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ARTICLES

NOTES AND COMMENTS

BOOK-REVIEWS

HUMAN TRAFFICKING : INSUFFICIENT LAWS AND THE ROLE OF LAW ENFORCING AGENCIES IN BANGLADESH

*MD. MORSHEDUL ISLAM**

ABSTRACT : Human trafficking is a major problem in the present world. It is not a problem at all, but the outcome of failure in different sectors particularly- economic and political fields of the government. Bangladesh being a developing country is not out of this issue. Lack of good governance, political unrest, rampant corruption, declining economic condition, unprecedented rate of unemployment, and lack of surveillance on the part of police and Border Guard of Bangladesh are vital causes for human trafficking in Bangladesh. Men, women and children are the subjects of human trafficking. In Bangladesh laws applied in combating human trafficking are concentrated to women and children. Recently trafficking of Bangladesh men in huge number destined to South East Asian countries by waters became the headlines of national and international news media. Human traffic of men is not a new aspect in Bangladesh. According to some report number of men trafficking is in quantity equal to and to some extent more than that of women. The laws are incapable of, and the role of police and BGB is not notably praise worthy in combating human trafficking. A notion prevalent is that crimes occur in Bangladesh not for the negligence of police but for the lenience of the political government. If law enforcing agencies carry out their duties professionally, crimes would be reduced and criminals would be contained to a great extent, let alone crimes like human trafficking. This paper is thus intended to point out the loopholes of existing human trafficking laws, enchain all

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aspects of human trafficking under one umbrella including the godfather of human traffickers, make recommendation for stimulating police and BGB to carry out their professional duties and thereby urge the legislature to adopt appropriate measures for making a full stop to human trafficking.

KEY WORDS : Human trafficking, Forced Labour, Negligence, Human Trafficking Act, , Constitution of the People's Republic of Bangladesh, Dhaka.

I. INTRODUCTION

Bangladesh is going to reach the rank of middle income countries by 2021. In spite of living in the dream of future bright Bangladesh people are being trafficked in a huge number every year for the search of job and better life. The reality of government's assertion does not match with the declining socio-economic, political and moral conditions of Bangladesh society. Any dimming chance of getting enlightened economic call draw millions of literate/ illiterate, able young and old irrespective of gender with magnetic force. Such type of smallest hope of better life encourages the mastermind of human trafficking in Bangladesh as well as other parts of the world. Only economic deficiency is not the cause of human trafficking. Political unrest and lack of good governance play vital role in accelerating the number of human trafficking in Bangladesh. Law enforcing agencies have not less complicity in this regard too. Whatever may be the root cause of human trafficking, government made law prohibiting it in all its forms? After legislative enactment government feels that she has finished her duties whatever may be the output of the same. The government and its spokespersons in meetings, public gatherings, seminars, conferences etc reiterate that they have accomplished their responsibility and duty keenly and smoothly with regard to human trafficking without following the outcome of the act. It is the researchers or academics or the field workers who are engaged in the implementation of law face defects of the same. Immediately after the passage of new human trafficking law in 2012 in Bangladesh, reports of human trafficking of Bangladeshi by waters disseminate all over the world. This law however incorporated every subject of human trafficking viz, man, woman and child. This law is claimed to be the perfect one but in reality what challenges are faced by the law enforcing members during its execution have never been examined. That whether law enforcing agencies are carrying out

their responsibilities to curb human trafficking or not also falls within the responsibilities of the government. Therefore this paper is intended to analyse the prevailing human trafficking law in Bangladesh and at the same time to examine the role of law enforcing agencies in combating human trafficking.

II. HUMAN TRAFFICKING LAW IN BANGLADESH

In Bangladesh there was no specific law relating to prohibiting human trafficking as a whole. Bangladesh constitution contains certain provisions in articles 18(2), 34(1), 36 which though are not directly related to human trafficking yet have some remote touch with the outcome of that such as, prostitution, forced labour and freedom of movement.[1] Since after being trafficked the subjects thereof i.e., women, men and children, abused for sex work, forced labour, and put into captivity, can knock the door of highest court for redress but these provisions do not at all mention human trafficking.

In Penal Code-1860 there are certain provisions which deal with the objects of human trafficking such as sale or purchase of minors for immoral purposes, rape, kidnapping, abduction, slavery, forced labour, procurement of female minors etc but do not directly mention the phrase human trafficking.

The Suppression of Immoral Traffic Act, 1933 dealt with women and children particularly girl children. It negated trafficking of this section for sex business or illicit purposes. This Act was repealed after the passage of the Women and Children Repression Prevention Act, 2000. This new law contained only two sections- 5 and 6 which definitely focused on objects and penalties of human trafficking. This law did not define human trafficking, nor did it clarify the position of man. It prescribed punishment for trafficking of women for sex work and children for immoral purposes. It penalised mastermind of women trafficker, client of sex worker and brothel owner. There are many aspects of human trafficking which were ignored of by that Act. Because of the shortcomings and incompleteness of all the above mentioned laws regarding human trafficking, the government being pressurised by international organisations, international

1. *The Constitution of the People's Republic of Bangladesh*, Dhaka, 1996

non-governmental organisations, and civil society groups adopted the Prevention and Suppression of Human Trafficking Act, 2012 repealing all other previously enacted laws relating to human trafficking. However this law authorises the ongoing proceedings registered and carried on under previous laws.

a) Defects in Current law

Government says that the Prevention and Suppression of Human Trafficking Act, 2012 is an exhaustive one total on which deals not only with every aspect, object and criterion of human trafficking but brings mastermind, middlemen, agent, broker of human trafficking, the owner and agent of brothel, and the sex worker too under its ambit. In respect of severity of punishment it is one step ahead of previous laws and even the international conventions too. It covers up all subjects of human trafficking- women, men and children. In spite of having all the aspects of a good law there are certain loopholes in the new human trafficking law.

i) Maiming any Person or Organ Trade[2]

It says that maiming any person or the removal of organ for trade purpose fall within the term exploitation or oppression. Illegal organ transplant and removal of organ deceptively is a topic which requires a sole law to deal with the culprits- doctors and nurses, hospital as well as nursing home owners, agents and suppliers of victims are involved in such heinous crime. All these aspects of organ trade are interestingly compressed into two terms of a small clause. For couples of years victims of internal and external trafficking alleged that their kidneys were removed in the name of medical checkup before providing them employment. Hundreds of victims of such illegal organ trade raised their voice against the internal and external masterminds of organ trade and demanded justice. Police only held two or three local agents but did not take action against them let alone the masterminds. Police did not proceed with the investigation without any reason. Perhaps the masterminds were very strong and powerful, and they might have support of the upper class of the society. This is carried out by a scores of persons- illiterate to highest academic degree holders in other words it's an organised crime most

2. *The Prevention and Suppression of Human Trafficking Act 2012,* Act No.3 of 2012, Section 2 subsection 15 clause (h)

probably planned, arranged and carried out with the aid and cooperation of government officials including the police.

ii) Penalty for Kidnapping, Stealing and Confining with intent to Commit Human Trafficking [3]

In Middle-Eastern countries there exists a huge demand for Bangladeshi maid servants. News reveals that some maid servants are made subject to sexual exploitation. Government for couples of years takes action against some of the recruiting agencies who provide these female workers to Middle-East countries. Section 10 of this Act says that where any person (natural or artificial or group of persons not incorporated) having the knowledge of the future use of these women transfers them to the said abused abode shall be convicted with severe punishment- imprisonment and compensation both. The law is silent if that person is none other than the government. Here another important matter remains absent in the Act and that is the flesh abuser i.e., the Sheiks of Arab or in other words owner and his male family members who abuse the captive Bangladeshi women in their residents in the name of house hold services. In 2014 one female Anu aged 45 went to Dubai as a maid servant through proper government channel. Immediately after entering into owner house she was made sex slave. In order to get rid of such flesh business she escaped from the resident within 36 hours after arrival at the said destination and took shelter at Bangladesh Embassy in Dubai. Thereafter she returned to Bangladesh within a week. Here government was involved and it seems that the government took no responsibility whatsoever, neither in compensating Anu nor in criminating the the foreign family at government level. The Sheikh and his family members who sexually assault and abused "Anu" are not criminal, nor part of crime committed under this Act. They are above the law. This law has not put any punishment for government nor made any provision criminalising government as human trafficker. Definitely here requires some change i.e., insertion of new provision for ill doing of the government and abuser of women in foreign soil.

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3. *The Prevention and Suppression of Human Trafficking Act 2012,* Act No.3 of 2012, Section 10

iii) Penalty for Keeping Brothel[4]

Prostitution is not legally prohibited in Bangladesh though Article 18(2) of Bangladesh Constitution stipulates that government shall take appropriate measures for preventing prostitution.[5] So far we know prostitution is legal and there are unknown numbers of sex centres or sex villages in Bangladesh which are basically called "Palli". Under the shadow of government and with the protection of police these Pallis carry on flesh trade peacefully, strongly and with new recruits. Section 12 of the law penalises the keeping, managing, assisting of brothel- sex Palli. In Dhaka innumerable number of beauty parlours, massage parlours carry on flesh business under the auspices of police. Even Gulshan, Banani, Baridhara, residential areas of high class society members operate sex amusement centres using rented flat in front of police and army officers. Here bureaucrats, political figures and members of upper class are seen to come for amusement and enjoyment in name of refreshment. It is suggested that prostitution must be declared as a crime and legally made illegal all its forms for the upkeep of moral value.

iv) Penalty for Soliciting for the Purpose of Prostitution[6]

Flesh trade at individual level is penalised by this Act though call girls and escort style sex is growing rapidly in Dhaka and other big cities. Unconfirmed reports suggest that in Rajshahi University some racket of professional sex business has been going on with the female students for a long time under direct control of some wives of University professors. Soliciting prostitution is an offence. In spite of that soliciting at personal level for sex business have explored enormously. In this case clients invite the call girls or comfort women at hotel and residence, and enjoy their sexual desire. The law has not put any provision for these clients.

v) Penalty for Threatening the Victim or Witnesses[7]

The law contains protective provision for the safety and security of victims of trafficking and witnesses of the proceedings. If any person

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4. *Ibid*, section 12
5. *The Constitution of the People's Republic of Bangladesh*, Dhaka, 1996
6. *The Prevention and Suppression of Human Trafficking Act 2012,* Act No.3 of 2012, Section 13
7. *Ibid,* section 14

threatens or intimidates or uses force against victim of trafficking or witnesses or any member of their family which create bottlenecks to the way of justice, that person shall be convicted of imprisonment which may extend from three to seven years with fine. In reality victims and witnesses are not given security. Again when police and government officials use their authority threatening against the victims and witnesses to keep away from giving evidence there is no redress against such officials in the law. In Mawlana Sayeedy case police and government officials disappeared witness Sukho Ronjon Bali whose evidence might have negated public prosecutor's charges against Sayeedy as false, concocted and fake[8]. Again in Pilkhana case, law enforcing agencies and government officials forced and abused the witnesses to give false and untrue evidence.[9] In fear of attack and false case against them witness is not found in most of the cases. In Bangladesh where the accused is a rich and powerful one, the police is used as a weapon to threaten the victim and witnesses to change their evidence against the culprit. For the last six years hundreds of victims and witnesses were killed in police custody for not agreeing to concocted evidence in the court.[10] It started immediately with the commission of Pilkhana Massacre in February 24-25, 2009. The law does not say what would happen if members of law enforcing agencies are involved in this offence.

vi) Penalty for Filing False Case or Complaint [11]

Section 15 prescribes punishment for filing false or frivolous case or abusing legal process under this Act. This is a good provision no doubt. For last seven and eight years law enforcing agencies and government agencies lodged thousands of false, scrupulous, and vexatious criminal cases not only against political opposition but also common people though the people and media know that those are blatant lies. The question is if police brings false and scrupulous allegation or compel someone to bring

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8. *The Economist*, November 19, 2012
9. The searcher himself taking interview with some of the victims now serving life imprisonment in different jails in Bangladesh found that they were not involved in the incident but government prosecutors induced them to confess their involvement and offered their release in return.
10. *Ain O Salish Kendra, January 1, 2013*
11. *The Prevention and Suppression of Human Trafficking Act 2012,* Act No.3 of 2012, Section 15

fake allegation of human trafficking or prostitution what would be the consequence of such cases. There is no provision in this regard in the Act. It is obvious that such may not happen but the activities of law enforcing agencies for last seven to eight years wiped away such hope. That's why exemplary punishment should be incorporated against law enforcing agencies for lodging or instigating to file false suit under this law. The law enforcing agencies shall be directed to perform their task with professional ethics.

vii) Cognizability and Non-bailability of Offence[12]

This Act stipulates that any offence committed shall be cognizable and non-bailable. The law enforcing agencies easily extract money from the common people in Pre-trial harsh punishment before being adjudged convicted. Recently in an interview with some officers of Boalia Thana, Rajshahi City Corporation, Rajshahi it has become evident that arrest as many number of people-male, female, adult or minor as you can and show them arrested under non-bailable offences for suppressing the ongoing movement of 20-party alliance for holding midterm free and fair against the government.[13] Police easily use this Act against the political opponents as well as common masses. Therefore cognizable and non-bailable provisions should be eased. However this provision should be kept alive for the mastermind of the offences committed under this Act. So far no mastermind is reached within the grip of the law enforcing agencies and the local agents who are not aware of their godfather are made the subjects of this section.

viii) Filing of Complaints [14]

This Act contains that police maintains secrecy and security of the person making any complain or giving information of commission of any offence. Unfortunately the police himself disclose identity of the persons who provides information against the culprit or mastermind of the offences under this Act. As a result the informer is or in some cases family of the

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12. *The Prevention and Suppression of Human Trafficking Act 2012,* Act No.3 of 2012, Section 16
13. Researcher personal interview with Police members, Boalia Thana, Rajshahi City Corporation, Rajshahi, January 23, 2015
14. *The Prevention and Suppression of Human Trafficking Act 2012,* Act No.3 of 2012, Section 17

informer is to embrace different forms of harassment and mental torture.[15] Not only that police after receiving concrete information seeks huge amount of money or other valuables from the accused instead of taking legal action. There is no provision against such action of the police in this Act.

ix) Proactive Investigation and Closure of Investigation[16]

Under this Act police is given the power to make a proactive inquiry before filing a first information report regarding the alleged commission of offence. In the context of our police this is a weapon of extracting money or other benefits from wrong doer and after getting benefits the police vanishes the information as if nothing has happened at all. Police uses such type of proactive investigation for harassing and grabbing benefit from innocent people.

This law fixes the time limitation for police investigation to 90 working days. It is not a suitable provision. Crimes committed under this Act requires a lot of time to unveil the culprit. The mastermind of the offence in most of the cases, live in the upper society and resides close to power. Therefore when any trace of any offence under this law is smelt by any person or police the mastermind changes their plan of action, method, tactics and mode of program. In certain cases they shift their program from one cell to another cell. In some cases they stop working for a while until the chill down of the alleged offence. That's why the police fail to find out or make any proper conclusion incriminating the mastermind within those 90 days. The culprits utilize this loophole very sharply and rationally. This time restriction should be removed and the process should be carried on according to requirement of the circumstances. It is suggested that this investigating time shall be extended to one year. Though criminals do keep silent or halt their activities for short period but they cannot remain inactive for long. And one year period is definitely a prolonged period for staying out of crime on the part of the human traffickers.

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15. Ansari Md. Al Mamunul, *Preventing and Reducing the Women and Children Trafficking in Bangladesh: A Study on Combating Strategies of Law Enforcing Agencies*(Ph.D Thesis), Rajshahi, Institute of Bangladesh Studies, Rajshahi University, 2009 p.146
16. *The Prevention and Suppression of Human Trafficking Act 2012*, Section 19(2) and (3)

The Act lays down that for bringing speed in the police investigation process in the offence committed under this Act a central monitoring cell at police headquarter shall be set up.[17] This is obviously a good provision. But its composition is not mentioned in the Act. If thirty percent of the cell are allotted for civil society, twenty percent for NGOs, rest for law enforcing agencies then acceleration, smoothness and transparency in the working of police is expected to be attained in this regard.

x) Exemption of Witnesses etc[18]

Court has exempted witness, victim or any person from appearing before the court for the sake of their security. It is fine. In Bangladesh police in the name of security and safety of the witness and victims, abuses the law and proves the innocent person as culprit and trafficker under this Act. It has been proved in the war criminal cases against innocent people. The people of the country feel that such type of provision may be abused against innocent people.

xi) Conclusion of Trial[19]

This Act says that Anti-human Trafficking Offence Tribunal shall conclude the trial within one hundred and eighty working days from the date of charge frame. If within that time period trial is not finished tribunal shall send report to the High Court Division clarifying the reason for non-compliance of the provision. This time limit is not rational. Where time limit is fixed, there arises the chance of injustice which law does not permit. The criminal always wait for suitable opportunity to evade legal chain. This limit encourages them in killing time just to expire the stipulated period fixed for discharging judgment. Where the court fails to conclude the case within the stipulated time frame the accused utilises that failure in order to get his/her bail or release. The period shall be extended to two years. This period will not give any space to the alleged human traffickers for creating any plea or excuse for killing the valuable time of the tribunal hastily. Tribunal can easily conduct and carry out its duty and thereby reach to appropriate conclusion.

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17. *Ibid*, section 19(6)
18. *Ibid,* section 22(2)
19. *Ibid*, Section 24

xii) Other Shortcomings

These are in short the loopholes researcher can easily find in the latest Act prohibiting human trafficking with all its manifestations and objects. Bangladesh is famous for making new laws and regulations. Though this law was adopted in February 2012 it has not yet been fully implemented because of non framing of rules and regulations required by the parent law. Non framing of rules and regulations by the authority within a reasonable time is also another weakness of the law. The government has not yet provided any fund for the implementation and taking care of different aspects of victims of human trafficking. The number of safe shelter required for the protection and treatment of rescued people are very poor. According to the Trafficking in Persons Report 2014[20] there are nine government run shelter home, drop-in-centers and safe homes in Bangladesh. These two are for women and children. Safe home for men is not available in Bangladesh let alone abroad for Bangladeshi workers. Two safe homes are run by Bangladesh Embassy in Riyad and at consulate Jeddah, Saudi Arab for women.[21]

III. ROLE OF LAW ENFORCING AGENCIES

The working of any law depends upon the efficient and dynamic approach of the law enforcing agencies. The effective implementation of the Prevention and Suppression of Human Trafficking Act-2012 basically depends upon the Bangladesh police, Border Guard of Bangladesh and Bangladesh Coast Guard.

a) The Negative Role of Police

In Bangladesh it is claimed that the attitude, mentality and behaviour of police is inferior to that of four legged animal of the animal world. Police instead of friend is a threat to the peace and tranquility of the common masses. Prime Minister Sheikh Hasina termed the police as the friend of people as well as the society, and last secured centre for distressed community of Bangladesh.[22] Common people think in the

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20. Tafficking in Person Report 2014, United States Department of State, 20 June, 2014
21. *Ibib*
22. *Ekattor TV News*, at 7.00 pm, January 28, 2015

reverse. Bangladesh police from its inception is used as a tool to secure the throne of the ruling party. For the last seven years police role of maintaining law and order has been changed. After 2014 in voter less election police is being used as political and party cadre of the ruling government. Since the existence of the government depends totally upon the law enforcing agencies particularly on police, BGB, and RAB, these organs are being utilised to crash opposition in place of maintaining law and order. The crime rate along with human trafficking is growing rapidly without any letup.

b) Lust for Financial Benefit

Bangladesh police does not take up any case or show interest in any crime where lucrative money or financial benefit is not visible. Since the subject of human trafficking is basically poor and poverty driven people of the society, their issue relating to this topic is ignored by the police. A report suggests that around 4500 male from rural areas of Sirajganj district were trafficked to Malaysia by waters in 2014 alone. The victims' families lodged cases in local police stations but police did not take any action. In other words since police did not get any cash incentive from these poor complainants no action was taken. However the report reveals that in response to the alleged information police arrested two local agents who are very poor too just to justify their duty in this regard.[23]

According to the provision of the Prevention and Suppression of Human Trafficking Act police officer is bound to keep the secrecy of the informer of alleged human trafficking case. Since informer does not pay money police in order to get money from the alleged trafficker exposes the identity of the informer to them. In such type of cases police harass the informer by bringing about false cases in compliance with the traffickers.[24]

In Panch Bibi upazilla, Jaipurhat a huge number of village people were deceptively induced to sell their kidney for money or employment and some of them were trafficked into India. After removal of their organ

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23. Bangle Vision TV, News at 7.30 pm, January 28, 2015

24. 25 Ansari Md. Al Mamunul, *Preventing and Reducing the Women and Children Trafficking in Bangladesh: A Study on Combating Strategies of Law Enforcing Agencies*(Ph.D Thesis), Rajshahi, Institute of Bangladesh Studies, Rajshahi University, 2009 p.146

they came back to their villages and complained the police of their ill fate. Police did not take steps. In order to avoid the criticism of media it registered cases and arrested two local agents but no progress has been heard in that regard further.[25]

c) Negative Role of Bangladesh Coast Guard

The role and achievement of Bangladesh Coast Guard in containing human trafficking are to some extent praise worthy. According to Bangla vision TV report people are sent to Malaysia and Thailand by sea.[26] The Cox's Bazar Police reported that 1500 victims of human trafficking were rescued in 2014 by Coast Guard. This number is too little to that of total number of male trafficked into Thailand and Malaysia each year. However this rate of rescue was 81 in 2012 and 1028 in 2013. The most interesting thing is that these rescued victims came under the sight of Coast Guard only when their boats or vessels sank into the waters and fishermen asked the Coast Guard to save the passengers of sunken boat, trawler and vessel. In very few cases Coast Guard catch the boat or vessel carrying illegal migrants to Malaysia and Thailand by chasing them. Bangladesh Coast Guard proceeded to rescue a sunken boat full of illegal male migrants heading to Malaysia after a fishing boat informed the Coast Guard ship. The Coast Guard saved 25 men from the sea but dozens remained uncounted for.[27] If Coast Guard had intention to stop trafficking by waters then the trawler would have been arrested and the passengers been detained before sailing for Malaysia. But this did not happen in this incident let alone other previous cases. Most pathetic fact is that police filed complaint against ten of the rescued passengers as trafficker in the Kutubdia Trawler Capsized incident.[28]

The Cox's Bazar police report suggests that they have prepared a list of five hundred probable human traffickers through waters. It says that Awami League MP Abdur Rahman Badi stands top of that list. The police did not take any step against him. Ithe interesting fact is that Awami League lawmaker Badi is in jail for anti-corruption charges.[29] The Cox's

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25. The Kidney Case, *The Daily Jugantar*, June 28, 2014
26. *Ibid*
27. *Channel 24 TV*, News at 7 pm, January 29, 2015
28. *The Naya Diganta*, February 3, 2015
29. *The Independent*, October 20, 2014

Bazar police said that 33 cases were lodged in 2012, 81 in 2013 and 95 in 2014. Under these cases police rescued 342 in 2012, 1028 in 2013 and 550 in 2014.[30] According to the provision of the Prevention and Suppression of Human Trafficking Act-2012 these cases which were initiated in 2012 and 2013 should have been finished and the accused should have been in jail. That means only lodging of suits and detention of accused is the duty of the police without complying with any other provisions of the said law. This is true in case of Cox's Bazar. But in the greater context it is not so. However the number of disposal cases is low.

It is reported that 84 new cases of sex trafficking and two cases of forced labor in 2013 were investigated. In 2012 this number was 67. Government initiated prosecutions of 215 trafficking cases in 2013, compared with 94 in 2012. In these cases 14 traffickers were convicted in 2013 and eight in 2012.[31] This number is less than the number of cases filed in Cax's Bazar alone. This definitely exhibits inability and inefficiency of police in respect of human trafficking.

d) Negative Role of Bangladesh Rifles (Now Border Guard Bangladesh) Cash Study

Mst Zinnatun Ferdous, village: Rahegaon, Gomostapur, Nawabganj, Bangladesh was trafficked into India in 1993 by some person through India-Bangladesh border by giving some cash to the BDR members. Later on she was sold to Sharif and Sharif married her. In 1998 Zinnatun came to Bangladesh with her husband Sharif and a two year old daughter. At this time they gave some rupees to BSF and BDR for their entry. They went back to India. In 2006 they again came and visited Bangladesh through illegal means. Zinnatun now lives in Karaijhar, thane Chaidai, Rampur, Lucknow, Uttar Pradesh, India.[32]

This incident reveals that human trafficking is being carried on with the aid or under the auspices of the BDR now BGB. Here the traffickers are to pay some cash to the BGB members. Since the victims of trafficking are not checked BGB remains unaware whether trafficking is done or

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30. *Ibid*
31. *Tafficking in Person Report 2014*, United States Department of State, 20 June, 2014
32. Researcher personally interviewed with the victim. The Victim's sister is the close door neighbour of the researcher.

not. Where the victims raise question or inform the BGB member that they are being crossing into India for job or other purposes without proper document then the BGB arrest the people and exhibit them as the victims of human trafficking.

In some cases BGB members are given sex comfort by the alleged victim for easy border cross. In these cases the traffickers are not to pay money or other financial benefit to the BGB. In these cases the BGB knows that women are being trafficked for prostitution.[33]

These are in short the negative side of the law enforcing agencies in dealing with human trafficking in Bangladesh. There is also positive side of law enforcing agencies in restricting, and controlling human trafficking as well as rescuing victims of trafficking.

e) Positive Role

For controlling trafficking central monitoring cell was set up at Police Headquarter, Dhaka. District monitoring cell acts under the supervision of the Additional Superintendent at second tier. This special unit of police along with NGOs and concerned ministries monitors the human trafficking cases all over the country. This special unit installed integrated crime data management system at police headquarter which preserves all information regarding trafficking victims/survivors and other statistics thereof.

Preventive Action of police: police takes different programs, seminars, workshops for creating awareness regarding human trafficking. It involves educational and religious institutions in creating awakening vulnerable people. More than 11632 police personnel's have been trained up on anti-human trafficking in 2012.

Bangladesh police runs nine victim support centers. Children have been sheltered, counseled and rehabilitated here with proper care. Bangladesh police has undertaken huge plan of setting up more victim support centers on emergency basis.

The government reported investigating 84 new cases of sex trafficking and two cases of forced labor in 2013, compared with 67 sex and labor trafficking cases in 2012. All cases were prosecuted under the 2012 PSHTA. Authorities reported initiating prosecutions of 215 trafficking cases in 2013, compared with 94 in 2012. The police registered 377

cases involving individual or groups of victims in 2013, compared to 602 in 2012.[34]

f) Bangladesh Police Special Branch (immigration wing)

With the object of stopping human trafficking by way of fake documents through airports, sea ports, and land check posts Bangladesh police has set up its special branch. It offloads probable victims from being trafficked in abroad. This branch is active in three international air ports, two sea ports and twenty eight land check posts. With the aim of making coordination it established the central connectivity between special branch headquarter with other major airports and land check posts which covers 97% of total movement of passengers. In 2012 immigration police offloaded 3967 out going passengers. These persons bore forged visa, passports, man power clearances and seal. Most of the cases these offloaded passengers were going to be subjects of human trafficking.

i) Rapid Action Battalion

It is an elite force. It shows agility and success to detect such offences and apprehend individuals involved in human trafficking. In 2012 it rescued eleven victims –two were women and eleven were children. And it arrested seven traffickers.

ii) Border Guard Bangladesh

BGB guards and controls the land border of the country. It takes part in awareness growing activities with the aim of preventing human trafficking. For securing borders government started building border sentry post all along the border. This would definitely reduce human trafficking. For making vigilance of the borders sound, BGB is going to start air patrol in 2015.[35] In 2012 it rescued 255 women and 86 children and arrested 10 traffickers. BGB members have to take training in different aspects regarding combating human trafficking.

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33. Ansari Md. Al Mamunul, *Preventing and Reducing the Women and Children Trafficking in Bangladesh: A Study on Combating Strategies of Law Enforcing Agencies*(Ph.D Thesis), Rajshahi, Institute of Bangladesh Studies, Rajshahi University, 2009 p.152
34. Tafficking in Person Report 2014, United States Department of State, 20 June, 2014
35. *The Naya Diganta,* January 12, 2015

iii) Bangladesh Coast Guard

Bangladesh coast guard plays important role in combating male human trafficking through waters. Sea is used for trafficking particularly male. Coast guard has taken several programs for curbing human trafficking effectively-

It operates regular petrol in vulnerable human trafficking areas in the offshore areas of Cox's Bazar, Chittagong, Khulna, Bhola, and Potuakhali districts. It checks ships and crafts using India-Bangladesh river transit routes at various checkpoints in the Sundarban. It trained 19000 persons in 2012 on the causes and consequences of human trafficking.

IV. FAILURE OF COMBATING HUMAN TRAFFICKING AND SUGGESTION

All these are positive side of the law enforcing agencies in combating human trafficking. But effectiveness is not visible on the part of the police, RAB, and BGB. For the last six-seven years these forces are being nakedly used to suppress political opposition of the government. Another thing is that new recruits are to pay a handsome amount of money to the recruiting authority. As a result after appointment they are very much keen to earn money. Moral values of the new recruit are not considered at the time of appointment. Consequently patriotism and passion for duty is not exhibited in the actions of law enforcing members. The most important thing is that subjects of human trafficking are always poor, distressed and jobless section of the society. Providing security and rescue to them from problems do not create any lot for the law enforcer. On the other side traffickers are rich and wealthy, they stand by the power. Thus assisting in their wrong doing ensure financial as well as official support to members of law enforcing agencies. Therefore the rate of human trafficking is not reduced but increased rapidly. The vital cause of human trafficking is poverty, unemployment, and at present lawlessness and political unrest. If these issues are not addressed human trafficking will never stop. However it may be checked if law enforcing agencies are reconstituted and developed in the following ways:

1) Law enforcing agencies must act as the servant of the state and they must not carry out the illegal order of the government.

2) Recruitment of new members of law enforcing agencies is to be made on the basis of merit and efficiency, not on money. Morally wicked person must not be selected for security forces.
3) The most important recommendation is to bring about economic development and create job for the people. It is the duty of the government. At the same time good governance must be ensured for all the citizens.
4) Prostitution must be declared illegal. All forms of brothel and commercial sex centres must be shutdown.
5) Broadcasting and publication of dirty TV channels and pornographic videos must be stopped.

If these are met human trafficking shall be presumed to come to an end.

V. CONCLUSION

Human trafficking is a common problem in Bangladesh. The root causes of human trafficking is not surfaced or discussed in the ruling elite but they are very much interested in making tough law for reducing the offence. When they make laws they assert it as the complete and perfect one. The laws face difficulties at the time implementation. The latest human trafficking law in Bangladesh contains some loopholes also. Its provisions provide law enforcing agencies with huge option for materialising their whims and caprices. In most of the cases of trafficking they are found having complicity with the traffickers. In spite of that sometimes some rescue operation directed by them reminds us the ability of law enforcer in curbing human trafficking. For making transparency and efficiency in the action of law enforcing agencies some recommendations are made for the government and security forces. If the recommendations are materialised in the actions of law enforcing agencies, and government is careful of bringing economic stability and good governance human trafficking may be severely controlled in Bangladesh.

