept of 'Hinduism' and of 'Hindu' as a votary of it, is not applicable to ancient times.[3] When Ashoka spoke of religious persons he spoke of 'Sramanas and Brahamans'. Brahmanism, the large pool of divergent ideas held by various schools of Brahmans priest and philosophers, was a basic fact of Indian religious history; it was distinct from Buddhism and Jainism or, in the West, Parsism. But what defined *Dharma*, the rules of conduct, was the caste system and social ritual which in practice engulfed all, the devotees and patrons of the Brahmanas, Buddhists and Jains alike. The creation out of this of 'Hinduism' as a single religion was a process which took place in the medieval centuries, though in a sense its completion belongs to modern times.[4]

The Encyclopedia of Religion and Ethics describes Hinduism as the title applied to that from of religion which prevails among the vast majority of the present population of the Indian Empire.[5]An Advaita Vedantist philosopher Sarvepalli Radhakrishnan observed:

> "The Hindu civilization is so called as its original founders or earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North-West Frontier Province (NWFP) and the Punjab. This is recorded in the Rig Veda, the oldest of the Vedas, the Hindu scriptures which give their name to this period Indian

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2. The word 'Hindu' is given by Turkish and Persian Muslims to describe non-Muslims in India. Even today Arabic , Persian and Turkish word for India is Hind and Indians is Hindi.
3. See, Mayne's *Hindu Law and Usage,* 13th ed., p.4; Monier Williams, Hinduism,p.1
4. See, Irfan Habib, *"Medieval Popular Monotheism and Its Humanism, The Historical Setting*," *Social Scientist,Vol.21,No.3-4,March-April,1993,p.79.*
5. See, An Advaita Vedantist philosopher Sarvepalli Radhakrishnan and Indian statesman who was the first Vice President of India and the second President of India.

> history. The people on the Indian side of Sindhu were called Hindus by the Persian and letter western invaders".[6]

In the Anglo-Indian legal terminology of the last century, the word "Gentoo" occurs as a frequent substitute for the term 'Hindu'. The Regulations in the earlier British period associated Hindu legal system either with the followers (who were called 'Gentoos,' 'Hindoos' or 'Hindus') or with the religious scriptures (called 'Shastras' or Dharma'). All expressions other than Hindu law (with different spelling of the term 'Hindu'), however, soon became out of use.[7] William Wilberforce, a British parliamentarian, once spoke of the "dark and bloody superstitions" that embody the creed that came to be termed Hinduism.

Prior to that, the mind-boggling diversity in sub-continental religious practices existed without a common definition to bind them together, and this "crystallization of the concept" is what Brian K Pennington traces in his book.[8] The term "Hindu" is nowhere used in any Sanskrit text. Therefore it is said that it has a foreign origin. That is the genesis of the word "Hindu". Etymological genesis of the word 'Hindu' today lies in the history of the inhabitants of India. But this meaning does not help us much as this would include Muslims and other persons, like Christians, Parsis and Jews. The term "Hindu" is now used in the theological as distinguish from a national or racial sense. Therefore, a 'Hindu' is one who professes the Hindu Religion. To know something about the term "Hindu" it is very much required to go deeper in the ocean of *Upanishad* wisdom.

II. HINDU RELIGION : A WAY OF LIFE

The four human desires that Hinduism recognizes are and usually refer to the four proper goals or aims of a human life. The four *purucârthas*

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6. Radhakrishanan, "*The Hindu : View of Life*" p. 10, as quoted by Justice Gajendragadkar in Shastri Yagnapurshadasji v. Muldas Bundardas Vaishya, Bench: Gajendragadkar, P.B. (Cj), Wanchoo, K.N., Hidayatullah, M., *Ramaswami*, v., *Satyanarayanaraju, P*, AIR (1966) SC 119.
7. See,Tahir Mahmood, Studies in Hindu Law, at p. xiii (3rd edn., 1986); and M.P. Jain, *Outlines of Indian Legal History* (3rd edn.,1972)pp.582-608.
8. See, Brian K Pennington, *Was Hinduism Invented? Britons, Indians and the Colonial Construction of Religion*. Oxford University Press (2005).

are *Dharma* (righteousness, moral values), *Artha* (prosperity, economic values), *Kama* (pleasure, love, psychological values) and *Moksha* (liberation, spiritual values). When we think of the Hindu religion, it is difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one god; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rights or performances; in fact, it does not appear to satisfy the traditional features of any religion or creed. It may broadly be describe as a way of life and nothing confronted by this difficulty, Dr. Radhakrishnan realized that:

> "To many Hinduism seems to be a name without any content. Is it a museum of belief, a medley of rites, or a mere map, a geographical expression?"

Having posed these questions, which disturb foreigners when they think of Hinduism, Dr. Radhakrishnan as explained the term 'Hindu' as one that had originally a territorial and not a religious significance. It implied residence in a well defined geographical area. Aboriginal tribes, the cultured Dravidians and the Vedic Aryans were all Hindus. The Hindu thinkers reckoned the striking fact that the man and women dwelling in India belonged to different communities, worshipped different gods, and practiced different rites.

Monier Williams has observed[9] that "Hinduism" is far more than a mere form of theism resting on Brahmanism. The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than five thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds. Former judge of the Supreme Court, Justice V.R Krishna Iyer, has describes Hinduism as a boundless religion whose spiritual universality spans all creation, transcends temples and idols, reaches and rouses sinner and saint, identifies dynamics divinity as dwelling omnipresently, proclaiming "*ahambrahmasmi*" and "*tattvam asi*"

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9. See, *Monier Williams,* Religious Thought & Life in India, p. 57]'..."

and defines narrow faiths, local limitations and fanatical petrifaction.[10]

Normally, any recognized religion or religious creed in the world subscribes to a body of set philosophic concepts and theological beliefs. The usual tests turn out to be inadequate in dealing with Hindu religion. Will this test apply to Hindu religion? In answering this question, we would base ourselves on the exposition of Dr. Radhakrishnan in his work on Indian philosophy. According to him, Indian philosophy is "*a way of life*, an approach to spiritual realization." it is significantly called *Darshan* which means 'a vision' -and philosophy is *darshan* since it is the vision of reality.[11]

In a fascinating case the verdict of the Kerala High Court[12]The learned judges have reached to a pantheon-based identification of Hindu with two dogmatic tests -one is as to commitment to gods and the other is idol worship. It was a case in respect of religious endowments that the definition of "Hindu" in terms of religion was some significance. In the absence of a set of philosophic concepts and theological beliefs or any recognized statutory test of Hinduism, this judgment has been delivered with caution. As the court observed:

> "The term 'Hindu' in the context of the constitution of Devaswom board has to mean only a Hindu who believes in God and temple worship, as otherwise, the temple administration will be in peril and putting the temple administration in the hands of non-believers will ruin the atmosphere and will result in disaster."[13]

Justice Iyer the Judge of the Judges reacting to the Kerala judgment opines that it is arbitrary, irrational, contrary to the genius of that great religion and cannot be rooted in principle. Regarding idol worship, he emphasizes that at best it is a symbol and at worst a dead stone deified to receive personalized prayers for material boons. Alas! The boundless religion is tried to be imprisoned in sanctified stone icons and chant.

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10. V.R. Krishna Iyer, "*Who is Who among Hindus*", Mainsream, July 7,1990,p.25
11. The Schools of Indian Philosophy are mainly classified into two categories; Orthodox-Theist and Hetrodox-Atheist (Buddhist and Jains), See N.R. Raghavachariar *Hindu Law : Principles and Precedents*, 8th ed., (1987)p.28
12. supra Note 1
13. Ibid.

Our Supreme Court once observed about Hinduism thus:

> "The Indian mind has consistently through the ages been exercised over the problem of the nature of god hood, the problem that faces the spirit at the end of the life, and the inter-relation between the individual and universal soul. According to Hindu religion the ultimate goal of humanity is realize and freedom from the unceasing cycle of births and rebirths and state of absorption and assimilation of the individual soul with the infinite. On the means to attain the salvation or *moksha* there is a great divergence of views."

Thus, whatever path a person takes to reach the destination or the realization of the self, the ultimate principle, he is following the Hindu way of life, Hindu philosophy, and thus he is a Hindu.[14]

III. BASICS BELIEFS OF A "HINDU"

Beneath the diversity of philosophic thoughts, concepts and ideas, expressed by Hindu philosophers who started different philosophic schools, lay certain broad concepts given below which can be treated as basic:

> a) Acceptance of the Vedas as the highest authority in religion and philosophic matters. This concept necessarily implies that the entire system claim to have drawn their principles from a common reservoir of thought enshrined in the Veda.
>
> b) Acceptance of the great world rhythm, vast periods of creation, maintenance and dissolution following each other in endless succession.
>
> c) Accepting the belief in rebirth and pre-existence.[15]

A court has observed that Hindu religion system is encyclopedic in and is commonwealth of all faiths.[16] Our life is a step on a road, the direction and goal of which are lost in the infinite. On this road, death is never an end or an obstacle but at most the beginning of new steps.

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14. Paras Diwan, *"Believing and Non-Believing Hindus"*, 33 JILI, p. 106 (1991).
15. *Shastri v. Muldas*, supra note 4 at 1130
16. *Ashim Kumar v. Narendra*, 76 CWN 1016; Paras Diwan , *Modern Hindu Law*, 8th ed., Reprint (1992) p.2.

The saint and great philosopher Swami Vivekananda condemned ceremonials, opposed superstition and external worship and denounced the *touch-me-not' ism*. Our religion is in the kitchen. Our God is in the cooking pot, and our religion is: 'don't touch me, I am holy'.[17] The Swami Vivekananda said: "Religion as it is generally taught all over the world is said to be based upon faith and belief and in most cases consists only of different sets of theories and that is the reason why we find all religions quarrelling with one another. These theories are again based upon faith and belief. Indirectly external worship as the unavoidable essence of Hindu religion has been upheld in the recent Kerala High Court judgment. Whether this judicial contribution will be acceptable by the people who respect Nehru's spirituality informed secularism? Will seers of Vivekananda's higher Vendant and rational humanism, or Dayanand's followers with an anti-idol stance for unification of Hinduism be out of bounds because of this court verdict?

The judgment, however, seems legally effective, as the ruling of the bench is binding as precedent until it is unsettled by appropriate higher judicial verdict or by valid legislative change. It may be said that because of the unparallel structural complexity of Hindu religion, this judgment seems to be a judgment based upon narrow philosophic concepts and theological beliefs. Do the Hindus worship at their temples the same set or number of gods?

In Hinduism, *Dharma* is an important term in Indian religions which means 'duty', 'virtue', 'morality', even 'religion' and it refers to the power which upholds the universe and society. Dharma is universal but it is also particular and operates within concrete circumstances.

Consequently, this type of question may be asked in this connection, and the answer to this question has to be in the negative. Indeed, there are certain sections of the Hindu community which do not believe in the worship of idols. As regards those sections which believe in the worship of idols, their idols differ from community to community and it cannot be said that one definite idol or a definite number of idols are worshipped by all the Hindus.

In the Hindu *Panth'* the gods that were worshipped in Vedic times

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17. Supra note 6 at 26.

were mainly *Indra, Varuna, Vayu and Agni*. Later, *Brahma, Vishnu and Mahesh* (Know as Trinity) came to be known as worshipped. In course of time, Lord Rama and Lord Krishna secured a palace of pride in Hindu *Panth*. Gradually, as different philosophic concepts held away in different sects and in different sections of the Hindu brethren, a large number of gods were added, with the result that today the Hindu *Panth* presents the spectacle of a large number of gods who are worshipped by different sections of the Hindu.

IV. REFORMIST MOVEMENTS: NEW SECTS AND CULTS

The development of Hindu religion and philosophy shown that from time to time saints and religious reformers attempted to remove the elements of corruption and superstition, and revolted against the dominance of rituals and the power of the priestly class with which it came to be associated; and that led to the formation of different sects.

In *Shastri's* case,[18]the question before the Supreme Court was whether the Swaminarayana sect (Satsangis) was a Hindu sect so as to entitle Harijans to have entry into its temple under the Bombay temple entry legislation. Justice Gajendragadkar, an erudite Sanskrit Scholar, made his philosophic flight into the ocean of *Upanishadic* wisdom and finally declared the Swaminarayana sect as a Hindu sect. Mahatma Buddha started Buddhism; Mahavir founded Jainism; Guru Nanak Devji inspired Sikhism; Basava became the founder of Lingayat religion, Dhayaneshwar and Tukaram initiated the Varakaricult. Raja Ram Mohan Roy founded Brahamo Samaj, Dayananda founded Arya samaj, Radhaswamis of Santsatguru, Pranamis of Nijanada Swami[19] and Chaitanya began Bhakti cult; and as a result of the teaching of Ramkrishna and Swami Vivekananda, Hindu religion flowered into it, most attractive, progressive and dynamic form.

By and large these socio-religious movements represent a revolt

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18. The essence of Swaminarayana sect is that an individual is enjoined to follow the basic Vedic injunctions of good, pious and religious life and that the path of salvation lies in the devotion of lord Krishna. Philosophically its founder Swaminarayana was the follower of Ramanuja. See Shastri v. Muldas, supra n.4.
19. This dharma began to spread about 125 years ago. See 'The Pranami Dharma' in the Darjeeling - Sikkim Himalayas: A Preliminary Study by Tanka B. Subbam, Religion and Society, Vol. XXXVI, No. 1, March, 1979, p.52.

against the orthodox practices of Hindu, particularly the ceremonial and ritual aspects of Hinduism, or against the rigidity off class system. All these movements purport to free Hinduism from the supposed or real degeneration and profess to resurrect it; and for these very reason followers of this movements and sects are Hindus. If, we study the sects of Hindu philosophy, the teachings of the saints and religious reformers we will find an amount of divergence in their respective views-but, simultaneously, there is kind of unity in the central theme or doctrines of Hinduism.

Bal Gangadhar Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion, and he evolved a working formula which may be regarded as fairly adequate. He said in *Gitarahasaya*:[20]

"Acceptance of the Vedas with reverence; recognition of the fact that the means or ways of salvation are diverse; and realization of the truth that the number of Gods to be worshipped is large that indeed is the distinguish feature of Hindu religion."

V. THE TERM "HINDUS" UNDER THE INDIAN CONSTITUTION AND STATUTORY LAWS

For the purpose of law, the term 'Hindu' does not have a religious connotation. The theological requirements for being a Hindu are, therefore, not much relevant for us. In law, the term; Hindu' has a clear meaning very different from, and much wider than, that of the theological expression. As the Hindu law was influenced by the theological tenets of the Vedic Aryans and their philosophical theories, the Constitution-maker were fully conscious of broad and comprehensive character of Hindu religion. So, while guaranteeing fundamentals rights of religion, Explanation II to Article 25 has made it clear that in sub clause (b) of clause (2) the reference to Hindus shall be construed as including the person professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institution shall be construed accordingly. According to the Full Bench of the Court in Tharmel Krishnan v. Guruvayoor

20. B.G. Tilak's *Gitarahasaya*, as quoted by Justice Gajendragadkar in Shastri's case, supra n.4.

Devaswom[21].In this case the meaning and scope of the word "Hindu" occurring in Travancore Cochin Hindu Religious Institutions Act, 1950. What is meant by the term "Hindu" occurring in the Act? The said word is not defined in the Act. Will it take in any person, who is a Hindu by birth, irrespective of his belief in God and temple worship? In order to come within the term 'Hindu' occurring in the Act, should a person besides being a born Hindu, also have belief in God and in temple worship? Two rival pleas are put forward before us. According to the petitioners, a person though a Hindu by birth, should also have belief in God and have faith in temple worship,

As regards legislation, in the pre-Independence period Acts and Regulations usually referred to these four religions—Hindu, Sikh, Jain and Buddhist-separately.[22] See, for example, the Special Marriage Act, 1872 and the Indian Succession Act, 1925. Consistently with the Constitutional provision, the Hindu Marriage Act,1955 the Hindu Succession Act,1956;the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act,1956 have extended the application of these Acts to all persons who can be regarded as Hindus in this broad and comprehensive sense.