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ANTICIPATORY BAIL TO ABSCONDING ACCUSED : JUDICIAL APPROACH

*AKHILENDRA KUMAR PANDEY**

ABSTRACT : In the administration of criminal justice, two supreme values of paramount importance come in conflict and law seeks to strike a balance between them. While individual liberty is to be guarded in a democratic and free society unless there existed justification for its curtailment, the interest of the society by shielding it from criminals is equally a competing interest. Arrest and detention is a method of shielding the society from criminal; bail seeks to protect the individual liberty. Law has made another devise where it seeks to protect the individual liberty even before the arrest and detention which is known as anticipatory bail. On several occasion the issue has arisen before the court that at up to which stage of criminal proceeding, the court may entertain application for granting of anticipatory bail. The paper seeks to analyze the object of anticipatory bail and the judicial approach in entertaining the application after a particular stage of criminal proceeding

KEY WORDS : Bail, Anticipatory bail, Liberty, Absconder, Cognizance.

I. INTRODUCTION

Liberty has been of great value. In the process of social evolution attempts have been made to make government compatible with personal liberty. The significance of personal liberty is realized when one lands up in a police State. Ordered social life rests upon synthesis and balance of certain slowly developed ideas and institutions like government, law, personal liberty and democracy. Personal liberty existed since ages but

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ordered civilized society was not possible without government. When government came into existence it brought evils of slavery, monarchy and superstition. This was another crisis. Law came to deal with such evils. Law created another crisis before mankind by bringing despotism and it was sought to be mitigated by developing another institution of personal liberty followed by democracy.[1] Anticipatory bail is one of such a salutary attempt incorporated in the Criminal Procedure Code, 1973 which intends to protect personal liberty of an individual. It is a device to secure the individual's liberty; it is neither a passport to commission of crime nor a shield to against any and all kinds of accusation.[2] The power conferred on superior courts is of extra ordinary character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.

On certain occasions the State has opposed the maintainability of application for anticipatory bail. While entertaining an application for anticipatory bail , two issues have come up before the courts, first, whether after being declared an absconder under Section 82/83 of the Cr PC or by Police through Farari Panchnama or through declaration of cash reward for apprehension, an application moved under Section 438 Cr PC seeking anticipatory bail is maintainable or not. Secondly, whether the application for anticipatory is barred after the filing of charge sheet or committal of case to the Court of Session. This paper seeks to analyze the concept and purpose of anticipatory bail and the judicial approach on the issues as delineated above approach in granting anticipatory bail to absconding accused at different stages of the criminal proceedings.

II. PURPOSE OF ANTICIPATORY BAIL

Arrest and detention is a devise to ensure the presence of the accused for trial by the court and, if found guilty, to receive the sentence. Detention of the accused throughout the trial only on the ground of the suspicion that he might have committed an offence would naturally be in contradiction

1. Russell Bertrand, *Ideas That Have Helped Mankind*, Unpopular Essays, Routledge Classic, First Indian Reprint (2010) pp. 121 -141
2. *Adri Dharan Das v. State of W. B*. AIR 2005 SC 1057

to the principle that an accused is presumed to be innocent till his guilt is proved beyond reasonable doubt. Thus bail is a devise to release the detained accused with the condition that he would appear before the court during trial and, if found guilty, he shall receive the sentence. The precondition for bail is thus the detention and/or custody of the accused.

The concept of anticipatory bail did not find place till 1973 Code of Criminal Procedure. Though the term anticipatory bail may be a misnomer as provides for release of a person before detention, but indicates that it is a conditional release in anticipation of arrest. This power of direction in granting anticipatory bail is of an unusual nature.[3] The provision for giving direction for granting anticipatory bail, which is vested in the superior courts, was on the recommendation of the Law Commission which felt the need for introducing such a provision and it observed:

> The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.[4]

The Law Commission emphasized upon human weakness to implicate someone because of jealousy, vendetta or otherwise and also due to political rivalry. The false implication in criminal cases was increasing at that time and the Law Commission took note of this reality. With a view to prevent the misuse of power to grant anticipatory bail, the Law Commission later on expressing its view that this to be exercised in exceptional circumstance, observed:

> In order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order

3. *Balchand Jain v. State of M.P.* (1976) 4 SCC 572

> should be made only after notice to the Public Prosecutor. The initial order should only be interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interest of justice. [5]

In view of the recommendations of the Law Commission of India, the provisions for anticipatory bail and initially passing only interim order and notice to the Public Prosecutor before passing the final order were inserted in the Criminal Procedure Code.[6] The purpose of incorporating provision relating to anticipatory bail in the Criminal Procedure Code was delineated by the Supreme Court in case of *Siddharam Satlingappa Mhetre v State of Maharashtra*[7] as under:

> ...the purpose of incorporating Section 438 in the Cr. P. C. was to recognize the importance of personal liberty and freedom in free and democratic country....the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.[8]

The provision of anticipatory bail contained in Section 438 has been interpreted in the light of Article 21 of the Constitution of India. In *Gurubaksh Singh Sibbia v. State of Punjab*,[9] serious allegations of political corruption were leveled against the petitioner who was Minister of Irrigation and Power in Punjab. The petitioner applied for the direction under Section 438 Cr PC but the High Court dismissed the application on various grounds including that the power is to exercised in exceptional cases. On behalf of the petitioner it was argued that since the denial of bail amounted to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section

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4. 41st Law Commission Report (1969) Para 39.9
5. 48th Law Commission Report (1972) Para 31
6. Section 438, Criminal Procedure Code, 1973.
7. 2010 Cri LJ 3905 (SC)
8. Id at 3910 per Bhandari Dalveeri, J.
9. AIR 1980 SC 1632 per Chandrachud, CJ

438. In this case the Court attempted to strike a balance between the personal freedom and the investigational rights of the police. The provision of anticipatory bail has given wider discretion to superior courts and such discretion is given to the court exercise its jurisdiction judiciously.

The High Courts in many cases have observed that bail is not to be denied unless there were reasons for doing so. Krishna Iyer, J. in *Gudikanti Narasimhulu v. Public Prosecutor*[10] has observed that the issue of bail is one of liberty, justice and public safety and burden of public treasury, all of which insists that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The court at times has enumerated the factors and parameters that the court must consider before considering the application for anticipatory bail.[11]

Personal liberty is antithesis of restraint and right to physical inviolability symbolizes the degree of civilization recognizing the human dignity. The purpose of anticipatory bail is to ensure supreme value of liberty of individual and to protect the rights of the police and investigative agencies as well. Further, unless there are cogent reasons for denying the liberty, it is not to be taken away on flimsy reason because anticipatory bail is to be granted by imposing conditions intended to ensure the presence of the accused at various stages of criminal proceedings.

III. JUDICIAL APPROACH

Where arrest warrant is issued the court has refused to grant anticipatory bail. In *N. Dashrath Reddy v. State*[12] where the court had issued the warrant of arrest and the accused sought anticipatory bail, holding that it was not a fit case for the grant of anticipatory bail, where Madhusudan Rao, J. observed that:

> The Court's process must be respected first before anyone can seek the aid of the court. If there is a warrant for the

10. AIR 1978 SC 429
11. *Bhadresh Bipin bhai Sheth v. State of Gujrat* (2016) 1 SCC 152; *Subhas Kashinath Mahajan v. State of Maharashtra* SLP Cr. 566/2017
12. 1975 (2) APLJ (HC) 214 as referred in Sheikh Khasim Bi case at 349

> arrest of a person, such person may submit himself to arrest or may himself appear before the court and seek bail under S. 437. Section 438 applies only to arrests while the court's process has not been issued. That is clear if S. 438 (3) is read along with S. 438 (1).

The Division Bench in *A. Kamalakar Rao v. State of A. P.*,[13] agreed with the view expressed by Madhusudan Rao, J. in Dashrath Reddy case. The Division Bench observed:

> When the process of a court is set in motion by filing the charge sheet and issue of non – bailable warrant, the applicant is precluded from having recourse to Section 438 Cr PC for anticipatory bail. S. 438 (3) Cr PC makes the position explicitly clear that the warrant has to be modulated if the order under S. 438 precedes the initiation of proceedings before the Magistrate. S. 438 is concerned with a situation of taking cognizance of an offence and issuance of warrant subsequent to or during the subsistence of order under Section 438 (1) Cr PC. The question of passing the order under S. 438 (1) is not visualized when the proceeding commence before the Magistrate. S. 438 (3) is confined to vary the warrant in the event of the order under S. 438 and there is absolutely no indication of cancellation or withdrawal of warrant. Therefore, the power under S. 438 does not survive after the initiation of proceedings by filing charge sheet and issue of arrest warrant. In the absence of provision of cancellation or withdrawal of warrant the situation of parallel exercise of power arises when the order under S. 438 is passed subsequent to issue of warrant. The essence of S. 438 (3) is that the Magistrate has to vary the warrant if the proceedings commence after the order is passed under S. 438 (1) and the terminal of the exercise of power under S. 438 is the initiation of proceedings under Cr PC by the Magistrate.[14]

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13. Cri, M.P. 884 of 1981 Ramchandra Raju, J.
14. 1983 Cri LJ 872 at 875

Initially the Supreme Court was of the view that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail. In *State of Madhya Pradesh v. Pradeep Sharma*[15], the accused moved an application for anticipatory bail before the High Court which was rejected on the ground that custodial interrogation was necessary in the case. In the meantime, charge sheet against 4 accused was filed in the court, whereas the investigation in respect of other 4 accused including the respondent Pradeep Sharma, who were absconding, continued since the date of incident. The Court issued arrest warrant against 4 including the respondent but it returned without service. Since accused were not traceable, proclamation order u/s 82 of the Cr PC was issued for appearance. Out of these four accused anticipatory bail was granted to another accused who filed application before the High Court for grant of anticipatory bail. The issue before the Supreme Court was whether the High Court was justified in granting anticipatory bail to the respondent/accused when the investigation was pending and when the accused were absconding all along and were not cooperating with the investigation. In this case the Supreme Court held that where the accused is declared absconder or proclaimed offender in terms of Section 82 of the Cr. P. C., he is not entitled to relief of anticipatory bail. The Supreme Court allowing the appeal of the State, observed:

> warrants were issued for the arrest of the respondents herein. Since then they were not available/traceable, a proclamation under Section 82 of the Code was issued. The documents produced by the State clearly show that CJM, Chhindwara, MP issued a proclamation requiring the appearance of the respondent/ accused under Section 82 of the Code to answer the complaint. . . All these materials were neither adverted nor considered by the High Court while granting anticipatory bail to both and the High Court without indicating any reason except stating" facts and circumstances of the case" granted an order for anticipatory bail to both the accused. It is relevant to point out that both the accused are facing prosecution for offences punishable under Section 302 and

15. AIR 2014 SC 626 bench consisted of P. Sathasivam, CJI and Ranjan Gogoi, J.

> 120B read with Section 34 of the IPC. In such serious offences, particularly, the respondent/accused being proclaimed offenders, we are unable to sustain impugned orders of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused have been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail.[16]

In *Rajni Puruswami v. State of Madhya Pradesh*[17], the appellant was mother in law of the deceased who committed suicide after seven years of marriage. A case under Section 306, 498 A and ¾ Dowry Prohibition Act was registered. The appellant and her husband were apprehending their arrest in this case. The son was arrested and enlarged on bail under Section 439 Cr PC. The Police submitted the challan showing the appellants as "absconded accused". The Magistrate committed the case to the Court of Session for trial. Both the applicants moved application for anticipatory bail before the Additional Session Judge and the anticipatory bail application were rejected. Besides submitting on behalf of the applicant that the applicants were wrongly implicated in the matter, it was also submitted that no custodial interrogation was required in case and thus, the applicants are entitled for anticipatory bail. The State opposed on the ground that the accused are absconded since the date of committal of case and challan has been filed in their absence by showing them as absconded accused; therefore, the dismissal of anticipatory bail application by the trial court was justified. The Court distinguished between "tenability of application" and "entitlement to get the bail". If the application is "not tenable" then the Court cannot consider the fact of the case and bound to reject the application outright upon the ground of tenability. If the application is tenable, then the Court will consider the merits, facts and other circumstances of the case. In the aforesaid situation, the Court may grant or refuse the anticipatory bail. On the issue of maintainability of the case, the Court observed:

> So far as the maintainability of anticipatory bail is concerned, it is maintainable even the person is declared absconder under

16. Id at 629-30 per Sathasivam, CJI
17. 2020 Cri LJ 3457 (MP)

> Section 82 of Cr PC . . .There is no any restrictions in the law about the tenability of the application by the accused, who is absconded or against whom the challan has been filed by showing him as an "absconded accused".

In this case, the trial court dismissed the application only upon the ground of tenability while as per law, application was tenable. The trial court was required to see the merits of the case. If the accused has absconded then definitely it may be ground for dismissal of application but it cannot be treated as a bar for the purpose of tenability of application in the light of settled law.

In *Sobran Batham v. State of MP*[18], where the co accused was enlarged on bail under Section 439 Cr PC, the appellant moved an application under 438 Cr PC for grant of anticipatory bail. The objection of the State was that since the police have submitted the charge sheet against the applicant showing him as absconder therefore the application for anticipatory bail was not maintainable. While holding that the application for anticipatory bail was not maintainable, the High Court observed:

> The issue of the proclamation under Section 82 of Cr PC is not very material but in fact the spirit of the law that if a person is absconding and is running away from the law enforcement agencies and the court, then he is not entitled for anticipatory bail under Section 438 of Cr PC. When the investigation is pending and if the person is running away from the Investigating Agency, then it can be said that he has a reasonable apprehension of his arrest and therefore, during the pendency of investigation, the application under Section 438 for grant of anticipatory bail would be maintainable but once the charge sheet is filed invoking Section 299 of Cr PC and the Magistrate has issued the warrant against the accused, then in the considered opinion of this court, the application for grant of anticipatory bail would not be maintainable.

The Supreme Court considered the scope of granting relief under Section 438 Cr PC to a person who was declared as an absconder or

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18. 2018 (2) MPJR 252

proclaimed offender in terms of Section 82 Cr PC in *Lavesh v State of Delhi*[19]. The appellant was the elder brother of the deceased's husband. The deceased committed suicide. An FIR was lodged by the mother of the deceased against the family members of the husband of the deceased. The husband and the mother-in-law were arrested. The appellant was living in the same house but separately with his family. The appellant moved an application for anticipatory bail but it was rejected by the Court of Sessions and the High Court. Then petition under Special Leave was filed. It was pointed out by the State that the efforts were made to arrest the petitioner but he absconded and as such he was declared a proclaimed offender and the trial was pending. Rejecting the petition, the Court observed as under:

> The present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant has been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.[20]

The grant of anticipatory bail after the cognizance is taken has also been an issue. In *Bharat Chaudhary v State of Bihar*[21], the appellant husband and wife were made accused by daughter in law for offences under Section 504, 498 A and 406 of the Indian Penal Code read with ¾ of the Dowry Prohibition Act. The appellant filed an application before the High Court for anticipatory bail which was rejected. This order of the High Court was challenged by way of Special Leave. It was contended on behalf of the State that since the court of first instance has taken the cognizance of the offence in question, Section 438 Cr PC cannot be used for granting anticipatory bail even by the Supreme Court and according to respondent the only relief available to the appellant was to surrender before the trial court and then apply for regular bail under Section 439 of

19. (2012) 8 SCC 730. Bench consisted of Sathasivam and Ranjan Gogoi, JJ.
20. Id at 733 per Sathasivam, J.
21. AIR 2003 SC 4662 The Bench consisted of Hegde, Santosh and Singh, B.P. JJ.

the Cri PC. It was held that even after taking cognizance of complaint by the court or after filing of charge sheet by the Investigating Agency, a person can move an application for anticipatory bail and Section 438 nowhere prohibits the concerned court for grant of anticipatory bail in appropriate cases. The appeal was allowed and the Court observed:

> From the perusal of this part of S. 438 of the Cr PC we find no restriction in regard to exercise of this power in a suitable case either by the Court of Sessions, High Court or this Court even when cognizance is taken or charge sheet is filed. The object of S. 438 is to prevent undue harassment of the accused persons by pre trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or investigating agency has filed a charge sheet, would not by itself, in our opinion prevent the concerned Courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation but these are only factors that must be borne in mind by the concerned Courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge sheet cannot be themselves be construed as a prohibition against the grant of anticipatory bail. In our opinion, the Courts, i.e. the Court of Sessions and the High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under S. 438 of the Cr PC even when cognizance is taken or charge sheet is filed provided the fact of the case require the Court to do so.[22]

In Bharat Chaudhary case[23], the Court further observed:

> We do not find any restriction or absolute bar on the concerned Court granting anticipatory bail even in cases where either the cognizance has been taken or a charge sheet has been filed. This judgment only lays down a

22. Id at 4663 per Hegde, J.
23. Supra

> guideline that while considering a prima facie case against the accused the factum of cognizance been taken and the laying of charge sheet would be of some assistance for coming to the conclusion whether the claimant for anticipatory bail is entitled to such bail or not.

In *Salauddin Abdulsamad Sheikh v. State of Maharastra*,[24] it was observed that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail order should be of limited duration only and ordinarily on the expiration of that duration or extended duration, the court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted.

Ordinarily the Court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material place before it, the accused person is entitled to bail.

> . . . we do not find any restriction or absolute bar on the concerned court granting anticipatory bail even in cases where either cognizance has been taken or a charge sheet has been filed. The judgment only lays down a guideline that while considering the prima facie case against the accused the factum of cognizance having been taken and laying of charge sheet would be of some assistance for coming to the conclusion whether claimant for anticipatory bail is entitled for such bail or not.

Submission of charge sheet does not bar the In *Ravindra Saxena v State of Rajasthan*[25], the accused were alleged to have committed criminal breach of trust and forgery along with criminal conspiracy. The High Court dismissed the application of anticipatory bail on many occasions with the observation that in the facts and circumstances, the case of the

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24. AIR 1996 SC 1042
25. AIR 2010 SC 1225. Bench comprised Tarun Chatterjee and Surinder Singh Nijjar, JJ.

petitioner cannot be said to have improved with the filing of challan against him when the prima facie case has been found against the accused. The Supreme Court however held that the approach of the High Court in this regard was wholly erroneous. The application for anticipatory bail was rejected without considering the case of the appellant. It was rejected solely on the ground that the challan has now been presented. The Supreme Court held that the anticipatory bail can be granted at any time so long as the applicant has not been arrested, meaning there by the maintainability of an application under S. 438 of Cr PC does not lie at the mercy of any Investigating Agency/Officer or any other consideration including the provisions of the Cr PC. The Court observed:

> . . . anticipatory bail can be granted at any time so long as the applicant has not been arrested. When the application is made to the High Court or Court of Session it must apply its own mind on the question and decide when the case is made out for granting such relief. , , the denial of anticipatory bail only on the ground that the challan has been presented would not satisfy the requirements of Section 437 and 438 Cr PC. . . the High Court committed a serious error of law in not applying its mind to the facts and circumstances of this case. The High Court is required to exercise its discretion upon examination of facts and circumstances and to grant anticipatory bail "if it thinks fit".[26]

The expression "if it thinks fit" occurs in Section 438 in respect of power of the High Court or the Court of Session but it does not find place Section 437. . .we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefore is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if material before it justifying such refusal.

The Andhra Pradesh High Court in *Smt. Sheik Khasim Bi v. State*[27] held that filing of charge sheet by the police and issuing of warrant by the Magistrate do not put an end to the grant of anticipatory bail u/S. 438 (1)

26. Id at 1226 per Surinder Singh Nijjar, J.
27. AIR 1986 AP 345

The High Court or the Court of Session may grant anticipatory bail under Section 438 to a person after the criminal court has taken the cognizance of the case and has issued process viz. the warrant of arrest of that accused person. In this case, a complaint was registered against two accused. The Additional Sessions Judge granted anticipatory bail to accused no. 2. Thereafter, another accused filed an application for anticipatory bail on similar ground and by that time the police filed its report to the Magistrate. The Additional Sessions Judge rejected the anticipatory bail because of changed circumstances due to filing of the police report. The Additional Sessions Judge followed A. Kmalakar Rao v. State of A.P.[28] The accused thereupon filed an application under Section 438 before the High Court. The petition came before Seetharam Reddy, J. who felt that Kamalakar Rao case required reconsideration and the matter was referred to the Division Bench and the Division Bench disagreed with the decision taken in Kamalakar Rao case and, ultimately, the matter came up before the Full Bench of Andhra High Court for consideration whether the power to grant anticipatory bail under Section 438 Cr PC comes to an end after the Magistrate has taken cognizance and issued process against the accused. Rejecting the view that S. 438 (3) bars the grant of anticipatory bail, the High Court observed:

> That subsection (3) of S. 438 Cr PC does not in any manner restrict the power of the court to grant anticipatory bail, but on the other hand it only contains the procedural aspect that is necessary to give effect to the order of anticipatory bail passed under Sub Section (1) of S. 438 and the manner in which it would be given effect to. May be the High Court or the Court of Session would not be inclined to bail keeping in view the fact that the Magistrate has taken cognizance and issued process, but mere not existence of such power does not mean lack of jurisdiction.[29]

Further,

> Even where cognizance is taken there may be justifiable grounds to grant anticipatory bail to a person who apprehends the arrest and against whom warrant of arrest

28. 1983 Cri LJ 872 (AP)

29. Id AIR 1986 AP 345 at 350 per Jayachandra Reddy, J

is pending.[30]

In view of this, the Andhra Pradesh High Court held that the filing of charge sheet by police and issuing of a warrant by the Magistrate do not put an end to power to grant anticipatory bail under S. 438 (1) Cr PC and on the other hand the High Court or the Court of Session has power to grant anticipatory bail under S. 438 (1) to a person after a criminal court has taken cognizance of the case and has issued process viz. warrant of arrest of the accused person.

An application for anticipatory bail can be moved at any stage and there is no bar as to exercise of power under Section 438. In *Nirbhay Singh v State of M.P.*[31], the police registered a case against two accused on the information furnished by the complainant. After investigation, charge sheet was filed against the two accused. The first informant thereafter filed a private complaint in the concerned court alleging that he laid information with the police against seven persons but information was recorded only against two persons and this was done with the help of other persons with a view to escape the process of law. The complaint was thus directed against remaining five persons. The statement of complainant and the witnesses were recorded by the Magistrate. Taking the cognizance into the matter, the Magistrate u/s. 204 Cr PC issued non-bailable warrant against those five accused. Thereupon two out of these five accused, filed application under Section 438 for anticipatory bail. The Full Bench held that anticipatory bail may be granted even after Magistrate issued process or even at the stage of committal to the Court of Session or even at subsequent stage. An application under Section 438 Cr PC would be maintainable even after the Magistrate issued process under Section 204, if the circumstances justify the invocation of the provision.

IV. CONCLUSION

The society has an interest in apprehending the accused and producing before the court for trial and to receive the sentence consequent upon conviction. The loss of liberty while in custody is quite natural.

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30. Ibid.
31. 1995 Cri LJ 3317 (MP)

Depriving a person from liberty while there is a presumption of innocence till the guilt is proved is not in conformity with the value of liberty. Bail is thus a devise which seeks to dovetail the individual liberty with that of the social interest when one is in custody. The concept of anticipatory bail was introduced to secure liberty where the detention was actuated with vendetta or political rivalry. The provision relating to anticipatory bail has given wide discretion to superior courts in granting anticipatory bail and where the applicants satisfy the court for issue of anticipatory bail in accordance with Section 438 Cr PC, the anticipatory bail should not be denied only because the criminal proceeding against the applicant has reached to a particular stage; more so, the bail is always conditional and it may be cancelled at any stage, if the applicant contravenes the conditions imposed upon him. The approach of the court in entertaining the application for granting anticipatory bail at any stage of criminal proceeding is in full consonance with the constitutional commitment in preserving the individual liberty.

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RIGHT TO DIE WITH DIGNITY : RETROSPECT AND PROSPECTS

J.P.RAI*

ABSTRACT : In our day-to-day life we often come across terminally-ill patients, patients who are bedridden due to irreparable injuries and are totally dependent on others. It is not a dignified situation for such people. A sensible prudent man would think that death would be a better option rather than living such painful life. Physical and psychological deterioration happens swiftly, but escape from such pain takes longer time. People justify euthanasia in such cases. Argument for legalizing it comes forward every now and then. But it is not a simple task, for the government or legislature. The most alarming drawback of legalizing euthanasia is its abuse.

KEY WORDS : Right to Life, Right to Die, Euthanasia, Living Will, Advance Medical Directive, Public Interest

I. INTRODUCTION

Every human being desires to live and enjoy the life till he dies. But, sometimes a human being wishes to end his life in the manner he chooses. To end one's life in an unnatural way is a sign of abnormality. When a person ends his life by his own act we call it 'suicide' but to end a person's life by others on the request of the deceased, is called 'euthanasia' or 'mercy killing'.[1]

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1. Euthanasia is mainly associated with people with terminal illness or who have become incapacitated and don't want to go through the rest of their life suffering. A severely handicapped or terminally ill person is supposed to have the right to choose between life and death. It may be either by direct intervention (active

Opinions about euthanasia differ widely from complete rejection of euthanasia (it is morally never acceptable under any circumstances) to the totally opposite view (euthanasia is a benefit and not only should it be allowed, but it should also be considered as the release from unnecessary suffering). The supporters of a moderate point of view offer to limit any extremes, as well as to work out the details that would concern the control and safety of the patients[2].

To cause pain or wish ill to or to take the life of any living being out of anger or a selfish intent is *himsa.* On the other hand, after a calm and clear judgment to kill or cause pain to a living being from a pure selfless intent may be the purest form of *ahimsa*. Each such case must be judged individually and on its own merits. The final test as to its violence or non-violence is after all the intent underlying the act. Philosophers believe that we have to control switch that can end it all, on request. In medical/legal parlance, it is called euthanasia: *'an easy and gentle death'*. Philosophically, this debate is about our right, when terminally ill, to choose how to die. It is about the right to control how much we have to suffer and when and how we die. It is about having some control over our dying process in a system that can aggressively prolong life with invasive technology.[3]

After a long decade, overruling its previous decisions, the Supreme Court of India in its recent milestone unanimous verdict in *Common Cause* v *U.O.I.*[4], has declared that the right to die with dignity as passive euthanasia is a fundamental right under Article 21 of Indian Constitution and approved 'living will', to provide terminally ill patients or those in Persistent Vegetative State (PVS), a dignified exit by refusing medical treatment or life support. After this judgment a long debate has been started about reasonability, applicability, merits and demerits of this decision.

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euthanasia) or by withholding life prolonging measures and resources (passive euthanasia). It is either at the express or implied request of that person (i.e., voluntary euthanasia), or in the absence of such approval (non-voluntary euthanasia). Available at https://en.wikipedia.org/wiki/Euthanasia, visited on May 23, 2019

2. Available at https://www.rsu.lv/sites/default/files/dissertations A%20Gabrieljans _kopsav_ENG_A4.pdf, visited on July 12, 2019
3. Available at http://www.legalserviceindia.com/article/l404-Right-To-Die.html, visited on Aug 17, 2019
4. (2018) 5 SCC 1

In this paper, an attempt has been made to critically analyse theoretical basis of the concept of euthanasia, prospects and retrospect of acceptance of euthanasia as a new fundamental right to die with dignity.

II. CLASSIFICATION OF EUTHANASIA

Euthanasia may be classified under following sub-categories[5]-

A. On the Basis of Consent-

Euthanasia may be classified according to whether a person gives informed consent under the following heads:

(a) Voluntary Euthanasia - When euthanasia is practiced with the expressed desire and consent of the patient, it is called voluntary euthanasia. It is primarily concerned with the right to choose of the terminally ill patient who decides to end his or her life, choice which serves his/her best interest and also that of everyone else connected to him. This includes cases of seeking assistance for dying, refusing heavy medical treatment, asking for medical treatment to be stopped or life support equipment to be switched off, refusal to eat or drink or deliberate fasting.[6]

(b) Non-Voluntary Euthanasia - It refers to ending the life of a person who is not mentally competent to make an informed decision about dying, such as a comatose patient. The case may happen in case of patients who have not addressed their wish of dying in their Wills or given advance indications about it. Instances can be enumerated, like severe cases of accident where the patient loses consciousness and goes into coma. In these cases, it is often the family members, who make the ultimate decision.[7]

(c) Involuntary Euthanasia - It is euthanasia against someone's wish and is often considered as murder. This kind of euthanasia is usually

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5. Available at https://www.medicalnewstoday.com/articles/182951#euthanasia-and-assisted-suicide-, visited on June 30, 2019
6. *Ibid*
7. *Ibid*. The person cannot make a decision or cannot make their wishes known. This includes cases where the person is in a coma, the person is too young (e.g. a young baby), the person is absent-minded, the person is mentally challenged or the person is severely brain damaged.

considered wrong by both sides hence rarely discussed. In this case, the patient has capacity to decide and consent, but does not choose death, and the same is administered. It is quite unethical and sounds barbaric. During World War II, the Nazi Germany conducted such deaths in gas chambers.[8]

B. On the Basis of Procedure

On the basis of procedure and manner of euthanasia, euthanasia can be classified as:

(a) Active Euthanasia - It involves painlessly putting individuals to death for merciful reasons. A doctor administers lethal dose of medication to a patient. Active euthanasia involves the use of lethal substances and it is where the controversy begins. A person cannot himself cause his death but requires someone else's help with some medication causing death. Active euthanasia is a crime all over the world except where permitted by legislation. In India, active euthanasia is covered under Section 302 or at least Section 304 IPC. Physician assisted suicide is a crime under Section 306 IPC (abetment to suicide).[9]

(b) Passive Euthanasia - Euthanasia is passive when death is caused by turning off the life supporting systems. Withdrawing life supporting devices from a terminally ill patient which leads eventually to death in normal course is a recognized norm. In 'passive euthanasia', the doctors are not actively killing anyone; they are simply not saving him.[10] Passive euthanasia requires the withholding of common treatments, such as antibiotics, necessary for the continuance of life. Passive euthanasia is described when the patient dies because the medical professionals refrain from doing something necessary to keep the patient alive, such as switch off life-support machines, disconnect a feeding tube, not to carry out a life extending operation, not to give life extending drugs.[11]

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8. Available at https://en.wikipedia.org/wiki/Extermination_camp, visited on July 12, 2019
9. Available at https://www.researchgate.net/publication/247153684_Physician-assisted_Suicide_and_ Euthanasia_in_Indian_Context_Sooner_or_Later_the_Need_to_Ponder, visited on July 14, 2019
10. *Aruna Ramchandra Shanbaug* v. *Union of India*, (2011) 4 SCC 454
11. Available at https://www.objectiveias.in/passive-euthanasia-right-to-die/, visited on July 22, 2019

III. REASONS FOR EUTHANASIA

Reasons and circumstances behind advocating euthanasia are:

(a) Unbearable Pain

Patients who suffer from unbearable pain which is beyond treatment or improvement desire peaceful death. It is life with less dignity or sometimes absence of dignity. Medical sciences have reached its peak in inventing life saving drugs and treatments.[12] Numbing the severe pain caused by illness until recovery is acceptable, but depending on pain killers for the rest of your life is not a welcome choice. If such choice becomes a necessity of day to day living then the patient tends to develop the tendency towards putting an end to his life.[13]

(b) Demand of Right to Commit Suicide

Euthanasia is not about the right to die. It's about the right to bring about someone's death. Further it is not about giving recognition to the right but to make legal provisions for smooth and harmonious procedure of conducting euthanasia. Euthanasia and suicide should not be used together. These terms do not have common ingredients. Suicide is a sad, individual act. Euthanasia is not about a private act. It's about letting one person facilitate the death of another.[14]

(c) People should not be Forced to Stay Alive

This is the third important question regarding the timing of administering euthanasia. One should not be forced to stay alive. Law and medical ethics require that every possible means must be resorted to keep a person alive. Persistence, against the patient's wishes, that death be postponed by every means and manner available is contrary to law and practice. It would also be unkind and inhumane. There comes a time when continued attempts to cure are not compassionate, wise or medically sound. Then 'only' all interventions ought to be directed to alleviating pain as well as to provide support for both the patient and the patient's loved ones.[15]

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12. Kumud Lata Tripathi, Mercy Killing: The Indian Legal Perspective, p.20.
13. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563356/, visited on Aug 15, 2019
14. *Ibid*.
15. These reasons are of indicative and directive in nature. One cannot make them mandatory while considering euthanasia. Every case is different, therefore same yardstick cannot be applied to each case.

IV. EUTHANASIA: INTERNATIONAL PERSPECTIVE

(a) United Kingdom – In *Airedale NHS Trust* v. *Bland*,[16] the House of Lords made a distinction between withdrawal of life support on the one hand, and Euthanasia and assisted suicide on the other hand. It permitted non-voluntary euthanasia in case of patients in a Persistent Vegetative State (PVS).[17] The Court held that medical treatment including artificial feeding and the administration of artificial drugs, could lawfully be withheld from an insensate patient with no hope of recovery. A competent patient cannot be compelled to undergo life saving treatment and can exercise his right to die. To this extent, this principle of the sanctity of human life must yield to the principle of self-determination.[18]

(b) United States of America - In *Washington* v. *Glucksberg*[19] and *Vacco* v. *Quill*[20], the Court made a distinction between Euthanasia and

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16. 1993 (1) All ER 821. In this case, Anthony Bland aged about 17 went to the Hillsborough ground on 15th April 1982 to support the Liverpool football club. In the course of the disaster which occurred on that day, his lungs were crushed and punctured. The blood circulation to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centre to the brain. For three years, he was in persistent vegetative state (PVS). This state arises from the destruction of the cerebral cortex on account of prolonged deprivation of oxygen, and the cerebral cortex anthony had resolved into a watery mass. He was in PVS, sometimes known as 'irreversible coma', the Gulliain Barre syndrome, 'the locked in syndrome' and 'brain death'. This decision has been accepted by the Supreme Court of India in *Gian Kaur* v. *State of Punjab*, (1996) 2 SCC 648.
17. The distinguished characteristics of PVS is that the brain stem remains alive and functioning while the cortex has lost his function and activity. Thus, the PVS patient continues to breathe unaided and his digestion continues to function. But although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is incapable of voluntary movement and can feel no pain. Ha cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and thus can feel no emotion, whether pleasure or distress.
18. Available at https://en.wikipedia.org/wiki/Legality_of_euthanasia, visited on Aug 16, 2019
19. 521 U.S. 702 (1997)
20. 521 U.S. 793 (1997), In these cases the respondents are physicians who claim a right to prescribe lethal medication for mentally competent, terminally-ill patients who are suffering from great pain and who desire doctor's help in taking their own lives, but are deterred from doing so because of the New York Act. They contended that this is not different from permitting a person to refuse life sustaining medical treatment and hence, the Act is discriminatory.

physician assisted suicide and held that when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient injects lethal injection prescribed by a physician, he is killed by that medication. Death which occurs after the removal of life sustaining systems is from natural causes. When a life sustaining system is declined, the patient dies primarily because of an underlying fatal disease. Similarly, the majority of State legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted life saving medical treatment by prohibiting the former and permitting the latter. In United States, nearly all States expressly disapprove of suicide and assisted suicide either in statutes dealing with durable power of attorney in health care situations or in 'living-will' statutes.[21]

(c) Australia -The Northern Territory of Australia became the first country to legalize euthanasia by passing the Rights of the Terminally Ill Act, 1996. It was held to be legal in the case *Wake* v. *Northern Territory of Australia*[22] by the Supreme Court of Northern Territory of Australia. But later a subsequent legislation that was the Euthanasia Laws Act, 1997 made it again illegal.

(d) Canada - In *Rodriguez* v. *British Colombia,*[23] the Court dismissed the application of the plaintiff to permit her to seek the assistance of a doctor to commit suicide. The appellant sought a declaration in a court of law to the effect that she was entitled to have assistance in committing suicide when her condition became no longer bearable. The appellant does not want to die so long as she still has the capacity to enjoy life, but wishes that a qualified physician be allowed to set up technological means by which she might, when she is no longer able to enjoy life, by her own hand, at the time of her choosing, end her life[24].

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21. Available at https://www.journalcra.com/sites/default/files/issue-pdf/28047.pdf, visited on July 27, 2019
22. (1996) 109 NTR I
23. [1993] 3 SCR 519
24. The appellant pleaded that Section 24(1)(b) of the Criminal Code of Canada that makes it offence for anyone to aid or abet a person to commit suicide be declared invalid on the ground that it violates her right under section 7, 12 and 15(i) of the Canadian Charter of Rights and Freedom guarantees under Constitution Act, 1982 and is therefore, to the extent it precludes a 'terminally ill' person for

The Court held that patients have the rights to refuse life sustaining treatments but they do not have the right to demand euthanasia or assisted suicide.[25]

V. LAW COMMISSION OF INDIA REPORTS

There are reports of the Law Commission of India making variety of recommendations:

(a) 42nd Report on 'Indian Penal Code' (1971)[26] recommended repeal of Section 309 of India Penal Code, on the basis of which the Indian Penal Code (Amendment) Bill, 1978, was introduced but it lapsed.

(b) 156th Report on 'Indian Penal Code' (1997),[27] after the pronouncement of the judgment in *Gian Kaur* v. *State of Punjab*[28], recommended retention of Section 309 of Indian Penal Code.

(c) 196th Report on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)' (2006)[29] is one of the most important subjects ever undertaken by the Law Commission of India for a comprehensive study. The Commission recommended that every 'competent patient', who is suffering from terminal illness, has a right to refuse medical treatment or the starting or continuation of such treatment which has already been started. Commission also recommended to provide an enabling provision under which the patients, parents, relatives, next friend or doctors or hospitals can move a Division Bench of the High Court for a declaration that the proposed action of continuing or withholding or withdrawing medical treatment be declared 'lawful' or

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committing "physician assisted suicide" is of no force and effect by virtue of Section 52(i) of the Constitution Act, 1982 of Canada.

25. Available at https://en.wikipedia.org/wiki/Legality_of_euthanasia, visited on June 14, 2019
26. Available at http://lawcommissionofindia.nic.in/150/Report42.pdf, visited on May 17, 2019
27. Available at http://lawcommissionofindia.nic.in/101 169/Report156Vol2.pdf, visited on June 16, 2019
28. (1996) 2 SCC 648
29. Available at http://lawcommissionofindia.nic.in/reports/rep196.pdf, visited on May 27, 2019

'unlawful'.[30]The Central Government accepting this recommendation introduced the Medical Treatment of Terminally Ill Patients (Protection of Patients & Medical Practitioners) Bill, 2006[31] but lapsed.

(d) 210th Report on 'Humanisation and Decriminalisation of Attempt to Suicide' (2008)[32] recommended to initiate steps for repeal of the anachronistic law contained in Section 309, Indian Penal Code.

(e) 241st Report on 'Passive Euthanasia – A Relook' (2012)[33] was a response of Court's remark in *Aruna* case[34]*,* where it requested the Commission *"to give it's considered report on the feasibility of making legislation on euthanasia taking into account earlier 196th Report of the Law Commission".*[35] Commission responded that a legislation on the subject is desirable and provided a revised draft Bill[36] making certain changes in the earlier bill. In 2016, a bill titled 'The Medical Treatment of Terminally-Ill Patients (Protection of Patients and Medical Practitioners) Bill, 2016' was introduced in Rajya Sabha.[37]

VI. EUTHANASIA: INDIAN PERSPECTIVE

The liberal concept of autonomy focuses on choice and likewise,

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30. *Ibid*. As time is essence, the High Court must decide such cases at the earliest and within thirty days. Once the High Court gives a declaration that the action of withholding or withdrawing medical treatment proposed by the doctors is 'lawful', it will be binding in subsequent civil or criminal proceedings between same parties in relation to the same patient. It was also made clear that it is not necessary to move the High Court in every case. Where the action to withhold or withdraw treatment is taken without resort to Court, it will be deemed 'lawful' if the provisions of the Act have been followed and it will be a good defence in subsequent civil or criminal proceedings to rely on the provisions of the Act.
31. Available at http://lawcommissionofindia.nic.in/reports/rep196.pdf, visited on April 20, 2019
32. Available at https://lawcommissionofindia.nic.in/reports/report210.pdf, visited on Oct 23, 2019
33. Available at http://lawcommissionofindia.nic.in/reports/report241.pdf, visited on March 07, 2019
34. *Aruna Ramchandra Shanbaug* v. *Union of India,* (2011) 4 SCC 454
35. *Ibid*
36. Available at http://164.100.47.4/billstexts/rsbilltexts/AsIntroduced/medcal%20tret-5816-E.pdf, visited on Nov 22, 2019
37. *Ibid*

self-determination is understood as exercised through the process of choosing[38]. The respect for an individual human being and in particular for his right to choose how he should live his own life is individual autonomy or the right of self- determination. It is the right against non-interference by others, which gives a competent person, who has come of age, the right to make decisions concerning his or her own life and body without any control or interference of others.

Since in cases of euthanasia or mercy killing, there is an intention on the part of the doctor to end the life of the patient, such cases would clearly fall under Clause first of Section 300 of the Indian Penal Code,1860. However, as in such cases there is a valid consent of the deceased, Exception 5 to the said Section would be attracted and the doctor or the medical professional would be punishable under Section 304 for culpable homicide not amounting to murder. But it is only cases of voluntary euthanasia (where the patient consents to death) that would attract Exception 5 to Section 300. Cases of non-voluntary and involuntary euthanasia would be struck down by *Proviso* one to Section 92 of the IPC and thus be rendered illegal. The law in India is also very clear on the aspect of assisted suicide. Right to suicide is not a right available in India; it is punishable under the India Penal Code, 1860. Provisions of punishing suicide are contained in Sections 305 (Abetment of suicide of child or insane person), 306 (Abetment of suicide) and 309 (Attempt to commit suicide) of the said Code.

The Indian Medical Council Act, 1956 also deals under Section 20A read with Section 33(m), where the act of euthanasia has been classified as unethical except in cases where the life support system is used only to continue the cardio-pulmonary actions of the body. In such cases, subject to the certification by the term of doctors, life support system may be removed.[39]

In *Maruti Shripati Dubal* v. *State of Maharashtra*[40] and *P. Rathinam*

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38. John Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, p32, 33
39. Available at https://www.researchgate.net/publication/259485727_POSITION_OF_EUTHANASIA_IN_INDIA_-_AN_ANALYTICAL_STUDY, visited on Oct 23, 2019
40. 1987 Cri.L.J. 743 (Bom.)

v. *Union of India*[41]cases, Section 309 IPC was held to be discriminatory in nature and also arbitrary and violated equality guaranteed by Article 14. Article 21 was interpreted to include the right to die or to take away one's life and consequently, it was held to be violative of Article 21also. The Apex Court further stated that suicide attempt has no either beneficial or unfavourable effect on society and the act of suicide is not against religions, morality or public policy. However, in *Chenna Jagadesswar* v. *State of Andhra Pradesh,*[42] the Andhra Pradesh High Court held that right to die is not a fundamental right under Article 21 of the Constitution.

The question again came up in *Gian Kaur* v. *State of Punjab*[43], where Court overruled the *P. Rathinam* case[44] holding that right to life under Article 21 does not include right to die or right to be killed and there is no ground to hold Section 309, IPC constitutionally invalid. The true meaning of life enshrined in Article 21 is life with human dignity. Any aspect of life which makes a life dignified may be included in it but not that which extinguishes it. The right to die if any is inherently inconsistent with the right to life as is death with life and by no stretch of the imagination can extinction of life be read into it. Dying a natural with dignity at the end of life must not to be confused or equated with the 'Right to die' an unnatural death curtailing the natural span of life.

In *Gian Kaur*'s case, the appellants who were convicted under Section 306 for 'abetment of suicide' contended that if Section 309 dealing with 'attempt to commit suicide' was unconstitutional, for the same reasons, Section 306 which deals with 'abetment of suicide' must be treated as unconstitutional. But the Court upheld the constitutional validity of both Sections 306 and 309. The Court made it clear that 'Euthanasia' and 'Assisted Suicide' are not lawful in India and the provisions of the Indian Penal Code get attracted to these acts.

But the question is whether *Gian Kaur*'s[45]case, either directly or indirectly deals with 'withdrawal of life support'? Fortunately, in context of Section 306, there were some useful remarks in *Gian Kaur*'s case

41. AIR 1994 SC 1844
42. 1988 Cri.L.J. 549
43. 1996 (2) SCC 648; AIR 1996 SC 946
44. AIR 1994 SC 1844
45. *Supra* note 43

which touched upon the subject of withdrawal of life support. Before the Supreme Court, in the context of an argument dealing with 'abetment of suicide', the decision of the House of Lords making distinction between withdrawing life support and euthanasia in *Airedale N.H.S. Trust* v. *Bland*,[46] was cited and in effect, the Supreme Court, while making the distinction between 'euthanasia', which can be legalized only by legislation, and 'withdrawal of life-support', appears to agree with the House of Lords that 'withdrawal of life support' is permissible in respect of a patient in a Persistent Vegetative State (PVS) as it is no longer beneficial to the patient that 'artificial measures' be started or continued merely for 'continuance of life'. The Court also observed that the principle of 'sanctity of life' which is the concern of the State, was 'not an absolute one'.[47]

In *Aruna Ramchandra Shanbaug* v. *Union of India*[48], the Court held that while giving 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 life support or not. Agreeing with *Airedale case*[49] that the approval of the High Court should be taken in this connection, the Court held that 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 family as well as the public. This is also in consonance with the doctrine of *parens patriae* which is a well-known principle of law.[50] Though, it turned down the mercy killing petition, it allowed passive euthanasia in India. The Court referred to the authorities in *Charan Lal Sahu* v. *Union of India*[51] and *State of Kerala* v.

46. [1993] AC 789
47. *Supra* note 43
48. (2011) 4 SCC 454. In this case, Aruna Shanbaug, was a 25 years old nurse sexually assaulted resulting asphyxiation, cortically blind, paralyzed, speechless, cervical cord injury and in coma, decided to move the Supreme Court with a plea to direct the KEM Hospital not to force feed her. But doctors at KEM hospital don't agree saying she responds through facial expressions. On the basis of a medical panel, the Court concluded that she met "most of the criteria of being in a PVS" and that in all probability, she will continue to be in the state in which she is in till her death.
49. *Supra* note 46
50. Available at https://indiankanoon.org/docfragment/235821/?big=3&formInput=parens, visited on Sept 30, 2019
51. (1990) 1 SCC 613

N.M. Thomas[52] and further opined that the High Court can grant approval for withdrawing life support of an incompetent person under Article 226 of the Constitution.[53] Because of the *Aruna Shanbaug* case, the Supreme Court permitted Passive Euthanasia and, in each case, the relevant High Court was to evaluate the merits of the case, and refer the case to a Medical Board before deciding on whether passive euthanasia can apply. And till Parliament introduces new law[54] on euthanasia, it is *Shanbaug* case that is to be used as a point of reference by other Courts.

In *Aruna Shanbaug,*[55] the Court observed that 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 decisions 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 had he/she been competent

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52. (1976) 2 SCC 310

53. Available at https://indiankanoon.org/doc/235821/, paras 133, 138. Dealing with the procedure to be adopted by the High Court when such application is filed, the Court ruled that when such an application is filed, the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not and before doing so, the Bench should seek the opinion of a Committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Amongst the three doctors, as directed, one should be a Neurologist; one should be a Psychiatrist and the third a Physician.The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient. The High Court should give its decision assigning specific reasons in accordance with the principle of ¯best interest of the patient laid down by the House of Lords in *Airedale case*. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature. See also *Chandrakant Narayanrao Tandale* v. *The State of Maharashtra*, decided by Bom HC on 9 December, 2020

54. In November 2007, a member of Parliament of the Communist Party of India introduced Euthanasia Permission and Regulation Bill to legalize euthanasia in the Lok Sabha that would allow the legal killing of any patient who is bed-ridden or deemed incurable but if failed. Quoted by Dr. B.K. Rao, Chairman of Sir Ganga Ram Hospital in New Delhi; http://legal servicesindia.com, visited on June 15, 2019

55. Available athttps://indiankanoon.org/doc/235821/, visited on June 24, 2019

or to act in the patient's best interest. It is expected that a surrogate acting in the patient's best interest follows a course of action because it is best for the patient, and is not influenced by personal convictions, motives or other considerations.

Although the Constitution Bench in *Gian Kaur*'s case, 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's* case, which upholds the validity of passive euthanasia and lays down an elaborate procedure for executing the same on the wrong premise that the Constitution Bench in Gian Kaur's case had upheld the same.

VII. RIGHT TO DIE WITH DIGNITY: NEW DIMENSON

In a milestone verdict expanding the right to life to incorporate the right to die with dignity, the Supreme Court in *Common Cause* v. *U.O.I.*[56] legalised passive euthanasia and approved 'living will' to provide terminally ill patients or those in Persistent Vegetative State (PVS) a dignified exit by refusing medical treatment or life support. The person concerned can also authorize, through the will, any relative or friend to decide in consultation with medical experts when to pull the plug.[57]

The Court held that right to die with dignity is a fundamental right and 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 shall be applicable. When passive euthanasia as a situational palliative measure becomes applicable, the best interest of the patient shall override the State interest. Furthermore, the Court clarified that it did not intend to use the word 'Living Will', instead agreed for use of term 'Advance Medical Directive'. The Court also laid down the detailed procedure for execution of an Advance Directive and provided guidelines

56. Available at https://indiankanoon.org/doc/184449972/, visited on July 12, 2019
57. Available at https://www.livelaw.in/breaking-right-die-dignity-fundamental-right-sc-allows-passive-euthanasia-living-will-issues-guidelines/, visited on July 15, 2019

for passive euthanasia, both in the presence and absence of such directive, in exercise of the power under Article 142 of the Constitution. It included detailed procedure regarding who can execute the Advance Directive and how; what should it contain; how should it be recorded and preserved; when and by whom can it be given effect to; what if permission is refused by the Medical Board and revocation or in-applicability of Advance Directives. The Court held that these directions with regard to the Advance Directives and the safeguards shall remain in force till the Parliament makes legislation on this subject.[58]

This decision is being criticized on the ground that *firstly,* if we embrace 'the right to death with dignity', people with incurable and debilitating illnesses will be disposed from our civilised society. The practice of palliative care counters this view. *Secondly*, there is a grave apprehension that the State may refuse to invest in health (working towards Right to life). Legalised euthanasia may lead to a severe decline in the quality of care for terminally-ill patients. Hence, in a welfare state, there should not be any role of euthanasia in any form.[59] *Thirdly,* in the era of declining morality and justice, there is a possibility of misusing euthanasia by family members or relatives for inheriting the property of the patient.[60] *Fourthly,* the expectation of society is 'cure' from the health professionals, but the role of medical professionals is to provide 'care'. Hence, euthanasia for no cure illness does not have a logical argument.[61] *Fifth,* if euthanasia is legalised, then commercial health sector will serve death sentence to many disabled and elderly citizens of India for meagre amount of money.[62] *Sixth,* the act of mercy killing, despite the good intentions, violates the rule that no one has the right to take one's life and the life of another person. *Seventh,* euthanasia is a clear opposition of Doctor's oath to

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58. *Supra* note 56
59. Available at https://www.ijmr.org.in/article.asp?issn=0971-5916;year=2012; volume=136;issue=6; spage=899; epage=902; aulast=Math;type=3, visited on Oct 26, 2019
60. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3612319/, visited on Nov 22, 2019
61. Available at https://www.ijmr.org.in/article.asp?issn=0971-5916;year=2012;volume=136;issue=6;spage =899;epage=902;aulast=Math, visited on Sept 30, 2019
62. *Aruna Ramchandra Shanbaug* v. *Union of India,* (2011) 4 SCC 454

preserve lives.[63] *Eighth,* **e**uthanasia, like suicide has a psychological effect on people and society. According to experts, people with family members who have committed suicide are prone to doing the same and this also goes with the act of mercy killing. If society will accept it as a normal practice, it can influence more people to consider euthanasia.[64]

The decision is being welcomed on the ground that *firstly,* it ends the suffering of the dying with terminal and incurable diseases.[65]*Secondly,* it gives dignity to a dying person. *Thirdly*, it is the most humane act to end the suffering of a human being. Moreover, the process or method is done in such a way that the person will not feel any pain.[66] *Fourth,* the caregiver's burden is huge and cuts across various domains such as financial, emotional, time, physical, mental and social. *Fifth,* right to refuse medical treatment is well recognised in law, including medical treatment that sustains or prolongs life. *Sixth,* many patients in a persistent vegetative state or in chronic illness, do not want to be a burden on their family members. Euthanasia can be considered as a way to upheld the 'Right to life' by honouring 'Right to die' with dignity. *Seventh,* euthanasia in terminally ill patients provides an opportunity to advocate for organ donation. This in turn will help many patients with organ failure waiting for transplantation.[67]

VIII. CONCLUSION

Common law jurisdictions reveal that all adults with capacity to consent have the right of self- determination and autonomy. The said rights pave the way for the right to refuse medical treatment which has acclaimed universal recognition. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death. The

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63. *Ibid*
64. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC166123/, visited on Nov 17, 2019
65. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3612319/, visited on Oct 03, 2019
66. Available at https://academic.oup.com/ilarjournal/article/40/3/97/959811, visited on Oct 27, 2019
67. Available at https://www.clearias.com/euthanasia/, visited on Nov 26, 2019

'Emergency Principle' or the 'Principle of Necessity' has to be given effect to only when it is not practicable to obtain the patient's consent for treatment and his/her life is in danger. But where a patient has already made a valid 'Advance Directive' which is free from reasonable doubt and specifying that he/she does not wish to be treated, then such directive has to be given effect to. Right to life and liberty under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and liberty. It has to be stated without any trace of doubt that the right to live with dignity also includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery. A failure to legally recognize Advance Medical Directive may amount to non-facilitation of the right to smoothen the dying process and the right to live with dignity.

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MULTI-DISCIPLINARY PRACTICE OF LAW IN INDIA : POLICY AND ETHICS

*RAJNEESH KUMAR PATEL**

ABSTRACT : Globalization is a familiar, acknowledged, properly known, and the exceptionally observable fact of today's economic setup of any country in the entire world. In its plain meaning it refers to a state which treats the whole world as a single unit; exclusively concerning commercial policies and decision making. The term globalization is associated not only with an extension of border-free financial transactions but also with well planned economic actions that overlap National boundaries of the mutually agreed countries. Its process requires a compulsory elimination of tariff or other blockades on trade and invites investment between the different countries, which always results in a fully-free economic operation across the borders of countries and never accept any obstacle by the government of one country to the business of others. The impact of globalization on various jurisdictions has always been a matter of debate. On one hand, it is being said that various economies especially the developing ones have been greatly benefited by globalization; while on the other hand, it has been argued that the policy of globalization was premeditated by the rich countries only to exploit the resources' of developing countries for their own interest. Regarding India, the policy of globalization has given a mixed experience to the governments, as it has its negative and positive impacts both. In India, the wind of globalization influenced not only the business sectors but also the service sectors, including the legal service, consequently, the foreign law firms have opened their liaison offices in this country. Apart from their existence, their working system has been also a point of

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dispute. After the collaboration of big five firms with various law firms, individual law practice has become an old days phenomenon. Professionals of different fields are providing their services under the same umbrella of a single group, which is heavily appreciated by the clients nowadays, as they don't have spare time due to their busy life. This system of practice is known as the multi-disciplinary practice of law, in which different business associates, advocates, accounting firms, and other professionals formed an organization to offer several services to the client, solving increasingly complex issues, including the legal services at one stop. It is a type of professional services network which operates to provide services to its members.

KEY WORDS : Globalization, Multi-Disciplinary Practice, Profession, Bar, Legal Service.

I. INTRODUCTION

From its beginning days, the profession of law is considered as a most gleaming, striking, and society oriented profession. Being an integral part of the administration of justice this *pro-bono-publico* institution; with the assistance of its knowledge, argument, and experience has always tried to maintain the rule of law in society at any cost. The degree of responsibilities that is required by the legal profession from its members is unique and it is a distinct profession carrying the highest responsibility on its shoulder for the sake of justice to the society. This great profession is composed of a group of the person with a high sense of admiration and marked by healthy competition only, as lawyers on opposite sides of a case are like the two parts of shears, they cut what comes between them, and not each other.[1] While professing their profession, the advocates are morally and legally duty-bound to transact it with the utmost honesty and great quality of prudence. Their profession is, amongst all the learned professions, the most independent one.

It is also a notable fact that, from the very beginning, the legal

1. Daniel Webster (1782 - 1852), Quoted by Mr. Justice F.M. Ibrahim Kalifulla, Judge, Supreme Court of India, in his lecture which was delivered on the Inaugural Function of "Redefining Legal Practice for Advocates – Generation Next (1-10 Years) Continuing Legal Education to young lawyers at the district level, organized by the Tamil Nadu Judicial Academy on 15/12/2013.

profession being a noble one is concerned with facilitating society as a duty and not a compulsion or any private gain.[2] Therefore, one may be agreed on the point that though money has been accepted by the profession as a means of livelihood, but not as a profit-making entity. Similarly, it is also true that money has never been the purpose and criteria for success in the profession. In this regard, Mahatma Gandhi observed, that, "I had learned the true practice of law. I had learned to find out the better side of human nature and to enter man's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so deeply burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby, not even money, certainly not my soul." [3]

He also remarks that "throughout my career at the bar I never once departed from the strictest truth and honesty. The first thing which you must always bear in mind, if you would spiritualize the practice of law, is not to make your profession subservient to the interests of your purse, as is unfortunately but too often the case at present, but to use your profession for the service of your country. The fees charged by lawyers are unconscionable everywhere. I confess I have charged what I would now call high fees, but even whilst I was engaged in my practice, let me tell you I never let my profession stand in the way of my public service."[4]

The above thoughts of Mahatma Gandhi are indicating a high degree of professionalism and a bundle of ethical responsibility attached with the legal profession, which the member of this social institution expected to perform in their sense of duty. However, on the other hand with the passage of time and the occurrence of numerous changes in society, the earlier ethical norms of the legal profession are also changing. During the last two to three decades, the legal profession had been the witness of several positive and negative changes, which have altered and still altering its earlier model and set-up with its well established ethical values.

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2. In 204 B.C. there was a law in Rome that prohibits the professionals to ask fees from their clients.
3. Young India, The Weekly News Paper, (written as series between 1919-1931) 22-12-1927, pp. 427-28
4. Ibid.

Acceptance of liberalizations policy is primarily answerable for all these changes, which enters into the legal profession with a verity of progressive proposals, newly invented techniques, economically attractive offers on one side and sugar quoted proffers, uncertainty, and several ethical as well as legal challenges on the second side. The issue related to the multidisciplinary practice of law is one of the breathing concerns among them. The policy of multi-disciplinary practice of law is a system of practice under which the various types of firms may collaborate with one or more law firms or a group of lawyers to provide a variety of services to the society at one stop, including the legal services. Hence, it is a splendid service system from the viewpoint of the client and customers as it saves their time even without compromising the quality of service. It also provides a choice based legal service along with several necessary services related to their daily life.

Moving towards the second face of the coin, the system of multi-disciplinary practice of law is considered as a threat to the autonomy, dignity, and even the existence of the legal profession.

Therefore, its acceptance in the Indian legal system has given birth to two contradictory estimations on the issue. The first view is arguing in the favor of multi-disciplinary practice demands that as it will provide different types of qualitative services therefore India should lift all the obstacles, barriers, and impediments put against this system and it should be properly recognized without further delay. On the other hand, the second view on this point argued that the system of multi-disciplinary practice of law is against the values of the legal profession and if it will be recognized in the Indian legal system then it will convert the legal profession into a bread-butter supply industry, which will no doubt detrimental to the dignity of the profession.

In the above backdrop, the question arises that how these two contradictory approaches will be harmonized? To find out a way forward in this concern, the present paper is intended to discuss and examine the utility of the concept of the multidisciplinary practice of law, especially in the Indian context. The study will move around the concept of globalization, privatization, and liberalization to testify the possibility of application of this system in the Indian legal system. The paper will also discuss the position of application of this system on the global juncture. It will also discuss the pros and cons of the application of this system in

India. Finally, the study will try to find out some way forward in this regard.

II. MEANING AND EXTENT OF MULTI-DISCIPLINARY PRACTICE

In its common parlance profession is an occupation, livelihood, calling, or service which requires the element of the organization, special skill, and orientation toward a social service. There are several professions and almost all the profession traditionally holds members of the same discipline. However, with the introduction of globalization; where under mutual consent various countries have opened their door to each other for free trade, consequently, the constraint of the same discipline of professionals becomes the story of the past. Liberalization which crosses the economic boundaries of nations also comes with an innovative model of the business guild; just like a rainbow in which different types of professionals in conjunction with each other professionals provide their different services to the public. This combination of the multi-disciplinary practice of law offers a range of professional services to the public such as financial, banking, technical, and medical as well as legal services.

According to the Collins dictionary[5], it is an organization that offers a range of professional services such as accountancy and the law.[6] The phrase multi-disciplinary practice of law itself makes it clear that in place of conventional personage service by a professional, it is a group service, in which their professional comes from a different discipline. It will be interesting to note that the term multi-disciplinary practice of law is nowhere statutorily defined, whether in India or abroad. However, the American Bar Association gives a very comprehensive definition of this term, according to which, multi-disciplinary practice of law is "a partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client other than the multi-disciplinary practice of law, itself or that holds itself out to the public as

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5. Collins Dictionary, W. J. @ Stewart 2006.

6. Traditionally lawyers have been prevented from entering such arrangements because of the core ethical value of independence and service to the client in hand while at the same time honoring obligations to the court and justice. However, throughout the world demand from consumers, competition regulators, and the large multinational accountancy firms are bringing pressures for these changes.

providing non-legal, as well as legal services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement."