Section 2 of the Hindu marriage Act, 1955, details the groups of person who would be governed by the Act and also those who would be included within each of the various groups. The section makes it abundantly clear that the Act applies to all Hindus who are within the territories of India. This intra-territorial aspect is not controlled by domicile. Thus, for instance, a Nepali of Gorkha tribe residing in India and describing himself as a Hindu by creed and married to a Hindu girl according to Hindu rites in India would be governed by this Act.[23] Gorkhas are regarded normally as Hindus. The expression "Hindu" in section 2 of

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21. 1979 Ker LT 350: (AIR 1978 Kerala 68) affirmed in *S. P. Mittal v. Union of India*, AIR 1983 SC 1 laid down that persons who do not have faith in God and temple worship should not be allowed to choose a member to manage the affairs of the Board. Any other interpretation to the term Hindu, according to the petitioner, will violate the guarantee given to the religious denomination under Articles 25 and 26 of the Constitution.
22. See, Tahir Mahmood, *Studies in Hindu Law*, xiii (2nd ed., 1986).
23. *Prem Singh v. Dulari Bai* AIR 1973 Cal. 425; MUlla's *Principles of Hindus Law*, 15th ed. (1986), p. 724.

the Hindu Marriage Act 1955 is used in *pari materia* with the others.[24]

Section 2 of the Hindu Marriage Act, 1955 provides that:

1. This Act applies.
2. to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lignayat or a follower of the Brahmo, Prathana or Aryan Samaj;
3. to any person who is a Buddhist, Jain or Sikh by religion; and
4. to any other person domiciled in the territories to this Act extends who is not a Muslim, Christian, Parsi or Jew by religion; unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation- The following persons are Hindus, Buddhist, Jains or Sikh by religion as the case may be:

a) any child, legitimate or illegitimate both of whose parents are Hindu, Buddhist, Jains or Sikhs by religion;

b) any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhist, Jains or Sikhs by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

c) Any person who is a convert or re-convert to the Hindu, Buddhist, Jain, or Sikh religion.

d) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any scheduled tribe within the meaning of clause (25) of Article 366 of the Indian Constitution unless the central government by notification in the official gazette otherwise directs.

e) The expression "Hindu" in any portion of this Act shall be construed.

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24. The four Acts are: (i) The Hindu Marriage Act, 1995. (ii) The Hindu Succession Act, 1956, (iii) The Hindu Minority and Guardianship Act, 1956, (iv) The Hindu Adoption and Maintenance Act, 1956.

VI. PERSONS TO WHOM HINDU LAW APPLIES: JUDICIAL AND LEXICON RESPONSE

Having seen the definition and scope of the term "Hindu" under the Indian Constitution and the different Hindu-law enactments, a brief study of judicial response through interpretation of the term becomes necessary. Usually the courts make use of the dictionaries for this purpose. The Supreme Court has in *Perumal's* case.[25] (Shah, J.) And *Shastri's* case (Gajeindragadkar, J.) explained the scope of the term 'Hindu' and examined general characteristics of the Hindu religion.

According to Mitra's *Legal and Commercial Dictionary*, the term "Hindu" means a person born of Hindu parents, and one converted to Hinduism is a Hindu. A Hindu does not cease to be Hindu merely because he departs from the standard or orthodoxy in matters of diet and ceremonial observances.[26] In another dictionary, Hinduism is described as a religion that is widespread in modern India. The dogma of Hinduism took shape as the result of evolution of the ideas that constitute Vedaism and Brahmanism. It does not have single authoritative organization and its creation cannot be attributed to any specific founder. Hinduism as a complex range of religion and philosophical and also a code of prescription, which specifies all man's rights and obligations from birth to death.[27]

Undoubtedly, a person who passes the test of 'Hinduism' as laid down by the Supreme Court is a Hindu. But it cannot be said that person who does not pass this test is not Hindu. Here lies the crux of the matter. A person who has faith in Hindu religion, and who practices or professes it, is a 'Hindu'. But a person does not cease to be a 'Hindu' and is not a less Hindu who has faith in Hindu religion if he does not practice or profess it. Thus, even when a Hindu starts practicing, professing or having faith in a non-Hindu religion, he will not cease to be Hindu unless it is conclusively established that he got converted into another faith. Similarly, a person does not cease to be a Hindu if he becomes an atheist, i.e., Buddhist and Jain or dissents or deviates from the central doctrines of Hinduism, or lapses from orthodox religious practices, or adopt western

25. *Perumal v. Poonnuswami*, AIR 1971 SC 2352.
26. See, Mitra's Legal and Commercial Dictionary by A.N Shah, 5th ed. (1990) p. 365.
27. See, A Dictionary of Believers and Non-believers, Progress Publishers, Moscow (1989)

way of life, or eats beef.[28] There may be a type of social ban, but it does not amount to renunciation of religion. A Full Bench of the Kerala High Court[29] has ruled that a religious sect or denomination has the undoubted right guaranteed by the Constitution to manage its own affairs in matters of religion. Judicially, thus, the followers of Buddhism, Jainism and Sikhism continue to be called Hindus and to be governed by Hindu law with modification here and there whenever the claim to be governed by their own customs prevalent and recognized among them.[30] They are not Hindus by religion but they are Hindu as they are being governed by codified Hindu law.[31]

(A). 'Hindu' By Birth

If a person is born of Hindu parents, he is a Hindu. No measures are required to gauge his 'Hinduness'. His legitimacy or illegitimacy is also im-material. Nobody will bother whether he does or does not profess, practice or proclaim Hinduism. He may grow into adulthood as a totally irreligious, non-religious or anti-religious person. He may grow up as an atheist. The emphasis is on birth. If he is of Hindu parentage, he is a Hindu. If either his parents convert or one of them converts to some other religion, he will continue to be a Hindu unless he converts to some other religion. The emphasis is on the birth and not on the faith of the person born of Hindu parents. This is brought into clear terms by *Rani Bhagwan Kaur's* case,[32]In which the Privy Council held that no one can cease to be Hindu even if he declared that he is not a Hindu. Thus, it seems, a person can become a Hindu by declaration but a person cannot cease to be a Hindu by mere declaration.

Hindu law goes a step further. If one of the parents (mother or father) is a Hindu and the child is bought up as a member of the tribe, community, group or family to which the Hindu parent belonged at the time of his birth, then the child is a Hindu.[33] Similarly, it was held that sons of Hindu dancing girl converted to Islam who was brought up by

28. Rani Bhagwan Kaur v. J.C Bose, (1903) 30 Indian Appeal, p. 249; *Chandra Shekhar v. Kulandaivelu*, AIR (1963) SC p. 185.
29. See, *T. Krishnan v. G.D.M. Committee* A.I.R 1978 Kerala 68.
30. *Commissioner of Wealth Tax, West. v. Champa Kumari Singhi & Ors* (1972) 2 SCJ 168 on 19 January, 1972; AIR, 1972 SCR (3) 118.
31. Ibid.
32. Rani Bhagwan Kaur's, supra n. 28.

their grandparents as Hindu were Hindus.[34] Obviously, if such a child is not brought up as Hindu he will not be Hindu.[35]

That this is so has been clarified by statutory law which lays down that where only one parent is a Hindu and the child is brought up as a member of the tribe, community, caste or group or family to which the Hindu parent belonged, the child will be Hindu[36].It may be observed that the words are not that the child is brought up in Hindu religion, but that he is brought up as a member of tribe, etc. to which Hindu parent belonged. Thus the emphasis is on the way of the life led by the Hindu parent, irrespective of the fact whether it is religion, irreligion or non-religious way of life.

(B). Hindu by Presumption

After the codification of Hindu law this principle is very clear that persons who are not Muslims, Christians, Paris or Jews by religion are governed by Hindu law, unless it is proved that Hindu law is not applicable to such a person. Sometimes it may be difficult to prove whether a person is a Hindu, though negatively. It may be easier to prove that a person is not Muslim, Christian, Parsi or Jew. If the negative is proved, such a person will be presumed to be a Hindu, unless this presumption is rebutted by proving that Hindu law is not applicable to such a person. So, one who is a Hindu by religion is certainly a Hindu by law, but converse is not true. There are many persons, who could hardly be called Hindu by religion, but they could not be called Muslims, Christians or Parsis, and therefore they are called Hindus.[37] The same is held in Raj Kumar Gupta's case where the child was born of a Hindu father and a Christian's mother. It was not shown that the child was brought up as Hindu or Christian. But it was not shown that the child was Muslim, Parsi or a Jew, It was held that the child was a Hindu.

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33. *Myna Boyee v. Ootaram* (1861) 8. M.I.A. 400; *Nicolas v. Commr. Of W.T.*, AIR 1970 Mad. 1249 (This is the case under codified Hindu law)
34. *Ram Pergash v. Dahan Bibi*, (1924) 3 Pat 152; Mulla's *Principles of Hindu Law*, 15th edn. (1986) p. 83.
35. *Abraham v. Abraham,* (1863) 9 M.I.A. 199 *Veenno Muddala v. Chehkati,*1953 Mad.571;Paras Diwan, *Modern Hindu Law*,8th Edn.Reprint 1992 p.8
36. Explanation (b) to section 2 of the Hindu Marriage Act, 1955. The other statues of the codified Hindu law contain similar provisions.
37. Sec. 2(1) oF the Hindu Marriage Act, 195; *Raj Kumar Gupta* v. *Barbara Gupta*, AIR 1989. Cal. 165.

(C). Hindu by Conversion

The ancient Hindu law did not contemplate that followers of other religion would convert to Hinduism. It is only Arya Samaj Hindus who prescribe a ceremony of conversion, known as *shuddhi*'. A non-Hindu person who undergoes the *shuddhi* ceremony converts into Arya Samaji- an offshoot of Hinduism. A person who re-converts to Hinduism is also a Hindu. For example in *Kusum v. Satya*,**[38]** a Hindu boy was converted to Christianity and married to a Christian girl. After sometime, he reconverted to Hinduism and married a second Hindu wife. The first Christian wife filed a case field a case for committing bigamy. The court held that conversion to Christianity is no bar to reconvert to other religion and it can take place even in a few hours. In the Supreme Court decision in *Perumal's cas[39]e*, Shah, J. pronounced as under:

> "A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is the Hindu sufficient to convert him to Hinduism. But a bonafide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion."

(D). Hindu by Declaration

The Kerala High Court in Mohandas case[40] has gone a step further from the proposition given by the Supreme Court in Perumal's case. We have the case of K.J Yasuda's, a person born in Christian faith who become a Hindu by fileing a declaration that I am a follower of Hindu faith. He was a catholic Christian by birth and a famous playback singer who used to give devotional music in a Hindu temple and Worshipped there like a Hindu. One fine morning it occurred to some fundamentalist Hindus to turn him out of the temple on the specious plea that Yesuda's, being a Christian, could not be allowed to enter Hindu temples. On these facts, relying upon the declaration, the court held that Yesuda's was a Hindu.

38. *Kusum v. Satya* (1907) 30 Cal. 999; see, R.K. Aggarwal, Hindu Law, edited by U.P.D. Kesari, p. 14, 1993.
39. Ibid at 24.
40. *Mohandas v. Devaswom Board*, (1973) KLT 55 (known as Jesudas or Yesuda's case).

But a mere declaration under the special Marriage Act, 1872 that a person was not a Hindu did not mean that he had ceased to be Hindu.[41]

(E). Hindu and the Customary Law

It is well settled that the general Hindu law, prevailing over large tracts of country and populous communities, applies to every Hindu amongst them, unless he could show some valid local, tribal or family custom to the contrary. Under the Hindu system of law, clear proof of usage will outweigh the written text of law. In other words, where there is a conflict between a custom and the test of the *Smritis*, the custom will override the text.[42]There are classes of Hindus who are governed by their customary laws and not by Hindu Law for instance, *Nayars* who follow the *Marumakattayam law* in Malabar. Some communities are governed by the *Aliasanthana law* in Kanara. There are Hindu communities in the Punjab who are governed by their customary law and not by Hindu codified law. The unique feature of the Punjab customs has been that it has cut across the religious boundaries. The same custom has been applicable to all members of tribes, even if some of them follow Hinduism and some Islam or any other religion. All Punjabi Hindus are governed by customary law of the tribe to which they belong or by the local custom of the place where they reside. This continued to be position till the enactment of the codified Hindu law.

Now, the four codified major enactments apply also to the Punjabi Hindus. However, the codified enactments still save customs in certain matters. Thus the Ceremonies of marriage (under section 7), the Prohibited relationship in Marriage (clauses iv and v of section 5), and the grounds of divorce and forum of divorce like Caste tribunals [under section 29(2)], regardless of Hindu Marriage Act, 1955, are still regulated by the custom.[43]

It is a general principle of law that a person who has accepted a religion cannot rely on a custom opposed to that religion.

Thus, where a Hindu converts to Islamic faith he will be, as a general rule, governed by the Muslim law. But a well established custom in the case of such converts following their old law in matters of inheritance and succession has been held to override the general presumption.[44] For

41. *Commr. of Income Tax v. Pratap,* AIR 1959 Punj. 415.
42. *Collector of Madura v. Moottoo Ramalinga,* 1868. 12 , MIA 327.
43. See, Paras Diwan, *Customary law*, 3rd ed. (1990)p.627
44. *Mohammad Siddiq v. H. Ahmad*, ILR 10 Bom. 1.

example, some Muslim communities, described from an original Hindu ancestry, like the *Khojas*, the *Cutchi Memons*, the *Bohras*, *Mappillas and the Halai Memons* are now subject to the Muslim Personal Law (Shariat) Application Act, 1937. They were earlier governed by Hindu law or custom in matters of inheritance and succession.[45] But, in view of the effect of codifying laws on the subject, the customs of the communities ceases to be applicable and these Muslims communities are, therefore, now governed by their Muslim Personal Law (Shariat) application Act, 1937 in the matters of inheritance and succession also.[46]The Vannia Tamil Christians district of Chitor district of Kerala is governed by the Mitakshara School of Hindu law in matters of inheritance and succession. But section 14 of Hindu Succession Act, 1956 does not apply to them.[47]

VII. CONCLUSION

In a country with religious pluralism, Hindu religion continues to expand and still abounds in paradoxes, dissentions and controversies. In the process various cults, sub-cults and faiths have emerged and become part of expanding horizons of Hindu philosophy. It has never seen any distinction between those who believe in God or idol worship and those who do not believe in either. In our submission, the recent judicial exposition of the term 'Hindu' by the Kerala High Court regarding identification of Hindu is contrary to the genius of that great religion and is not tenable under the law. However, it is for the legislature to decide the religious reformative law in terms of the policy of uniform law for Hindu religion in the light of the Constitutional spirit. However, we deem it proper to observe that the Government would be doing a great service to the Hindu society by eliminating all the evil and corrupt practices, if at all prevailing in believes and practices under Hindu Religion and Religious institutions towards making of New India i.e., Bharat.

45. *Bai Baiji v. Santock*, ILR 20 Bom. 53; *Gogireddy S. Sambi v. Gogireddy Jayama*, ILR (1973) AP 1240.
46. Mulla's *Muhammad Law*; R.K. Aggarwal, *Hindu Law*, edited by U.P.D. Kesari, p. 14, 1993.
47. *Albuttamal v. Taluka Land Board*, (1977) K.L.T.333, N.R. Raghavachariar's *Hindu Law: Principles and Precedents*, 8th edn. (1987) p.26.

DICHOTOMY BETWEEN WTO NORM AND INDIAN PRACTICE ON FOOD SECURITY : QUEST FOR PERMANENT SOLUTION

*ANOOP KUMAR**

ABSTRACT : Governments have repeatedly raised the issue of food security at the WTO since the Doha Development Round in 2001 but the quest of formula to resolve issue relating food security under WTO is as challenging as the quest of Holy Grail. Developing countries have the option of a wide range of domestic support exemptions in the WTO Agreement on Agriculture (AoA) but Indian food security law and practice is considered contrary to the norm of WTO. Therefore, issue relating to public stockholding for food security in WTO becomes an unresolved question and the amendment proposed by India in AoA is considered by developing countries as a desirable change. In this context, present paper highlights the Dichotomy between WTO Norm and Indian Practice on Food Security and also attempts to find out a proper formula for resolving the issues regarding public stockholding for the purpose of food security at WTO level.

KEY WORDS : Agreement on Agriculture, Food Security, Food Aid,Public Stockholding, Domestic Support, Public Policy, Public Distribution System (PDS).

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I. INTRODUCTION

Governments intervene in the agricultural sector for a number of reasons, including the desire to provide adequate food security[1], to achieve self-sufficiency and to promote rural welfare. In India, agriculture has been a way of life and the single most important livelihood for the masses. India's culure and civilization is based on agriculture. It grows with the growth of agriculture and strengthens with the strength of agriculture. Agriculture also matters for economic reasons because it still accounts for a substantial part of Gross Domestic Product (GDP) *i.e.*16 percent and it is still the main source of livelihood and employment (49 percent) for the majority of the rural population.[2] Poor agricultural performance can lead to inflation, farmer distress and unrest, and larger political and social alienation and same time all of which can hold back the economy. Therefore, Agricultural policy focus in India across decades has been on self-sufficiency and self-reliance in foodgrains production.Therefore, record food-grain production is recoded in recent past.

Agriculture remains one of the highly protected areas of international trade as the trade in agricultural goods was governed by exceptions to the General Agreement on Tariffs and Trade 1947.[3]A wider attempt to

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1. For a partial list of literature on issue relating to agriculture and Domestic Support, *see,* Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (United Kingdom: Cambridge University Press, First Publish, 2014); John H Jackson, *The World Trading System* (Cambridge: MIT Press, Second Edition, 1997).A.K. Koul, *The Agreement of Tariff and Trade (GATT)/ WTO* (New Delhi: Satyam Book, First Edition, 2005); Nestor Stancanelli, "The Historical Context of the Green Box", in Ricardo Melediz-Ortiz, *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009); Jonathan Hepburn and Christophe Bellman, "Doha Round Negotiations on the Green Box and Beyond", in Ricardo Melediz-Ortiz, *Agricultural Subsidies In The WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009); Schoenbaum J. Thomas, "Fashioning A New Regime for Agricultural Trade: New Issues and Global Food Crisis", 14(3) *Journal of International Economic Law,* 2011; A. B. Deogirika, *W.T.O. and Indian Economic* (Jaipur: Shree Niwas Publication 2004 First Edition; D. Mc Niel, "Furthering the Reforms of Agricultural Policies in the Millennium Round", 9(41) *Minnesota Journal of Global Trade,* (2000);
2. See generally, Economic survey 2017-18
3. A.K. Koul, *The Agreement of Tariff and Trade (GATT)/ WTO* (New Delhi: Satyam Book, 2005 First Edition) at 3

influence the agricultural policies of all Contracting Parties was made by the Haberler Report (1958). Report concluded that the domestic agricultural policies of the Contracting Parties play major role in restraining the growth of international agricultural trade[4]. The Ministerial Declaration of *Punta del Este* of September20, 1986 included comprehensive negotiations in agriculture for the first time in a multilateral round[5]. The Uruguay Round noted that "The Contracting Parties agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions …so as to reduce the uncertainty, imbalances and instability in world agricultural markets".[6] Despite the preparatory work undertaken by the GATT Committee on Trade the progress of the negotiations were very slow on the issues relating to agriculture. The Uruguay Round was formally concluded by the Marrakesh Declaration of April 15 1994, adopted by the 124 governments that had participated in the negotiations.[7]The Uruguay Round was a historic achievement with respect to agriculture because it produces the Agreement on Agriculture (AoA).[8]

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4. The 1958 report of a Panel of Experts known on the name of its Chairman as the Haberler Report on international trade, including agricultural trade. Summarizing the current state of international trade in agricultural products, the report noted: ". ..whether or not agricultural protectionism has increased in the highly developed countries, there are two incontrovertible facts. First, agricultural protectionism exists at a high level in the most industrialised countries; and second, the development of production and consumption of agricultural production in such countries has been such as to make net agricultural imports into these countries more and more marginal in relation to their total domestic production and consumption of such products."
5. Nestor Stancanelli, "The Historical Context of the Green Box", in Ricardo Melediz-Ortiz, *Agricultural Subsidies in the WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009) at 25.
6. Jonathan Hepburn and Christophe Bellman, "Doha Round Negotiations on the Green Box and Beyond", in Ricardo Melediz-Ortiz (*ed*.), *Agricultural Subsidies In The WTO Green Box, Ensuring Coherence With Sustainable Development Goals* (Cambridge: Cambridge University Press, 2009) pp.36-69.
7. Dominic Coppens, WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints (United Kingdom: Cambridge University Press, First Publish, 2014) at.
8. In *Canada- Dairy*, the Panel referred to the Preamble and identified the "main purpose" of the Agreement on Agriculture as fallows: "As enunciated in the

The AoA is frequently criticized for not providing sufficient policy space to developing countries for promoting their food security. Critic argued that the AoA essentially favors developed countries and they continue provide heavily support to their agriculture and same time they constrain the ability of developing countries to pursue their agricultural development and food security policies.[9] In this backdrop present paper highlights the status of right to food and food security. Paper further, discus the WTO norm on public stockholding for food security and Indian law and practice on food security. Paper will also explore the dichotomy between WTO Norm and Indian Practice on Food Security and also attempts to find out a proper formula for resolving the issues regarding public stockholding for the purpose of food security at WTO level.

II. RIGHT TO FOOD AND FOOD SECURITY

1. Legal Status of the Right to Food

Food is a fundamental basic need and accepted as fundamental inherent rights of all human. Governments are under an obligation to respect, protect and fulfill right to food. The human right to adequate food has been recognized in different international instruments, most notably the Universal Declaration of Human Rights (UDHR)[10]; the

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preamble to the Agreement on Agriculture, the main purpose of the Agreement is to 'establish a basis for initiating a process of reform of trade in agriculture' in line with, inter alia, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'. This objective is pursued in order 'to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets'."

9. Alan Matthews, Policy space to pursue food security in the WTO Agreement on Agriculture, available at: *http://www.fao.org/3/a-i5224e.pdf* last accessed on September 30, 2018.

10. Article 25: Right to Adequate Standard of Living-

1.Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

International Covenant on Economic, Social and Cultural Rights (ICESCR)[11,12]; and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[13], which recognizes in Article 12, the right of pregnant and lactating women to special protection with regard to adequate nutrition. The Convention on the Rights of the Child (CRC).[14,15] Beside the International humanitarian law the Regional Instruments on human rights also recognized the right to food as fundamental human right *i.e.* San Salvador protocol of the American

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11. International Covenant on Economic, Social and Cultural Rights (ICESCR),Article 11

    1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

    2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

    (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

    (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.
12. *See generally*, Pooja Ahluwalia, 'The Implementation of the Right To Food at the National Level: A Critical Examination of the Indian Campaign on The Right to Food As An Effective Operationalization of Article 11 of ICESCR' by Center For Human Rights and Global Justice Working Paper Economic, Social and Cultural Rights Series, Number 8, 2004 available at: *http://www.fao.org/eims/secretariat/right_to_food/showDocument.asp?doc_id=218664&main=false&name=AH417.pdf.* Last accessed on September 30, 2018.
13. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 UNTS 13 (entered into force Sept. 3, 1981)
14. Convention on the Rights of the Child, 1989, Article 24 (1) (C)
15. Lidija Knuth and Margret Vidar, Constitutional and Legal Protection of the Right to Food around the World Food and Agriculture Organization of the United Nations Rome, 2011 available at: *http://www.fao.org/docrep/016/ap554e/ap554e.pdf*last accessed on September 30, 2018.

Convention on Human Rights (1988); the African Charter on the Rights and Welfare of the Child *etc*. Right to food is now recognized as Human Rights and Human rights are the fundamental inherent rights of all human beings to which people are entitled simply by virtue of being born into the human family.

Committee on Economic, Social and Cultural Rights, CESCR, 1999 observed that "The right to adequate food is realized when every man, woman and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement."[16] The right to adequate food is a long-standing international human right to which many countries are committed. Over the last decades, a number of countries have developed and implemented constitutional amendments, national laws, strategies, policies and programmes for the fulfillment of right to food for all.

A country's constitution plays a fundamental role in the realization of the right to food because it is the supreme law of the land and the source of all political power within a nation. The inclusion of a specific provision on everyone's right to food particularly that of children and women, within the constitution has significant merit in providing legal protection of the right to food, as such, and in ensuring freedom from hunger. As par the study of Food and Agriculture Organization of the United Nations in 2011.[17] 23 countries recognize the right to food explicitly as an individual human right. Nine of these countries recognize the right as an independent right applicable to everyone, for the example, Article 27 of Constitution of South Africa provides that "…everyone has the right to have access to sufficient food and water…"[18] and ten stipulate

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16. The Food and Agriculture Organization (FAO), available at: *http://www.fao.org/right-to-food/en/*Last accessed on Nov. 30, 2018.
17. See generally, Lidija Knuth and Margret Vidar, Constitutional and Legal Protection of the Right to Food around the World Food and Agriculture Organization of the United Nations Rome, 2011, pp14-16. available at: *http://www.fao.org/docrep/016/ap554e/ap554e.pdf*last accessed on September 30, 2018.
18. Article-27

    1.Everyone has the right to have access to[...]

    b. sufficient food and water; and

    c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

the right to food for a specific category of the population only, such as children or prisoners.*e.g*. Article 44 of Colombian Constitution, provides that 'Children have fundamental rights to: life, integrity, health and social security, and adequate food'. Five countries have constitutional provisions that stipulate the right to food explicitly as being part of another human right. This is often worded in ways similar to Article 11.1 ICESCR.[19] The study of FAO concludes that up to 2010,56 constitutions protect the right to food either implicitly or explicitly as a justiciable right, or explicitly in the form of a directive principle of state. In addition, through the direct applicability of international treaties, the right to food is directly applicable, with a higher status than national legislation, in at least 51 countries, thus reaching a total of 106 countries in which the right to food is applicable.[20],

In India, Supreme Court in *Kishen Pattnayak & another* v. *State of Orissa*[21]and *People's Union for Civil Liberties (PUCL)* v. *Union of India and others*[22]has recognized the right to food is a part of the right to life stipulated in article 21 of the Indian Constitution. Therefore, Government of India enacted the National Food Security Act, 2013 (NFSA) and recognised legal rights and entitlements of persons belonging to eligible households. On the basis of literature serve, present paper conclude that at this stage of human civilization, right to food now recognized as a fundamental human, constitutional and legal rights all over the world.[23]

2. Food security: Meaning and Scope

Food security may be defined as the state in which all persons obtain a nutritionally adequate and culturally acceptable diet. The World Health

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2.The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

19. *Supra* note 15 at. 15.
20. *Supra* note 15 at 32.
21. AIR1989 SC 677
22. (1997) 1 SCC 301
23. Many national constitutions take into account the right to food or some of its aspects. Constitutional recognition of the right to food can be divided into four broad categories: (i) Explicit and direct recognition, as a human right in itself or as part of another, broader human right; (ii) Right to food implicit in a broader human right; (iii) Explicit recognition of the right to food as a goal or directive principle within the constitutional order; and (iv) Indirect recognition, through interpretation of other human rights by the judiciary. The following subsections will look at each type of protection in turn.

Organisation (WHO)[24], defines food security as "physical and economic access to food that meets people's dietary needs as well as their food preferences (WHO)."People are considered "food secure" when they have access to sufficient, safe, nutritious food to maintain a healthy and active life.

Food security includes four pillars: *First*, *Availability:* sufficient quantities of food available on a consistent basis. *Second*, *Access:* sufficient resources to obtain appropriate foods for a nutritious diet. *Third*, *Use:* appropriate use based on knowledge of basic nutrition and care, as well as adequate water and sanitation. *Fourth*, *Stability*: Adequate food must be obtainable at all times so that access and availability of food is not curtailed by acute or recurring emergencies.[25]The World Bank defines food security simply as 'access by all people at all times to enough food for an active and healthy life.' In a food policy paper the Organisation for Economic Co-operation and Development (OECD) defined food security as the 'adequate and stable supply for the farm products and food for domestic use.'[26]

In 1996, the Food and Agriculture Organisation (FAO) of the United Nations developed a plan of action for food security which provides that "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences

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24. Food security includes both physical and economic access to food. Basic components of food security include the following aspects. *Availability*: Sufficient quantities of appropriate food are available from domestic production, commercial imports or food assistance on a consistent base. *Access*: Adequate income or other resources are available to access appropriate food through home production, buying, exchange, gifts, borrowing or food aid. *Utilization:*Food is properly used through appropriate food processing and storage practices, adequate knowledge and application of nutrition and childcare practices, and adequate health and sanitation services. *Stability:* Adequate food must be obtainable at all times so that access and availability of food is not curtailed by acute or recurring emergencies (sudden crises or seasonal shortages) *http://www.emro.who.int/nutrition/food-security/*last accessed on Nov. 30, 2018.
25. Food and Agriculture Organisation (FAO), Committee on World Food Security, 1996
26. Sachin Kumar Sharma & Seema Bathla, 'Indian agriculture under Multilateral and Regional Trade Agreement' Sanjit Kumar Chakraborty, 'Intellectual Property Rights, Agricultural Biotechnology and food Security: Issues and Challenges in India, Centre for WTO Studies, at 244.

for an active and healthy life."[27]On the one hand International and national laws as well as constitutional provisions impose an obligation on state to provide proper food security to all citizens but on the other hand WTO limits the ability of developing countries to achieve food security objective. Therefore, in the light of two contrary situations it is required to be study the dichotomy between WTO Norm and Indian Practice on Food.

III. WTO NORM ON PUBLIC STOCKHOLDING FOR FOOD SECURITY AND FOOD AID

WTO Agreement on Agriculture establishes a framework to reduce domestic support for agriculture. Domestic support measures are basically categorized in three boxes, *first*, green box supports are deemed not to be, trade distorting and allowed without limits. *Second*, blue box support linked to production could also be offered if it is made in the framework of a production-limiting programme. *Third,* all other types of domestic support are in principle subject to reduction commitments because of their trade-distorting effect known as amber box.[28]In addition to these three general boxes, Dominic Coppens in his book discuss about two more boxes such as certain *de minimis* level of amber box support and Special and differential (S&D box) treatment is given to developing countries regarding some types of domestic support.[29]

Procurement, stockholding and distribution of food grains are important aspects of food security in many developing countries including India. Food security expenditures relate to public stockholding for food security purpose as well as domestic food aid to fall within the green box. To meet the requirements of green box, the Agreement on Agriculture stipulates general and policy-specific criteria in Annex 2.

In reference to public stockholding for food security, Annex 2 para 3 of AoA provides three criteria, which includes *First,* The accumulation and holding of privateor government alstock must be purchased by the

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27. Blandford, David, 2015, The World Trade Organization Agreement on Agriculture and World Food Security, *Journal of Law & International Affairs* 3(2) PP156-167
28. Anoop Kumar, Domestic Support Under Agreement on Agriculture: WTO Commitments *Vis-à-vis* Indian Response, Vol.46, No.2 *Banaras Law Journal* (2017) at 91.
29. *Supra* note 7 at 279.

government at the current market price and not sold below the current domestic market price, *Second*, There must be predetermined targets for stock accumulation relating solely to food security objectives. *Third,* there must be financial transparency.[30]

In reference to expenditures on domestic food aid programs policy-specific criteria provided under para 4 of Annex 2, which includes *First,* to provide domestic food aid to sections of the population in need, *Second*, eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. *Third,* food purchases by the government shall be made at current market prices, *Fourth,*the financing and administration of the aid shall be transparent. For the purpose of food aid sales at subsidies prices is permitted under WTO.[31]

An exception is offered for developing countries in footnote 5 of the AoA provides that the expenditure related to distribution and stockholding of food grains is permissible without any limit under the Green Box. However, procurement of food grains at administered price is limited by the rules of the WTO and is covered and counted under the Amber Box, which accounts for trade distorting support, the difference between the administered price and an External Reference Price (ERP) is accounted within the Aggregate Measurement of Support (AMS) within the amber box.[32]

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30. *See* Annex 2, para. 3 - 4 of the Agreement on Agriculture. Annex 2, para. 3 Public stockholding for food security purposes: Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme. The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.
31. *See* Annex 2, para. 4 *Domestic food aid*: Expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need. Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.
32. *Supra* note 26 at. 223.

The Amber Box subsidies are considered to be trade distorting and were entitled to progressive reduction commitments. The maximum limit for the total AMS is fixed at 5 percent of the value of domestic agricultural output for developed and 10 percent for developing countries. In reference to amber box, price support measures have been the most important type of policy measure which is not exempted. Price support can be provided either through administered prices (involving transfers from consumers) or through certain types of direct payments from governments. For the purpose of Current Total AMS calculations, price support is generally measured by multiplying the gap between the applied administered price and a specified fixed external reference price ("world market price") by the quantity of production eligible to receive the administered price. Calculation details are specified in Annexes 3 and 4 of the Agreement on Agriculture and also incorporated into Members schedules by way of references to Supporting Material. For each product, the implicit subsidy of price support measures is added to other product-specific subsidies - a product specific fertiliser subsidy, for example - to arrive at a product-specific AMS which is then evaluated against the applicable *de minimis* threshold. Non-product specific subsidies are calculated separately and, as in the former case, are included in the Current Total AMS only if they exceed the relevant *de minimis* level. In reference to minimum support price (MSP) which are required for procurement and stockholding of food grains in developing countries like India, price support measures and rule relating to that are very important.