A close reading of the above definition makes it clear that it is a category of unusual business arrangement that provides a fusion of reserved and non-reserved legal services together with other non-legal services, under which a verity of services will be available at one station. It may also be defined as a multiparty professional practice between lawyers and members of other professions where their joint professional activities in pursuit of such joint practice involve the offer of legal services to the public.

Thus, going through the above definition of the multi-disciplinary practice of law it is quite clear that, it is an attempt to draw the entire legal services market within one regulatory framework and that major emphasis should be given to scrutinize the multi-disciplinary practice of law concept effectively.

III. ESSENTIALS OF MULTI-DISCIPLINARY PRACTICE

Considering the above definition of the term Multi-Disciplinary Practice of Law, its essentials may be discussed as under:

1. The first and foremost essentials of multi-disciplinary practice of law are that it is not an individual service but a group service under which legal practitioners can provide their 'in and outside court services' with the consensus of other professionals. It is important to note here that, there is no limitation on the nature of work in this regard and that's why the other professionals may come from any discipline, such as medicine, accountancy, engineering, banking, and commercial agency, agents of life Insurance Corporation or even the salesmen of any company or firms and may join the same association.[7]

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7. The largest multidisciplinary networks are: Alliott Group, M.S.I. Global Alliance, Morison International, Geneva Group, International Practice Group, W.S.G.World Services Group and Russell Bedford International. These networks have more than 100 member firms in as many as 90 countries in hundreds of offices. The members employ a huge number of professionals.

2. Considering the above definition it is also clear that the multi-disciplinary practice of law is not an entity itself, but it is only a mode of operation of the business. Therefore, the different professionals may join their hands with the intent to provide a number of services in conjunction with other members of the same group, without restricting themselves into any specific mode of business.[8] This group may be in the form of a partnership, professional corporation, societies, company, or any other Association or entity that includes lawyers and non-lawyers. It is to be noted that the purpose of this group will not only to provide legal services, but that may be the one purpose along with other purposes of the group.

3. It is a group service and there is the number of professionals from different discipline works together, therefore, every member are devoted to the group and no one can claim that it is his own personal service. It may be concluded that each member of this group is like an employee and will observe the rules and regulations of the same.

4. As, the basic feature of the multi-disciplinary practice is a group service, consequently under this system of practice all the members, including advocates, will be bound to share their fees or remuneration with other professionals of the group.[9]

5. In the same swing, multi-disciplinary practice of law is a combination of many professionals, therefore, the business may be controlled by any member of the group. Actually, the controlling authority in business depends upon numerous factors. It may depend upon the deed by which that group was constituted or upon the collective decision of the group. As a tradition of the business, it depends upon the dominating position of members, and even under the law, it depends upon the rule of the majority.[10] Therefore, if any person or lobby is holding more shares of that company or the business guild, then definitely that person or that lobby shall control the administration of the business, and other members will be bound to work under his or their direction, guidance, and supervision. It goes without saying that under this system of practice an

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8. The most common business models are, Sole Proprietorship, Partnership, Company and Limited Liability Partnership.
9. Sharing of fee with non-layers is prohibited yet under the existing Bar Council of India Rules, 1975.
10. See, Foss V. Horbottle, (1843) 67 E.R. 189

advocate may be bound to work under the control of other professionals of the group.

6. The last but not least, as every professional are the members of the same group and working under an agreement of brotherhood, so with the mutual consent or personal agreement name and fame of any member may be used by the group or by any other member of the group.[11] The group may also make a common consensus in this regard. For example, if under any group a famous advocate Mr. X is working then the group may use his name in its advertisement and may declare that Mr. X is our group member and he will be instrumental in any dispute before the court of law on behalf of the group. Hence, by declaring that the group will be legally entitled to use his name.

It depicts from the above discussion that multi-disciplinary practice of law is a system of group service by which the group can provide several necessary services to the society along with the legal services. Members of the group will work under the contractual obligations and they will work for the group, not for individual service with the compulsion of sharing remuneration, name, and fame.

IV. THE JOURNEY OF MULTI-DISCIPLINARY PRACTICE

The subject of law is the only discipline which touches all aspect of the daily life of human being. The presence and force of law are always involved in all the activities of our routine work, whether, we are purchasing any goods and service, walking in a park or roadside, and even when we are listening to the songs on our balcony or sleeping in our bedroom. The law shall always be there and try to protect our rights while regulating the other's rights in different forms and policies of its own. This connection of the subject of law with other subjects may be called an overlapping state of law subject with other disciplines.

In the same swing, one can understand the design of multi-disciplinary practice of law as commercial and necessity-based exploitation of the natural overlap between legal service and other different services, such as accounting, banking, and taxation, etc. Regarding the origin of the multi-disciplinary practice of law, it may safely argue that its birth

11. This is not permitted yet, under Bar Council of India Rules, 1975.

does not have any territorial or jurisdictional boundaries, and rather it has been developed simultaneously in different jurisdictions in a similar span of time. Therefore, the coming study is focusing its attention briefly on the development of the multi-disciplinary practice of law as taken place in different countries.

While tracing the olden times of multi-disciplinary practice of law we need not go before the year 1940. As a matter of fact, primarily, it was neither allowed nor prohibited in any part of the world. Hence, in the original draft version of Canon of Professional Ethics, 1908 of the American Bar Association, the rules regarding the prohibition against the multi-disciplinary practice of law were not in black and white.[12] Therefore, the mixing of the legal profession with financial or managerial involvement of non-lawyers was prohibited first time in 1928.[13] These inserted rules were contained under canon number 33-35 of American Bar Association Cannon and were too stringent in the outward appearance and nature, as it prohibits any kinds of business or professional guilds with the group of advocates, such as accounting firms, company, associations, business guilds or any entity.[14] The reason behind the rules, which prohibits lawyers from arranging any kind of association with non-lawyers was to preserve the professional confidentiality of advocacy from any external profession, as the level of professional standards which are expected from the member of the legal profession, whether, individually or collectively is much higher than the group of any other professionals.[15]

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12. It starts with 1928.
13. Paul D. Paton, Multidisciplinary Practice Redux: Globalization, Core Values, and Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America, published in Fordham Law Review, Vol.78, Issue 5.
14. See, the cannon number 33 to 35 as added in 1928, to the American Bar Association Canons.
15. The American Bar Association Model Rules of Professional Conduct prohibits lawyers from sharing fees or entering into partnerships with non-lawyers. The Rule 5.4 forbids multi-disciplinary practices with influence by non-lawyer. Model Rule 5.4(a) prohibits lawyers from fee-sharing with non-lawyers, Model Rule 5.4(b) prevents partnerships with non-lawyers if the activities are not ancillary to the practice of law, and Model Rule 5.4(d) precludes lawyers from practicing in a professional corporation if a non-lawyer owns an interest, has the right to control, or is a director in that corporation.

The issue relating to multidisciplinary practice[16] arose first time in the United States in the year about, 1940 which was dealt with by the American Bar Association prohibiting lawyers working for accounting firms to represent clients before the Internal Revenue Services.[17] Meanwhile, the concept of multi-disciplinary practice started in Germany after the Second World War[18], where they allowed accountants and lawyers to practice together and since then it has gained support across Europe and in other parts of the world.

Further, in the year 1969, the above canons were seceded by the Model Code of Professional Responsibility in the United States. By this new change the previous canons 33 and 34 which were added in 1928, became part of disciplinary rules and canon number 35, which prohibited lawyers from permitting non-lawyers to control their services, did not survive in the new Model Code as a separate rule.[19]Again, in the year 1976, the *Kutak Commission* proposed an amendment under Rule 5.4 that would have allowed the formation of multi-disciplinary practice in the field of law. It was proposed by the commission that, lawyers may be allowed to share their fees and remuneration with their fellow partners even the non-lawyers. Though it was based on a condition that non-lawyers shall not influence the independence of the bar and they shall also observe the rules of legal ethics related to confidentiality, solicitation, and legal fees. But finally, the recommendation of the Commission was rejected and the ban on the creation of multi-disciplinary practice remains

16. Mijares, A H, The SEC's ban on Legal serves by Audit firms: Amendments to Rule 2.01 of Regulations S-X under the Securities and Exchange Act of 1934. 36 U.S. F. L. Rev 209–236 (2001).
17. It is revenue service of the United States federal government. The government agency is a bureau of the Department of the Treasury, and is under the immediate direction of the Commissioner of Internal Revenue, who is appointed to a five-year term by the President of the United States. The IRS is responsible for collecting taxes and administering the Internal Revenue Code, the main body of federal statutory tax law of the United States. The duties of the IRS include providing tax assistance to taxpayers and pursuing and resolving instances of erroneous or fraudulent tax filings.
18. The Second World War was a global war and it was lasted between 1939-1945.
19. See, Canon 33, prohibiting partnerships between lawyers and non-lawyers became Disciplinary Rule 3103 (A),' and Canon 34, which prohibited fee-splitting, Disciplinary Rule 3-102 (A).

to continue. [20]

These ethical rules in the United States experience another key modification in 1983 and consequently, the Model Rules of Professional Conduct substituted the Model Code of Professional Responsibility, although the 1983 changes did not ultimately affect the earlier rule regarding the policy of multi-disciplinary practice.[21]

It depicts from the early history of the multi-disciplinary practice of law is that, though it is not a new system of practice, but, this policy comes expressly in the picture only after the year 1990, when the big accounting firm began to expand to the legal profession, and after that, the history of the multi-disciplinary practice of law is well documented.[22]

Hence, the proper establishment of multidisciplinary practice starts when the big four[23] accounting firms split out to become multidisciplinary in the area of the legal profession, technology, accounting as well as employment services. Though the method and structures varied from business to business the fundamental idea was the sharing of revenue between lawyers and non-lawyers. These accounting firms were initially very successful in creating alternative businesses. Very soon, the Big 6 firms[24] having multi-billion dollar technology consulting businesses entered this area and started to provide their services to the public. This worldwide development regarding multidisciplinary practice has divided even the legal fraternity into two groups on the issue of its implementations and acceptance of this practice in the field of law.

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20. Washington, D.C. is the only jurisdiction in the United States that allows fee-splitting and partnerships with non-attorneys; however, such arrangements are only allowed where the attorneys are providing legal services and the non-attorneys are providing services that are incidental to the legal services.
21. Mijares, A H, The SEC's ban on Legal serves by Audit firms: Amendments to Rule 2.01 of Regulations S-X under the Securities and Exchange Act of 1934. 36 U.S. F. L. Rev 209–236 (2001).
22. Charles W. Wolfram; Comparative Multi-Disciplinary Practice of Law- Path Taken and Not Taken, Cass Western Reserve Law Review, Vol. 52, Issue 4.
23. The Big Four is the nickname used to refer collectively to the four largest professional services networks in the world, consisting of Deloitte, Ernst & Young, KPMG, and PricewaterhouseCoopers.
24. The Big Six firms are nick names of combination of Arthur Andersen, Coopers & Lybrand, Deloitte & Touche, Ernst & Young, K.P.M.G. and Price Waterhouse.

Moving again to the United States in August 1998, a twelve-member Commission on Multidisciplinary Practice was constituted. The chief aim of the constitution of this commission was to study and report on the extent and manner of the professional service firms operated by non-lawyers and lawyers. In January 1999, the Commission published an informational paper addressing the developments in multidisciplinary practice and the issues facing the business of law.[25] Finally, the Commission recommended that Rule 5.4 should be revised to allow fee-splitting and partnerships between lawyers and non-lawyers.[26] On the issue, finally, the American Bar Association Commission refers to five models. These are the Cooperative Model, Ancillary Business Model, Contract Model, Command and Control Model, and Fully Integrated Model.

Regarding the Canadian Bar Association, which is a professional and voluntary organization of Canada, established its International Practice of Law Committee in 1997 with a mandate to monitor the "activities, negotiations and developments regarding the globalization of legal practice and the trend towards multi-disciplinary practices. The Committee released an interim report in 1998 that recommended that multi-disciplinary practice should not be permitted to provide legal services to clients unless this organization will be controlled by lawyers. However, after further study and consultations, the Committee in August 1999 released its surprising reversal of view and recommended that lawyers be allowed to participate in multi-disciplinary practice even if such group is not controlled by lawyers. Moreover, the combined effect of the Resolution 1O-F of the American Bar Association House of Delegates and 00-03-A and 01-

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25. The Commission also submitted reports with recommendations endorsing the amendment of Rule 5.4 at both the 1999 and 2000 Annual Meetings of the American Bar Association.

26. The Commission wrote that, lawyers would be able to form partnerships, and share legal fees, with non-lawyers. Lawyers in Multidisciplinary Practice offering legal services would be bound by the same ethics rules as lawyers in traditional law firms, including the imputation-of-knowledge standard of Model Rule 1.10. Non-lawyers working on the same team as lawyers on a client's matter within a Multidisciplinary Practice would be bound by the lawyer's conflict rules as to that matter. Non-lawyers in Multidisciplinary Practice would not be permitted to practice law. Safeguards must be implemented to guarantee the ability of lawyers within a Multidisciplinary Practice to exercise independence of their professional judgment, as lawyers in law firms, corporations, and other existing practice forms are already bound to do.

01-M of Canadian Bar Association Resolutions, 2000-2001 resulted in the prohibition against integrated multidisciplinary practices involving lawyers and other professionals.

However, again after many, if and buts as the law itself require attorneys to work with professionals from other disciplines multi-disciplinary practices are in existence in the United States.[27] This is the current legal situation regarding multi-disciplinary practice in the United States, and the Canadian Bar Association finally allowed the joining the hands and sharing the rumination between lawyers and non-lawyers, with a condition that, the practice of law and business activities in the multi-disciplinary practice of law must be effectively controlled by the lawyers in the association or group.

Approaching the United Kingdom, their early period is also the witness of the prohibition against the multi-disciplinary practice and fee-sharing between lawyers and non-lawyers. Before, 2007 there was a common restriction on non-lawyers owning or investing in businesses providing regulated legal services. It will be relevant to note here that, in England, the solicitors always worked closely with non-lawyers because of the number of changes introduced by the Law Society since the middle period of 1980. On the other hands, the Office of Fair Trading had been always favoring the removal of restrictions on the formation of multi-disciplinary practice and recommending changes to the Law Society's Practice rules by amending Act 1974 to remove statutory barriers to fee sharing by solicitors, which was finally achieved with the introduction of section 66 of the Courts and Legal Services Act, 1990.

Further, in the year 2007, the Legal Services Act was passed which allows a new kind of business policy which is known as alternative business structures in England. Under this system of practice, solicitors may join with other kinds of lawyers and non-lawyers while dealing with

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27. Section 2 analyzes the current ethics rules governing the creation of multi-disciplinary practice in the United States and compares it to the legal system in Canada. Section 3 explores the significance of the problems surrounding multi-disciplinary practice and investigates the activities of the Big Five accounting firms. Section 4 surveys the arguments in favor of and against allowing multi-disciplinary practice and Section 5 suggests several reasons why the Model Rules should be amended to allow multi-disciplinary practice.

their day to day practice.[28] These business structures allow lawyers to go into multidisciplinary practices with other kinds of professionals and allow non-lawyers to own practices that provide legal services.[29] It aimed to increase competition in the legal services market by allowing these alternative business structures, which cover a number of business models, including multi-disciplinary firms in which lawyers and non-lawyers work together to provide a range of legal and non-legal services.[30]

Moving further, in the past, the multi-disciplinary practice was also not allowed in Australia. In 1994, the Trade Practices Commission, at present known as the Australian Competition and Consumer Commission, recommended for the repealing of the rule which prevented fee-sharing between lawyers and non-lawyers. Therefore, in Australia, multidisciplinary practices and incorporated legal practices with outside ownership are permitted.

In Germany, lawyers are permitted to form the multi-disciplinary practice of law only with patent lawyers, tax consultants, tax agents, accountants, and certified auditors for the purpose of a common exercise of the profession.[31] Again, by virtue of the decision given by the Constitutional Court, the German lawyers can enjoy the Constitutional authority to enter into any partnership arrangement with non-lawyers.[32] In the opinion of the court, it has been done so because putting any kind of restriction on this multi-disciplinary practice would not serve the purpose of protecting the confidentiality and independence of these German lawyers.[33]

It will be relevant to note here that, after the productive and economically beneficial application of the policy of multi-disciplinary

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28. Judith A. Mc. Morrow. "UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US." Georgetown Journal of International Law 47, no.2 (2016): 665-711.
29. Ibid.
30. The main change that the Legal Services Act 2007 brought to the legal profession was the introduction of alternative business structures. This allows non-lawyers to take a financial stake in, and become partners of, established law firms. Equally, new legal businesses could be founded under a shared ownership model between lawyers and non-legally trained managers.
31. *See, section 59a, Federal Lawyer's Act.*
32. *Bundesver fassungsgericht, decision of 12. January 2016, case no. 1 BvL 6/13.*
33. Ibid.

practice of law in the United States of America, Canada, Australia, Germany, and United Kingdom; by inspiring the same most of the countries in the world like France, Switzerland, Austria, Belgium, Spain, Ireland, and South Africa, have also allowed this system of multi-disciplinary practice of law in their respective jurisdictions by specific domestic laws.

Thus, it is clear from the above discussions that by taking into account the financially beneficial consideration of the multi-disciplinary practice of law, almost all the countries with slight modification have adopted the same policy and allowed in their respective jurisdiction to form an association of lawyers and non-lawyers with the facility of sharing of profit and remuneration. The upcoming study will focus on the state of this policy in India.

V. MULTIDISCIPLINARY PRACTICE AND THE LAW IN INDIA

The Advocates Act, 1961, is the only legislation that directly regulates the entire system of the legal profession along with legal education in India. The Act constitutes two types of Bar Councils, i.e., State Bar Councils and Bar Council of India for this purpose and provide them various autonomous, administrative, and managerial powers for smooth functioning and organization of the legal profession. Apart from the provisions of the Act these councils also derive their powers from a set of rules which is known as Bar Councils of India Rules, 1975.

Though it is true that neither under the Act nor under the rules there are any provisions which directly prohibit or allow the system of multi-disciplinary practice of law, it is equally correct that principles and necessary conditions of practice which is given under the Act as well as rules seem not in favor of the policy of multi-disciplinary practice of law. Further, the Indian judiciary also by the series of its decisions makes it clear that the existing laws and policy related to the legal profession are not in support of mixing the different professionals by liberalizing the legal sector.

Hence, in order to examine the issues related to the multi-disciplinary practice of law, it will be not out of the mark to discuss that who and under what conditions one can practice the profession in India. Some of the relevant provisions are discussed as under:

a. Who can Profess the Legal Profession

In regard to the legal practice in India, Section 29 of the Advocates Act, 1961 provides that, subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates. Therefore, after 16th August 1961, which is the date of enforcement of the Advocates Act, only an advocate can practice the profession of law. This intension of the legislature is again repeated and mentioned under section 33 of the Act, which provides that, except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under this Act.

Hence, by both sections, it is clear that only an advocate can practice under the Act. It will also be relevant to note here that as per section 2(1) of the Act, "advocate" means an advocate entered in any roll under the provisions of this Act. Therefore, to be an advocate and getting a right to practice under section 30 of the Act, one must be enrolled before any State Bar Councils under the Act.

Further, a scrutiny of section 24 which provides the conditions of enrolment under the Act, makes it clear that it never prohibits any foreign nationals to be an advocate or practice before Indian courts. Though it indeed prescribes the requirement of citizenship as an essential condition of enrolment, it is not rigid over that condition, and by the explanation, to the section, it makes clear that even a person from abroad may be enrolled as an advocate, just like an Indian citizen, if his own country will allow Indian citizen to enrolled as an advocate there. Hence, section 24 of the Advocates Act, 1961 allows foreign nationals only to require a very simple and necessary criterion of reciprocity, that if their country will allow the Indian citizen then India will also welcome them for being enrolled as an advocate. Apart from section 29 read with sections 24 and 30 of the Act, another condition of practice is given under Part VI, Chapter III of the Bar Council of India Rules, 1975.[34]

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34. As amended by the Bar Council of India through its resolution by its meeting held on 10th April, 2010 and which was published in the Gazette of India on June 12, 2010.

Consequently, the combined effect of the statutory provisions[35] contained under Advocates Act, 1961 and Bar Council of India Rules, 1975 that, for practice in India firstly he has to enroll before State Bar Council and also he has to pass the examination held by the Bar Council of India. It is also clear from the above provisions that in India right to practice is given only to the individual advocate and not to the group, in any form like partnership firms, associations, or companies. However, if all the members of that group are advocates as defined under section 2(1) of the Act, then they can profess the profession authoritatively under section 29 read with sections 30 and 33 of the Act.

Now, after considering the first issue regarding the statutory conditions of practice it will be relevant to move towards the issue of multidisciplinary practice. It is to be noted that as far as the necessity of this policy is concerned, presently a number of the companies, firms, and even the clients and customers consider this multidisciplinary practice as a tool to minimize the cost of the litigation.

b. Prohibition against involvement in Business like Activities

Concerning the multi-disciplinary practice of law, the second argument is related to certain rules contained under the Bar Council of India Rules, 1975. The very first rule provides that, an advocate shall not personally engage in any business; but he may be a sleeping partner in a firm doing business provided that in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.[36]

In the above reference, it is needless to say that the legal profession is considered a very serious occupation that requires full-time attention towards the profession. Due to this reason any person if he is doing any job or other service in permanent nature or regular basis then he or they will not be able to choose or continue with the legal profession. In the case of *Hans Raj Chhulani* V. *Bar Council of India*[37], there was a medical practitioner who also obtained the degree of law and applied for enrolment before the State Bar Council. The council rejected the application for a reason that he was a practicing doctor. He contended that it was a violation

35. See, sections 2(1), 29, 30, 33, 35 and 47 of the Advocates Act, 1961.
36. See, Chapter II Part VII, Rule 47, Bar Council of India Rules, 1975.
37. 1996 S.C.C. (3) 342.

of rights guaranteed under Articles 14, 19 as well as 21. Rejecting all the contentions Supreme Court held that the above articles were not violated by the council. The rule made by the Bar Council restricting the entry of persons already carried on other professions is not admitted and therefore not violative to Article 14, 19(1) (g) and Article 21 of the Constitution. Therefore, considering the seriousness of the legal profession if any person is engaged in any other profession or service on regular basis then he could not be an advocate under the Act.

However, it should be noted carefully that an advocate may be engaged in any service which is ad-hoc or not regular.[38] Similarly, an advocate may be the member or chairman of the board of directors of a company with or without any ordinarily sitting fee, provided none of his duties is executive. However, an advocate shall not be a managing director or a secretary of any company.[39] Further, An advocate shall not be a full-time salaried employee[40] of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment.[41] Nothing in this rule shall apply to a Law Officer of the Central Government or a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28 (2) (d) read with Section 24 (1) (e) of the Act despite his being a full-time salaried employee. Law Officer for the purpose of these rules means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in Courts on behalf of his employer.[42]

Therefore, the thing which is prohibited under the rules is active involvement in any service or business which may disturb his devotion to this serious profession. Due to this reason, Indian advocates are debarred from being the partners of any partnership firm, though they may be

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38. *Thomas P.C.* v. *State Bar Council of Kerala*, A.I.R. 2006 Ker. 69
39. See, Chapter II Part VII, Rule 48, Bar Council of India Rules, 1975.
40. *Anees Ahmed* v. *University of Delhi*, A.I.R. 2002 Del.440.
41. Ibid, Rule 47.
42. Ibid, Rule 49.

sleeping partners in the same firm. However, an advocate who has inherited, or succeeded by survivorship to a family business may continue it, but may not personally participate in the management thereof. He may continue to hold a share with others in any business which has descended to him by survivorship or inheritance or by will, provided he does not personally participate in the management thereof.[43]

Thus, the above-mentioned rules proved that the Indian bar considered the legal profession as a too serious occupation which creates a full devotion amongst the professionals to keep the environment clean and pure. The spirit of the profession demands that if any person has enrolled himself as an advocate then being a representative of his client he should concentrate his skill and experience only on the legal profession in the interest of his client along with the interest of the administration of justice in general. This state of the profession also indicates the high estimation of the legal profession.

c. Sharing of Professional Fees or Remuneration

Another argument related to multi-disciplinary practice is given under rule 2 of Part III Chapter III, which provides that an advocate shall not enter into a partnership or any other arrangement for sharing remuneration with any person or legal practitioner who is not an advocate. Again the reason behind this rule is to protect the confidentiality as well as the prestige of the profession. The same is also necessary to maintain the autonomy of the profession.

d. Use of Name and Fame of Advocate by others

The rules contained under Rule 37, Part III, Chapter III provides that an advocate shall not permit his professional service or his name to be used in the advertisement or to make possible the unauthorized practice of law by any agency. This is to maintain the dignity of the profession again. Thus, the above-discussed rules provided under the Bar Council of India Rules, 1975 as well as the provisions of Advocates Act, 1961 indirectly contravene with the provisions of the multi-disciplinary practice of law.

Thus, it is clear from the above statutory provisions that Indian laws are yet, not in good turn of the concept of the multidisciplinary

43. Ibid, Rule 50.

practice of law or even to liberalize the legal profession.

VI. LEGAL AND ETHICAL ISSUES INVOLVED IN LIBERALIZATION

The above study related to existing laws on legal practice as well as the liberalization of the profession reveals that the Indian legal mandates are not in favor either of opening up the arena of legal practice for foreign law firms or even adopting the multi-disciplinary practice of law, due to the very simple and obvious reason that legal profession is a social service and its environment should not be polluted by any money-oriented tactics which may result into the commercialization of the profession.

It will be very pertinent to note that acceptance of globalization policy and liberalization of legal practice sector to the foreign firms is not a sole issue and rather it the mother of several issues, whether legal or ethical. Hence, the policy of multi-disciplinary practice is only a unit or one outcome of the main issue. Accordingly, the most important question in this regard is whether a business agent or accountant may assist his client in legal drafting, court hearings, joint venture agreements, and tax compliances? It may be a vice-versa question that, whether an advocate legally may invite an accountant to participate in practice on the consideration of agreement of fees sharing with him? Whether an advocate can constitute any firm or company with doctors, accountants, company secretaries, and business agents to provide a combined service providing guilds? Keeping in view that advocacy is an independent profession; advocates should work under the supervision of any other professionals or not? These are some of the legal and ethical questions which are highly debated in India. For a better understanding of these questions it will be relevant to focus on the benefits and drawback of this multi-disciplinary practice of law under the following two heads:

a. Benefits of Multi-Disciplinary Practice of Law

While discussing the issue related to the acceptance of the multi-disciplinary practice of law, no one can out-rightly reject the valuable and advantageous belongings of this practice system. Firstly, the acceptance of the principle of globalization and topical improvement in technology at the global level, multi-disciplinary-practice of law acquires massive reputation not only in a developed country but even in developing countries. The chief idea of providing various services in one place is the

first and foremost benefit of this system of practice. As in this system of practice being a member of the same group the different professionals can easily communicate with each other to resolve any critical or multidimensional issues. The presence of other professionals along with legal professionals proves to be more feasible for the client as they don't have to run here and there. Therefore, it is a time and money-saving system of practice, which is the most demanded need of the present. Similarly, it is a combination of numerous different natures of professionals. They all devote their service to a common goal, therefore, it is also a client-centered practice. It frequently makes sense to consider more than one professional viewpoint when trying to resolve a particular problem.

Another benefit of this system is collective wisdom. The services provided by the group are the delivery of an integrated team approach. This system involves the number of the brain to meet out a problem so it can efficiently cater to the needs of the clients rather than an individual approach. Further, it is well-established fact that Indian society is never faced the problem of lack of legislative provision on any point but lack of an effective mechanism to implement that legislation to the members of society. It has been experienced in almost all the fields that government agencies are not doing well due to numerous reasons along with the lengthy procedures given under different legislations. Apart from these, unfortunately, delayed justice is also a key problem[44] of the Indian legal system.[45] Against these limitations, the practice of multi-disciplinary is much better because its management is much easier as they have their own rules of professional conduct. Expensive justice is also a problematic feature of the Indian justice delivery system. It is believed that the use of multi-disciplinary practice will also decrease the cost of litigation in India. Finally, in areas like International Trade, International Arbitration, Information Technology and Cyber Crime any Indian or foreign law firms can provide better quality services by using their internal cooperation system. Hence, this system of practice will increase the overall quality of the legal profession in India.

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44. There were 44.75 lakh cases pending in the various High Courts and at the District and Subordinate Court levels, the number of pending cases stand at a 3.14 crore over the country; the Wire Government law ; 27th November, 2019.
45. As per the official record of the Supreme Court there is 60469 pending cases which was on 1 march, 2020.

Thus, it is clear from the above discussion that the system of multi-disciplinary practice is a good system of practice presently. The main features of this system are time and money-saving system which is the common requirement of the present-day society.

b. The drawback of the Multi-Disciplinary Practice

After considering the benefits of the multi-disciplinary practice to develop a better and favoritism- free understanding it will be necessary to discuss the second face of the same coin. Indeed, liberalization of the legal profession and adoption of the multi-disciplinary practice of law is certainly beneficial but it is to be noted that this practice system is not free from blemishes. As indicated earlier and also decided by the honorable Supreme Court the legal profession is a very serious occupation that requires full-time attention towards the profession.[46] On the other hand, multi-disciplinary practice is a group service in which, members of the group are bound to devote their time towards the activities of the group, which may be other than legal services. Hence this compulsion is a serious threat against the seriousness of the profession which may disturb the spirit of the legal profession.

Advocates are officers of the court, an independent professional.[47] They are an important wheel of the chariot of justice. If they will be engaged in multi-disciplinary practice, then the firm owners will control them, and the independent character of the profession ultimately will come under the question mark. Similarly, from its origin days, the legal profession has its surrounding free from any pecuniary purpose and it has been always guided and controlled by the certain core values of the profession. Actually acceptance of multi-disciplinary practice is not only a question of profit and losses but rather it is deeply attached with the ethical values of the legal profession. How one can oppose this contention that multi-disciplinary practice is a system to run any business mode rather than profession while the law is considered a noble profession. Thus, there is a clash between business and profession.

Further, many ethical issues always put their fingers towards the working style and management of multi-disciplinary practice in the field

46. Supra Note, 37.

47. *Sushma Suri* v. *Government of National Capital Territory of Delhi*, 1993 (3) S.L.J 34.

of the legal profession. Supporters of the multidisciplinary practice believed that advertising should be allowed in the field of the legal profession, so that the public may aware of the services of the firms available along with the cost of those services. On the other hand, advertisement is considered always against the spirit of the profession. The same is with slight relaxations[48] is still prohibited under rule 36 of the Bar Council of India Rules, 1975.[49]

Likewise, advocates are prohibited to take any case in which he is personally interested[50] but in this system of multi-disciplinary, this restriction cannot works because there are different types of professionals and they work for the interest of the group not in the interest of a particular client.

One step ahead Indian legal practitioners are also prohibited under the rule, 20 of chapter II, Part II of the Bar Council of India Rules, 1975 for offering or accepting the contingent fees from their clients.[51] Therefore, duty towards clients may be impaired because the practitioners of each discipline are not bound to have the same degree of care and devotion as a member of the legal profession owes to their clients. Further, the system of multi-disciplinary poses a possible threat to the confidentiality of

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48. See, Amendment of 2008 in Rule number 36.

49. An advocate shall not solicit work or advertise, either directly or indirectly, whether by circulars, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing or inspiring newspaper comments or producing his photographs to be published in connection with cases in which he has been engaged or concerned. His sign-board or name-plate should be of a reasonable size. The sign-board or name-plate or stationery should not indicate that he is or has been President or Member of a Bar Council or of any Association or that he has been associated with any person or organization or with any particular cause or matter or that he specializes in any particular type of worker or that he has been a Judge or an Advocate General.

50. After 2008 under a proviso has been incorporated in rule 36 in Section IV, Chapter II, Part VI of the Bar Council of India Rules, which provides that this rule will not stand in the way of advocates furnishing website information as name, address, telephone, email address and area of interest prescribed in the Schedule under intimation to and as approved by the Bar Council of India. Any additional other input in the particulars than approved by the Bar Council of India will be deemed to be violation of Rule 36 and such advocates are liable to be proceeded with misconduct under Section 35 of the Advocates Act, 1961."

51. An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.

information. For instance, the accountant with whom the client has shared his information could be called as a witness against the client

Finally, it is important to say that, whenever advocates accept the brief of their clients, they immediately come under two types of duties, i.e., contractual duties[52] and duty of trust.[53] These duties have been described under rule 11-33 of the Bar Council of India Rules, 1975. As these duties are compulsory in nature so in case of any infringement of these duties councils are also empowered under the Advocates Act, 1961 to take action against the errant advocates.

VII. CONCLUSION

The Indian legal profession has undergone a key change, wherein, the ongoing wave of liberalization is raising the question of applicability of multi-disciplinary practice of law on a prominent basis. It may safely believe that the argument in favor of the multi-disciplinary practice of law is based mainly on the acceptance of liberalization policy in the legal sector, which is itself not undisputed. The main resistance against liberalization privatization and globalization is that this policy is not in favor of developing countries, because no doubt with this policy any country can obtain some sort of money and may increase its level of the economy, but as experiences are showing that blind application of this policy is causing harm to the poor countries in long run. From its origination, the legal profession is a social service meant for society without having any intention to earn or profit motive. On the other hand, multi-disciplinary practice is a model and approach of the business. Therefore, if this policy will be implemented in the area of the legal profession, it will be against its spirit and core values of the profession, as there is a strong belief that business policy will disturb the autonomy and the very existence of the legal profession.

As Mr. Justice Krishna Iyer concluded, in the case of, *Rohtas Industries* Limited v. *Staff Union*[54] *that* a law of any country may be an

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52. See, Section 73 and 75 of the Indian Contract Act, 1872.
53. An advocate shall not, directly or indirectly, commit a breach of the obligations imposed by Section 126 of the Indian Evidence Act.
54. (1976) S.C.R (3) 12.

example for other country and it can't be the basic feature of the same. Therefore, before implementing any foreign policy to this country it should be not only studied properly but also there should be proper thinking about the implications of that policy. While advocating the liberalization of the legal sector and applying the policy of multi-disciplinary practice, one should not overlook its repercussions on the well-established values of the legal profession.

Moving further, regarding the argument that this policy will be made available employment to the Indian citizen may be accepted with full heart, however, the same is not very much appreciable, because as undoubtedly aim of the globalization was making the Indian economy the fastest growing economy and globally competitive, in which up to some extent it got success too, although it is also true that the level of poverty, the problems of unemployment, ill education system, poor working conditions, unhealthy health services, and even the unsettled economy have not been controlled yet.

Similarly, any country which liberalized its service sectors it will do so on an apparent risk that any time foreign firms may return to their own country and may take back their investment. In case of any unprecedented situation or falling economy of India, the question arises whether overseas firms will continue to work here? Rather answer will be negative. Therefore, it is the chief reason why developing countries should be very careful while adopting the policy of liberalization. Anyone can understand that the objects of multinational corporations are business and they will not do the business at any point of loss. Hence, it is very humbly requested that India should depend upon its shoulders and should try to increase the employment of its own.

Concerning its qualitative services, it is acceptable and appreciable both, as in the area of international arbitration, international trade, cybercrime, and information technology the Indian expertise is yet not satisfactory. However, it does not mean that this country should always depend upon foreign countries. This problem can be removed by increasing our own academic as well as professional quality. It is very humbly submitted that instead of applying unnecessary and flying ideas of multinational companies and only playing with the data, groundwork shall be necessary for almost all the fields related to the legal profession.

Thus, necessary reform in legal education is also, needed, started with a fully professionalized educational setup in the field of legal education in India. The five-year law course which is running all over the country right now may give help in this regard. Actually, as per the present syllabus, every student of law who got admitted are bound to study all the subjects prescribed by the Bar Council of India. But it is very humbly requested that during the first two years common paper should be taught and thereafter students must be separated depending upon their interest first and also as per their eligibility. From third year they should be taught only the subject of specialized areas.

In the last decade, many policies have been implemented to improve the quality of education in this country, including the grading of institutions, teaching, and non-teaching staff, students, and also the infrastructure of the institution. Starting from the Mid-day-Meal policy of primary education to the Quality Education policy of higher education, there are so many strategies that are implemented in this country with a utopian dream. Therefore, due to the lack of groundwork and blind adoption of foreign policies, most of them are still far from their destinations. The reason is obvious; every country has its own circumstance; therefore a policy which is working in a country may not work in the other. Consequently, removing the Indian problem with foreign policies is neither possible nor advisable. Hence, with all due respect, it is requested that a Nation favored policy should be made and far from the slogans be implemented for the overall development of the country.

The last but not least, as the policy of globalization, liberalization, and privatization becomes the necessity and reality of the time, India should go through these policies with a special outlook and with all interest of the Nation.

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A REVIEW OF THE DOCTRINE OF CORPORATE *ULTRA VIRES* : WHAT EXPERIENCES HAS TAUGHT US OVER THE TIME

PRAKASH SHARMA*
NAVEEN CHANDRA SHARMA**

ABSTRACT : Over the years there have been tremendous changes to the corporate laws. It is argued that the modernization of the corporate laws has resulted strengthening and protection of the financial and economic institutions. Perhaps, the idea behind such legislative changes is to attain enhanced solutions to the controversies unanticipated at the time of its formation. Further, it is argued that concept which has outlived its utility and acts as barriers to the market achievement, should be promptly eliminated. It is in this regard the paper traces the changes witnessed to the doctrine of *ultra vires* and examines how with the effective assistance, the relics of corporate *ultra vires* does hold good for the Indian corporate laws.

KEY WORDS : *ultra vires*, Company, Memorandum of Association, Object-Clause, *intra viresi*, Estoppel.

I. INTRODUCTION

Company is an incorporated association, having separate legal entity created by the law which allows it to have rights usually available to the natural individual such as right to sue and be sued, own property, hire employees or loan and borrow money. The rights available to the company are subjected to the certain limitation. The Memorandum of Association (MOA) of the company, which is basically a constitution of company,

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contains object clause and provides information about the basis upon which company is formed.[1] A company cannot do anything beyond the power expressly or impliedly conferred upon it by statue or by MOA. The function of memorandum is "to delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activity are to be confined".[2]

The term *ultra vires* is derived from Latin word having two different meaning *viz*. 'ultra' means beyond, and *'vires'* means powers. Every illegal transaction or abuse of power by a director/ employee will not fall under the ambit of the doctrine of *ultra vires*.[3] Only those transactions that are beyond the scope provided under MOA of company will be censured under this doctrine. Thus, *ultra vires* means an act done outside the object clause for which the company is formed provided under MOA of company. An action outside the object clause of memorandum is beyond the power of the company and hence void. It cannot be ratified even if all the shareholders/Directors (as the case may be) consent or wish to ratify such transaction. In the case of *Re Port Canning & Land Investment Co*[4]it was held by the court that it is their function to see that the company does not move in a direction away from that field. This doctrine is basically tries to protect the interest of the investors and the creditors. The new Companies Act, 2013 (Act, 2013) had few sections which tries to incorporated this doctrine in company law but it has never been codified formally and this doctrine is usually regarded as the judge made law.

II. HISTORICAL PERSPECTIVE

The doctrine of *ultra vires*[5] was introduced through limited liability

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1. Stephen J. Leacock, *"Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic*", 5 *DePaul Business & Commercial Law Journal,* 72 (2006).
2. Avatar Singh, *Company Law* p60(2013), Eastern Book Company Publishing Ltd, Lucknow
3. *Rolled Steel Product (Holdings) Ltd* v. *British Steel Corp* (1986) 1 Ch 306.
4. (1871) 7 Bengal LR 583.
5. The *ultra vires* doctrine typically applies to a corporate body, such as a limited company, a government department or a local council so that any act done by the body, which is beyond its capacity to act, will be considered invalid.

partnership[6] (LLP).Until then the companies were governed by the rule of partnership under which fundamental changes in the business of partnership was not possible without the consent of all the partners.[7]Similarly, if a partner does something, which is found outside the actual, or apparent authority will not be binding upon the other partners but the act can always be ratified by all the partners. This rule was regarded as investor friendly and was providing better protection to them. Similarly, the owners of the business were also had unlimited liability. There was no distinction between owners of the business and business itself. The creditors were always assured of getting their money back as they had the power to compel the owners to pay business loans; this ensures enough protection to the creditors.[8]

The position has been changed by the introduction of the rule of LLP whereby the liability of each partners were limited to the extent of their share they are holding. The rule make distinction between the company from the partners and partners were no longer going to be held unconditionally liable for the loans of the company.[9] Their liability was restricted to the extent of capital they have invested into the business or according to their pre-decided profit sharing ratio. This rule made creditors worried about their investment into the business of a company, as they may no longer recover their loans given to the LLP's. In order to provide protection to the creditors and investors of the doctrine of *ultra vires* was found integral part of law. It provides protection against the partners taking advantage of the limited liability principle. It provides any transaction, which is beyond the constitution of the company, will be

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6. According to Section 27 of the Limited Liability Partnership Act, 2008- A Limited Liability Partnership combines the advantages of both the company and partnership into a single form of organization. In an LLP one partner is not responsible or liable for another partner's misconduct or negligence; this is an important difference from that of an unlimited partnership. LLP is not liable for any unauthorized act done by any partner of LLP.
7. G. Lathom Browne, *Treatise on the Companies Act, 1862, with Special Reference to Winding-up, for the Purposes of Reconstruction or Amalgamation* 18 (Stevens & Haynes, London, 1867), *available at*: file:///Users/prakashsharma/Downloads/1GLathomBrowneATreatiseon%20(1).pdf (last accessed on 11 July, 2019).
8. *Ibid*.
9. Charles E. Carpenter, "*Should the Doctrine of Ultra Vires Be Discarded*", 33*Yale Law Journal* 49 (1923-1924), *available at*: file:///Users/prakashsharma/Downloads/33Yale LJ49.pdf (last accessed on 11 July, 2019).

null and void.The elaboration of such a rule specifies that a company should include an objects clause within its memorandum that would define the contractual capacity of the company.[10]

III. DILEMMA WHETHER IT IS *ULTRA VIRES* OR ILLEGAL

The *Ultra Vires* act often been used in relation to illegal act or forbidden act. But, an *ultra vires* act is not necessarily an illegal act even though both are void. An *ultra vires* act is different from illegal act, although, in most of the cases *ultra vires* act turn out to be an illegal but an *ultra vires* act doesn't necessarily imply illegality. The two terms sometimes overlap each other but both are different in their operation. The *ultra vires* act will remain void even though it is not illegal. For example, suppose an automobile company involved in manufacture provides accommodation to its employees and spends a good chunk of money in that. This act is neither illegal nor prohibited by the statute; but it goes beyond the scope of the company's object clause and the company is also spending on this act, therefore, it is *ultra vires* of the company. Similarly, an illegal act done by a company will be void even if it falls under the object clause and not making it *ultra vires*. For example, where the same company hires a gangster to murder a competitor, the act is illegal as well as *ultra vires*. Therefore, every *ultra vires* act cannot be treated as an illegal act even though both are void.[11]

IV. PROTECTION OF INVESTORS AND CREDITORS

The doctrine of *ultra vires* comes into operation to protect the investors and creditors of the company and anything, which is done beyond the specified objects in the object clause of MOA, will be prohibited and declared *ultra vires*. Thus, it prevents the money of the investors to be invested other than those specified in the constitution of the company.[12]This

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10. Laurence Cecil Bartlett Gower*et al.*(eds.),*Gower's Principle of Modern Company Law* 85(Stevens & Sons, London, 1979).
11. Frank A. Mack, *"The Law on Ultra Vires Acts and Contracts of Private Corporations*", 14 *Marquette Law Review* 212, 214 (1930), *available at*: http://scholarship.law.marquette.edu/mulr/vol14/iss4/4(last accessed on 12 July, 2019).
12. Raghvendra Singh Raghuvanshi & NidhiVaidya, "Applicability of Doctrine of Ultra Vires on Companies", *available at*: https://papers.ssrn.com/sol3/

makes the investors of the company well aware of the fact that the acts of investment by company is being within the scope of the objective of the company and thus are *intra vires*. The creditors of the company are also being protected by this doctrine by making them aware that the funds of the company are not used in the unauthorized activities. Thus, this doctrine ensures that there is no wrongful application of the company's assets, which may result into situation of insolvency of the company under which the creditors cannot be paid.[13] It also put limitation on the powers of the Directors and compels them to exercise their powers within the object prescribed within the constitution of the company. Thus, it enables better protection to both investors and creditors of the company.

V. ESTABLISHMENT OF DOCTRINE OF *ULTRA VIRES*

The doctrine of *ultra vires* was not firmly established until 1875 when House of Lords applied this doctrine in the landmark case of *Ashbury Railway carriage & Iron Co*. v. *Riche*[14]. The decision of this case confirmed the application of this doctrine to the companies registered under the Companies Act, 1862. The facts of the case were that Ashbury Railway Carriage & Iron Co. entered into an agreement to construct a railway line in Belgium with a man named Mr. Riche. However, the object clause[15] of the MOA of the company did not include in its scope the construction of railway lines. Owing to this fact, the company repudiated the contract. Mr. Riche filed a suit for damages against the company on the grounds of cancellation of the contract. Also, he strengthened his argument by stating that the company had ratified the agreement with the majority of the stakeholders in the company. Hence, it was binding. The

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Delivery.cfm/SSRN_ID1558971_code650603.pdf?abstractid=1558971&mirid=1&type=2 (last accessed on 12 July, 2019).

13. *Ibid*.

14. (1875) L.R. 7 HL 653.

15. The object clause of Ashbury Railway Carriage & Iron Co. "To make and sell or lend on hire, railway carriages and wagons, and all kinds of railway plants, fittings, machinery and rolling stock; and to carry on the business of mechanical engineers and general contractors, to purchase, lease, work and sell mines, minerals; land and buildings; to purchase and sell as timber, coal, metals or other materials and to buy and sell any such materials on commission or as agents; to acquire, purchase, hire, construct or erect works and buildings for the purpose of the company, contingent, incidental or conducive to all or any of such objects", *Id*.

House of Lords held that object clause of the MOA does not authorize company to advance loans in respect to the construction of railway line. The term 'general contractor' must be taken to indicate the making generally of such contracts as are connected with the business of mechanical engineers. The court further held that the contract is null and void from its inception, as the term does not authorize the making of contracts of any and every description. At last the court held that, if the shareholders are permitted to ratify an *ultra vires* act or contract, it will be nothing but permitting them to do an act which has been prohibited by the Act of Parliament from doing.[16]

(i) Doctrine of *ultra vires* in India

The doctrine was first applied in India in the case of *Jahangir R. Modi*v. *Shamji Ladha*[17] where the plaintiff was holding 601 registered shares of a company, the object of the association neither included dealing in shares nor the purchase of company's own shares. But the directors (defendants) did deal in share and incurred losses on behalf of company, and did purchase 142 shares. The Bombay High Court applied this doctrine to a joint stock company and held that "the purchase by the directors of a company on behalf of the company of shares in other joint stock companies, unless expressly authorized in the memorandum is *ultra vires*". Similarly, in the case of *A. LaxmanaswamiMudaliar* v. *Life Insurance Corporation of India*[18] the Supreme Court of India held that, an *ultra vires* contract remains *ultra vires* even if all the shareholders agree to it. Further, the 'power' to do a thing and 'object' of a company are two different things. The power to make a charity is not an object. The Court further held that:[19]

> A company was competent to carry out its objects specified in the memorandum of association and could not travel beyond its objects. Power to carry out an object in the

16. As on today the relevance as case law has been diminished as the result of the sections 31 & 39, Companies Act, 2006 (UK), *available at*: http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf (last accessed on 16 July, 2019).
17. (1866-67) 4 Bom HCR 185.
18. 1963 AIR 1185.
19. *Id*. at para 17.

> memorandum of association undoubtedly included the power to carry out what was incidental or conducive to the attainment of the main object. The memorandum has to be read with articles of association where the terms are ambiguous or silent. The articles of association might explain the memorandum of association, but could not extend its scope.

Hence, the court held that the funds of the company couldn't be diverted to any kind of charity even if an unrestricted power to that effect is in the company's memorandum. The primary object of the company was to carry on the life insurance business in all its branches, and donation of the company's fund for the benefit of the trust for charitable purpose was not incidental or conducive to the main object and hence the act was declared *ultra vires*.

(ii) Shortcomings and limitation created by the doctrine

Soon after the landmark judgment given by the House of Lords in the case of *Ashbury Railway Carriage Company's* case where due regards has been given to doctrine of *ultra vires*, the shortcomings and disadvantage of this rule become apparent.[20] These are some of the limitation created by this doctrine, these are:

a) Hardship to outsiders dealing with company

The doctrine of *ultra vires* created a situation where outside party dealing with the company is presumed to have the knowledge of the provisions of the MOA and Articles of Association (AOA) that are public documents, and any agreement contrary to the constitution of the company will be declared null and void.

b) Hardship to management

Due to the strict rule of doctrine of *ultra vires*, the management of the company remains subject to certain limitations. The management of the company has to examine each and every step before taking any decision and they had to verify whether the acts are falling within the object clause of the company or not. Thus, it restricts the right of company of freedom to do business.[21]

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20. *Supra* note 1 at 78.
21. Timothy L. Fort and Cindy A. Schipani, *"Corporate Governance in a Global Environment: The Search for the Best of All Worlds*", 33 *Vanderbilt Journal of Transnational Law*829, 831 (2000).

c) Longer decision making

A company has to follow its object clause provided in the constitution (MOA). If any act done outside the object clause will be regarded as null and void. So, the management was required to take decision after proper enquiry done as to the nature of agreement with the outside party. Thus, the process was time consuming and cumbersome.

d) Long MOA alteration process

If the company has to do an agreement, which is not covered by the objects clause in the memorandum, a company has to undergo lengthy procedure to alter the object cause. Even if all the members of the company are willing to rectify the agreement the object clause prevented them to do so. Thus, the doctrine created much nuisance by preventing from changing their activities. According to Professor Gower "The doctrine causes much nuisance by preventing the company from changing its activities in a direction upon which all members have agreed". [22]

e) Restrict the growth of the business

The doctrine hamper the growth of the company as it created a sense of pressure and fear in the mind of management of the company and the outside party to do business specified within the objects clause of the company.[23] If an agreement is done not in relation to the objects clause mentioned in memorandum of association of the company, it cannot even rectify by all the shareholders agreed to do so. Thus, the outsider party was reluctant to make any agreement without proper understanding of object clause of the company.

(iii) Recommendation by Cohen and Jenkins Committee

The Cohen Committee[24] was appointed after World War-II to report the major amendment needed in the existing English Company Act, 1929. The Cohen committee recommended the abolition of doctrine of *ultra vires* as it is creating unnecessary prolixity and vexation. Furthermore,

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22. *Supra* note 10 at 83.
23. Robert Goddard, *"Modernizing Company Law: The Government's White Paper*", 66 *Modern Law Review* 402 (2003).
24. The Report of the Committee on Company Law Amendment (London, 1945), *available at*: http://reports.mca.gov.in/Reports/17Justice%20Cohen%20committee%20report%20of%20the%20committee%20on%20company%20law%20amendment,%201943.pdf(last accessed on 16 July, 2019) [Cohen Committee].

the committee was of the view that the doctrine was creating an illusory protection for the shareholders and a pitfall for third party dealing with the company. The British Parliament did not accept the recommendations suggested by the committee on the doctrine of *ultra vires*. Similarly, the Jenkins Committee[25] of the view that the doctrine of *ultra vires* should not be repealed but protection should be available to the third party dealing with the company in good faith such as abolition of the rule of constructive notice. The committee also recommended for the easy alteration of the object clause of the company.[26]

(iv) Liberal construction to the rule of *ultra vires*

In the case of *Attorney General* v. *Great Eastern Railway Co*[27] the House of Lord while maintaining the principle laid down in the *Ashbury case*, the court gave liberal construction to the doctrine of *ultra vires* and have agreed that everything reasonably incidental to the object authorized ought not to be held *ultra vires*, unless it is expressly prohibited. Thus, the company may do an act which is a) necessary for, or b) incidental to, the attainment of its object, or c) which is otherwise authorized by the Act. In the case of *Evans* v. *Brunner Mond & Company*[28] the company was formed to do business in manufacturing chemicals, the objects clause in the memorandum of the company authorized the company to do "all such business and things as may be incidental or conductive to the attainment of the above objects or any of them" by a resolution the directors were authorized to distribute £ 100,000 out of surplus reserve account to such universities in UK as they might select for the furtherance of scientific research and education. The resolution was challenged before the court but court held that the expenditure authorized by the resolution was necessary for the continued progress of the company as chemical

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25. The Report of the Company Law Committee (London, 1962), *available at*: https://www.takeovers.gov.au/content/Resources/other_resources/downloads/jenkins_committee_v2.pdf (last accessed on 16 July, 2019) [Jenkins Committee].
26. The Jenkins Committee recommended slight amendment in section 5 of the English Act 1948, which deals with the alteration of the objects, including the abolition of the list of purposes for which alterations are authorized and allowing the alteration to extend to the inclusion of any new object which could lawfully have been included originally.
27. (1880) 5 AC 473.
28. (1921) 1 Ch 359.

manufacturers as the resolution was incidental or conductive to the attainment of the main object of the company. Similarly, in India in the case of *Gujarat Mining& Manufacturing Company* v. *Motilal H.S. Weaving Company*[29] this doctrine was also interpreted in a liberal way, the Supreme Court of India held that the company has no doubt, the power to carry out the objects stated in the objects clause of its memorandum and also what is conclusive to or incidental to those objects, but it has no power to travel beyond the objects or to do any act which has not a reasonable proximate connection with the object or object which would only bring an indirect or remote benefit to the company.

(v) Determination of doctrine of *ultra vires*

In order to determine whether an act is beyond the constitution of company and hence *ultra vires*, due regards has to be given to the fact that- (a) whether it is within the main purpose, (b) whether it is within the special powers expressly given by the statute to effectuate the main purpose (c) not within the both mentioned earlier than whether incidental to or consequential upon the main purpose and a thing reasonably done for effectuating the main purpose. In the case of *Attorney General* v. *Mersey Railway Co*.[30] the company was formed to carrying on a hotel business. The company entered into the contract with the outside party for purchasing furniture, hiring servants and for maintain omnibus which was expressly mentioned in the object clause of the company. The deal was challenged before the court as *ultra vires*, the court held that a company incorporated for carrying on a hotel can purchase furniture, hire servants and maintain omnibus to attend at the railway station to take or receive the intending guests to the hotel because these are reasonably necessary to effectuate the purpose for which the company has been incorporated and consequently these are within the powers of the company, although these are not expressly mentioned in the objects clause of the memorandum of the company, or the statute creating it.

(vi) Circumventing the doctrine of *ultra vires*

The limitations created by doctrine of *ultra vires* forced the companies to circumvent this rule by enlarging the scope of object clause

29. AIR 1930 Bom. 84.
30. (1907) 1 Ch. 81.

provided in the memorandum of association. The companies along with the main object clause various other sub-clauses were added in MOA in order to by-pass the doctrine of *ultra* vires. However, the courts have dealt this situation by the construction of the rule of main object clause. In the case of *In Re, German Date Coffee Co*.[31] the company was formed to acquire and use a German patent for making coffee from dates. Further, the company was also to acquire other patents and inventions by purchase or otherwise for improvements and extensions of German patent. The company was failed to acquire German patent but the majority of shareholders authorizes company to continue but two shareholders approached the court for winding up on the ground that the company was failed to achieve its main object. The court held that the that the main object for which the company was formed was to acquire the German patent and the other objects stated in the objects clause of its memorandum were merely ancillary to that object and since the main object had failed, it was just and equitable that the company should be wound up.

a) **Avoiding the rule of main object clause**

In the case of *Cotman* v. *Brogham*[32] in order to defeat the purpose of object clause, the object clause of the company contained as many as thirty sub-clauses enabling the company to carry on almost every conceivable kind of business. The company in order to exclude this main object clause by inserting the *Independent object clause*[33] in the MOA. In this case a rubber company underwrote shares in an oil company. The objects clause in the memorandum of the company contained many objects and one of them was to subscribe for shares of other companies. The court held that the underwriting was not ultra vires. Similarly, in the case of *Bell Houses Ltd*. v. *City Wall Properties Ltd*.[34] the object clause of MOA authorizes company to carry on any other trade or business, which could, in the opinion of the directors be advantageously carried on by the company in connection with its general business. The court held that if the object clause authorizes such power and directors decide to

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31. (1882) 20 Ch. D. 169.
32. (1918) AC 514.
33. According to this Independent Object Clause, all the objects are independent and in no way ancillary or subordinate to one another.
34. (1966) 2 WLR 1323.

carry on a business, which can be carried on advantageously in connection with, or ancillary to the main business will be *intra vires* and not *ultra vires* even if it has no relationship with the main business of the company. The acceptance of this type of Independent clause mentioned in MOA where it does not state any objects but leave the objects to be determined by the bona fide opinion of the board of directors created the situation of death of the doctrine of *ultra vires*.

b) Difference between power and object of the company

In the case of *In Re, Introductions Ltd*[35] court made a decent step to prevent such kind of tendency to by-pass the doctrine of *ultra vires*. The court held in this case that the 'independent objects clause' could not convert a power into an object. There is a difference between a power and an object. Only the objects are required to be stated in the objects clause of the memorandum and not powers but if the powers are also stated in the objects clause, they must be exercised to effectuate the objects of the company.

VI. CONSEQUENCES OF THE ULTRA VIRES TRANSACTION

When a company indulges in *ultra vires* transaction, it cannot be enforced by or against the company. The question arises as to what will be the effects of such transaction.

***(i) Ultra vires* contract**

The *ultra vires* contract is *void ab initio* and cannot becomes an *intra vires* even if all the shareholders agreed to rectify it or by the reason of estoppel, lapse of time, acquiescence of delay.[36] In the case of *In Re, Jon Beaufore (London) Ltd*.,[37] court opined that the act of the company, as authorized through its MOA, was to carry on the business of costumiers, gown-makers and other activities of allied nature, but instead decided to undertake the business of making veneered panels is *ultra vires*. The court held that everyone dealing with a company is supposed to know its power. Thus, the doctrine of *ultra vires* is capable of causing

35. (1969) 1 All ER 887.
36. *Supra* note 14.
37. (1953) Ch. 131.

hardships as great as those, which it prevented.[38]For example the individual creditors who had lent money to a company could not claim it back from the company if it happened to be an *ultra vires* borrowing.

Besides the abovementioned reasoning there are other occasions wherein the acts of company would amount to be in contravention to the purpose, these are:

a) Money used to pay debt of the company

If there is an ultra vires contract under which the money or property obtained for purpose of paying debts of the company then by the principle of subordination; the lender who had advance the money to company can recover the amount.[39]

b) Property *exist in specie*

The property which was handed over to the company by the virtue of the *ultra vires* contract can return back to that person before the money or property is spent or the identity of the property is lost or property passes in the hands of a bona fide purchaser for value.[40]

c) Innocent third party concept

The position in England has been changed by section 9(1) of the European Communities Act, 1972[41] which gave protection to third party dealing with the company in good faith. There is no provision like this in India available to the innocent third party and the doctrine of *ultra vires* is strictly applicable, though this doctrine has been evolved and some leniency has been adopted by Indian court in applying this doctrine.

(ii) Injunction

If a company involves in the *ultra vires* contract any member of the company can get an injunction to restrain it from proceeding with it.[42]

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38. Anne Staines, "*Ultra Vires in Modern Company Law*", 46 *Modern Law Review* 211 (1983).

39. In the case of *Cunliffe Brooks & Co*. v. *Blackburn Building Society* (1884),8 App. Cas. 857, it was held that if the lender has lent the money for discharging any debts or liabilities of the company lawfully incurred, the lender may recover the amount.

40. *Sinclair* v. *Brougham* (1914) AC 398.

41. Third person can enforce the ultra vires contract against the company if he had no knowledge of the fact that it was ultra vires and the contract was decided on by the directors of the company.

(iii) *Ultra vires* property

If a company spend some amount to acquire any property which was through ultra vires contract, such property will be legally protected because of the reason that property represents the money of the company.[43]

(iv) *Ultra vires* lending

If a company lend money which is not authorized by the Memorandum, the company can still sue to recover it.[44]

(v) *Ultra vires* Tort or Crime

For any activity, which is done by its employees and is beyond the constitution of the company, a company will not be held liable. However, the employees will be personally liable for *ultra vires* tort or crime done by them in the course of their employment.[45] A company can be held liable only if it has been shown that the act committed by them in the course of their employment is *intra vires* activities.

(vi) Liability of Directors for *ultra vires* activity

There are two ways of understanding the liability of directors done in course of their employment a) liability towards the company b) liability towards the outside party. The liability of the directors towards the company will arise if they act beyond the power authorize by the memorandum of association. They will be personally liable for those acts will are *ultra vires* to the object clause. The shareholders have the right to maintain an action against the directors to compel them to restore to the company the funds, which have been employed by them through the *ultra vires* transaction.[46]Similarly, the personal liability of the directors

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42. *Attorney-General* v. *Great Eastern Railway co*. (1880) LR 5 AC 473.
43. *Supra* note 7 at 6.
44. In the case of *In Re Coleman* [1975] 1 All ER 675. The court held that the only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person who lent him the money and to who he had made a promise to repay that money, had no authority to lend him that money. The promise to pay back the money which you borrowed is not illegal. The only objection is, that those who made contract with the debtor has no authority to make it, and that it an objection which he cannot take.
45. *R*. v. *Ovenel,* (1969) 1 QB 17.
46\. In the case of *Weeks* v. *Propert* (1873) LR8 CP 427, a railway company invited applications for loan on debentures, although it had already exhausted its limits

towards the third party will arise if they act beyond the authorized power by memorandum and the third party can sue directors for *ultra vires* act in the breach of their authority which amount to implied misrepresentation of facts. However, in order to make directors personally liable for the loss to the third party, the following conditions must exist: (a) there must be representation of authority by the Directors and the representation must be of fact, not of law. (b) By such representation, the Directors must have induced the third party to make a contract with the company in respect of a matter beyond the memorandum or powers of the company. (c) The third party must have acted on such inducement and suffered some loss.