According to Paragraph 9 of Annex 3 "The fixed external reference price shall be based on the years 1986 to 1988"[33] a time period science there has been exponential increase in food price. For the purpose of the calculation of AMS, the difference between in the administered price and ERP (World Market Price) is multiplied with the 'quantity of production eligible to receive the applied administered price.'[34]The terminology used

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33. Paragraph 9 of Annex 3, The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.
34. Paragraph 8 of Annex 3, Market price support: market price support shall be

in AoA Paragraph 8 of Annex 3 is not just because, it refers '*the quantity of production eligible*' and opposed to the *total procurement from the quantity*, which is eligible. Further, clarified that 'budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.' In sum, it may concluded that for the purpose of calculation of AMS, cast of total production eligible for MSP is relevant instead off cast of actual procurement on MSP.

At the Bali Ministerial Conference[35] members did not relax these conditions, but included a *peace clause* for non-conforming public stockholding by developing countries. This means that non-conforming public stockholding resulting in domestic support above commitment levels (*i.e*. in excess of Amber box limits) could not be challenged under the Agreement on Agriculture. However, The *peace clause* also imposed conditions that the stocks procured for food security purposes do not distort international trade or adversely affect food security of other members. Limited and shrinking policy space in Amber Box is creating problems in implementing the food security policies by developing countries as well as for India. Permanent solution to the issues related to public stockholding for food security purposes has now become an important issue for successful conclusion of the Doha Development Round.[36]

IV. INDIAN LAW AND PRACTICE ON FOOD SECURITY

1. Constitutional and Legal Mandate

Mahatma Gandhi had written that there could not be any swaraj without adequate provision of food to people. All modern civilised nations

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calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.

35. *Public Stockholding For Food Security Purposes Draft Ministerial Decision*, 7 December, 2013, WT/MIN(13)/38WT/L/913; 11 December 2013 Available at: *https://mc9.wto.org/system/files/documents/w10_1.pdf* last accessed on 22 June 2015.
36. Sharma, Sachin Kumar,WTO and Shrinking Policy Space for Food security: Issues and Challenges for China available at: *http://wtocentre.iift.ac.in/workingpaper/China%20Food%20Security.pdf* last accessed on 02 Oct. 2018.

recognised right to food as a human right as well as legal right. Article 21 of Indian Constitution assures every person right to life and personal liberty. The term "life" has been given a very expansive meaning by the Supreme Court of India and at the same time Art. 21 was used as a residuary fundamental right and has been interpreted liberally and broadly. In number of cases Supreme Court declared that 'Right to Food' is fundamental right under Article 21 of Indian Constitution.[37] In order to implement the judgments of Supreme Court and the constitutional obligation under Article 21 together with articles 39(a) 'citizens' right to an adequate means of livelihood' and Art.47[38]'Duty of the State to raise the level of nutrition and the standard of living and to improve public health' the Government of India has promulgated the National Food Security Ordinance on 5th July 2013. The Bill was introduced in the Lok Sabha on 7thAugust 2013 and passed on 26th August 2013. The Bill as passed by Lok Sabha was discussed and passed by Rajya Sabha on 2ndSeptember 2013. The Bill became an Act after it was assented to by the President Pranab Mukherjee on 10thSeptember 2013.[39]

The National Food Security Act[40] (NFSA) provides for legal rights and entitlements of persons belonging to eligible households. The Act defines 'eligible households'[41] under two categories: (i) households

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37. *KishenPattnayak& another* v. *State of Orissa,* AIR1989 SC 677; *People's Union for Civil Liberties (PUCL)* v. *Union of India and others*((1997) 1 SCC 301
38. Article.47 of Indian Constitution: Duty of the State to raise the level of nutrition and the standard of living and to improve public health- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
39. Compendium on parliamentary enactment, the National Food Security Act, 2013 Published by : The Secretary-General, Rajya Sabha, available at: *https://rajyasabha.nic.in/rsnew/publication_electronic/National_Food_security_Act2013.pdf*last accessed on 02 Oct. 2018.
40. The Preamble of the Act, "An Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto"
41. Section 2 (3) of the Act,"eligible households" means households covered under the priority households and the Antyodaya Anna Yojana referred to in sub-section (1) of section 3

covered under the Antyodaya Anna Yojana (AAY); and (ii) households covered as the priority households under the Targeted Public Distribution System (TPDS). The percentage coverage of population in rural and urban areas belonging to eligible households under the TPDS is to be determined by the Central Government on the basis of the population estimates as per the latest census figures. The entitlements of the persons belonging to the eligible households at subsidized prices shall extend up to 75% of the rural population and up to 50% of the urban population.[42, 43]

Each priority households shall be entitled to 5 kg. of food grains per person per month from the State Government under the TPDS. The households covered under the AAY shall be entitled to 35 kg. offood grains per household per month at the subsidized price not exceeding Rs.3, Rs.2 and Rs.1 per kg. for rice, wheat and coarse grains, respectively for a period of three years from the date of commencement of the Act and thereafter, at such price as fixed by the Central Government from time to time not exceeding the Minimum Support Price[44] (MSP) for wheat and coarse grains. Subsidized price for rice, wheat and coarse grains which were valid up to July, 2016 but present government is not willing to revise prices of food grains up to the June, 2019.

The Act also provides special nutritional support to women and children.[45] Every pregnant and lactating mother shall be entitled to a meal, free of charge, during pregnancy and six months after the child birth, through the local *Anganwadi* and maternity benefit of not less than rupees

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42. Compendium on parliamentary enactment, the National Food Security Act, 2013 Published by : The Secretary-General, Rajya Sabha, available at:*https://rajyasabha.nic.in/rsnew/publication_electronic/National_Food_security_Act2013.pdf*last accessed on 02 Oct. 2018.
43. Section 9 of the Act, Coverage of population under Targeted Public Distribution System- The percentage coverage under the Targeted Public Distribution System in rural and urban areas for each State shall, subject to subsection (2) of section 3, be determined by the Central Government and the total number of persons to be covered in such rural and urban areas of the State shall be calculated on the basis of the population estimates as per the census of which the relevant figures have been published.
44. Section 2 (10) of the Act, "minimum support price" means the assured price announced by the Central Government at which foodgrains are procured from farmers by the Central Government and the State Governments and their agencies, for the central pool"
45. Section 4 of the Act, Nutritional support to pregnant women and lactating mothers

six thousand, in such installments as may be prescribed by the Central Government. The Act also stipulates that every child up to the age of fourteen years shall be covered under this Act. For their nutritional needs, the children in the age group of 6 months to 6 years are entitled to receive age appropriate meal from the local *Anganwadi* whereas the children in the age group of 6 years to 14 years are to get one mid-day meal from the Government/Government aided schools. Where the government is fail to supply the entitled quantities of food grains or meals to the entitled persons, in this circumstance that person shall be entitled to receive food security allowance from the concerned State Government. Apart from all these, section 32 (1) of the Act provides that the Act shall not preclude the Central Government or the State Government from continuing or formulating other food based welfare schemes.

It is important to note that the Act provides food security[46] up to the 75% of the rural population and up to 50% of the urban population. All the children below the age of 14 years and every pregnant women and lactating mothers have statutory right to food under the Act. The Act is being implemented in all the States/ UTs, and 80.72 crore persons are being covered for receiving subsidized food grains. In Chandigarh, Puducherry and urban areas of Dadra & Nagar Haveli, the Act is being implemented in the cash transfer mode, under which food subsidy is credited directly into the bank accounts of beneficiaries, who then have the choice to buy food grains from the open market. For the month of December, 2017, Rs.12.91 crore were transferred as food subsidy for 9.24 lakh persons covered under the cash transfer of food subsidy scheme.[47]

2. Policy Initiatives by Government of India

i. *Procurement of Food grains*

The food security system in India is managed by intertwined organisational framework between Centre and States that involves centralized and decentralized procurement of food grains through price

46. Section 2 (6) of the Act,"food security" means the supply of the entitled quantity of food grains and meal specified under Chapter II;

47. ANNUAL REPORT, Department of Food & Public Distribution, (Ministry of Consumer Affairs, Food & Public Distribution, Government of India, 2017-18.

support operations, allocation and distribution of food grains at reasonable prices to consumers/beneficiaries through Targeted Public Distribution System(TPDS) and the maintenance of buffer stocks for price stabilization. There are multiple objectives may be achieved through the system of procurement in India. For example, providing fair price to farmers, making food grains affordable to low income consumers, provisioning for contingencies/shortages by maintaining buffer stocks and to reduce food price volatility.

For the purpose of procurement of food grains during the Kharif Marketing Season (KMS) and the Rabi Marketing Season (RMS), Food grains are parched at the Minimum Support Price (MSP) generally by the state governments in India. Paddy/ Rice and Coarse grains like Jowar, Bajra, Ragi & Maize are procured during the KMS and Wheat, Barley is procured during RMS. Food grains are procured at the Minimum Support Price (MSP) fixed by the Government of India. For KMS 2017-18, the MSP for Common and Grade 'A' paddy is fixed at Rs. 1550/- and Rs.1590/- per quintal respectively and for KMS 2018-19, it has been fixed for Common and Grade 'A' at Rs. 1750/- and Rs.1770/- per quintal respectively. The MSP of wheat was fixed at Rs.1625/- per quintal for the RMS 2017-18, and for RMS 2018-19, it has been fixed at Rs. 1735- per quintal.[48]

ii. *Stockholding of food grains*

Post-harvest wastages and losses of agricultural produce have been a major challenge in India. The reason for such huge post-harvest losses mainly attributes to lack of scientific storage facilities and improper transportation and poor infrastructure. Stockholding, in the last few years, has touched new heights given remunerative MSPs coupled with better operational outreach. As a result, Central Pool Stocks had increased from 196.38 lakh MT as on 01.04.2008 to a peak level 823.17 lakh MT as on 01.06.2012. Total storage capacity available with FCI is 360.68 lakh MT as on 30.11.2017. Storage capacities, both Covered and CAP, available with State Agencies for Central Pool stock of food grains is 365.68 lakh

48. Government of India Ministry of Agriculture & Farmers Welfare Department of Agriculture, Cooperation & Farmers Welfare, Farmer Portal, Minimum Support Prices (MSP) available at: *https://farmer.gov.in/mspstatements.aspx* [Accessed on 18 July, 2018].

MT. As a result, total of 726.18 lakh MT of storage capacity was available for storage of Central Pool stock of food grains.[49]

iii. *Distribution of food grains*

In India the Public Distribution System (PDS) evolved as a system for distribution of food grains at affordable prices or prices fixed by the government. PDS was started to manage food supplies during scarcity. Over the years, PDS has become an important part of Government's policy for the management of food security in the country. PDS is operated under the joint responsibility of the Central and the State Governments. The Central Government, through Food Corporation of India (FCI), has the responsibility for procurement, storage, transportation and bulk allocation of food grains to the State Governments. The Government of India launched the Targeted Public Distribution System (TPDS) in June, 1997 with focus on the poor. The coverage under TPDS was based on State-wise poverty estimates of the Planning Commission for 1993-94 and population projection of Registrar General of India for the year 1995. Subsequently, the base of the population projection was shifted to 01.03.2000.[50]

In order to modernise and to bring transparency in the TPDS, the present government is implementing scheme on End-to-end Computerization. The Scheme provides for digitization of ration cards & beneficiary records, computerization of supply chain management, setting up of transparency portals and grievance redressal mechanisms. A pilot scheme on DBT (In-cash & In-kind) on the pattern of "PAHAL"[51] has been launched in Nagri Block of Ranchi District, Jharkhand w.e.f. October, 2017. Under this scheme, the subsidy amount (economic cost, less the central issue price) is directly transferred into the bank account of the eligible NFSA beneficiaries in advance in the beginning of the month. The beneficiary then can purchase the food grains as per entitlement from the

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49. ANNUAL REPORT, 2017-18, Department of Food & Public Distribution, (Ministry of Consumer Affairs, Food & Public Distribution, Government of India)
50. *Supra* note 42 at 78.
51. Direct benefit transfer scheme for food subsidy in jeopardy; what ails this crucial scheme? available at:*https://www.financialexpress.com/economy/direct-benefit-transfer-scheme-for-food-subsidy-in-jeopardy-what-ails-this-crucial-scheme/830266/*last accessed on 02 Nov. 2017.

Fair Price Shop at economic cost of the food grains after authentication on Point of Sale (PoS) device.

The government has achieved significant milestones in the PDS reforms. As part of the implementation of NFSA, almost all states have undertaken PDS reforms. Reforms includes Adhaar Linked and digitized ration cards, Computerized Fair Price Shops, Direct Benefit Transfer scheme (DBT), Use of GPS technology, SMS-based monitoring, Use of web-based citizens portal etc. Transparency portals and grievance redressal mechanisms– Transparency Portals and Online Grievance Registration system/ Toll-free helpline numbers (1967/1800-series) are available in all States/UTs.[52]Recommendations of the Shanta Kumar Committee[53] provide useful suggestions for the future road-map of food policy. The much-needed PDS reforms are moving in the right direction.

Subsidy released for distribution of subsidized food grains and maintenance of buffer stocks during the last seven years and current financial year to FCI and the States operating the Decentralized Procurement Scheme is as follows:

52. SakshiBalani, Functioning of the Public Distribution System, An Analytical Report by PRS Legislative Research, Dec.2013. at 13, available at: *https://www.prsindia.org/administrator/uploads/general/1388728622~~TPDS%20Thematic%20Note.pdf*last accessed on 02 Nov. 2017

53. *Santa* Kumar Report on FCI-restructuring, Buffer stock, PDS & Food security & Direct Benefit Transfer, 22-January-2015, available at: *http://pib.nic.in/newsite/PrintRelease.aspx?relid=114860* [Accessed on 3 January, 2016].

Table 1: Subsidy released for distribution of food grains
(in crore)

Year	Subsidy Released		
	FCI	**States**	**Total**
2010-11	50729.56	12200.00	62929.56
2011-12	59525.90	12845.00	72370.90
2012-13	71980.00	12574.00	84554.00
2013-14	75500.02	14240.00	89740.02
2014-15	91995.35	21175.81	113171.16
2015-16	112000.00	22919.00	134919.00
2016-17	103334.61*	27338.35	130672.96
2017-18 (as on 31.12.2017)	104901.15	32000.00	136901.15

*includes Rs.25000 crore NSSF loan to FCI[54]

V. WTO NORM *Vis-À-Vis* INDIAN PRACTICE ON FOOD SECURITY

Under the present WTO framework, all members are allowed to provide green box subsidies and *de minimis* level of amber box subsidies. In addition to that, developing countries are free to offer support falling under the S&D box, and in special reference to public stockholding for food security footnote 5 of AoA provide certain exemptions for developing countries.

The existing WTO disciplines on agriculture particularly on food security, and some proposals to strengthen these, are far from perfect. Clear difference between WTO norm and Indian practice exist in the context of food security. Regardless of WTO norms the National Food Security Act (NFSA) provides legal rights and entitlements up to the 75% of the rural population and up to 50% of the urban population. Apart of this all the children below the age of 14 years and every pregnant women

54. ANNUAL REPORT, 2017-18, DEPARTMENT OF FOOD & PUBLIC DISTRIBUTION, (Ministry of Consumer Affairs, Food & Public Distribution, Government of India) at.35.

and lactating mothers have statutory right to food under the Actual subsidized prices are Rs.3, Rs.2 and Rs.1 per kg. for rice, wheat and coarse grains respectively. Food grains are procured in India at the Minimum Support Price (MSP) fixed by the Government. Government of India, for the purpose of stockholding as well as food aid always perching the food grains at administrative price and distribute billow the market prices. This policy and practice is contrary to the WTO norm. Therefore, India, argue that the requirements of these policy measures under the AoA are excessively restrictive and should be reform. WTO norm should not be considered just in the context of developing and least develop countries because it would be difficult for them to implement price support as well as other product specific budgetary support policy for food security in the immediate future due to shrinking policy space as a result of binding commitments related to agriculture sector.