VII. EXCEPTIONS TO THE *ULTRA VIRES* DOCTRINE

The doctrine of *ultra vires* has been termed as Judge made law.[47] This rule is strictly followed by the courts around the world to govern the company's illegal activities and prohibit them to act beyond what have been authorized to them by the constitution (memorandum of association) of the company. The rule of constructive notice provides that that the third party must know the object of the company with whom they are doing the business. If the third party failed to know the MOA and AOA of the company in that case company will not be liable for any *ultra vires* activity done by it. The doctrine of *ultra vires* is however subjected to certain exception for example:[48]

(i) An *intra vires* act but outside the authority of Directors— In the case of *Rajendra Nath Dutta* v. *Shailendra Nath Mukherjee*[49] the court held that an act which is *intra vires* the company but outside the authority of the Directors may be ratified by the company in proper form.

(ii) An *intra vires* act done in irregular manner — An act that is

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as laid down in the memorandum. On seeing the advertisement, the plaintiff offered a loan of euro 500 and the directors accepted this. The loan being *ultra vires* was held to be void and not binding upon the company but the directors were held personally liable as by giving the advertisement they warranted that they had the power to borrow which, in fact, they did not have.

47. *Supra* note 9 at 67.

48. N.V. Paranjape, *The New Company Law* 111(Central law Agency, Allahabad, 2014).

49. (1982) 52 Comp.Cas. 293 (Cal.).

intra vires but done in an irregular manner by the company, may be validated by the consent of the shareholders. The law, however, does not require that the consent of all the shareholders should be obtained at the same place and in the same meeting.

(iii) *Ultra vires* acquired property — In the case of *Turner* v.*Bank of Bombay*[50]it was held that if a company acquired any property by the way of investment which acquired through ultra vires transaction, the companies right over such property will still be secured.

(iv) Implied authority of company not mentioned in MOA — There are certain which are although not mentioned in the memorandum of association but are deemed to be within the power of the company and hence cannot be deemed to be ultra vires acts. For example, a business company can raise its capital by borrowing.

(v) *Ultra vires* of AOA — If the company does an act which resulted in the ultra vires of the articles of association, the company the company can alter its articles in order to validate the act.

(vi) There are few other exceptions that have been recognized by the courts of different jurisdiction around the world, such as:

a) In the case of necessity—The acts, which are essential for the fulfillment of the objects stated in the main objects clause of the memorandum, will not to be held *ultra vires*.

b) Incidental or consequential —When an act of the company is Incidental or consequential or reasonably within its permissible limits of business will not be held to be *ultra vires* unless they are expressly prohibited by the statute.

c) Authorized by the Statute —An act during the course of businessthat has been authorized by the statutewill not be termed *ultra vires* for the mere reason of not been mentioned in the MOA.

The doctrine of *ultra vires* has since its inception been surrounded with controversy with regard to its application since this doctrine has done more harm than good as the companies under the garb of this doctrine have started to manipulate the object clause under the MOA to suit their needs and desirability's.[51] The companies have started to use tactics such

50. (1901) ILR 25 Bom 52.

51. K.W. Wedderbum, "Notes of Cases: The Death of Ultra Vires?", 29 *Modern Law Review* 673 (1966).

as making a wide and vague object clause which includes within its ambit all sort of possible business activities and thus making the ancillary objects of the company independent of the main objects of the company.[52] The ancillary objects of the company are those objects, which are used to assist or act as support to the main objects. In case if the objects of the company are vague and wide it gives the company a free hand to do any and all sorts of business activities thereby making the company escape its liability under the doctrine of *ultra vires*.

It is not yet clear whether the doctrine, which is a judicially pronounced doctrine, has lost its sanctity.[53]The doctrine, which was formed in order to bar the corporations from entering into activities beyond their scope and object, has now compelled them to include almost everything within their scope *via* the object clause thus making no activity *ultra vires*.

VIII. CONCLUSION

After thoroughly discussing the historical background, nature, concept, origin, development and applicability of the doctrine of *ultra vires* we can safely conclude that this doctrine was first developed by the courts around the 17th century and hence is a judge made rule wherein we are unable to find an enacted law on this doctrine. Since the beginning till now this doctrine has remained mostly static and is made use of against the defaulting corporate enterprises while pronouncing judgments/ decisions by appropriate judicial authorities. There were various discussions for the abolition of the doctrine due to its uncertainty in the applicability.[54]Similarly in India, the view of Bhabha Committee had been

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52. NellMinow, "Corporate Charity: An Oxymoron?", 54 *The Business Lawyer* 1001-1003 (1999).

53. *Supra* note 1 at 99. But perhaps this phenomena of change is explained well with the of J., Benjamin Cardozo, which runs thus: "Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed…", *see*Benjamin N. Cardozo, *The Nature of the Judicial Process*178 (Universal Publishing Co. Ltd., New Delhi, 2012).

54. In 1945 the first report of the Cohen Committee submitted to abolish the doctrine as it was stated that this doctrine was a deception for the entire shareholder and a trap for third parties dealing with the companies.

that the doctrine was meant to merely protect the shareholders and thus causing loss for third parties who deal with the company.[55] However, this doctrine which though may seem insignificant has a very important role to play as most or in fact all actions/transactions of the company can only be scrutinized under the doctrine of ultra vires, thus surfacing the importance of this doctrine.

Moreover, the Act, 2013 though has incorporated and codified a few sections such as section 245(1) (a) the companies Act, 2013 which states that the doctrine of *ultra vires* gives the right to the members and to the depositor(s) of the companies to file an application to the tribunal on behalf of its members or depositors to restrains the company from committing any act which is ultra vires of the AOA or MOA of the company.

The doctrine of *ultra vires* would have to lost its sanctity if the Companies Amendment Bill, 2016 comes into force, since the proposed amended section 4(1)(c)[56]on comparison with section 4(1)(c) of the Act, 2013[57]gives leeway to businesses by enabling them to adopt a model memorandum instead of a universal memorandum or not defining in exact terms the main objects in the MOA. This would have meant that the companies that will be formed after the commencement of the new Act would enjoy the benefit by having a single line object clause stating that they will engage in any lawful act or activity or business. However, no

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55. The Report of the Company Law Committee (New Delhi, 1952), *available at*: http://reports.mca.gov.in/Reports/22Bhabha%20committee%20report%20on%20Company%20law%20committee,%201952.pdf (last accessed on 24 July, 2019) [Bhabha Committee].
56. Section 4(1)(c) of the proposed Companies (Amendment) Bill, 2016 which states that the Memorandum of the Company shall state that the company may engage in any lawful act or activity or business, or any act or activity or business to pursue any specific object or objects as per the law for the time being in force. Provided that in case a company purposes to pursue any specific object or objects or restrict its objects, the Memorandum shall state that the said object or objects for which the company is incorporate and any matter considered necessary in furtherance thereof and in such case the company shall not pursue any act or activity or business other than specific object stated in the Memorandum.
57. Section 4(1)(c) of the Companies Act, 2013 provides for restriction on the object for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof be stated in the Memorandum.

such proposed changes were accepted in *the Companies (Amendment) Act*, 2017.

Thus, the doctrine of *ultra vires* has been codified in Act, 2013 and this codification is meant for controlling the unscrupulous business practices that are undertaken mostly by the Directors and the employees of the company wherein we see that this doctrine is still developing in India. If the corporations are permitted to expansive object clauses, then the new businesses will find it difficult to incorporate themselves for want of new ideas in the market. Thus, we see that the doctrine of *ultra vires* gives a fair playing field to all and also protection can be given to the creditors and shareholders.

This is an important doctrine and in case the doctrine is strike down it would result in another set of problems.The only suggestion to further tighten the implementation of the doctrine is to remain more specific and uniform to what the company can do or cannot do i.e. clearly demarcate the *ultra vires* or *intra vires* activities. As mentioned above the authors again reiterate that there is a difference between the term *ultra vires* and illegality and that both should not be used synonymous to each other. Hence keeping in mind the aforesaid points put forth the authors lastly concludes that the doctrine of *ultra vires* is an integral safeguard deeply embedded and rooted in a few sections of the Act, 2013 and which under no circumstance must be done away with.

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ROLE OF FORENSIC SCIENCE AND ELECTRONIC EVIDENCE IN NEW ERA

MUKESH KUMAR MALVIYA*

ABSTRACT : With the emergence of technology, it has brought itself a scenario of new technology of evidence. It is assumed a very significant position in our life, because there are many unending questions that how to some of evidence which are in the form of electronic form to be proved. With the advent of latest technology criminal activities also becomes major issue of concern. Although it can not be denied the role of such fascinating technologies in our life, both personally and professionally. However, on the weighting scale, we find out difficult to balance both the situations. when we talk about the cybercrime it automatically takes us to the thought of internet, technology and virtual world. the criminals are using these high-End technologies to commit such crimes which are beyond the reach of layman. an unskilled person cannot easily able to find out the roots of crime. The question arises how to use of forensic evidence in various aspect of law. Criminal prosecution use electronic evidence in variety of crimes where incriminating evidences can be found like homicide, financial fraud, drugs and embezzlement, harassment is one of the examples of criminal prosecution. Digital evidence never in a format readable by humans. As such, another step is required for admitting any digital document into evidence. It is very important to understand the nature of electronic evidences it is easy to tutor electronic evidences by expert who deals with them on regular basis. So, in this way special care and caution must require to handling such sensitive piece of evidence.

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I. INTRODUCTION

We know that digital devices are in everywhere in these days. This is perception everyone believes computers, cell phone, and as the only sources for digital evidence. What do the Chandra Levy disappearance, Enron/Arthur Anderson collapse, Danielle Van Dam murder case, Microsoft antitrust trial, former President Clinton sex scandal, and tracking of al Qaeda terrorists all have in common? In each instance, computer[1] forensics figured prominently in investigating the questions at hand. Simply put, computer forensics has reached prime time. It is no longer the stuff of back-office geeks and techno-wizards but has been embraced by both law enforcement and the private sector as a technique to reconstruct crimes, conduct digital discovery, and, generally, uncover the electronic traces that help prove or disprove accounts of historical events.[2]

Forensic Science[3] embraces all branches of science and applies to the purposes of law. Originally all the techniques were borrowed from various scientific disciplines like chemistry, medicines, surgery, biology,

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1. Sec. 2 (1) (i) IT Act, 2000 defines "computer" is any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network.
2. Erin Kenneally, *Computer Forensics*, Available at : <https://www.usenix.org/legacy/publications/login/2002-08/pdfs/kenneally.pdf?q=computer-forensics>
3. Forensic Science is any science used for the purposes of the law, and therefore provides impartial scientific evidence for use in the courts of law, e.g. in a criminal investigation and trial. Forensic Science is a multidisciplinary subject, drawing principally from chemistry and biology, but also physics, geology, psychology, social science, etc. In a typical criminal investigation crime scene investigators, sometimes known as scenes-of-crime-officers (SOCO's), will gather material evidence from the crime scene, victim and/or suspect. Forensic scientists will examine these materials to provide scientific evidence to assist in the investigation and court proceedings, and thus work closely with the police. Senior forensic scientists, who usually specialize in one or more of the key forensic disciplines, may be required to attend crime scenes or give evidence in court as impartial expert witnesses. Available at <http://www.staffs.ac.uk/schools/sciences/forensic/

photography, physics and mathematics. But in the past few years it has developed not only its own techniques but also its own branches, which are most or less exclusive domains of forensic science. The science of fingerprints, anthropometry, track marks, documents (especially the examination of handwriting) and forensic ballistics essentially belongs to forensic science alone.[4]

Forensics is the process of using scientific knowledge in the collection, analysis, and presentation of evidence to the courts. The word forensics means "to bring to the court." Forensics deals primarily with the recovery and analysis of latent evidence. Latent evidence can take many forms, from fingerprints left on a window to DNA evidence recovered from blood stains to the files on a hard drive.[5] Forensics takes scientific knowledge and methods and combines them with standards of law for the purpose of recovering and presenting at court evidence related to a crime.[6]

Forensics whether involving the application of chemistry, molecular biology, or computer science embodies those legal bounds in applying tools and technologies to prove the truth of a past event. The discipline of digital forensics has developed and/or applied technologies to enhance the identifying, correlative, and characterizing properties of electronic information[7]. As with other forensic disciplines, technology is used to increase information symmetries so that recreations of past events more accurately reflect the truth and justice is better served.[8]

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whatisforsci/whatisforensicsci/>

4. B. R. Sharma, *Forensics Science in Criminal Investigation & Trials,* 4th Edition (New Delhi: Universal Law Publishing C. Pvt. Ltd.)
5. *Computer Forensics* , US-CERT Available at <http://www.us-cert.gov/sites/default/files/publications/forensics.pdf>
6. *First Responders Guide to Computer Forensics*, CERT Training & Education, pdfAvailable<http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&sqi=2&ved=0CCgQFjAA&url=http %3A%2F%2Fwww.cert.org%2Farchive%2Fpdf%2FFRGCF_v1.3.pdf&ei=raeNUpe9KoyxrgeNwoDICQ&usg=AFQjCNFMbpGt TdmFZy8UeweEhCTO6PqaKw&bvm=bv.56987063,d.bmk>
7. Sec. 2 (1) (v) IT Act, 2000 defines "information" includes data, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche
8. Available at <http://www.lawtechjournal.com/articles/2005/05_051201_

Evidence can be generally defined as 'something that tends to establish or disprove a fact. It can include documents, testimony, and other objects. It can be classified into three categories:[9]

- Real or physical evidence, which consists of tangible objects that can be seen and touched.
- A testamentary evidence, where the testimony of a witness can be given during a trial, based on a personal observation or experience.
- Circumstantial evidence, which is based on a remark, or observation of realities that tends to support a conclusion, but not to prove it.

The widespread use of computers in recent years has led to a new type of evidence in criminal cases: digital evidence, consisting of zeros and ones of electricity. Digital evidence or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial. As computers have become more prevalent in today's society, their potential as sources of evidence in criminal investigations has increased. In some cases, computers have merely replaced ink and paper, serving as additional repositories for evidence of crimes like tax fraud or drug dealing. In other cases, most notoriously in the area of child pornography, the nature of the crime has expanded to fill the capabilities of computers and computer networks.[10] Digital evidence can come from a variety of sources, such as computer programs, computer networks and other electronic devices such as cell phones, beepers and personal digital assistants. Although there are many possible sources of digital evidence, the most common type of digital evidence used in criminal courts is from personal computers ("PC"s)[11]

As a result, computers have become a primary source of evidence.

As sources of evidence, computers are unique. They can contain an almost incomprehensible amount and variety of data. Analogies to physical-world sources of evidence often fail to encapsulate the salient

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9. Available at http://www.crime-research.org/articles/chawki1
10. Available at Department of Justice, Child Exploitation and Obscenity (CEOS): Child Pornography, http://www.usdoj.gov/criminal/ceos/childporn.html
11. Marcella J Albert and Greenfield Robert(1st ed. 2006) ; Cyber Forensics; A Field Manual for Collecting, Examining & Preserving Evidence of Computer Crimes;

details of how computers store and use data. For example, although computers can "contain" evidence, unlike a traditional container, the evidence is not physical. A suitcase containing laundered money is a physical container containing physical evidence; the only physical evidence a hard drive contains is magnetic charges. Similarly, computers seem to be like file cabinets, but computer data is far more complex than paper documents. Documents may be intermingled in a file cabinet, but parts of documents may be scattered throughout a computer's hard drive.

Digital evidence[12] is so prevalent and powerful that any attorney, civil or criminal, going to court or engaging in negotiations is selling his or her clients short if no attempt is made to obtain such evidence. The trick is to find a trained computer forensics examiner who uses industry-accepted practices and tools to preserve and gather critical evidence. Although digital evidence in the criminal realm receives most of the attention in the media, this type of evidence may be even more important in the civil arena, where the burden of proof is less than the criminal standard. Such evidence could literally make or break a civil case. The changing contexts of computer search and seizure and digital forensic investigation demand an evolution in forensic acquisition methodology, and that this evolved methodology can meet the standards for evidence admissibility and reliability.

II. DIGITAL FORENSICS AND THE DIGITAL EVIDENCE

As early as 1984, the FBI Laboratory and other law enforcement agencies began developing programs to examine computer evidence. To properly address the growing demands of investigators and prosecutors in a structured and programmatic manner, the FBI established the Computer Analysis and Response Team (CART). In 1991, a new term; "Computer Forensics" was coined in the first training session held by the International Association of Computer Specialists (IACIS) in Portland,

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Auerbach publications

12. "Digital Evidence is any information of probative value that is either stored or transmitted in a binary form," (SWGDE, July 1998). Later "binary" was changed to "digital". Digital evidence includes computer evidence, digital audio, digital video, cell phones, digital fax machines, etc. Available at [Carrie Morgan Whitcomb, *An Historical Perspective of Digital Evidence: A Forensic Scientist's View*,

Oregon.[13] It is the science whereby; experts extract data from computer media in such a way that it may be used in a court of law; it deals with the application of law to a science. In this case, the science involved is computer science and some refer to it as Forensic Computer Science.[14] Computer forensics has also been described as the autopsy of a computer hard disk drive because specialized software tools and techniques are required to analyze the various levels at which computer data is stored after the fact. Since then, it has become a popular topic in technological circles and in the legal community, while the digital forensic is the use of scientifically derived and proven methods toward the preservation, collection, validation, identification, analysis, interpretation, documentation, and presentation of digital evidence derived from digital sources for the purpose of facilitation or furthering the reconstruction of events found to be criminal, or helping to anticipate unauthorized actions shown to be disruptive to planned operations"[15]

The domain of computer forensics involves collecting, preserving, seizure, analyzing and presentation of computer-related evidence utilizing secure, controlled methodologies and auditable procedures, the These examinations involve the examination of computer media, such as floppy disks, hard disk drives, backup tapes, CD-ROM's and any other media used to store data. The forensic specialist uses specialized software, not normally available to the general public. The examination will discover data that resides in a computer system, or recover deleted/erased, encrypted or damaged file information and recover passwords, so that documents can be read. Any or all of this information found during the analysis may or can be used during both criminal and civil litigation. Thus, this evidence can be visible when stored in the mean of files saved on disks, or not visible, when it requires some sort of software to locate it.[16]

Regarding computer related crimes cases, evidences are classified into three main categories, according to SWGDE/IOCE standards:

- Digital evidence, where the information are stored or transmitted in electronic or magnetic form.

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13. Available at http://www.crime-research.org/articles/chawki1
14. Available at http://www.fbi.gov/hq/lab/fsc/backissu/april2000/swgde.htm

- Physical items, where the digital information is stored, or transmitted through a physical media.
- Data objects, where the information is linked to physical items. [17]

III. ADMISSIBILITY OF THE DIGITAL EVIDENCE

Generally speaking, there are three requirements for the evidence to be admissible in the court. (a) Authentication, (b) the best evidence rule, and (c) exceptions to the hearsay rule.

AUTHENTICATION

As with any evidence, the proponent of digital evidence must lay the proper foundation. Courts largely concerned themselves with the reliability of such digital evidence. As such, early court decisions required that authentication called "for a more comprehensive foundation." As laid down in the case of *US v. Scholle*,[18].

As courts, like society, became more familiar with digital documents, they backed away from the higher standard. Courts have since held "computer data compilations… should be treated as any other record." *US v. Vela.*[19],

Nevertheless, the "more comprehensive" foundation required by Scholle remains good practice. The American Law Reports lists a numbers ways to establish the comprehensive foundation. It suggests that the proponent demonstrate "the reliability of the computer equipment", "the manner in which the basic data was initially entered", "the measures taken to insure the accuracy of the data as entered", "the method of storing the data and the precautions taken to prevent its loss", "the reliability of the computer programs used to process the data", and "the measures taken to verify the accuracy of the program".

IV. BEST EVIDENCE RULE

Digital evidence is almost never in a format readable by humans. As

15. Supra
16. Supra
17. http://www.fbi.gov/hq/lab/fsc/backissu/april2000/swgde.htm
18. 553 F.2d 1109 (8th Cir. 1976)

such, another step is required for admitting any digital document into evidence. Conceptually, any additional step creates a new document, which might otherwise not qualify under the "best evidence rule". However, the Federal Rules of Evidence rule 1001(3) states "if data are stored in a computer…, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'"

Moreover, courts almost never bar printouts under the best evidence rule. In *Aguimatang v. California State Lottery*,[20] the court gave near per se treatment to the admissibility of digital evidence stating "the computer printout does not violate the best evidence rule, because a computer printout is considered an 'original.'"

HEARSAY

Very often an opponent to digital evidence will object to its admission as hearsay. Like documentary evidence, not all digital evidence is hearsay.

First, there is some digital evidence which is not hearsay at all. Hearsay is a "statement, other than one made by the declarant while testifying at the trial… offered in evidence to prove the truth of the matter asserted." A declarant is a person. Therefore, courts have held that digital evidence is not hearsay when it is "the by-product of a machine operation which uses for its input 'statements' entered into the machine" and was "was generated solely by the electrical and mechanical operations of the computer and telephone equipment." As laid down in the case of *State v. Armstead*.[21]

Moreover, in *US v. Simpson*[22] it was held that where the evidence is not offered to prove the truth of the statements, digital evidence is not hearsay. This is the case, for example, with logs of chatroom conversations. While a chatroom log may contain many out of court statements, which would otherwise be hearsay, they may be used for other purposes, including as a party admission.

Second, hearsay recognizes a number of exceptions. Most frequently, proponents of digital evidence seek admission under the business records exception. This perhaps is because the definition of business records

19. 673 F.2d 86, 90 (5th Cir. 1982).
20. 234 Cal. App. 3d 769, 798.
21. 432 So.2d 837, 839 (La. 1983)

includes a "data compilation." FRE 803(6). However, obviously not every piece of digital evidence is a business record. Such reliance on the business records exception has had bad results for its proponents. In *Monotype Corp. PLC v. International Typeface Corp*[23], the plaintiffs relied on the business records exception to attempt to admit two e-mails as evidence that the defendants had infringed their copyright only to have it excluded by the court. The court noted that the e-mail was not created "in the regular course of [the third party's] business."

Other proponents have had success with the public records exception, excited utterance, Present sense impression, and the FRE 807—the catch-all. Where digital evidence does not meet one of the other exceptions but has "equivalent circumstantial guarantees of trustworthiness" that hearsay seeks to protect against, a court may apply the catch-all.

IV. SEARCH AND SEIZURE

Search and seizure of digital evidence is the first process that is often disputed. If it is not completed properly, the defense or prosecution's evidence may not be admitted. An illegal search and seizure or improper methodology employed during search and seizure can negatively affect the admissibility of the evidence.[24]

A unique issue with computer forensics search and seizure centers on the source of the items in the warrant or in verbal/written affirmation, when a warrant is not needed (e.g., open view resulting in a search and seizure). For instance, when a computer has the power turned off, the data in volatile media storage, for technical purposes, is virtually impossible to reconstruct. In pre-digital crimes, electricity was not a major factor in the ability to execute a proper search and seizure. i.e. Volatile media storage. Aaron Caffrey, the defendant, was arrested under the suspicion of launching a denial of service attack against the Port of Houston 's systems on September 20, 2001 [25]. The defense argued that the Trojan was installed on the defendant's computer by the others who wanted to frame him for

22. 152 F.3s 1241 (10th Cir. 1998)
23. 43 F.3d 443 (9th Cir. 1994).
24. http://mba.iiita.ac.in/augsept05/technova4.htm

the attack The Trojan launched the attack from the defendant's computer but the defendant was not aware of the attack. The forensics examination showed that there was no sign of a Trojan, only attack tools on the computer, but could not rule out that a Trojan may have been in volatile storage media (random access memory). The jury unanimously decided that the defendant was not guilty.

Though courts may grant a search and seizure warrant, law enforcement may ask individuals for verbal or written consent searching and seizing items. However, the voluntary nature of consent may vary. In *Williford v. Texas*[26], the appellant complained that the search and seizure of his computer was illegal. The appellant contended that his consent to the search and seizure was tainted and, as there was no warrant, there was no probable cause. The judge dismissed the claim. In U.S. v. Habershaw,[27] the issue was whether the officers involved had the right to search and seize the computer, and if the defendant was capable of giving consent. The defendant argued that the warrant went "overboard." The defendant gave verbal permission for the officers to operate his computer after the defendant stated the possible location of contraband child pornography images on the computer. Searching and seizing computers raises unique issues for law enforcement personnel that will influence the government's search and seizure decisions. Searching or seizing computers, not referring only to the CPU (Central Processing Unit) but it consists of input (e.g., a keyboard or mouse) and output (e.g., a monitor or printer) devices. These devices, known as "peripherals,"' are an integral part of any "computer system." Failure to more specifically define the term "computer" may cause misunderstandings. Having probable cause to seize a "computer" does not necessarily mean there is probable cause to seize the attached printer.

Hardware "The physical components or equipment that makes up a computer system....". Examples include keyboards, monitors, and printers. Software "The programs or instructions that tells a computer what to do." This includes system programs, which control the internal operation of the computer system such as Disk Operating For search and seizure purposes, unless the text specifically indicates otherwise, the term

25. supra

26. www.supreme.courts.state.tx.us/events/2004/case_event_disp.073004.rtf

"computer" refers to the box that houses the CPU, along with any internal storage devices such as internal hard drives and internal communications devices such as an internal modem or fax card. It is important to remember that computer systems can be configured in an unlimited number of ways with assorted input and output devices. In some cases, a specific device may have particular evidentiary value. "A bookie who prints betting slips, the printer may constitute valuable evidence; in others, it may be the information stored in the computer that may be important. In either event, the warrant must describe, with particularity, what agents should search for and seize".

The computer system may be a tool of the offense. This occurs when a defendant to commit the offense actively uses the computer system. For example, a counterfeiter might use his computer, scanner, and color printer to scan currency and then print money. Second, the computer system may be incidental to the offense, but a repository of evidence. For example, a drug dealer may store records pertaining to customers, prices, and quantities delivered on a personal computer, or a blackmailer may type and store threatening letters in his computer. In each case, the role of the computer differs. It may constitute "the smoking gun" (i.e., be an instrumentality of the offense), or it may be nothing more than an electronic filing cabinet (i.e., a storage device). In some cases, the computer may serve both functions at once. Hackers, often use their computers both to attack other computer systems and to store stolen files. In this case, the hacker's computer is both a tool and storage device. By understanding the role that the computer has played in the offense, it is possible to focus on certain key questions:

- Is there probable cause to seize hardware?
- Is there probable cause to seize software?
- Is there probable cause to seize data?
- Where will this search be conducted?

The principles of Fourth Amendment, Constitution of United States of Americas apply to computer searches, and traditional law enforcement techniques may provide significant evidence of criminal activity, even in computer crime cases. To determine whether an individual has a reasonable expectation of privacy in information stored in a computer, it helps to treat the computer like a closed container such as a briefcase or file

cabinet. The Fourth Amendment generally prohibits law enforcement from accessing and viewing information stored in a computer without a warrant if it would be prohibited from opening a closed container and examining its contents in the same situation. The questions looming large in the minds of investigation agency and makers of the law was aptly answered by the fourth amendment in the US Constitution, which in principle uphold the integrity of individual privacy with only certain exceptions giving limited privileges to investigation and enforcement agencies. The Indian Telegraph Act upholds the privacy in an individual significantly limiting surveillance and seizer of electronic information only under exception of affecting public safety and tranquility. Whereas in cases of terrorist and anti-national activities individual privacy seizes to exist.

V. PROVISIONS IN INDIAN TELEGRAPH ACT, 1885

The Indian Telegraph Act authorizes the surveillance of communications, including monitoring telephone conversations and intercepting personal mail, in case of public emergency or "in the interest of the public safety or tranquility." Every state government has used these powers. The Union Government also uses the powers of the Indian Telegraph Act to tap phones and open mail. The Indian Telegraph Act of 1885 authorizes the surveillance of communications, including monitoring telephone conversations and intercepting personal mail, in cases of public emergency, or "in the interest of the public safety or tranquility." The central Government and every state government used these powers during the year. Although the Telegraph Act gives police the power to tap phones to aid an investigation, they were not allowed to use such evidence in court; however, under POTA and the (UAPA) Unlawful Activities Prevention Act such evidence was admissible in terrorist cases, and some human rights activists noted that the new UAPA Ordinance confers additional powers on police to use intercepted communications as evidence in terrorism cases. While there were elaborate legal safeguards to prevent police from encroaching on personal privacy, there were no such protections in terrorist cases.

VI. ELECTRONIC SURVEILLANCE AND THE FOURTH AMENDMENT

Electronic surveillance it is a method which is requires training for

safety and success of the operations. *The Olmstead Case*.[28] —With the invention of the microphone, the telephone, and the dictograph recorder, it became possible to ''eavesdrop'' with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged, and in 1928 the Court reviewed convictions obtained on the basis of evidence gained through taps on telephone wires in violation of state law. On a five-to-four vote, the Court held that wiretapping was not within the confines of the Fourth Amendment. Chief Justice Taft, writing the opinion of the Court, relied on two lines of argument for the conclusion. First, inasmuch as the Amendment was designed to protect one's property interest in his premises, there was no search so long as there was no physical trespass on premises owned or controlled by a defendant. Second, all the evidence obtained had been secured by hearing, and the interception of a conversation could not qualify as a seizure, for the Amendment referred only to the seizure of tangible items. Furthermore, the violation of state law did not render the evidence excludible, since the exclusionary rule operated only on evidence seized in violation of the Constitution.

The Berger and Katz Cases.[29] —In *Berger v. New York*, the Court confirmed the obsolescence of the alternative holding in Olmstead that conversations could not be seized in the Fourth Amendment sense. Berger held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of ''reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded.'' For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. ''First, eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described.

In *Katz v. United States* , Justice White sought to preserve for a future case the possibility that in ''national security cases'' electronic

27. Supra 12

28. www.dljmlight.tripod.com/DL/Olmstead.htm

surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to ''bug'' in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of ''inherent'' presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a ''reasonable'' search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required.[30]

(i) INDIAN EVIDENCE ACT, 1872

The key provisions that are made in Indian Evidence Act relate to widening of the scope of term document' to include electronic record. Most importantly, section 65B recognizes admissibility of computer outputs in the media, paper, and optical or magnetic form. There are detailed provisions relating to admissibility of computer output as evidence. New section 73A prescribes procedures for verification of digital signatures. New Section 85A and 85B create presumption as regards electronic contracts, electronic records and digital signatures, digital signature certificates and electronic messages.

- According to Indian Evidence Act, section 65 refers to "Cases in which secondary evidence relating to documents may be given". However, the modifications made to this section by ITA-2000 have added Sections 65 A and Section 65 B.
- According to Section 65 A therefore, "Contents of electronic records may be proved in accordance with the provisions of Section 65B".

Whether by design or otherwise, Section 65B[31] clearly states that "

29. Supra 12
30. http://mba.iiita.ac.in/augsept05/technova4.htm
31. 65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer

Not withstanding anything contained in this (Indian Evidence Act) Act, any information contained in an electronic record which is printed on a

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in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein or which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely :-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the materiel part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the functions of storing or processing information for the purposes of any activities of any regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computer, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the

paper, stored, recorded or copied in optical or magnetic media produced by a computer called the Computer Output shall be deemed to be also a document"

However, for the "Computer Output" to be considered as admissible evidence, the conditions mentioned in the Section 65 B (2) needs to be satisfied. Section 65B(2) contains a series of certifications which is to be provided by the person who is having lawful control over the use of the Computer generating the said computer output and is not easy to be fulfilled without extreme care. It is in this context that the responsibility of the Law Enforcement Authorities in India becomes enormous while collecting the evidence. In a typical incident when a Cyber Crime is reported, the Police will have to quickly examine a large number of Computers and storage media and gather leads from which further investigations have to be made. Any delay may result in the evidence getting obliterated in the ordinary course of usage of the suspect hard disk or the media.

(ii) INDIAN PENAL CODE, 1860

A number of amendments have been made to sections 29, 167, 172, 192, 463, 464 and the like. The key amendment relates to the widening of term document to include electronic records. Section 464 now recognizes the concept of digital signature. The prevalence of mobile digital devices and there a potential involvement in perpetuating crime and criminal activities has proven to be a challenge to agencies involved in electronic

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management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.]

surveillance. The problem of tracking with multiple service providers in different geographical areas has effected the capability of electronic surveillance systems where as services like roaming are useful to individuals but are cause of anarchical situations of investigations.

In the case of a Cyber Crime pursued by the Police "Evidence" plays a vital part in securing the interests of the Information Asset owner. The legal requirements and the devices required for the purpose of collecting judicially acceptable Cyber Evidence. The necessary amendments were made to the Indian Evidence Act 1872 by the Information Technology Act 2000 (ITA-2000).

In the case of electronic documents produced as "Primary Evidence", the document itself must be produced to the Court. However, such electronic document obviously has to be carried on a media and can be read only with the assistance of an appropriate Computer with appropriate operating software and application software. In many cases even in non-electronic documents, a document may be in a language other than the language of the Court in which case it needs to be translated and submitted for the understanding of the Court by an "Expert". Normally the person making submission of the document also submits the translation from one of the "Experts". If the counter party does not accept the "Expert's opinion", the court may have to listen to another "Expert" and his interpretation and come to its own conclusion of what is the correct interpretation of a document. In the case of the Electronic documents, under the same analogy, "Presentation" of document is the responsibility of the prosecution or the person making use of the document in support of his contention before the Court. Based on his "Reading "of the documents, he submits his case. This may however be disputed by the counter party. In such a case, it becomes necessary for the Court to "Get the document Read by an expert" to its satisfaction. It is necessary to have some clarity on the legal aspects of such documents presented to the Court because most of the court battles are expected to revolve around "Proper Reading" of the documents and "Possible manipulation of the documents". In making presentation of an "Electronic Document", the presenter may submit a readable form of the document in the form of a "Print Out". Question arises in such a case whether the print out is" Primary Evidence" or" Secondary Evidence".

VII. CONCLUSION

The inevitable fact that technology is becoming more intertwined in the daily life of the individual will lead to an increase in court cases where computer evidence is a vital component. Because the judicial system is having difficulties in mandating and interpreting standardization for computer forensics, it becomes the responsibility of the scientific community to assist in this endeavor. In the evolution of the Indian challenge to Cyber Crimes, during the last three years, Police in different parts of the Country have been exposed to the reality of Cyber Crimes and more and more cases are being registered for investigation. However, if the Law enforcement does not focus on the technical aspects of evidence collection and management, they will soon find that they will be unable to prove any electronic document in a Court of Law. Now we have to embark on the next step of assisting the Law Enforcement in India with suitable Computer hardware and software that would enhance the quality of "Cyber Evidence" that can be produced to a court of law in case of any Cyber Crime. If the process of such collection, recovery and analysis is not undertaken properly, the evidence may be rejected in the Court of law as not satisfying the conditions of Section 65B of the Indian Evidence Act

Suggestions

1. If the country that suffered damage wants to prosecute a culprit of foreign nationality, there has to be an extradition treaty with the country where the hacker is resident. Besides, the legal framework for proceeding with prosecution is still not certain. In spite of the extradition treaty, if a law allegedly broken in a country has no equivalent in the culprit's native country, there can be no prosecution.
2. In developing countries including India, the problem is further compounded because of the lack of training of cops on subjects such as computer forensics to investigate into cybercrimes or of the adjudicating officers. This will adversely affect the fight against Cyber Crime. Unless the police are able to retrieve data from a computer, they would not be able to deal with the cyber-crimes.
3. Law enforcement agencies are challenged by the need to train officers to collect digital evidence and keep with rapidly evolving technologies such as computer operating systems.

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CORPORATE CRIMINAL LIABILITY : A PLEA FOR ALTERNATIVE PENAL POLICY

DENKILA BHUTIA*

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 : Corporate, Crime, Liability, Mens- rea, guilty.

I. INTRODUCTION

A corporation is a group of individuals which has been conferred a legal personality by fiction of law. It is a creation of law and is distinct from natural persons. Hence a corporation is distinct from all the natural persons who compose it[1]. It can sue and be sued. It has rights and duties, in fact it enjoys most of the civil rights available to natural person[2] however it is incompetent to hold certain rights which are available to natural persons, for e.g., citizenship rights, but the incompetence to hold those rights is due to the nature of its personality.[3] Thus corporations can carry

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1. [6] [1895 – 99] All ER Rep 33.
2. *Chiranjit Lal Chowdhuri v. Union of India,* AIR 1951 S.C 41.
3. *The State Trading Corporation of India vs The Commercial Tax Officer,* AIR1963 SC1811.

out business activities but in the course of carrying out business activities by their unscrupulous acts causes threat to life and property of people. It is pertinent to mention that some corporations have a potential to cause more harm than individuals for example corporations dealing with hazardous substances.[4] The activities of corporations are carried out by natural persons, their actions can be criminal in nature and may lead to economical as well as human loss to the society.[5] But the issue of corporate criminal liability has remained largely neglected in India. There is a dearth of literature on corporate criminal liability. Most of the Indian literature that is available in context of corporate criminal liability pertains to the omission of statutory duties (which do not require specific intent) on the part of people working on behalf of corporations.

II. CORPORATE CRIMINAL LIABILITY

Corporate criminal liability refers "to the imposition of criminal liability on either the corporation or its employees and agents." Crime is an act or omission which is considered harmful for individual or society.

The followings are the essential element of crime:

(a) The Act done by a human being

(b) *Mens Rea*

(c) *Actus Reus*

(d) The subject must be fit for infliction of punishment.

Thus, criminal liability can be imposed on a person when all the elements of crime are fulfilled. *Mens Rea* is an essential element of crime but it can be excluded if the act is considered to be so harmful for individual or society. In the case of *Nathu Lal v. State of Madhya Pradesh*[6] the

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4. The Environment (Protection) Act,1986 (Act No 29 of 1986), s. 2(e) defines 'hazardous substance' as any substance or preparation which by reason of its chemical or physio chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants micro-organisms property or the environment.
5. Abhimanyu Kumar, Corporate Criminal Liability, *available at*: https://ssrn.com/abstract=1446669 (last visited on 2.5.2019).
6. AIR 1971 SC 43

Supreme Court observed "*Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof." Thus, *mens rea* is not an inviolable rule of law to hold a person liable for a criminal act. Section 11of the Indian Penal Code (I.P.C) states the word "person" includes any Company or Association or body of persons, whether incorporated or not. Thus it can be inferred that Indian Penal Code has contemplated corporate criminal liability. There are certain offences like murder, rape, etc. which can be committed only by human beings and cannot be committed by corporate body because it acts through agents or employees.[7] The Indian Penal Code has failed to contemplate the acts of a corporate body, which imperils the life of people and can be even worse than multiple murders as has happened in Bhopal gas tragedy. Other statutes in general and Company Law as amended by an Act in 2013 where the law imposes on him vicarious liability for acts of others however blameless himself. Punishments for various acts or omissions by a corporate body are scattered and also fail to take into account the acts of a corporate body, which is more serious in nature than multiple murders.[8] In order to attribute *actus reus* on the corporate body basically two models Vicarious Liability & Direct Liability have been used to extend criminal liability on corporates.[9] Some "mixed models" also exist which are either the combination of these models or modifications by which the acts of every corporate officer who meets certain criteria may make the corporation criminally liable.[10]

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7. *State of Maharashtra v. Syndicate Transport Co. (P) Ltd*, AIR 1964 Bom 195,(1964)
8. *Available at* http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P001795/M025770/ET/151377085026etext.pdf (last visited on 2.5.2019).
9. Cristina de Maglie, 4 *Models of Corporate Criminal Liability in Comparative Law* , Wash. U. Global Stud. L. Rev. 547 (2005).
10. Celia Wells, *Corporations and Criminal Responsibility* 94-95 (Oxford University Press, 2nd edn.,1993).

III. IMPUTING *ACTUS REUS* ON CORPORATIONS: THEORETICAL MODELS

(a) Vicarious Liability

Normally a person is responsible for his own wrongs. But, Salmond says that in general a person is responsible only for his own acts but in exceptional cases in which the law imposes on him vicarious responsibility for the acts of others however blameless himself. The liability for the tort committed by another arises in three ways: a. Liability by ratification b. liability arising out of special relationships. c. Liability by abetment[11]. In order to hold corporates liable for acts of persons who act for or on behalf of corporates the principle of vicarious liability is used which has been originally used to hold employer liable for acts of an agent or employee.[12] Principle of vicarious liability has widened the ambit of criminal law so as to hold principal or an employer liable for the deeds of an agent or employee.[13] Questions have been raised whether it is legitimate to use tort law and civil law concepts in criminal law? According to Glanville Williams objective of vicarious liability in tort law is largely compensatory. But in criminal law, the objective is deterrence, so the foundation of using vicarious liability in criminal liability is unsound. Vicarious criminal liability is inimical to the idea of personal fault. It becomes even more problematic in offences involving *mens rea*.[14]

A corporation can be held liable vicariously if the following conditions are satisfied[15].

(a) an agent of the corporation commits a crime,

(b) while acting within the scope of employment,

(c) with the intent to benefit the corporation.

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11. S.P Singh, *Law of Torts,*(Universal Lexis,New Delhi,7th edn., 2018).
12. Eli Lederman, Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, Buffalo Criminal Law Review* (2000).
13. Ibid
14. Matsiko G. Muhwezi,. (2016). The Case for Corporate Criminal Liability, *available at* https://www.researchgate.net/publication/309041784_The_Case_For_Corporate_Criminal_Liability(last visited on 4.5.2019).
15. Supra note 11.

American courts have rightly added a condition that the criminal acts were authorized, tolerated, or ratified by corporate management.[16] This theory has been criticised as it has failed to provide solution in the cases where the above conditions are not established. The theory has been supported on the grounds that the imposition of vicarious liability induces employers to adopt cost-justified precautionary measures, "including selective hiring and more stringent supervision and discipline, and, in some instances, to truncate the scope of their business activities."[17]

(b) Direct Liability

This rule is also known as the 'alter ego theory', and was formulated in the English case *Tesco Supermarkets, Ltd. v. Nattras*[18]. The corporate organ theory points to the people who exercise authority and control the power within the legal body. It identifies actions and thought patterns of certain individuals within the corporation and they are called corporate organs "who act within the scope of their authority and on behalf of the corporate body, as the behavior of the legal body itself." Those who direct the legal body, those who set the corporation's policy, should be regarded as brain and nerve centre.[19]Thus corporations have mind that thinks and decides what to do or what not to do. It has hands that carry out the directions of the mind. All high level officials who participate in the governance and policy making of the company are considered as mind of the company. There are some people who are servants or agents of the company who are like limbs of the company. It has been pointed out by jurists that "whether an officer can be said to represent the corporation depends on the controlling officer test; does the person control the corporation as the brain, controls the human body."[20] The functional inquiry that is the enquiry regarding "job related activities" helps to identify

16. H. Lowell Brown, Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents, 41 *Loy. L. Rev.* 279 (1995).
17. Catherine M Sharkey., "Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages" 53 *Valparaiso University Law Review*, (2019)
18. [1972] A.C. 153, 169–71.
19. Supra note 14.
20. D.Burles, "The Criminal Liability of Corporations" 141 *N.L.J.* 609-610 (1991).

acts of the corporation that had been performed by people and also helps to identify who had exceeded the scope of their authority.[21] The theory has been criticised on the ground that by the use of this theory, corporations are routinely charged and convicted.[22]

IV. CONSTRAINTS IN PROSECUTION & SENTENCING OF CORPORATIONS

Functions of a corporation are carried out by individuals. The functions are carried out for and on behalf of the corporation. The actions can be criminal in nature. At times there might be connivance of employees and policy framers of the corporate body.[23] It is comparatively easy to fasten guilt on individuals. But it is necessary to understand that in most of the cases corporation is a beneficiary of the actions of the employees and the policy framers of the corporate body. Under the situation it would be improper to inculpate the policy framers or employees and allow the company going scott –free. Few decades back corporate structure was viewed as a convenient shield to evade criminal liability[24]. In the landmark judgment of *Kapila Hingorani v State of Bihar*,[25] the Apex Court observed "A company incorporated under the Companies Act is a juristic person and has a distinct and separate entity vis-à-vis its shareholders. The corporate veil, however, can in certain situations be pierced or lifted. Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof. The veil can indisputably be lifted when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest."

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21. Supra note 14.
22. Ibid.
23. Corporation and corporate body has been used interchangeably to denote business entity having legal personality.
24. Geeta Narula, Corporate Criminal Liability In India: An Information Technology Perspective, *available at* https://www.naavi.org/geeta_narula/corporate_criminal_liability_nov12.html (last visited on 06.05.2019)
25. 2003 (6) SCC 1.

Under our present penal structure, for criminal acts of corporation, both the corporation and its officers can be made accountable[26]. In the case of corporate prosecution the difficulty lies in detecting the crime for the reason that the effect of the criminal act in question is diffused among a number of employees some are aware of the act while others might be unaware.[27] The structure of corporate body impedes the identifying and proving the personal liability of individual offenders. Even where corporate crime is detected it is not easy to establish the guilt due to the technicalities of law and the surrounding substances under which the crime has been perpetrated.[28]Once the guilt is established yet another difficulty arises in deciding how to punish and how to determine the quantum of punishment.[29] The penal law prescribes the nature and the limit of the sentence. The court has to make a choice from the range of available options. The determination of appropriate punishment is a delicate task and requires the balancing of competing interests. The measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, character of the offender, antecedents and other extenuating or aggravating circumstances. Sentencing a corporate body presents a conundrum before the judiciary. Obvious reason for the difficulty in inflicting of appropriate punishment on the corporation is due the fact that sentencing system has been devised having regard to human beings as accused and indicates the legislative failure to comprehend the situation of corporate criminal liability.

The sentencing policy under the criminal jurisprudence Indian legislations has been developed having regard to the individual offenders. The same framework has been used to sentence corporations for their criminal acts. As a result, the court is left with only two sentencing options viz, imprisonment and fine. Since a company is not amenable to imprisonment and, therefore fine remains the only available option. In

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26. Supra note 14.
27. Braithwaite and Geis, "*On Theory and Action for Corporate Crime Control*," 28 *Crime and Delinq*. 294 (1982)
28. Supra note 11.
29. Indian Penal Code,1860 (Act No 45 of 1860), s. 53 provides punishment for criminal acts carried out be a person include death, life imprisonment, rigorous and simple imprisonment, forfeiture of property and fine.

this regard, the criminal courts have been confronted with problems in convicting a company for offences for which there is a mandatory punishment of both imprisonment and fine.[30] In *State Of Maharashtra v. Jugamander Lal,*[31] the consideration before the court was whether it is obligatory upon the court which convicts a person of an offence under S. 3 (1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 to pass a sentence of imprisonment where the conviction is, in respect of a first offence, for a term not less than one year and not merely to a sentence of fine.[32] The Supreme Court disagreed with the interpretation of the phrase "punishable" given by High Court of Bombay, that the phrase punishable provides certain amount of discretion on the court to impose a sentence of imprisonment or a sentence of fine or both. It was held that "it is impossible to construe it as giving any discretion to the court in the matter of determining the nature of sentences to be passed in 'respect of a contravention of the provision." The Supreme Court in *Standard Chartered Bank & Others v. Directorate of Enforcement & Others*[33], considered the issue as to whether a company, or a corporation, being a juristic person, can be prosecuted in context of an offence which contemplates mandatory sentence of imprisonment and fine. The Supreme Court held that company does not enjoy immunity for prosecution in respect of offences which provide mandatory imprisonment. The Law Commission in its 41st Report addressed the issue and recommended that in such situations the court should be empowered to impose on such offender fine only.

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30. Ratna R. Bharamgoudar, "Corporate Criminal Liability: An Overview", *Cochin University Law Review*, 249-264 (2003).
31. AIR 1966 S.C 940
32. The punishments for a first offence under s. 3(1)of The Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No 104 of 1956) provided rigorous imprisonment for a period not less than one year and not more than three years and also a fine which may extend to Rs. 2,000/- The Presidency Magistrate, Bombay, held the respondent guilty of an offence under S. 3 (1) of the Act for keeping a brothel, or allowing the premises in his occupation to be used as a brothel and passed a sentence of fine but did not pass a sentence of imprisonment.
33. AIR 2005 SC 2622.

V. STRENGTHENING THE PRINCIPLES OF CORPORATE CRIMINAL LIABILITY: A NECESSITY

For last few decades' nature of business in India has drastically changed and small enterprises are being replaced by corporate bodies. There has not been even appropriate law relating to the payment of compensation where an accident takes place in an industrial operation involving hazardous substances. The need for proper law relating to corporate liability for compensation in India was observed by the Supreme Court as: "In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and under-takings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities, which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas. Though working of such factories and plants is regulated by a number of laws of our country, there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident."[34] Corporate crimes committed in various countries by industries dealing with multifarious activities some of which can be technically called as hazardous activities underscores the need for greater accountability on the part of corporate bodies in a global economy.[35] Uphaar cinema tragedy in Delhi that claimed around 59 lives underscores the need for developing the proper principles of corporate criminal liability. It has been very rightly pointed out "Modern systems that reject corporate criminal liability dismiss the notion that some corporations have more potential to cause harm than individuals. These systems do not accept that these organizations are criminogenic entities. Consequently, they fail to recognize the need to counteract these organizational offenders through criminal law." The corporate criminal liability in India has rarely been on agenda. There are numerous reasons for this. It has remained largely neglected whatever efforts have been made, it has been directed towards the mechanism for making the corporations liable to pay compensation in case of industrial accidents.

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34. *Charan Lal Sahu v U.O.I*, AIR 1990 SC 1480.
35. Supra note 11.

VI. CORPORATE CRIMES: PENAL POLICY IN SELECT JURISDICTIONS

(a) United Kingdom :

In United Kingdom, the concept of corporate criminal liability has its origin in the principle of vicarious liability. This principle basically applies in strict liability offences where there is no requirement to prove any mental element by the prosecution. The use of this principle as a basis for corporate prosecution is most commonly found in quasi-regulatory areas of criminal law such as health, safety and environmental law.[36]

The court deviated from the vicarious liability approach and imposed corporate criminal liability for *mens rea* offences in *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*[37] In this case, a limited company and its officer were charged with producing misleading documents and furnishing false particulars, signed by the transport manager with an intention to deceive. The respondents contended that the company could not be made criminally liable since the corporation could not have the *mens rea*, an essential element to a criminal offence. The court rejected this contention and held the company liable. Viscount Caldecote , L.C.J in this context observed: "although the directors or general manager of a company are its agents , a company is incapable of speaking or thinking except in so far as its secretary or general manager or directors and so on have spoken, acted or thought".

In *Bath v. Standard Land Co. Ltd,* [38]the court held that the Board of Directors are the brain and the only brain of the company, which is the body and the company can and does act only through them. Similarly it was held by the court that the general manager of a business is regarded as the alter ego of the company and it would be responsible for his personal negligence[39].

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36. Jonathan Grimes, Rebecca Niblock, *et.al*, "Corporate Criminal Liability in the UK: The Introduction of Deferred Prosecution Agreements, Proposals for Further Change, and the Consequences for Officers and Senior Managers, , *Practical Law, Multi-jurisdictional Guide* (2013-14)
37. 1944 KB 146. Also refer *Regina v. ICR Haulage, Ltd*(1994) 1 All E.R. 691: *Moore v I. Brestler*, (1994) 2 AII E.R 515
38. (1910) 2 Ch 408, 416
39. *Fanton v Denville,* (1932) 2 KB 309 , 329 (CA)

In *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd.*[40], the alter ego doctrine of corporate liability was endorsed where the state of mind of some of the officials of the company was considered as the state of mind of the company. In this case, the carrier of goods was a shipping company and under the English Merchant Shipping Act, 1874 a carrier of goods was liable only when the loss of goods or damage to the goods was due to the 'actual fault' of the carrier of goods. In this case the shipping company contended that being a legal person it was incapable of committing actual fault, as it could not have a state of mind. The House of Lords held that as the managing director of the company was negligent and the loss was caused because of his negligence his state of mind was the state of mind of the company and therefore the company was held liable. Lord Dunedin in this context observed:

> "..he [Lennard] was the alter ego of the company. He was a director of the company. I can quite conceive that a company may be entrusting its business to one director be as truly represented by that one director as in ordinary cases is represented by the whole board."

In Tesco Supermarkets Ltd. v. Nattrass,[41] the House of Lords refused to hold a supermarket company criminally liable for a violation of the Trade Description Act, 1968. The decision of the Court was based on the 'identification principle' where a company could be held liable for the acts of the individuals only if they were the directors and managers or any senior officials. In this case, the House of Lords held that in order to establish corporate criminal liability, the mental element of an offence must be attributed to the "directing mind and will of the corporation".

Under this identification principle, liability could be imposed on a corporation for the acts of the directors and superior officers of the company since they speak and act as the company and are the controlling minds of the company. The identification theory has restricted the scope of vicarious liability by confining the range of persons who can make the company liable.[42]

The identification principle also had made it challenging to prosecute

40. (1915) AC 705
41. (1972) AC 153
42. Supra note 16.

a large corporate body specifically where its sales and operations were scattered, as it would be arduous to prove that one or more of its senior most officers could have so acted with the requisite fault. [43]

In *R v CAV Aerospace*[44], a British firm was found guilty of manslaughter where an employee was crushed to death by stacks of aircraft grade metal billets, in a warehouse. The firm was found guilty on charges of corporate manslaughter and breach of health and safety and was fined £ 600,000 and £ 400,000 for two offences consecutively and was ordered to pay £125,000 prosecution costs[45], the highest recorded fine at that time in a manslaughter case. This case marked the prosecution of a parent company rather than a subsidiary company, even though the incident had taken place in the premises of the subsidiary company. In this case, there was email evidence sent to the senior management, which clearly proved they had repeatedly ignored clear and unequivocal warning that practices at its subsidiary company premises were dangerous.[46]With 460 employees and an annual turnover in excess of 73 million in 2013, this was the largest company to be convicted of corporate manslaughter in UK as prior to this case, majority of the convictions involved small companies where the managing or senior director was easily distinguishable.

In *R v Skansen Industries Ltd*[47], two employees of the company were guilty of bribing a senior project manager at a company in order to obtain the tender for refurbishment of two offices. This was later discovered by the newly appointed Chief executive order (CEO) and was reported. The company argued that they had adequate procedures to prevent bribery but the jury was not convinced to accept that and the company was convicted.

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43. Jonathan J Rusch, "Section 7 of the United Kingdom, Bribery Act 2010: A "Fair Warning" Perlustration" 43 *The Yale Journal of International Law Online* 10 (2010)
44. Unreported , Central Criminal Court, 31 July 2015
45. Editorial,"CAV Aerospace fine 600,000 for death of worker crushed by Airbus parts" *The Guardian, UK News*,, 31st July 2015
46. Victoria Roper, Corporate Manslaughter and Corporate Homicide Act 2007- A 10 year Review, 82 *The Journal of Criminal Law*, 48-75 (2018)
47. Southwark Crown Court (2018).

There are some statutory provisions that provide for criminal liability on corporate bodies for example the Corporate Manslaughter and Corporate Homicide Act 2007. This Act makes a company liable for the offence of manslaughter. It provides for prosecution of companies and other organizations if its activities are responsible for causing death of a person.[48] It amounts to a breach of duty of care on the part of the organization towards the deceased. [49] However, an organization is guilty of the offence specified in section 1(1) only where the nature of management is a substantial element in the breach to which section 1(1) refers.[50] It is pertinent to mention that the Corporate Manslaughter and Corporate Homicide Act, 2007 do not provide criminal punishment against individuals but only imposes fine on the guilty company.

Similarly the U. K Bribery Act, 2010 Act created a new corporate offence for failure of commercial organization to prevent bribery. Section 7(1) states " A relevant commercial organization is guilty of an offence under this section if a person associated with the organization bribes another person intending to (a) to obtain or retain business for the organization or (b) to obtain or retain an advantage in the conduct of business for the organization." If an organization is found guilty for failing to prevent bribery, an individual employee is liable on conviction on indictment to a fine or unlimited fine can be imposed against the company, unless the organization proves that it had in place adequate procedure designed to prevent persons associated with it from organizing such conduct.

The use of section 7 by the Serious Fraud Office in a large number of cases has made the section 7 of the Act as a theoretical model for dealing with increasingly influential corporate bodies in the United Kingdom and other jurisdictions around the world. [51]

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48. Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(1)(a).
49. Ibid. s. 1(1)(b).
50. Ibid. s. 1(4) (c) 'Senior management ' in relation to an organization means the person who plays significant roles in the making of decisions about the whole or a substantial part of its activities are to be managed or organized, or the actual managing or organizing of the whole or substantial part of those activities.
51. Supra note 45.

(b) United States of America:

In American Criminal Law, the concept of corporate criminal liability is derived from the civil law theory of *respondent superior*, which has its origin in the principle of vicarious liability[52].

In New York Central& Hudson River Railroad Co. v United States,[53] the Supreme Court of America relied on the principle of *respondent superior* and held that a corporation could be held liable for crimes of intent of their agents, acting within the authority conferred by them. Pursuant to this judgment all courts during the early twentieth century held corporations liable for almost all wrongs other than rape, murder, bigamy and other crime requiring malicious intent. [54]

Several states in U.S.A have adopted the American Law Institute's Model Penal Code. The American Law Institute, with certain exceptions, rejected the *respondent superior* principle but preserved a more limited role for corporate criminal liability. [55] The Model Penal Code provides that corporate criminal liability will be imposed when the commission of the offense was "authorised, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."[56]

The 'collective knowledge' theory of corporate criminal liability was applied in *United States v Bank of New England*[57]. According to the Currency Transaction Reporting Act, 1970 and its regulations banks were

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52. Under this principle three requirements should be met (i) *actus reus* and *mens rea* (ii) the agent must have acted within the scope of employment and, (iii) the agent must have intended to benefit the company. According to this principle, criminal liability can be imposed on the company for the acts of both the management and subordinate employees.
53. 212 U.S. 481, 494-95 (1909)
54. Richard S. Gruner, *Corporate Crime And Sentencing*, (Michie Co. 1994)
55. Sara Sun Beale, "The Development and Evolution of the U.S Law of Corporate Criminal Liability" *available at:* https:// scholarship.law.duke.edu/faculty_scholarship/3205 (last visited on 7.05.2019)
56. Model Penal Code, Section 2.07(1)(c)
57. N A, 820 F. 2d 844 (1st Cir 1987).

required to file currency transaction reports within fifteen days of any customer currency transaction if the amount was more than $10, 000. Banks would be held criminally liable if they failed to file the report. The Court attributed the knowledge of individual employees acting within the scope of their employment to the knowledge of the employer which meant that what the employees collectively knew was tantamount to the employers knowledge and satisfied the *mens rea* element of the offence even though the employees may not know that they are involved in wrongdoing.

Like Statutory provisions providing for punishment to corporate bodies for their criminal liability the United States of America have made sentencing guidelines in context of corporate bodies. The Department of Justice has drafted the principles of Federal Prosecution of Business Organizations and has stated that when a prosecutor decides to charge a company, the same rules that govern natural persons will apply to a corporation. The rule requires a faithful and honest application of sentencing guidelines.[58]

Chapter 8[59] of the Federal Sentencing Guidelines Manual introduced in 1991 lays out detailed guidelines for the sentencing of organizations convicted of offences, are in fact designed to reform the corporate culture.[60] Chapter 8 also has provisions for assessment of appropriate fines and also provides for corporate probation. If the defendant operated for a criminal purpose or by criminal means immediate payment of fine is

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58. 9-27.300, U.S Attorneys' Manual, U.S. Dep't of Justice.
59. A new chapter on Sentencing of organizations was added to the United States Sentencing Commission, Guidelines Manual in 1991 by the U.S Department of Justice. The introductory commentary of the Manual read that four factors that increase the ultimate punishment of an organization are: i) the involvement or tolerance of criminal activity; ii) the corporations prior history; iii) the violation of an order; and iv) the obstruction of justice. It also states that the corporate punishment can be mitigated by reliance on two factors: i) the existence of an effective compliance and ethics program in place ii). Self-reporting, co-operation or acceptance of responsibility
60. United Nations Special Representative of the Secretary- General on Human Rights and Business, *Report on Corporate Culture as a basis for the criminal liability of corporations,* (February, 2008)

required.[61] The maximum amount of fine authorised by statute may increase when the organization is convicted of multiple counts. The Court shall order a term of probation[62] for corporations where it is necessary to ensure that changes are made within the organization to prevent the possibility of criminal conduct.[63]

(c) Need for Legislative Change in Indian Penal Policy:

In order to hold a corporation for acts of criminal nature, there must exist corporate mens rea. The liability does not derive merely from an individual's guilt.[64] For the determination of corporate fault without having to establish individual culpability, traditional criminal norms may not work. At times innocent actions of individuals in combination with the actions of other individuals may culminate in commission of crime. Theoretical models of imposing criminal liability in European corpus juris, have been found to be inadequate to control corporate crimes.[65] K. Balakrishnan opines "The non-clarity of the concept of corporate liability, in India, may be due to the fact that there has not been much demand

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61. 8C3.2 (a)
62. 8D1.1
63. 8D1.1(6) Also The U.S Speedy Trial Act of 1974 authorizes the prosecutor to defer prosecution as it provides that time limits under the Act are suspended during any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant with the approval of the court for the purpose of allowing the defendant to demonstrate his good conduct as discussed in Ved P Nanda, "Corporate Criminal Liability in the United States: Is a new approach warranted?" 58 *The American Journal of Comparative Law.* 623(2010). The Department of Justice and a corporation may settle criminal, civil and administrative charges by entering into a deferred prosecution agreement (DPA) or non-prosecution agreement. A DPA requires judicial approval whereas a NPA does not require court approval. The Department of Justice has used these techniques to obtain demanding settlements from various corporations in United States including Monsanto, Merrill Lynch & Co., KPMG, AIG, American online etc as discussed in Sara Sun Beale, "The Development and Evolution of the U.S Law of Corporate Criminal Liability" *available at:* https://scholarship.law.duke.edu/faculty_scholarship/3205.
64. Supra note 11
65. Ibid.

made to the legislature or the judiciary to deal with corporate crimes and so opportunities to debate and develop an effective mode of controlling corporate crimes was not provided to them. But, the advent of free market economic policy and the consequential changes in the role of corporations in the Indian society is certainly going to provide fresh opportunities to test the sufficiency of the law in this area."[66] Similarly in the case of *The Assistant Commissioner, Assessment- II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors*[67]., B.N. Srikrishna J. said that "corporate criminal liability cannot be imposed without making corresponding legislative changes." In England a legislative change was ventured to legislate a special manslaughter offense—corporate killing—relating to death caused by the failure of a corporate body to adopt necessary precautionary measures, thereby significantly departing from reasonable standards of care.[68] Legal bodies have been held criminally liable for manslaughter on various occasions in United States. [69]

VII. CONCLUSION

In the present socio-economic condition, a fine balance between the interests of corporate entities and protection of life and property of people is necessary. An alternative penal policy to identify what to punish and how much to punish in the context of corporate entities, which can control corporate crimes is required. Indian Penal Code has been devised having regard to regulate human behaviour. It prohibits various acts that are harmful for individuals or society and penalizes those acts if done by human beings considered fit for infliction of punishment. A comprehensive corporate criminal code analogous to Indian Penal Code where Corporate Crimes are defined and punishment therefore are provided needs to be

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66. K.Balakrishnan, "Corporate Criminal Liability: A Comparative View", 421 *Cochin University Law.R*eview. 436 (1998).
67. Appeal (crl.) 142 of 1994,Supreme Court of India.
68. Supra note 14.
69. Cr.A. 3027/1990 *Modiem Constar. & Div. Ltd. v. State of Israel*, 35(4) P.D. 364, 381 (Per CJ Aaron Barak) (Hebrew) (Isr.)cited in Eli Lederman, Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, Buffalo Criminal Law Review* (2000).

devised. Necessary provisions should be made to address the issues where corporate crimes result in injury to or loss of human life, property, ecology or environment. The codification will give predictability and certainty to the law, enabling the corporate sector to plan their activities within the parameters of the law avoiding unnecessary pitfalls and save the society from avoidable harm ranging from minimal to phenomenal and unfathomable or unforeseen occasions.