All WTO members including India are under an obligation to fulfill the reduction commitments of WTO within the domestic support measures. As per the latest notification on 20th July 2018 to Committee on Agriculture, "India has no specific total AMS reduction commitments in its schedule."[55]The product specific subsidy was negative in the context of Wheat and Coarse cereals (bajra, jowar, maize, barley) and below the level of *de minimis* for all crops upto the Marketing Year 2016-2017.[56] Government of India recently announced new MSP *i.e.* for paddy Rs. 1750/- and Rs. 1770/- per quintal, for wheatRs.1735/- per quintal *etc.*.The new MSP have potential to increase the product specific subsidy more than the *de minimis*level therefore, it is challenging for India at WTO forum.

India's consistent position in the WTO has been that matters pertaining to livelihood, food security and rural development are of vital importance. Special and differential treatment is required for developing countries. In accordance with the decision of the Cabinet, India made it clear that the issue of food security was non-negotiable for India as it directly relates to the livelihood concerns of millions of subsistence farmers

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55. World Trade Organisation, Committee on Agriculture, 20 July 2018, G/AG/N/IND/13, at.3

56. World Trade Organisation, Committee on Agriculture, 20 July 2018, G/AG/N/IND/13, at.5

and food security of the poor and vulnerable sections of the society. An interim solution cannot be a temporary solution nor be terminated and must remain in place till such time that a negotiated permanent solution is in place.[57]

In Mid-2014, the new government came in power and pushed the pro developing countries approach under the discussion of WTO. India refused the ratification of Trade Facilitation Agreement, 2013 unless the demand of India is fulfilled. In the light of entire controversy Smt. NirmalaSitharaman, Minister of State in the Ministry of Commerce and Industry make a statement in parliament on 5 August 2014 regarding "India's stand in the WTO"[58] She stated that "the Bali Ministerial Decisions were adopted on ten issues relating to the Doha Development Agenda which is the agenda for the unfinished Doha Round of trade negotiations, underway in the WTO since 2001. Amongst these Ministerial Decisions, two are of particular significance – the Ministerial Decision for an Agreement on Trade Facilitation and the Ministerial Decision on Public Stockholding for Food Security Purposes. Public stockholding is a widely used means to ensure food security in many developing countries where agriculture is largely rain fed.[59] This is the only way to procure food for the Public Distribution System (PDS)".

VI. QUEST FOR PERMANENT SOLUTIONS FROM DOHA TO ARGENTINA

Governments have repeatedly raised the issue of food security at the WTO since the Doha Development Round in 2001 but the quest of formula to resolve issue relating to food security under WTO is as challenging as the quest of Holy Grail. Finding a permanent solution to the issues related to agriculture and public stockholding for food security

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57. Statement of Shri Anand Sharma, Minister of Commerce and Industry in the Lok Sabha and Rajya Sabha on the 9th Ministerial Conference of WTO at Bali.*http://commerce.nic.in/trade/Statement_CIM_Parliament_17_December_2013.pdf* [Accessed on 4 January, 2015] at. 3.
58. Statement by Smt. Nirmala Sitharaman, minister of state in the ministry of commerce and industry make a statement in parliament on 5 august 2014 regarding "India's stand in the WTO", available at: *http://commerce.nic.in/trade/CIM_parliamant_statement_WTO_5_8_2014.pdf* [Accessed on 4 January, 2016].
59. *Id.,* at 4.

purposes has now become an important issue for successful conclusion of the Doha Development Round.

Developed countries continue to have large entitlements to provide support to farmers. These would have been cut in the Doha Development Round which unfortunately remains unfinished. In present, developing countries are fighting to keep the negotiations focused on development against the single-minded mercantilist focus of most of the rich developed world on market access issues.

1. Bali Ministerial Conference and Food Security

The Ninth Ministerial Conference of the WTO ('MC 9') was held at Bali, Indonesia during 3-6 December 2013. In the Bali Ministerial conference in reference to food security and public stockholding, members agreed on following points:[60]

1. Members agree to put in place an interim mechanism to negotiate on an agreement for a permanent solution, for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial Conference.

2. In the interim, until a permanent solution is found, and provided that the conditions set out are met, Members shall refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security purposes existing as of the date of the Decision, that are consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA when the developing Member complies with the terms of the Decision.

Members also agreed to establish a work programme to be undertaken in the Committee on Agriculture to pursue this issue with the aim of making recommendations for a permanent solution. This work programme shall take into account Members' existing and

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60. *Public Stockholding For Food Security Purposes Draft Ministerial Decision*, 7 December, 2013, WT/MIN(13)/38WT/L/913; 11 December 2013 Available at: *https://mc9.wto.org/system/files/documents/w10_1.pdf* last accessed on 22 June 2015.

future submissions. In the context of the broader post-Bali agenda, Members commit to the work programme with the aim of concluding it no later than the 11th Ministerial Conference. The General Council shall report to the 10th Ministerial Conference for an evaluation of the operation of this Decision, particularly on the progress made on the work programme.

2. Nairobi Ministerial Conference and Food Security

The Tenth Ministerial Conference of the WTO ('MC10') is held at Nairobi, Kenya during 15-19 December 2015. Members agreed that Developed country shall immediately eliminate their remaining scheduled export subsidy entitlements as of the date of adoption of this decision and developing country Members shall eliminate their export subsidy entitlements by the end of 2018.In reference to public stockholding for food security purposes decided that "Members shall engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security purposes. In order to achieve such permanent solution, the negotiations on this subject shall be held in the Committee on Agriculture in Special Session"[61]

The G-33 proposal met with strong resistance. India, however, stood firm and through sustained efforts, managed to bring the US, EU, Australia, Canada and others to the negotiating table. The G-33 suggested several alternatives including inflation adjustment of administered prices. However, the developed countries effectively blocked any discussion on such proposals.[62] India displayed disappointment at the "cavalier manner"[63]

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61. Ministerial Decision on Public stockholding for food security purposes WT/ MIN(15)/44 WT/L/979 Ministerial Conference Tenth Session Nairobi, 15-18 December 2015.
62. *Ibid*.
63. Trade experts and NGOs have also said the 'Nairobi package' has "effectively killed" the fundamental objective of the WTO's Doha Round negotiations, which was to improve the trading prospects of the developing and the poor world, or in other words a 'development agenda, Biswajit Dhar, Professor at Jawaharlal Nehru University and trade expert, said "lack of consensus on the continuation of Doha Round, together with the clear articulation by the developed countries that they don't want to see the Doha Round any more, effectively means that we have seen the end of the Doha Round negotiations in Nairobi." "The Nairobi Ministerial Declaration… reflects the capitulation to insistent US proposals to set aside key Doha issues … and to open the door to issues that favour its own commercial interests," said Timothy A Wise, Policy Research Director, Global Development

in which issues of vital importance todeveloping nations are pushed into the future and expressed fears that the reform process started with the Doha round in 2001 "appears to be in jeopardy".[64,65]

3. Buenos Aires Ministerial Conference and Food Security

Eleventh WTO Ministerial Conference (MC11), which was held from 10 to 13 December 2017 at Buenos Aires, Argentina. Members of the WTO submitted a number of negotiating proposals to the WTO Committee on Agriculture in Special Session (CoA-SS). The submissions covered issues such as domestic support, public stockholding for food security purposes (PSH), export restrictions, market access and export competition etc.[66] WTO Members did not reach any agreement on the issue of public

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and Environmental Institute, Tufts University. The developing and the poor world wanted the Doha Round to continue till all outstanding issues, including on protection of poor farmers and food sovereignty, are resolved. But the rich countries wanted the Round to end and had sought the introduction of new issues that are of their interests, including e-commerce, global value chains, competition laws, labour, environment and investments.

Government to respond to WTO's 'Nairobi package' in Parliament, The Hindu Available at:*http://www.thehindu.com/business/Industry/wto-nairobi-meeting-government-to-respond-to-wtos-nairobi-package-in-parliament/article8011127.ece?ref=relatedNews*[Accessed on 20 December, 2015].

64. India disappointed over 'cavalier manner' at WTO, Available at: *http://www.financialexpress.com/article/economy/india-disappointed-over-cavalier-manner-at-wto/179945/*[Accessed on 22 December, 2015].

65. The Congress and other opposition parties will start an agitation within and outside Parliament on the issue of what they call the failure of the government to protect India's interests at the recently concluded Nairobi meet of the WTO. Mr Sharma, Deputy leader of the Opposition in RajyaSabha and former Commerce Minister told The Hindu. India did not secure any commitments at the Nairobi meet on a Special Safeguard Mechanism (a tool to help developing countries protect poor farmers from import surges and price falls of farm items) and on a permanent solution for the issue of public stockholding for food security purposes. "This is a huge failure at a time of agrarian distress and when many farmers are committing suicide. We will agitate within and outside the Parliament," Sharma also questioned how the government, after agreeing to the WTO's Ministerial Declaration in Nairobi, could release statements saying 'India opposes non reaffirmation of the Doha Development Agenda'. "Such statements have made already India a laughing stock," India return empty-handed from WTO meet: Anand Sharma, *The Hindu,* available at:*http://www.thehindu.com/business/Industry/wto-nairobi-meeting-india-return-emptyhanded-from-wto-meet-anand-sharma/article8011128.ece?ref=relatedNews* [Accessed on 21 December, 2015].

66. Update on World Trade Organization (WTO) Agricultural Negotiations And

stockholding for food security purposes, or on any specific post-MC11 agriculture work programme. Several groups of countries issued Joint Statements proposing additional areas for future work as part of the WTO negotiations. On agriculture, WTO Members were not able to reach any outcome because of substantial differences on many issues. For instance, on public stockholding for food security purposes, Members were not able to find a compromise despite the 2013 Bali Decision. They could not reach an agreement, *inter alia*, on the links between public stockholding and the need to make progress on domestic support, including cotton subsidies and the issue of transparency and notification obligations.[67]

The negotiations take place in the WTO Committee on Agriculture, meeting in special session and several dedicated sessions were held on public stockholding for food security purposes. Members kept to their well-known positions. WTO members consider food security a legitimate policy objective but they continue to disagree on how to shape the permanent solution[68]. According to 2018 annual report of WTO the Committee in special session carried out intense negotiations during the year. The Committee Chair held more than 100 meetings. WTO members made a number of proposals in key areas, such as public stockholding for food security and domestic support. Public stockholding for food security purposes was a priority issue for MC11but despite sustained efforts at the Ministerial Conference; no agreements were reached in Buenos Aires.[69]

The matter came up for discussion in the margins of the BRICS Trade Ministers meeting in Brazil on 14 July 2015 and the G20 Trade Ministers meeting in Sydney on 19 July 2015. It was also raised by the representatives of some countries in their interactions with the Indian government. Commitment and progress in working on the issue of public stockholding which affects the country's livelihood and food security. A permanent solution on food security is required, India cannot wait endlessly

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Regional Trade Agreements (RTAS) and FAO'S Support To Members, at 2, Rome, 26–28 September 2018, available at: *http://www.fao.org/3/mx617en/mx617en.pdf*[Accessed on 3 January 2015]

67. Eleventh WTO Ministerial Conference (MC11) – Outcomes for agriculture and fisheries, Trade Policy Briefs WTO Negotiations, No. 31,February 2018, available at: *http://www.fao.org/3/I8600EN/i8600en.pdf*[Accessed on 10 Feb. 2017]
68. WTO Annual Report, 2017 at. 35
69. WTO Annual Report, 2018 at. 46

in a state of uncertainty while the WTO engages in an academic debate on the subject of food security which is what some developed countries seem to be suggesting before they are ready to engage on this important issue.[70]

The General Council Decision on Public Stockholding for Food Security purposes makes it clear that a mechanism, under which WTO Members will not challenge the public stockholding programmes of developing country members for food security purposes, in relation to certain obligations under the WTO Agreement on Agriculture, will remain in place in perpetuity until a permanent solution regarding this issue has been agreed and adopted.[71] It, therefore, strengthens the safeguard available for continuing the Minimum Support Price policy which is a lifeline for millions of our low income, resource poor farmers. It is also critical for food security in India and in countries which have similar policies. The Decision includes a commitment to find a permanent solution on public stockholding for food security purposes. This introduces a sense of urgency in the process and would encourage other developing countries also to join the effort in pushing for a permanent solution at the earliest.[72]

Sanjit Kumar Chakraborty[73],summaries all the proposal made by different group for the purpose of permanent solution of public stockholding for food security. Numerous propositions have been uncovered through scholarly works, negotiation modules and other instruments such as G33 proposals. These solutions spanning across a plethora of sources include, but are not limited to, the following:

- Raising the *de mimimis* limit to beyond 10% for developing countries
- Eliminating the *de minimis* cap altogether for developing countries
- Including public stockholding of food items at any price (even if

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70. *Id.,* at 3.
71. Background Note on the WTO Negotiations, Dated on 25 August 2015, F. No. 1/14/2014-TPD (Agri) Ministry of Commerce and Industry Department of Commerce Trade Policy Division, at 1, available at: *http://commerce.nic.in/trade/Background_note_WTO_Negotiations_25th_Aug_2015.pdf*[Accessed on 3 January 2015].
72. *Id.,* at 2.
73. Supra note 26 pp. 225-226.

above market price) as a Green Box measure without having to account for the difference in the Amber Box.

- Revising the ERP and/or providing for a floating benchmark for calculation of the same
- The Committee on Agriculture making a clarification under Article 18.4 of the Agreement of Agriculture on excessive inflation
- Proposed change in the meaning of eligible production to include actual procurement only, and an increase in product coverage to include products more commonly subsidised in India

India's demand for a permanent solution on public stockholding subsidies at the WTO level is being challenged by several members, including Canada, the EU and the US, which are insisting on stiffer safeguards, restricted product coverage and a linkage with pruning of overall domestic support. Public stockholding for food security purposes is a priority issue for WTO but still world community in quest of a proper formula.

VII. CONCLUSION

Food security, for mankind's still a challenge at world level. All the institutions including State, UNO as well as WTO are under the moral obligation to facilitate the food security for all. As per the 2017 Goble Hunger Index Score, India ranked 100 out of the 119 countries listed and the same times FAO concluded that there has been a rise in world hunger. The absolute number of undernourished people, *i.e*. that facing chronic food deprivation, has increased to nearly 821 million in 2017, from around 804 million in 2016.

The right to adequate food is a long-standing international human right to which many countries are committed. Over the last decades, a number of countries have developed and implemented constitutional amendments, national laws, strategies, policies and programmes for the fulfillment of right to food for all but the same times public stockholding issue is still a major challenge in WTO forum and the amendment proposed by India in AoA must be considered at global platform as a desirable change. Members agreed to engage constructively to negotiate and make all concerted efforts to adopt a permanent solution on the issue of public

stockholding for food security purposes. In Indian context, at present all support to farmers is covered by the domestic support categories which are exempt from reduction commitments under the Agreement on Agriculture. New MSP and government plan to double the income of farmers may be critical in the context of WTO norm.

NOTES AND COMMENTS

ACCESS AND BENEFIT SHARING NORMS IN INDIA AND IMPLEMENTATION CHALLENGES: SOME REFLECTIONS

*RAJNISH KUMAR SINGH**

ABSTRACT : The difference between the objectives of the Agreement on Trade Related Aspects of Intellectual Property Rights and the Convention on Biological Diversity has already surfaced after the working of these international documents. The attempt on the part of various developing countries including India has been to evolve a legal framework for regulation of access to biological resources which complies with both the documents, however, the reconciliation remains a challenge for municipal laws. In India, the norms of access and benefit sharing are facing various implementation challenges. The issue is further aggravated by functioning of some of the State Biodiversity Boards and some of the judicial decisions. Further, other provisions particularly those related to procedural requirements of approval and timeline and offences etc. add to the challenges. The present paper presents some of the reflections related to above aspects for the indulgence of policy makers.

KEY WORDS : Biological Diversity, Conservation and Sustainable Use, Access and Benefit Sharing, ABS Rules, TRIPs and CBD, Implementation of BD Act

I. INTRODUCTION

The Agreement on Trade Related Aspects of Intellectual Property Rights, 1995 (TRIPs Agreements) was result of an intensive rounds of negotiations dominated by developed countries. The TRIPs negotiations

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were long, arduous and sometimes acrimonious.[1]The negotiations have had many differences including the North-South confrontations that persisted, although in a more muted manner, up to the very end of the negotiations.[2]At the time of above negotiations another document was also in the process of its making and it was the Convention on Biological Diversity, 1992.The CBD is built on a three-fold, interacting objective to ensure conservation of biological diversity, and sustainable use of its components; and to promote a fair and equitable sharing of the benefits arising out of utilisation of genetic resources.[3]

The South abandoned the common heritage strategy and successfully demanded for confirmation of national sovereign rights over genetic resources in the CBD negotiations.[4]The Convention accommodated the demands of developing countries over their biological resources which were supposed to be subject to private rights under the TRIPs Agreements. The increasing importance of biodiversity resources and associated Knowledge ignited severe tension between developed and developing countries as well as between multinational corporations and indigenous communities.[5]Developing countries were forced to adopt TRIPs Agenda but they attempted to strike back by signing the Convention on Biological Diversity, 1992, which first time recognised the national sovereignty of nations over their biological resources. These two legal instruments are called as representing demands of above two groups having competing interests. The demands of these two groups are well accommodated in some of the municipal laws.

India enacted the Biological Diversity Act, 2002 and there are three

1. JayashreeWatal, Intellectual Property Rights in the W and Developing Countries (New Delhi: Oxford University Press, 2010) at 11; *See also,*LekhaLaxman and Abdul Habib Ansari, "The Interface between TRIPs and CBD: Efforts towards Harmonisation", 11(2) *Journal of International Trade Law and Policy*, 2002, pp. 108-132.
2. *Ibid*.
3. The Convention on Biological Diversity, 1992, Article 1.
4. Kristin Rosendal, "Interacting International Institutions: The Convention on Biological Diversity and TRIPs- Regulating Access to Genetic Resources", *The Fridtjof Nansen Institute,* 2003, at 5.
5. "TRIPs versus CBD: Towards a Framework for Intellectual Property Protection of Biodiversity", available at: *https://shodhganga.inflibnet.ac.in/bitstream/10603/49080/14/9_chapter4.pdf*

main objectives of the Act: Conservation of Biological Diversity; Sustainable use of its components; and Fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[6]India was one of the leading voices at the CBD negotiation and facilitated its adoption. It is the third objective which created issues to be settled. Articulating norms around access and benefit sharing proved a significant challenge owing to the absence of any significant international precedent. The following parts highlight the challenges in implementation of the Act generally and ABS norms particularly.

II. BIOLOGICAL DIVERSITY LAW OF INDIA AND ISSUE OF ACCESS AND BENEFIT SHARING

The BD Act, 2002 introduced two new concepts into the legal and normative framework governing biodiversity in India namely "access" and "benefit sharing". It establishes three tier structure of National Biodiversity Authority (NBA), State Biodiversity Board (SBB) and Biodiversity Management Committee (BMC) to oversee the implementation of the Act.[7]The NBA on behalf of the Government of India takes measures to protect the biological diversity of the country as well as oppose the grant of Intellectual property rights (IPR) to any foreign country on any biological resources obtained from India or knowledge associated with such resources.

i.Norms for Access to Biological Resources

- Access to biological resources and traditional knowledge to foreign citizens, companies and non-resident Indians (NRIs) based on "prior approval of NBA".[8]
- Access permits to Indian citizens, companies, association and other organisations registered in India on the basis of prior intimation to the "State Biodiversity Board" concerned.[9]
- Any application for IPR based on Indian biological resources irrespective of whether such applications are field by Indians or

6. The Biological Diversity Act, 2002, Preamble.
7. *Id.,* Sections 8, 22, & 41.
8. *Id.,*Sections 3,4,and 6; and the Biological Diversity Rules, 2004, Rules 14-20.
9. *Id.,* Section 7.

non-Indians requires the prior approval of the NBA.[10]

- Exemption of prior approval or intimation for local people and communities, including growers and cultivators of biodiversity and *vaids* and *haqims* practicing indigenous medicines.[11]

ii.Access and Benefit Sharing Process

The Access and Benefit Sharing process under the Act involves the following stages:

- Paid application to secretary of NBA
- Application goes to Advisor (Law)
- Consultation with SBB and BMCs
- Opinion of expert committee on ABS is sought
- Verification by Secretary and Chairman again
- Matter placed in Authority meeting
- Clearance letter is issued by NBA with model agreement (Mutually Agreed terms)to applicant to deposit royalty to NBA Fund.

It is relevant to note that the mechanism of ABS under the law may raise two important questions in the context of Act's Regulating Mechanism *viz.* What is regulated? And who are regulated?

A large number of petitions during 2013 and 2014 by companies which were served show cause notice by Madhya Pradesh State Biodiversity Board prompted the Ministry of Environment, Forest and Climate Change to notify the guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014.[12]The above Guidelines was made by the National Biodiversity Authority in pursuance of the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological Diversity.[13] It is argued that the Guidelines

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10. *Id.,* Section 6.
11. *Id.,* Section 7.
12. *See*, YeshwanthShenoy, "A Critical Appraisal on Implementing Access & Benefit Sharing Guidelines", 2-4(1) *Journal of Traditional and Folk Practices*, 2016, pp.104-107.
13. The Gazette of India, Extraordinary, Part II, Section (3), sub-section (i), No. 612, dated 21st November, 2014.

change the way biological resources related intellectual property would be accessed and commercialized.[14]

In relation to norms of access it may be observed that for Access of Foreigner, 'non-Indians' are defined in a very broad terms to include even an Indian company with a single non-Indian shareholder.[15] As regards access by Indians, though the Act in section 7 calls for Indians to intimate the SBB when commercialisation of biological resources happens, however, several state rules are drafted in a manner that require that Indians must obtain 'permission'. This is a legal and implementation challenge.[16] Notices have been served to Indian companies by SBBs and ABS Guidelines have been challenged also.[17] Guidelines also ask for benefit sharing upon access by Indian entities. Ayurvedic Drug Manufacturer Association approached government officials for modification of 2014 Guidelines but, government response was not favourable.

Another significant issue is the list of exemptions provided in the Act, where access to biological resources does not require the permission of authorities. The Act provides that followings are exempted from the norms of access to biological resources:

- The Central Government may declare that the provisions of the Act shall not apply to biological resources which are 'normally traded commodities'. However the Government may only make such declarations with consultation of the National Biodiversity Authority.[18]The NBA has played important role in identifying such biological resources with the help of expert committee set up for the said purpose after consultation with different government bodies and research organizations. The Government has declared 385 biological resources as normally traded commodities till date.[19]

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14. Neeti Wilson, "Guidelines for Access and Benefit Sharing for Utilization of Biological Resources based on Nogoya Protocol Effective", 20 *Journal of Intellectual Property Rights*, 2015, pp.67-70.
15. The Biological Diversity Act, 2002, Section 23(b).
16. *See,*Shalini Bhutani and Kanchi Kohli, "Despite Landmark Judgment, Issues of Regulation Remain in India's Biodiversity Regime", available at: *https://thewire.in/law/divya-pharmacy-india-biodiversity-act*
17. *Ibid*.
18. The Biological Diversity Act, 2002, Section 40.
19. The Gazette of India, Extraordinary, Part II, Section (3), sub-section (ii), No. 858, dated 7th April, 2016.

- The provisions of access to biological resources also do not apply to the local people including growers and cultivators of biodiversity, and *vaids* and *hakims*, who are practicing indigenous medicine.[20]

- The provisions relating to access to biological resources are also not applicable to collaborative research projects involving transfer or exchange of biological resources between Government sponsored institutions of India, and institutions in other countries that confirms to notified Guidelines issued and approved by Ministry of Environment and Forest.[21]

- Access rules are also not applicable to human genetic materials and value added products as these are excluded form definition of biological resources under the Act.[22]Access to such resources are regulated under the Act and thus may be available to its users without restrictions under the Act.

- The rules of access to such resources does not apply to persons making application for right under the Protection of Plant Varieties and Farmers' Rights Act, 2001.[23]This exemption is possibly made to avoid the situation of conflict between these laws.

iii.Forms and Purposes

There are four forms for different purposes under the Act:

- Form I- Application for Access to Biological Resources and/or Associated Traditional Knowledge;

- Form II- Transfer the result of research to foreign Nationals, Companies, Non-resident Indians;

- Form III- Seeking Intellectual Property Rights;

- Form IV- Third Party Transfer of the Accessed Biological Resources and Associated Traditional Knowledge.[24]

In relation to the aspects of exemptions and the different forms various unsettled issues may be highlighted. These may include the

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20. The Biological Diversity Act, 2002, Section 7.
21. *Id.,* Section 5.
22. *Id.,* Section 2(c).
23. *Id.,* Section 6(3).
24. The Biological Diversity Rules, 2004, Schedule.

following:

a) Geographical location- many applicants may have accessed the resources/knowledge not directly but through various intermediaries including local markets, identification of benefit claimers in such a situation to is a challenge. It is difficult know for what purposes and at which place above resources are being used.

b) Normally traded commodities are exempted from access norms and there is a huge list of species identified by the government under the exemption normally traded as commodity. Does it not keep many biological resources of the country out of access norms? And whether such exemption would be right from conservation point of view?

c) Conventional breeding exemption under section2(f) of the Act does not appear to be clear on the point as to what constitutes traditional practices. For example, whether selling soya bean oil attract the ABS provisions? Since extracting oil is a traditional practice it may be said that ABS provision will not be invoked. The other view may be that the current methods of extraction are not traditional and hence ABS mechanism applies.[25]

d) Research collaboration- It is not clear as to how research collaboration is different from transfer of specimen between Indian and foreign research institutions.

e) Communication with patent office- The link between Patent law and access to biological resources is established with the help of disclosure requirement under the Patent Act, 1970.[26]Under the law geographical location of biological material has to be disclosed so as to identify the contributor and decide whether it is a fit case for NBA approval. But, the mechanism can only ensure that our resources and traditional knowledge are disclosed only if the application is filed in Indian office. The PCT route is outside the purview as well as foreign applications are outside the purview.In the absence of such a disclosure requirement in the laws

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25. ShaliniBhutani&KanchiKohli, *Litigating India's Biological Diversity Act: A Study of Legal Cases*, Foundation for Ecological Security, 2016, available at: *https://counterview1.files.wordpress.com/2016/12/bd-litigating-report-final-5-12-2016.pdf*
26. *See,* the Manual of Patent Practice and Procedure, the Patent Office, India.

of all the countries, the likelihood of misappropriation of biological resources and traditional knowledge of India in other countries can not be ruled out. An amendment in Article 29[27] of the TRIPs Agreement may be useful. It is also relevant to note that the issue of benefit sharing on the basis of the above link remains relevant only during the term of patent protection and not beyond that.

f) Another issue is delinking of the life of patent and benefit sharing requirement so that anytime the biological resource is used (even beyond the term of patent), benefit need to flow back to the community.

g) Third party Transfer (Form IV)- Non-Indian entities accessing the resource not directly but from Indian companies as Indian companies need not get approval under Form I, it becomes incumbent on the foreign entities to secure consent of NBA. This is required so as to avoid a situation where the purpose of form IV may get defeated.

h) Tracking and monitoring is an important aspect in order to prevent misappropriation.

i) Determination of Benefit Sharing is based on consideration such as commercial utilization of resources; stages of research and development; potential market for the outcome; amount of investment made; nature of technology applied; and timeline. Interestingly, the amount of benefit sharing is to remain same whether the end product contains one or more biological resources.

III. IMPLEMENTATION CHALLENGES FOR BIOLOGICAL DIVERSITY ACT

All offences under this Act are cognizable and non-bailable.[28]Police can arrest anyone without arrest warrant and that grant of bail is not a matter of right but a matter of discretion of the court. Absence of provisions to deal with the criminal procedures for search, seizure or arrest seems to be an important issue. The Forest Act, 1927, chapter 9, the Wild Life Protection Act, 1972, Chapter 6 provide for such powers to authorities.

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27. Tove Iren S. Gerhardsen, "Developing Countries Propose TRIPs Amendment on Disclosure", 2006, available at: *https://www.ip-watch.org/2006/06/01/developing-countries-propose-trips-amendment-on-disclosure/*
28. The Biological Diversity Act, 2002, section 58.

Further, Section 61[29] makes it a very authority centric legislation as it provides that no court can take cognizance of any offence except by a complaint made by the authorised officer/benefit claimer and statutory notice is required and also under section 190 of Cr.P.C. a magistrate can take cognizance of an offence through three means which are complaint, police report and information. The reasons for the same are not clear. Further, the law is authority centric because of another reason also. The standing to bring claim for benefit sharing under PPV&FR Act, 2001is diluted and a large number of persons and institutions have been given standing to raise the issue which is not the case with BD Act.[30] If the BD Act contains such kind of provisions then the scheme of benefit sharing may be realised to the greatest extent.

Coming back to the issue of lack of provision for search, seizure *etc*. it is relevant to note that the MP SBB has constituted the MP Biodiversity Enforcement Cell for taking legal action including arrest of those entities that are using biological resources without sharing benefits with the Board.[31]Pursuant to this, action was taken against GM of a company and two traders were arrested. Factories situated in Himachal Pradesh have been searched and biological resources were seized with assistance of forest department and HP SBB.[32]To what extend these activities are supported by law is a matter which requires indulgence of policy makers otherwise the tussle between users and regulators will continue.

National Biodiversity Authority in exercise of the powers conferred by section 64 read with sub-section (1) of section 18 and subsection (4) of section 21 of the Biological Diversity Act, 2002 and in pursuance of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity made the regulations called as

29. *Id.,* Section 61.
30. The Protection Plant Varieties and Farmers' Rights Act, 2001, Section 26 invites claims of benefit sharing to the variety registered under section 23(8) and section 24(2).
31. Alphonsa Jojan, "The Curious Case of the Indian Biological Diversity Act", 2017, available at: *https://spicyip.com/2017/11/the-curious-case-of-the-indian-biological-diversity-act.html*
32. *Ibid*.

Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014. The Guidelines is made for the purposes of determination of equitable benefit sharing.[33] The Act and the Rules make it clear that ABS will be made on a case by case basis though general criteria will be formulated through measures stated above.[34]

A foreigner, who intends to have access to biological resources or associated traditional knowledge for research or bio-survey and bio-utilization for research shall apply to the NBA in Form I of the Biological Diversity Rules, 2004 for obtaining access to such biological resource or associated knowledge, occurring in India.[35] The NBA shall, on being satisfied with the application enter into a benefit sharing agreement with the applicant which shall be deemed as grant of approval for access to biological resource for research etc. In case of biological resources having high economic value, the agreement may contain a clause to the effect that the benefit sharing shall include an upfront payment by applicant, of such amount, as agreed between the NBA and the applicant.[36]

Any person who intends to have access to biological resources including access to biological resources harvested by Joint Forest Management Committee/Forest dweller/Tribal cultivator/Gram Sabha shall apply to the NBA in Form-I of the Biological Diversity Rules, 2004 or to the State Biodiversity Board (SBB) prescribed by the SBB, along with Form 'A' annexed to the regulations. The NBA or the SBB shall on being satisfied with the above application enter into a benefit sharing agreement with the applicant which shall be deemed as grant of approval for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization referred to in that sub-regulation.[37]

In a judgement delivered on December 21, 2018 Uttarakhand High Court ruled that Divya Pharmacy (Indian company that manufactures Ayurvedic Medicines) will be subject to benefit sharing obligations under the BD Act. There was purposive interpretation of the provisions on ABS

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33. YeshwanthShenoy, *supra* n. 12 at 104.
34. *Id.,* at 105.
35. The Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, Clause 1(1).
36. *Id.,*Clause 1(2).
37. *Id.,*Clauses 2(1) & (2).

by the court to understand the intent of the parliament and not just the text. Court said that literal interpretation will lead to absurd outcome, where only foreigners are required to pay and not Indians. The aspect of differential treatment for Indian and foreigners in the context of ABS was diluted by the court.

It is difficult to understand why differential treatment cannot be given to Indians from foreigners. The provisions where the two have to be treated alike have been identified by the legislature for example potential patenting activity. Similarly, provisions have also been identified where differential treatment is to be given. Thus one may conclude that provisions like section 58, section 61 of the Act and decision of *Divya Pharmacy* and steps like MP Biodiversity Enforcement Cell will not help in effective implementation of the Act.

The implementation challenges can only be addressed if the true spirit of the law is appreciated. Further, minor technicalities the observance of which does not have direct effect on the purpose of the Act may be diluted. One such example may be thatNBA should consider the bona fide of the applicant and be open to issuing approval retrospectively. It must be kept in mind that the intent of the legislature is not to hinder research and development or commercial advancement but to ensure sustainable conservation and in the name of conservation we must not stop all avenues of research and scholarship. It is important to note that retrospective approach can encourage even those applicants who may have unintentionally missed seeking the approval. This seems to be a better proposition rather than spreading fear among innovators.

Another provision which presents challenge of implementation is the one related to NBA approval timeline under the Rules.[38]The prescribed time line of six months for approval and ninety days for disposing of the application for permission are not met mostly. Thus, a reconsideration of the prescribed timeline may not be out of context. We also need to conduct a study on the reasons for the above delay. There are other provisions which need reconsideration. For example, the penal provision appears to be harsh with less focus on conservation of resources and more on monetary sharing. Further, we may also consider modifying the provisions

38. The biological Diversity Rules, 2004, Rule 14(3).

which require multiple approvals, for example approval for access, IPR, and transfer of results *etc*.

IV. CONCLUSION

The foregoing suggests that probably there are gaps between the purposes of the Biological Diversity Act and the implementation of various provisions on ABS. The working of these provisions has resulted in wide dissatisfaction among the users of the law. As pointed before the procedure of ABS, list of exemptions, chapter on offences and other procedural technicalities need reconsideration. The experience gained with the working of the Act and ABS rules must be used to reformulate certain norms to make it in tune with the objectives of the Act. Role of local community must be recognised in decision making, so far the Act recognises them only as the benefit claimer for filing complain that too after giving statutory notice to the authority. We must also accept that it is good to see the law from the perspective of conservation but it is also important to see the law from the stand point of users.

HARMONISATION OF PUBLIC AND PRIVATE RIGHTS IN IPR : AN ANALYSIS

SUNEET SRIVASTAVA*

ABSTRACT : Intellectual Property is the product of human brain. A person who holds an IPR has the sole right to use it the way he or she desires. In other words it is an exclusive right against the whole world. It can also be considered as a negative right because if the right holder uses the right in an unruly manner then it may be considered as against human right or against the principles of human right perhaps that is one of the reasons that the right needs to be balanced in a proper manner. Harmonisation of this private right of the intellectual property holder with the public interest is must. In this paper the author has tried to analyse the ways how there can be harmonisation of IPRs.

KEY WORDS : Intellectual Property, TRIP, General Agreement on Tariffs and Trade (GATT), Patent, IP monopoly

I. INTRODUCTION

It is very important to understand that there should be a balancing of the exclusive monopoly right granted to the inventor with the public interest. These rights which are the creation of an individual's mind needs protection and are thus, accorded with some kind of protection in the name of exclusive rights or monopoly rights to the inventor.[1] IPRs, as the term denotes, are the products of the mind that are accorded certain kinds of protection.[2] It primarily originates from the 'intellect' and creates

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1. Aram Seinreich ,*The essential Guide to Intellectual Property*, Yale University Press, 2017
2. Siva Vaidyanathan ,*Intellectual Property : a very short introduction*, Oxford University Press, 2017

certain value. This value adds to the originality of an idea and so it should be protected. The basic question, however, is - how to protect merely the products of the mind? In legal terms something more would be required to really accord such a protection to an idea that originates in the mind. What kinds of incentives should be given to someone who has the idea to disclose the same in greater public interest? One way to do it is to provide a temporary monopoly to the IP holder through a statutory edict for a definite period. In this sense, IPRs are individual rights granted to an inventor or to a copyright holder. In turn, the IPR-holder has an obligation to disclose the invention or share his ideas with the public.[3] Further, he should be able to share his ideas with the public and implement the same within a definite period.

The creator of new idea or invention needs to be rewarded. The inventor spends long hours in finding something new and the application of that new invention would benefit the society. The creator of the ideas and invention would also invest his money and time. All these efforts need to be rewarded and the question arose as to how to reward these kinds of intangible subject matter that creates value. In other words, the creator should be able to recoup his investment in time and money within certain period of time. One way to do it was to create a situation wherein no one would compete with him. This is to exclude others from imitating or infringing original creation or invention.

Accordingly, the idea of granting a temporary monopoly over such ideas and inventions through statutory edict arose.[4] In the fifteenth century England the King granted monopoly rights to new creations under what was termed as 'Statute of Monopoly'. Monopoly, though regarded as bad in law, was given a statutory backing in the case of protection of new inventions and new ideas. No one could infringe the monopoly right of the creator for a definite period. After that period was over, the idea would fall into public domain. At that time anyone could take up that idea or invention and implement it. That way, it was argued, that the society would be benefitted.[5]

3. Section 83 (g) of the Indian Patent Act, for example, provides "that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public".
4. Chriss Weiss, *Key to Intellectual Property: Identifying your Patents, Trademarks, Copyright and Trade Secrets,* Kindle Edition2017
5. Stephen Jonson ,*Guide to Intellectual property* Cambridge University Press, 2015

II. PRIVATE VERSUS PUBLIC RIGHTS: ISSUES

Are IPRs private individual rights? Should IPRs have some public interest obligations? These questions are inherent in the nature of IP itself. These rights are applied for and granted to individuals for their creative works or inventions and exclude others from infringing these rights. In that sense, these rights should be regarded as private rights. On the other hand, considering its implications on the society, it is being argued that these rights should be treated as public rights and certain public interest obligations be placed on the holders of these rights.

The TRIPs Agreement, in its Preamble, terms IPRs as private rights. The entire TRIPs Agreement, it should be noted, is constructed on the assumption that IP are private rights and any action to be initiated cannot be done without prior lawful approval of the right holder. However, it is further argued that since the law confers on the individual a temporary monopoly right for a definite period, the individual also has concomitant obligations such as to disclose the invention (in the case of patents) fully and while doing so should provide the best way to locally work or implement the same.[6] The challenge to IP legislations within various countries is to find an appropriate balance between private gains of the individual right holders of the IP and the public interest concerns. The concern would be that the IP right holders should not use the monopoly nature of the right to strategize their presence in the market by eliminating competitors. The Indian Patent Law, for example requires the patent holder to take care of the 'reasonable requirements of the market'.

The public interest concerns also raise issues relating to the significance of IPRs and their benefits to the society. At the global level these issues are viewed differently by the developed and developing countries. One of the basic reasons for incorporating IPRs into GATT framework, as argued by developed countries, is to reduce barriers to

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6. Pursuant to this Report this proposal got incorporated as section 5 of the Indian Patents Act, 1970 provided that "(1) In the case of inventions (a) claiming substances intended for use, or capable of being used, as food or as medicine or drug or; (b) relating to substance prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds), no patent shall be granted in respect o claim for the substance themselves, but claims for the methods or processes of manufacture shall be patentable". Section 5 of the Indian Patent Act, 1970 has been deleted vide 2005 amendment

international trade. They had also argued that IPRs by themselves and on account of lack of effective domestic legislation, had distorted trade.

An effective IPR regime would, it was pointed out, facilitate transfer of technology and flow of foreign direct investment. That resulted in the query as to what would constitute an 'effective' and 'strong' IPR regime? TRIPs Agreement resulted in setting up formal and minimum standards of IP protection. TRIPs Agreement also mandated its Member States to strictly implement these minimum standards of protection. Developing countries had their reservations on these ideas and had objected to the inclusion of IPRs into the negotiating agenda of GATT. They had argued that GATT negotiations should not set standards for the IP protection. National legislative mechanisms, they had further argued, should have had the flexibility to approach and construct their own IP legislations taking into account their domestic needs and requirements.

While developing countries, *prima facie*, sought to incorporate certain public interest flexibilities into their IP legislations, developed countries argued for more stringent levels of protection. This has been an ongoing debate as to where and to what degree these public interest flexibilities should be allowed to be incorporated into the domestic legislations. In a more formal sense, a State has always the right to take necessary legislative and other measures in public interest. However, any arbitrary use of these flexibilities could also be challenged by the affected countries under the WTO dispute settlement mechanism.

Articles 7 and 8 of the TRIPs Agreement provide for what has been termed as flexibilities in implementation taking into certain public interest concerns. Article 7 provides that "The Protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations". Article 8 further provides that members of WTO while formulating or amending their laws and regulations could adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.

While there are divergent views on the level and degree of protection

and its formulation into domestic legislation, there is convergence on the issue of significance and benefits of IPRs. IPRs are crucial for a society or State in many ways. In the present state of affairs, IPRs constitute an important element in various decision-making processes such as issues relating to transfer of technology, local working of the patented invention, the possibilities for reverse engineering and other host of new issues relating to the protection of traditional knowledge and folklore. In larger scenario, IPR protection provides a basis for the effective development of a knowledge society. We shall examine some of these issues in the next section.

III. RELATIONSHIP BETWEEN THE TWO

In this section we shall attempt to understand the relationship that exists between individual rights and public interest. It should be noted that this relationship emerged during 19th century. Industrial revolution and the consequent development of numerous new technologies during that period provided the basis for this relationship. As mentioned in the earlier sections/units, IPR holders (patentees in particular) were reluctant to exhibit or transfer their new creations and inventions before others or in other countries. Their fear was that their new creations and inventions would be copied or imitated by others thereby wasting all their efforts *sans* any viable return or profit. IPRs, at this juncture, came as a handy legal tool to help inventors and creators to get an exclusive monopoly privilege for a definite period. IPRs, accordingly, provided the security against any imitation. The IPR holders had the option to legally challenge those who infringed their IPRs. IPRs and its enforcement helped in transfer of new innovative ideas from one country to another. This kind of transfer also helped in developing some of the key sectors of the economy. Copyright, for example, was till then a territorial right granted under a domestic legislation. The conclusion of the Berne Convention dealing with the protection of literary and artistic works changed the notions of territoriality. It, though, introduced the concept of reciprocity (on the basis of mutual protection), the authors and performers could look for markets in other territories and countries. IPRs, in that sense, expanded the marketability of the product. Increasing production of products and other subject matter of IPR helped the customers getting a fair deal or a good price.

The IPRs' case for sustaining economic growth and as a catalyst for economic development had other dimensions as well. IPRs would provide for the exclusive rights thereby stopping other inventors and creators coming out with better or competitive products. It is accordingly argued that it would curtail further inventive or creative activity. There were few questions. What kind of IPR laws should, therefore, be framed to overcome these kinds of problems? What sectors of the economic activity are to be excluded from the exclusive rights of the IPRs? Most importantly, how these rights are to be defined?

These questions lead us to the debate on what has been termed as 'strong' or 'weak' IPR[7] regimes. This is a debate that has gone on for nearly hundred years. Countries that had sound technological and innovative base opted for the strongest IPR protection. Countries that are still on the verge of developing their own technological and innovative base opted for selective IPR regimes, specifically in the case of patents. 'The patent controversy of the 19th century' as discussed in the earlier chapters arose on account of this uneven level of technological development. Those countries with high and emerging technologies would also look for new markets. Considering the nature of these technologies, they cannot be introduced in other markets without appropriate IPR protection. That again leads us to the point where in one will have to decide as to what would constitute a 'strong' IPR regime and conversely what would constitute a 'weak' IPR regime?

The strong IPR regimes provide most exclusive protection with no exceptions. In other words no sector of the economy is excluded from the IPR protection. IPR terms are longer and IPRs are granted within a definite time frame. The enforcement provisions are stringent and time bound. The weak IPR regimes, on the other hand, sought to exclude certain sectors of the economy from the absolute monopolistic nature of IPRs. They would attempt to rationalize the period of protection taking into account the diffusion rate of the technology and other related factors. The interpretative matrix of the enforcement provisions would be more conducive to their own domestic realities. Additionally, there could be other legislative mechanisms that would help in reducing the rigors of the hard IPR regimes.

7. David Waver, *Intellectual Property Rights: Critical Concepts in Law*, Taylor and Francis, 2006

IV. COMPLETE IP DISCLOSURE AS A PUBLIC INTEREST NORM

The grants of IPRs[8] are justified as a reward for disclosure. This is particularly true of patents. In copyright, protection is granted for the artistic and literary creation that has already been disclosed. An inventor may not disclose his invention in the absence of adequate incentive. Further to this, patents acts not only as an incentive but also as a reservoir of technological information. For example, the idea is that once the IPR grant expires anybody can use the information embodied in that grant. In other words, the subject matter of IPR grant whose term expires falls into public domain. Once in public domain it can be used, manufactured, and sold by anybody. Any new creation or invention that falls into public domain loses its novelty and for that reason it cannot be granted an IPR. Even when the subject matter falls into the public domain the original owner of the IPR grant retains certain rights such as moral rights. Any one, who infringes, mutilates or manipulates the original artistic or literary creation that has fallen into public domain could be sued for the violation of authors or artists moral rights.

As regards patent grants, the disclosure norms have two fold functions, namely (a) it would record the technological advance at the time of the patent grant i.e., when the required description is published (the actual manufacturing of the product may take some time as there is always a time lag between invention and innovation); (b) the collection of published patent applications would serve the scientific community as an up-to-date source on the advance of science. It should be noted that these considerations may not necessarily serve the purpose when the patents are taken out only to perpetuate the monopoly position. Above all, whatever has been disclosed in a patent specification, for instance, may not be a complete disclosure. In case of patents, the standard envisaged for a reasonable disclosure is its sufficiency to actually work the invention. In certain other cases, IPRs are resorted to only when the 'secrecy' was at stake. It is well known that a large and growing part of technology is not subject to IPRs. The actual disclosures are tied to large part of know-how and other restrictive requirements.

There is also this argument that disclosure may not necessarily always

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8. Stephen Johnson, *Guide to Intellectual Property*, Cambridge University Press, 2015

act as an incentive. Following reasons need consideration. (a) disclosures, particularly in the case of patents, may happen after several years e.g., patent examination procedures etc. may take very long time; (b) this restriction inhibits systematic and free exchange of materials within the scientific community either between individual researchers or between groups; and (c) disclosure through patents, for example, may mean less than full disclosure for it would be to the evident advantage of the patentee not to disclose fully and patent offices and judicial bodies tolerate a large amount of non-disclosure.

V. TRANSFER OF TECHNOLOGY

It is argued that an effective IPR regime would bring in many positive benefits to the society.[9] One of them is that it brings in technological know-how through transfer of technology. IPRs, it is further argued, would enhance the inventive and creative activity. This will help in the development of skilled personnel who would be conversant with the latest technological developments. Patent specifications that are filed with the local patent office, for instance, would contain the technological information that may in the long run benefit the society. That will add to the scientific and technical pool of the society. The flow of foreign direct investment and the decision-making process with regard to that would also largely dependent on the nature of IPR legislation in a given country. An effective copyright protection would allow the authors and artists to gain from their creative works at the global level. Geographical Indications would allow a community of producers to acquire benefits.

There are others, on the other hand, who argue that IPRs restrict further expansion of knowledge. It is possible that those who acquire an IPR would restrict the entry of others in that field. Sometimes, IPRs could be used as a tool to sustain the monopolistic right that it grants over a long period of time. However, IPRs have been regarded as the tool to trigger an effective transfer of technology and other related knowledge.[10]

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9. Prashant Reddy, Sunathi Chandrasekharan, *Create, Copy, Disrupt Indian Intellectual Property*, , Oxford Publications 2016
10. Virendra Kumar Ahuja, *Law Relating to Intellectual Property Rights*, Lexis Nexis Law, 2007

According to another view IPRs assist in protection and preservation of knowledge systems. The ambit of subject matter of protection of IPRs has now been expanded to include many new and emerging areas such as Traditional knowledge, folklore, genetic resources and others. The effective protection of these emerging areas through IPRs needs closer consideration.

It is argued that in the technology-driven market IPRs are regarded as an essential tool to sustain the economic growth for it facilitate transfer of technology and will also decide the sectors to which the flow of investment, specifically research and development (R & D) investments would take place. IPRs, being an exclusive right, purport to provide some comfort to the inventor or a creator, as the case may be, by providing a timeframe within which he could be assured of some return. We should also note that the climate or conditions for creations or inventions and their innovation would differ from country to country. An increasing IPR activity would help in building a pool of skilled technicians who would be conversant with the substantive or operational details of new and emerging technologies. For this reason, one could argue that uniform notion of IPR protection may not be entirely suitable or feasible.

At the outset, we need to understand the scope and application of IPRs. TRIPs Agreement lists the elements of IPRs. These are –patents, copyrights, trademarks, geographical indications (GIs), industrial designs, topography of integrated circuits and trade secrets. It should be noted that all these different elements of IPRs regulate and protect different kinds of subject matter. This is not all. They operate through domestic legal regimes. Patents, for instance, are regulated in India through Patents Act, 1970. Similarly, every country has its own legislation on patents, copyrights and other forms of IPRs. Each one of these IPR regimes operates with certain kinds of economic criteria. The protection sought for a particular subject matter through a specific IPR legislation, through various provisions would decide its economic implications as well. Pharmaceuticals and medicines, for example, are very sensitive to extent and scope of protection granted by patents. Historically, several countries had argued that they required independence in deciding what kind and at what level they need to frame their protection to be granted under their IPR laws keeping in view their public interest concerns. This level and scope of protection, it should be noted, had an inherent relationship with

the economic development issues as well.

VI. IP PUBLIC INTEREST DISCOURSE : INDIAN EXPERIENCE

The development of IP regimes post Second World War needs closer scrutiny to understand the complex relationship between IPRs and public interest. This period is crucial for the reason that during this period international community expanded to include more than hundred new countries within a span of three decades. These countries emerged from the colonial yoke and their primary focus after gaining independence was economic development. They regarded IPR as one of the tools for initiating the process of economic development. They sought to tailor their IP legislations to accommodate their developmental needs. One of the classic examples towards this effort could be seen in India itself. Immediately after independence in 1947 India appointed a Committee known as *Bakshi Tek Chand* Committee**.** This Committee suggested few changes to the Patent and Designs Act, 1911.

Thereafter, in 1957 Government of India appointed another Committee headed by Justice Rajagopala Ayyangar to examine and suggest a suitable patent regime for India. This Committee, after extensive consultation and after examining modern and forward-looking patent legislations that existed at that time concluded that India needs a patent legislation that would help it economically develop and at the same time allows it to get new and latest technology. In order to achieve this balance it suggested, after studying several then existing domestic legislations of many leading European and other countries that the product patent need not be granted in the sectors of pharmaceuticals and chemicals. Only process patents, the Committee suggested, could be allowed in these areas. It also further outlined as to what should not be patented. The term of the patent was also fixed at seven years for pharmaceutical and medicinal patents and for others the term was fixed at fourteen years. A WIPO survey made in 1988 showed that majority of the countries followed this kind of a legal framework to exclude or restrict certain sectors from patenting.[11] These exclusions and restrictions were justified on the ground

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11. According to section 3 of the Indian Patent Act, 1970 certain inventions were not patentable. Some examples are (a) frivolous claims, anything obviously contrary to well established natural laws; (b) inventions that are contrary to public order or morality or which causes serious prejudice to human, animal, or plant life or

that they facilitated the growth of these sectors within the Indian economy. Pharmaceuticals and chemicals, it has been pointed out, could be produced through different processes and that would help consumers get the product at a very cheaper price.[12]

Some of the recommendations of the Rajagopala Ayyangar Committee[13] which submitted its report in 1959 became part of the Indian Patent Act, 1970. One of the basic recommendations related to the actual and local working of the patent grant in India. The Committee had pointed out that the local working of the IPR grant, specifically patent grant had its benefits on the society. These ideas have been reflected in the section 83 of the Indian Patent Act, 1970 which *inter alia,* continue to point out (post TRIPs) that (a) patents are granted to encourage inventions and to secure that inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay; (b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article; (c) that the protection and enforcement of patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations; and…(g) that patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public.

The Indian IP legal framework identified few substantive issues that need consideration in the context of economic development and globalization. Copyright, trademark and other related rights posed fewer problems in terms of implementation and enforcement. The crucial issues

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health or the environment; (c) mere discovery of scientific principle and… there were at least ten other grounds. The provision has been amended vide amendment enactments of 2002 and 2005.

12. Section 53 of the Indian Patent Act has also been amended in 2005 to extend the protection to uniform 20 years from the date of filing of the patent.

13. While the Committee Report was finalized in 1959, it took another decade for India to formulate its own Patents Act. The Report was examined by a Parliamentary Select Committee and then it was debated in the parliament before it was finally adopted in the latter part of 1960s. The 1970 Act formally came into force in April 1972.

relating to economic development arose in the context of patents. We may deal with two of the most important requirements that would enable an IP regime, specifically relating to patents, to balance its public interest concerns along with private gains concept. These are (a) local working of the patented invention and (b) disclosure and transfer of technology.

The policy considerations to balance the IP regime need closer examination.[14] One of the basic requirements in this regard was local working of the patented invention. It is argued that the actual and local working of the patented invention had a close link with the economic development. We could, *albeit* briefly, examine this aspect. Historically, in the case of patents, the local working of the patented invention had been a contentious issue. For that matter all IPR regimes that include copyright, trademark, designs and others are implemented and enforced locally. We should also note that excluding patents and other IPR regimes do not provide absolute monopolistic conditions. Accordingly, while granting a patent grant majority of the local legislations, including Indian Patent Act provide that the inventions that have been granted patents must be worked locally within a reasonable period of time. The Paris Convention that was concluded in 1883 debated this issue of local working for nearly eighty years. Article 5 of this Convention dealing with the issue of local working of the patented invention was revised or modified in six different revision conferences. Initially, as it was drafted in 1883 Article 5 of the Paris Convention provided for the absolute right to the patentee to own the patent.

In the subsequent revision conferences the issue of 'abuse' of monopoly rights granted by the patent came into question. In other words, abuse of the monopoly right was in different forms. For example, once the patent holder acquires the patent right he may not do anything with his patent right for the period for which it was granted. That would result in loss to the society to get the benefits or fruits of his invention. Apart from this, it would also effectively block others from doing anything about that invention. Most importantly, if it is a very important invention, say a life-saving drug, the society and its 'reasonable requirements' or the 'reasonable requirements of the market' would not be met. How to

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14. Oran Bracre *Owning ideas: The Intellectual designs of American Intellectual Property, 1790-1969*, Cambridge University Press (December1, 2016)

contain these kinds of abuses? This was the question that came up before the revision conferences of the Paris Convention keeping in view specifically the commercial and economic aspects of the inventions.

These revision conferences held between 1900 and 1967, interestingly, while recognizing the imminent possibilities of such gross abuses provided certain conditional answers. For example, in one of the earliest revision conferences of the Paris Convention, negotiating members decided to provide a time frame of three years to the patent holder within which he should take measures to locally work the patent grant. If he fails to do so in that period of three years option was given to the Member States to initiate action either to compulsorily license the product to a third party who wishes to locally work it or by way of a 'licenses of right' unilaterally give it a third party for production to meet the reasonable requirement of the market. In extreme cases of urgency and necessity the rights of the States to revoke the patent was also retained. By 1967, this right of revocation was not acceptable to many technologically-leading countries.

The provisions of the Paris Convention relating to local working in the last one hundred years moved from an absolutist position to a more qualified absolutist position that allowed the patent holder retain certain rights against local working. To put this debate in more general terms, those countries with advanced level of technology preferred a qualified absolutist position *vis-à-vis* local working. Countries that were attempting to catch up with the developments in the arena of latest and emerging technology argued for stringent rules for local working. Local working brings in not only investment and technology, it also allows the development of skilled personnel who would be conversant with the latest and emerging technology. The evolution of such a skilled workforce would be beneficial to a society for it would bring lot many economic benefits. The decision to locate a factory or a work station would depend on the availability of this kind of skilled workforce in a given country. Differential in wages and other related costs would also help in making that investment more viable and cost effective. That would invariably help the consumers in terms of getting a product at lower price. It would also help and provide for more diversified range of products and further could lead to many alternatives. All this, however, would largely depend upon norms relating to disclosures. It is important to set standards for disclosures as these

disclosures in patent specifications virtually carry with them a cache of technological wealth.

The issue of local working is closely linked to disclosure norms (as enunciated in the case of patent applications) and transfer of technology. Both are very crucial for the economic development and are most significant in the context of globalization. A patent specification usually contains claims (as described in various steps) towards performance of certain invention. In other words, a patent specification would describe the best way of working that invention. More importantly, the description incorporated in the patent specification should be understood by what has been termed as the 'reasonably skilled person in the art'. The current state of the scientific and technological development is usually referred as the state of the 'art'. A reasonably skilled person is usually conversant with these developments and would recognize instantly the novelty of the invention. A patent examiner, in a patent office for instance, could be regarded as on such person who is reasonably skilled and has the knowledge of the state of the art. The disclosure of the invention in a patent specification or application should be comprehendible by him.

If an invention is not disclosed properly it may not be possible to locally work that in a given case. The whole economic rationale of patent grant, in such a case, would fail. That takes us to the next question as to what should constitute the correct or best mode of disclosure. The standards of disclosures vary from country to country. A stringent requirement of disclosure may also hinder the IP activity. A balance needs to be stuck between the level of disclosure and its application. Sometimes patent holders, big companies in these cases, would disclose what is specifically required for the grant of patent. They would perhaps disclose more as and when the patent term would be coming to an end. The additions to patents or new forms of existing inventions would allow them to retain the control over the markets by keeping their competitors away. The disclosure norms, in such cases, are used strategically to gain control over markets and to exclude competitors.

This kind of abuse of IP monopoly with less or restricted disclosures need to be balanced and the abuse of IP monopoly should be curtailed. That would be the primary task of the local patent legislation. It should be noted that issues concerning transfer of technology would largely depend on the level of protection granted or the balancing of these rights

within IP legislations. Many decisions on transfer of technology, it is argued, may not necessarily and entirely dependent on the local IPR regimes. At the same time, many other decisions with regard to investment and working of that investment in a given country would be largely dependent upon an effective IP regime. The movement of capital from one country to another is a phenomenon which has been the hallmark of the current sweep of globalization. That sweep may not be of any assistance to many of the developing countries. It should be noted that their priorities are different. Technology may not really be useful for them unless such a technology is adapted to their local conditions. It would also be important to note that technologies that are outdated may only drain their meager foreign exchange reserves. The IP regimes may be a useful tool in attracting new and emerging technologies. But, the internationalization of IP protection by placing it in the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT), transformed the entire linkage that existed between of IPRs and economic development. The TRIPs Agreement that was finalized and applied since January 1995 brought in different focus and set in certain minimum standards relating to IPRs.[15]

VII. CONCLUSION

Thus, we can say that there is a need to balance individual rights and public interest. It can be seen that the entire negotiating history of Paris Convention, as we have outlined in the beginning, reflects this relationship. Article 5 of the Paris Convention was at the core of this debate which *inter alia,* dealt with the issues concerning abuse if patent monopoly and measures to mitigate this abuse. A time frame of three years was introduced either to locally work the patented invention or in the absence of such working to compulsorily license the subject matter of patent grant in public interest. We have looked at the Indian experience in balancing the public interest concerns vis-à-vis individual rights with specific reference to section 83 and 84 of the Indian Patent Act. In this study we have also briefly examined the elements that constituted the 'strong' and 'weak' IPR regimes. Reference has also been made to the

15. Kusdeep Darni and Neeraj pandey *Intellectual Property Rights*, PHI Learning Pvt Ltd, Delhi, 2014

TRIPs Agreement and the minimum standards that have been incorporated in that Agreement. TRIPs Agreement, as we have seen, does not actually define an IPR. It merely lists out different kinds of IPRs. IPRs, therefore, include patents, trademarks, copyrights, geographical indications, industrial designs, topography of integrated circuits and trade secrets. Reference has also been made to Article 7 and 8 of TRIPs Agreement that seeks to provide flexibility in implementation.

The discussion, thereafter, turns to the approach to protection. What should be the approach to protection? Should IPR be treated as private rights or public rights? We have seen that TRIPs Agreement, in its Preamble, terms IPRs as private rights and the entire approach of TRIPs is to set the minimum standards with that approach. The public interest concerns are also important considering the fact that IPRs are essentially monopoly rights granted for specific period through a statutory enactment. In the above study we have also briefly looked at the significance of IPRs and its role within the society. We have also looked at the role of IPRs in the context of a developing country, specifically India. What role IPRs would play with regard to the question of transfer of technology and knowledge preservation.

BOOK-REVIEW

Competition Law in India **by** Abir Roy & Jayant Kumar, 2nd edn. (2018), Eastern Law House Publication, Paperback pp. 799, price Rs. 875/- ISBN Number: 9788171773350

Articles 38 and 39 of the Constitution of India[1] provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing (a) that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and (b) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Accordingly, Parliament had first enacted the MRTP Act thereafter, the Competition Act to promote equitable distribution of wealth and economic power. The Competition Act is the creation of the union legislature and there is no corresponding law enacted at the state/provincial level.

The objective of the Competition Act can be further gathered from its preamble which states as follows –

> "An act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom

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1. Article 38 and 39 of the Constitution of India is part IV of the Constitution, referred to as Directive Principles of State Policy (DPSP). DPSP is guidelines to the central and state governments of India, to be kept in mind while framing laws and policies. DPSP is not enforceable by courts, however the principles laid DPSP are considered fundamental in the governance of the country, making it a duty of the State to apply these principles in making laws to establish a just society in the country

of trade carried on by other participants in markets, in India…"

Competition law is a rapidly growing area of law which reflects the free market economy and increasing world globalization. The huge economic movements which have taken place in recent years increased the attractiveness of this subject among readers. No doubt there are so many literatures on said subject but for comprehensive reading for academicians and legal practitioners only few text books are available in the market till date specially on Indian perspective.

The book under review titled "Competition Law in India" is authored by Advocate Abir Roy and Jayant Kumar. The book is exhaustive in its ambit, rich in case law and the commentary given on each section speaks volume about writing skill and depth knowledge on subject of author. The book is divided into five chapters.

Chapter I of the book is Introduction which narrates about overview of Anti – Trust laws in India, the past and present and also provides a brief history on the evolution of Anti – Trust laws in India, from the days of the MRTP Act, its short comings and its effect on the Indian market to the currently in force Competition Act, 2002.

Chapter II deals with Anti-competitive Agreements and Competition Law. Section 3 of the Competition Act states that any agreement which causes or is likely to cause an appreciable adverse effect (AAE) on competition in India is deemed anti-competitive. In this chapter author has discussed the meaning, instances and scope of anti competitive agreements in detail. Although the phrase appreciable adverse effect is not defined in the Act but in this chapter author has analyzed the said phrase in detail through case law.

Chapter III of this book corresponds with section 4 of the Competition Act, 2002. Section 4 of the Competition Act is the operative provision of the Act dealing with the abuse of dominant position. The term 'dominant position' has been defined in the Act as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour". Section 4 prohibits any enterprise from abusing its dominant position. The author has outline the meaning and scope of

dominant position and the factors to evaluate the dominant position of an enterprises given in section 19 of the Act in the Chapter III of the book .

Chapter IV is devoted to provisions related to regulation of combinations. “combinations”, a term, which contemplates acquisition, mergers or amalgamations. Combination that exceeds the threshold limits specified in the Act in terms of assets or turnover, which causes or is likely to cause an appreciable adverse impact on competition within the relevant market in India, can be scrutinized by the Commission. In this chapter author has discussed all the relevant provision of combinations, types of combinations, procedure for investigation in combinations and regulation of combination under the Act.

Chapter V deals with Intellectual Property and Competition Law. The laws on intellectual property rights (IPRs) and competition have evolved historically as two separate systems. The traditional role of competition law has been to promote efficiency in the market and thereby prevent market distortions whereas the role of IPR has been the promotion of innovations by granting protection and rights over inventions. The general perception is that there is an inherent tension between IPR and competition law. In this chapter author had discussed the nexus between IPR and competition law in general with a focus on India. It also proposes to deliberate upon and discuss judicial decisions and policy measures undertaken in different jurisdictions so as to understand the nature of real-time disputes in other countries and to help formulate concrete guidelines for the effective working of Indian competition authorities and the patent offices.

The book contains two appendices. Appendix1 is bare provisions of The Competition Act, 2002 and Appendix 2 deals with the reports and recommendations of Raghwan committee on competition law and policies in India. The book also provides adequate reference to the relevant provisions and jurisprudence of EU and US competition law, to provide a context and deeper insight into international best practices in competition law.

On the whole this book aims at providing a practical insight on the evolving nuances of Indian competition law to enterprises, their management and officers in charge, on all three substantive aspects of the Competition Act 2002, i.e. provisions relating to anti-competitive

agreements, abuse of dominance and merger control provisions. The book traces the march from the erstwhile MRTP regime to the new competition law regime and provides an insight into the Indian competition jurisprudence being shaped by the Competition Commission of India from 2009 to date. It also highlights several substantive critical issues, which have developed over the course of years, as competition law has just witnessed hale a decade of it enforcement. Given that the CCI has become a very aggressive regulator with its hefty fines and sanctions, it is highlighted that clear standards and rules need to be in place for enterprises to understand the nuances of the new competition law. In this light, this book has incorporated the legal texts, interpretations by the Commission, economic analysis on every topic and scope of these economic interpretations along with examples cited from other jurisdictions predominantly the EU. Needless to say it is a must have for all legal practitioners, students, academicians and enterprises in the sphere of competition law.

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