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NOTES AND COMMENTS

PROTECTION OF RIGHT TO EDUCATION OF DRUG ADDICTED AND NEGLECTED CHILDREN IN INDIA

*ADESH KUMAR**

ABSTRACT : Education has an immense impact on the human society. Education is an indispensable asset with humankind in its attempt to inculcate the idea of peace, freedom and social justice. It trains the human mind to think and take the right decision. In other words, man becomes a rational animal when he is educated. It is universally accepted that education empowers the people for the full development of human personality, strengthens the respect for human rights, and helps to overcome exploitations and traditional inequalities of caste, class and gender. Drug addicted and neglected children are largely deprived from this basic human right in India. India is signatory of most of the leading international document adopted for protection of human rights i.e. Universal Declaration of Human Rights, ICCPR, ICESCR, UNDRC, UNCRC etc. The Constitution framers of India also provided adequate protection to children in chapter of fundamental rights and directive principles of state policy. The Parliament of India has also enacted Right of Children to Free and Compulsory Education Act 2009 to ensure protection of right to education even though large population of drug addicted and neglected children are out of four walls of schools.

KEY WORDS : Drug Addiction, Neglect, Education, Declaration, Covenant, Human Rights.

I. INTRODUCTION

Education is an indispensable asset with humankind in its attempt to

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inculcate the idea of peace, freedom and social justice[1]. The goal of a human rights-based approach to education is simple: to assure every child a quality education that respects and promotes her or his right to dignity and optimum development.[2] Achieving this goal is, however, enormously more complex. The right to basic education has been a key element of almost every international declaration on human rights since the United Nations was established. Education has been formally recognized as a human right since the adoption of the Universal Declaration of Human Rights in 1948. This has since been affirmed in numerous global human rights treaties, including, Declaration of the Rights of the Child[3], United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education[4], International Covenant on Economic, Social, and Cultural Rights[5], Convention on the Elimination of All Forms of Discrimination against Women[6], UN Convention on Rights of Child[7], World Declaration on Education for All[8], World Declaration on the Survival, Protection, and Development of Children[9], Beijing Declaration[10] and Amman Affirmation[11], all express a commitment to education as a right. Constitutions and statutory laws in most countries recognize the child's right to education[12]. These treaties establish an entitlement to free, compulsory primary education for all children; an obligation to develop secondary education, supported by measures to render it accessible to all children, as well as equitable access to higher education; and a responsibility to provide basic education for individuals

1. A. Selvan, *"Human Rights Education: Modern Approaches and Strategies"* 2010 Concept Publishing Company Pvt. Ltd., New Delhi.
2. A Human Rights-Based Approach to Education, United Nations Educational, Scientific and Cultural Organization, 2007
3. 1959
4. 1960
5. 1966
6. 1981
7. 1989
8. 1990
9. 1990
10. 1995
11. 1996
12. Asha Bajpai," *Child Rights in India*", 3rd Ed. 2017, Oxford University Press, New Delhi.

who have not completed primary education. They affirm that the aim of education is to promote personal development, strengthen respect for human rights and freedoms, enable individuals to participate effectively in a free society, and promote understanding, friendship and tolerance. The right to education has long been recognized as encompassing not only access to educational provision, but also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality. In addition, education is necessary for the fulfilment of any other civil, political, economic or social right[13].

II. PROTECTION OF RIGHT TO EDUCATION OF CHILD IN INTERNATIONAL DOCUMENTS

i) UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

The Article 26 of UDHR was proclaimed by the General Assembly as a 'common standard of achievement for all peoples and all nations' to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures to secure the universal and effective recognition and observance[14]. It provides that everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. It further provides that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

ii) CONVENTION AGAINST DISCRIMINATION IN EDUCATION 1960

It provides that states parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular to make primary education free and compulsory

13. *Supra note 3*
14. *Supra note 13*

and to make secondary education in its different forms generally available and accessible to all[15].

iii) INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1966

India has acceded to the International Covenants on Civil and political Rights and on Economic, Social, and Cultural rights on 10 April 1979[16]. Right to education as a human right is protected under article 13 of this covenant. It provides that the States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace[17]. It further provides that the states parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all.

Article 13(1) of the covenant provides that the state parties recognize the right of everyone to education. Article 13(2) recognizes that with a view to achieving full realization of the right to education, primary education should be made compulsory and available free to all and the development of a system of schools at all levels should be actively pursued. The article also respected the liberty of parents or legal guardians to choose their children's schools other than those established by public authorities and to ensure religious and moral education of their children. Article 13(3) recognizes the liberty of individuals and bodies to establish and direct educational institutions which shall conform to such minimum standards as may be laid down by the state. Article 14 provides that each party to the Covenant, if it has not been able to secure within its jurisdiction free, compulsory, primary education within a period of two years, shall

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15. Convention Against Discrimination in Education 1960, Art. 4
16. OHCHR, Geneva, Switzerland. Available at http://www.ohchr.org/EN/UDHRlPages/Introduction.aspx (accessed on 3 October 2015).
17. ICESCR 1966, Art. 13

adopt a detailed plan of action for its progressive implementation.

iv) CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1981

The CEDAW is the most comprehensive human rights instrument to protect women from discrimination. It is the first international treaty to address the fundamental rights of women in politics, health care, education, economics, employment, law, property and marriage and family relations. It ensures equal access to education and vocational guidance for women, equal access to the same curricula, examinations and teaching quality, equal access to scholarships and study grants and finally, equal access to adult education including literacy programs[18]. India signed this Convention on 30 July 1980 and ratified it on 9 July 1993 with certain declarations.

v) UNITED NATIONS CONVENTION ON RIGHTS OF CHILD 1989

Nearly every country in the world has ratified the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC strengthens and broadens the concept of the right to education, in particular through the obligation to consider in its implementation the Convention's four core principles: non-discrimination; the best interests of the child; the right to life, survival and development of the child to the maximum extent possible; and the right of children to express their views in all matters affecting them. Article 28 and 29 of this convention deals with right to education of child in fullest form.

Article 28 of the convention says that states parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make primary education compulsory and available free to all. They shall encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need. The state parties shall also make higher education accessible to all on the basis of capacity by every appropriate means. The state parties shall make educational and vocational information and guidance available

18. CEDAW 1981, Art. 10

and accessible to all children. The state parties shall take measures to encourage regular attendance at schools and the reduction of dropout rates.

The Convention imposes the duty on state parties to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. The state parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 of the Convention says that states parties agree that the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential. The state parties shall work towards the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations. The state parties shall also move towards the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own. The state parties shall tend towards the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin. The state parties shall also work the development of respect for the natural environment.

This Convention introduces an additional perspective. It imposes limits not only on the state but also on parents. It insists that children's best interests must be a primary consideration in all matters affecting them, that their views must be given serious consideration and that the child's evolving capacities must be respected. In other words, the convention affects the right of parents to freedom of choice in their child's education; parental rights to choose their children's education are not absolute and are seen to decline as children grow older. The rationale behind parental choice is not to legitimize a denial of their child's rights. Rather, it is to prevent any state monopoly of education and to protect

educational pluralism. In the case of conflict between a parental choice and the best interests of the child, however, the child should always be the priority.

The right to education thus involves these three principal players: the state, the parent and the child. There is a triangular relationship between them, and in the development of rights-based education it is important to bear in mind that their differing objectives need to be reconciled.

These international conventions ensures the right to education as a human right to all the children without any discrimination hence the protection of these international documents is available to all the children including drug addicted and neglected children. The drug addicted and neglect children are also entitled to protection of right to education under these documents. These international efforts secure and protect the rights of drug addicted and neglected children in its provisions in different ways. The rights of drug addicted and neglected children are protected in UDHR 1948 which provides that everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. The UDHR prohibits any kind of discrimination of drug addicted and neglected child form other child. UDHR also provides that states parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances[19]. UDHR talks about the rehabilitation of child victims and provides that "If you were neglected, tortured or abused, were a victim of exploitation and warfare, or were put in prison, you should receive special help to regain your physical and mental health and rejoin society[20]".

19. UDHR 1948, Art. 33
20. *ibid*, Art. 39

International Covenant on Economic, Social and Cultural Rights[21] also protect the rights of children without any discrimination of them on any condition. It ensures that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law[22].

The United Nations Convention on the Rights of the Child[23] also protects rights of drug addicted and neglected children. First of all it prohibits any kind of discrimination among the children. It provides that states parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status[24]. It provides that states parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts[25]. Such recovery and reintegration shall take place in an environment which fosters the health, self respect and dignity of the child.

Hence it is very clear that drug addicted and neglected children are widely protected under the international treaties without any discrimination and these international documents ensures that that right to education is also made available to them without any discrimination on any conditions.

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21. 1966
22. ICESCR 1966, Art. 10(3)
23. 1989
24. UNCRC 1989, Art. 2
25. *Ibid,* Art. 39

III. PROTECTION OF RIGHT TO EDUCATION OF DRUG ADDICTED AND NEGLECTED CHILDREN IN INDIA

i) CONSTITUTITON OF INDIA 1950

After Independence, the Constitution of India 1950 in Article 246 dealt with the subject matter of laws made by the Parliament and by the legislatures of states. Education, including technical and medical education, is placed in List III[26], that is, the Concurrent List of the Seventh Schedule of the Constitution of India. Thus, the Parliament as well as the individual state legislatures can make laws on the subject of education. Such a scheme of distribution of legislative powers under the Constitution is a necessary component of a federal political structure. The Constitution, in Article 45, made compulsory education a matter of national policy. The Constitution, in Article 45, lays down as a directive principle that every child up to the age of 14 shall receive free and compulsory education. Articles 39f, 46, and 47 lend further support to this constitutional directive. The founding fathers of the Constitution clearly intended to ensure that every child, irrespective of social or economic status of his/her parents, received care and education from birth up to the age of 14 years. This goal was to have been achieved 'within a period of ten years from the commencement of this Constitution[27].

Universal free and compulsory education- should have become a reality in India by 1960. After Independence, states have enacted legislations making elementary education compulsory. In the 1960s, most states framed their own laws on the model of the Delhi School Education Act, 1960. Before 86th amendment, Article 45 of the Indian Constitution says: 'The State shall endeavour to provide, within a period ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years.' This constitutional obligation was for ten years and it was deferred-first to 1970 and then again to 1980, 1990, and 2000. Realizing the sluggish attitude and delaying tactics in implementing the Constitutional commitment, the Supreme Court of India, in the Unnikrishnan judgment in 1993, said: 'It is noteworthy that among the several articles in Part IV only Article 45 speaks of time limit, no other article does. Has it not

26. Item 25
27. *Supra note 13*

significance? Is it a mere pious wish, even after 44 years of the Constitution?' The Tenth Five-year Plan visualizes that India would achieve universal elementary education by 2007. However, the Union Human Resource Development Minister recently announced that India would achieve this target by 2010[28].

There were two landmark pronouncement of Supreme Court of India which has held that education as a fundamental right is a matter of right to life for all children of the country as per interpretation of Article 21 of the Constitution. The Supreme Court first recognised the right to education as a fundamental right in *Mohini Jain v. Union of India*[29]. It was observed in this judgment that "Right to life is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facility at all levels to its citizens"[30]. Therefore it held that free education up to the age of 14 was a fundamental right of every child. In 1993 a five Judges Bench of Supreme Court in the case of *J P Unnikrishnan vs. State of Andhra Pradesh*[31] narrowed the ambit of the fundamental right to education as propounded in the Mohini Jain case. Thereafter, India ratified the UNCRC[32] and as part of Article 51(c) of the Constitution, it was obliged to foster respect for international laws and treaties. Article 28 of the UNCRC obliges commitment from its member nations to bring their national legislations for securing the rights and justice of children in their country. The 83rd Constitution Amendment bill was tabled in the Lok Sabah in July 1997. The Constitution (83rd Amendment) Bill provided to make free and compulsory education to all citizens of the age group of 6-14 years, a fundamental right by inserting Article 21A in the Constitution. Under this bill, Article 45 of the Constitution had to be omitted and in Article 51A of the Constitution, after Clause (j) the following

28. ibid
29. (1992) 3 SCC 666
30. Para 12
31. 1993 SCC (1) 645
32. India acceded to the convention on 11 December 1992

clause will be added, namely Clause (k) to provide opportunities for education to a child between the age of 6 and 14 years of whom such citizen is a parent or guardian[33]. This bill was replaced by the Constitution (Eighty Sixth Amendment Bill) 2001 which was passed by the Lok Sabha in November 2001. It became constitution (Eighty Sixth Amendment) Act in 2002, which had the following provisions. This amendment inserted a new Article 21A in Constitution of India which says that "The state shall provide free and compulsory education to all child of the age of six to fourteen years in such manner as the State may, by law, determine. It also substituted Article 45 of the Constitution as "The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years. This amendment also inserted a new clause in fundamental duties under Article 51(A)(j) which provides that It shall be the fundamental duty of the parents and guardians to provide opportunities for education to their children or, as the case may be, wards between the age of 6 and 14 years. This amendment made the right to free and compulsory education for the children, a fundamental right. The fundamental right to free education had a paramount importance as it mean that the state was now under the legal obligation to provide free and compulsory education to the children between 6-14 years of age. The Right of Children to Free and Compulsory Education Act or Right to Education Act (RTE), is an Act of the Parliament of India enacted on 4 August 2009 under Article 21A of the Indian Constitution. India became one of 135 countries to make education a fundamental right of every child when the act came into force on 1 April 2010. The title of the RTE Act incorporates the words 'free and compulsory'. 'Free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. 'Compulsory education' casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age group[34].

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33. *Supra note 13*
34. RTE Act 2009 , Sec 2(c) provides that "child" means a male or female child of the age of six to fourteen years

ii) PROTECTION OF RIGHT TO EDUCATION OF DRUG ADDICTED AND NEGLECTED CHILDREN UNDER THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT 2009

The enactment of The Right of Children to Free and Compulsory Education Act[35] by the Parliament of India is a historic moment in the direction of free and compulsory education of children of India. The law makes it obligatory on part of the state governments and local bodies to ensure that every child in the age group 6-14 gets free elementary education in a school in the neighbourhood. This Constitutional guarantee of free and compulsory education is also available to drug addicted and neglected children. The RTE Act 2009 do not discriminate the drug addicted and neglected children and ensures the free and compulsory education to all as per the constitutional mandate of Art. 14. The drug addicted and neglected children are also entitled to free and compulsory education as it is available to the other children. Hence a male or female drug addicted and neglected child is entitled to get elementary education in age group 6 to 14 years. RTE Act provides two special categories of child as "child belonging to disadvantaged group"[36] and "child belonging to weaker section"[37]. These special categories child are also conferred the right to free and compulsory education under clause (d) of sec 3 which says that "every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of section 2, shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education.

The drug addicted and neglected children are not covered under any of the two special categories provided under clause (d) and (e) of sec 2 of RTE Act. Hence the drug addicted and neglected children are

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35. 2009

36. RTE Act 2009, Sec. 2 (d) provides that "child belonging to disadvantaged group" means a child with disability or a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

37. RTE Act 2009, Sec. 2 (e) provides that "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;

considered in the definition of child under clause (c) of sec 2 in which the definition of child for the purposes of RTE Act is given. As per RTE Act, "child" means a male or female child of the age of six to fourteen years[38]. This definition of child includes drug addicted and neglected children and ensures the right to free and compulsory education to the drug addicted and neglected children also.

This Act makes special provisions for children not admitted to, or who have not completed, elementary education[39]. It provides that where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age. The child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years. The Act provides that where in a school, there is no provision for completion of elementary education, a child shall have a right to seek transfer to any other school[40].

This Act imposes the duty on parents and guardian to admit the child in school. It provides that it shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school[41]. The Act also imposes the duty on school to provide free and compulsory elementary education to all children. It provides that for the purposes of this Act, a school shall provide free and compulsory elementary education to all children admitted therein[42]. These provisions of RTE Act 2009 are also applicable to drug addicted and neglected children and they are entitled to free and compulsory education. It is their human right to get free and compulsory education.

IV. CONCLUSION

Having provisions for protection of right to education of drug addicted and neglected children in various international documents as

38. *ibid*, Sec. 2(c)
39. *ibid*, Sec. 4
40. *ibid*, Sec. 5
41. *ibid*, Sec. 10
42. *ibid*, Sec. 12

well as under Constitution of India, the drug addicted and neglected children are largely deprived of this basic human right. According to the provisions of The Free and Compulsory Education of Children Act 2009, the responsibility is fixed on the local authorities to send the children in the school even though the drug addicted and neglected children are out of school premises. It means that the working of local authorities is neither satisfactory nor effectively which results in mass violation of human rights of education of drug addicted and neglected children. The Free and Compulsory Education Act 2009 also imposes obligation to the parents to send their children in the school but the parents do not comply the provisions of abovesaid Act. Another major cause of not going of drug addicted and neglected children to school is that they have responsibility to earn their livelihood for them and their family for that they have to do child labour though the child labour is banned in India except certain conditions. Hence it is the need of the hour to re think about it in articulated manner.

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ELECTORAL BONDS AND POLITICAL FUNDING : A QUEST FOR TRANSPARENCY LOST IN ANONYMITY

*RAKESH KUMAR**

ABSTRACT : India is considered an 'oasis of democracy'. Multiple political parties and robust election campaigns are integral component to the free and fair election. Political parties require substantial financial resources for integration, mobilisation and aggregation of interest of electorate in its policies and programme. India has evolved very complex mechanism with respect to political party funding, election expenditure ceiling, disclosure and monitoring laws. Individual contribution, corporate donations, electoral trust and latest electoral bonds are some of the mechanisms attempted to regulate campaign expenditure and curb unaccounted funds or 'black money'. Presently, ceiling on expenses to be incurred by a candidate contesting election is there in place but there's no such ceiling for the amount of contribution received and expenses being incurred by political parties throughout elections. In this scenario, an attempt is being made to analyze the campaign financing regime of India with special regard to electoral bond scheme of 2017 and suggest possible reforms including possibility of state financing of political parties that may restore the faith of electorate in India's financing laws.

KEY WORDS : Election Campaign, Financing of election, electoral bonds.

I. INTRODUCTION

Free and fair elections lay a foundation for a successful democracy and the Election Commission of India's performance in carrying out of

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its constitutional mandate has been commendable. In absence of State funding to election and absence of ceiling on amount of contribution to political parties in elections, the extensive use of unaccounted money has vitiated the integrity of election process and compromises with virtuousness of electoral democracy in our country. In *Common Cause (A Registered Society)* v. *Union of India*[1], Justice Kuldip Singh speaking on behalf of the Supreme Court rightly remarked, "when elections are fought with unaccounted money, the persons elected in the process can think of nothing except getting rich by amassing black money. They retain power with the help of black money and while in office collect more and more to spend the same in the next election to retain the seat of power. Unless the statutory provisions meant to bring transparency in the functioning of the democracy are strictly enforced and the election funding made transparent, the vicious circle cannot be broken and corruption cannot be eliminated from the country."[2]

Apart from regulating election campaign, the money obtained by political parties and candidates is generally used to distribute money, gold, liquor and freebies such as mobile phones, laptops, refrigerators, TVs, sewing machines and even apparels in some cases like sarees to women to buy votes during election. In the absence of legislation, the ECI appoints election observers who have seized huge cash meant to influence elections.[3] For instance, during 2011 elections of Tamil Nadu, ECI agents seized Rupees 420,000,000 (Four Hundred Twenty Million) worth cash.[4] The then Chief Election Commissioner said, ''today for every Rs 100 spent on elections, Rs 90 is spent in cash''.[5] In March 2011, a Rajya Sabha

1. (1996) 2SCC 752.
2. *Id.*, at 762.
3. Ellen L. Weintraub and Samuel C. Brown, "Following the Money: Campaign finance Disclosure in India and United States", 11(2) *Election Law Journal*, 2012.
4. J. Balaji, "Tamil Nadu a Challenging Case But We Can't Close our Eyes: CEC",*The Hindu*, 9 April 2011, available at: *https://www.thehindu.com/news/national/tamil-nadu/Tamil-Nadu-a-challenging-case-but-we-cant-close-our-eyes-CEC/article14675778.ece* [Accessed on 13 May 2019].
5. Abheek Barman, "How Political Parties Try to get past EC Guidelines to fish for Votes",*The Economic Times*, 3 April 2011, available at: *https://economictimes.indiatimes.com/news/politics-and-nation/how-political-parties-try-to-get-past-ec-guidelines-to-fish-for-votes/articleshow/7854123.cms*[Accessed on 13 May 2019].

member was allegedly stopped at the Delhi airport on his way to Assam where elections were being conducted, with 5,700,000 (Fifty Seven Lakh) rupees in cash.[6] In 2019 Vellore Parliamentary constituency elections in Tamil Nadu, seizure Twelve Million rupees from DMK leader's associates was made.[7] Unaccounted money is central to the problem of corruption in India and political parties are suspected to be the largest beneficiaries of political corruption. Corruption in elections is also the cause behind decreased accountability, distorted representation, and asymmetry in policymaking and governance.

In the backdrop of these unfortunate incidents, the approach of legislature and judiciary towards regulating the entire gamut of election campaign financing in view of electoral bonds scheme as new channel of political funding is to be assessed, with an objective to check rampant "under-the-table cash transactions".[8]Hence, a study of financing system of elections in India becomes pivotal to properly understand the election finance framework and emerging issues. For the purpose of convenience, the present article has been divided into the following sub-heads: General Scheme of Election Financing in India; Electoral Bonds Scheme, 2017: Introduction, Salient Features and Issues attached thereto; Recommendations for Reforms to fine- tune election campaign financing system; and Concluding Observations.

II. GENERAL SCHEME OF ELECTION FINANCING IN INDIA

The election financing regime of India is broadly confined to systems of funding, monitoring, disclosure and exemption for contributing towards election campaign.In contrast to American campaign finance laws which impose disclosure requirements, contribution limits and some source restrictions, but no expenditure limits on the candidates to election, the Indian campaign finance laws focus primarily on expenditure limits, which

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6. "Trinamul MP let-off riles CPM", *The Telegraph,* 26 March 2011, available at: *https://www.telegraphindia.com/india/trinamul-mp-let-off-riles-cpm/cid/415024*[Accessed on 13 May 2019].
7. Available at: *https://www.indiatoday.in/elections/lok-sabha-2019/story/lok-sabha-polls-cancelled-in-vellore-after-massive-cash-haul-1503419-2019-04-16*[Accessed on 12 May 2019].
8. *Ibid.*

apply to candidates.[9] Campaign finance laws in India are still candidate centric, the scheme of which is outlined as under:

a) Funding

Under the existing provisions of election financing in India, no limitations are presently in place regarding the amount that individuals or corporate entities may contribute. Foreign contributions are still prohibited under the Foreign Contribution (Regulation) Act, 2010 but the Finance Act, 2016 made amendments permitting contributions by certain foreign companies through their Indian subsidiaries.[10] Section 29B of the RPA, 1951 permits political parties to accept any amount of voluntary contributions without limit except from government companies, local authorities or any entity funded by the government.[11]

b) Spending

Section 77(3) of the RPA, 1951 prescribes total expenditure limits as can be incurred by a candidate in elections. This prescription has been done through Rule 90 of the Conduct of Election Rules, 1961 for parliamentary constituencies and assembly constituencies. These limits differ from State to State. As per Section 77(1) Explanation 1(a) of the RPA, 1951, these expenditures aren't inclusive of travel expenses of a political party for propagating programmes of the party the candidate belongs to.[12]

c) Monitoring

The State Election Commissions appoint election expenditure observers during the State assembly elections. They are deployed at different assembly constituencies and entrusted with the task of overseeing

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9. Daniel P. Tokaji, "Following the Money: Campaign Finance Disclosure in India and the United States", 11(2) *Election Law Journal*, 2012.
10. The Press Trust of India, "Foreign funding: BJP, Congress withdraw appeals from SC",*The Indian Express,* 26 November 2016, available at: *http://indianexpress.com/article/india/india-news-india/foreign-funding-bjp-congress-withdraw-appeals-from-sc*[Accessed on 26 April 2020]; the Finance Act, 2016, Section 236 amends the definition of "foreign source" under the Foreign Contribution (Regulation) Act, 2010. The amendment was deemed to be made from 26 September, 2010 and retrospectively validated certain contributions made to major political parties.
11. The Income Tax Act, 1961, Section 13A(d).
12. *Common Cause* v. *Union of India* (1996) 2 SCC 752.

the use of black money and illegal gratifications during elections, checking movement of funds through banking channels, permitting candidates to hold campaign programmes and submit expenditure details in anticipation and even persuade general public to supply information as would enable them to detect violations in spending and maintaining accounts. In recent Delhi Assembly polls of 2015, the ECI directed the Central Board of Direct Taxes to ensure that its investigation wing in Delhi and adjoining states adopts measures to check physical and electronic movement of suspected funds across the borders of the State and Delhi.[13]Election expenditure accounts by the candidate to be submitted within 30 days from the date results are declared is obligatory.[14]Constant vigilance over expenses of candidates on a routine basis and report it correctly to ECI is the crucial task they perform.

d) Disclosure

Candidates are required under Section 77 of the RPA, 1951 to keep an accurate record of their election expenses from the date of nomination till the date of declaration of results. As per Section 78, the candidate is to submit a true account of their expenses to the district election officer within a prescribed period. The form and content of the accounts is provided in Part VIII of the Conduct of Elections Rules, 1961. Similarly, political parties are required under Section 29C of the RPA 1951 to disclose donations above twenty thousand rupees received by them during a financial year as prescribed in Part VIIA of the Conduct of Election Rules, 1961. It is vital to note that despite the change in permissibility of money from Rs. 20,000 to Rs. 2,000, need of disclosure of a party's donation report is still at Rs. 20,000. To ensure transparency with respect to funds received by a candidate, the candidates are under obligation to declare assets under Form 26 in the Conduct of Elections Rules, 1961. The 2017 amendment mandates disclosure of the source of these assets.[15]

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13. Available at: *https://economictimes.indiatimes.com/news/elections/assembly-elections/delhi/ec-appoints-22-irs-officers-as-expenditure-observers-for-delhi-polls/articleshow/73170912.cms?from=mdr*[Accessed on 7 May 2019].
14. ECI, "Expenditure Monitoring", 19 February 2019, available at: *https://eci.gov.in/it-applications/web-applications/expenditure-monitoring-r39*[Accessed on 13 May 2019].
15. The Conduct of Election (Amendment) Rules, 2017, Gazette Notification S.O. 1133(E), 7 April 2017, available at: *http://ceodelhi.nic.in/PDFFolder/Amendment%20.pdf*[Accessed on 22 April 2019].

Under Section 182 of the Companies Act, 2013, donations by companies and Electoral Trusts for receipt of voluntary contributions from persons like an individual or a domestic company are governed. It mandates listed corporates to disclose their political contributions including any donations, subscriptions, payments, and even expenditure incurred on publications, directly or indirectly, for the benefit of a political party. Upper limit on spending and the need for shareholder approval were done away with in 2017.[16]

e) Grants and Exemptions

Indirect state support is being provided to recognized political parties under the schemes like access to media, free access to public places for rallies, subsidized conveyance facilities, income tax exemption under **Section 13A of the Income Tax Act, 1961 in a regulated manner.**[17]

III. ELECTORAL BONDS SCHEME, 2017: INTRODUCTION, SALIENT FEATURES AND THE CONTROVERSY

The electoral bonds were introduced on 2January, 2018 to disinfect and purify the political funding system in the country. These bonds can be used for generating money in form of donations to parties registered under Section 29A of RPA, 1951. An electoral bond is a bearer instrument in the manner of a promissory note. It is an interest free banking instrument whereby a national, either singly or jointly with others, or a business entity incorporated or established in India becomes eligible for purchase of the bond either through cheque or digital payment. Political parties registered under Section 29A of the Representation of the People Act, 1951 having secured not less than 1 per cent of votes polled in the last election to the House of the People or the Legislative Assembly of the State is eligible to receive donations via bonds. The bonds issued in multiples of Rs. 1,000, Rs. 10,000, Rs. 1 lakh, Rs. 10 lakh and Rs. 1

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16. AzmanUsmani, "Most of India's Top 50 Listed Firms stayed away from Political Funding", *Bloomberg, The Quint*, 23 August 2019, available at: *https://www.bloombergquint.com/business/most-of-indias-top-50-listed-firms-stayed-away-from-political-funding*[Accessed on 18 April 2019].
17. Available at: *https://blog.ipleaders.in/funding-of-political-parties*[Accessed on 18 April 2019].

crore, will be available at specified branches of State Bank of India.[18]

With limited validity, bonds are valid for a limited 15- day period and shall not carry the donor's name; however, he is required to fulfill KYC (Know Your Customer) norms at the bank. It is pertinent to note here that neither donors nor political parties are legally bound to disclose donation details received via Electoral Bond Scheme.The legality of electoral bond was questioned by petition filed to the Supreme Court on 3 October, 2017 challenging the Finance Act, 2017 which was enacted as a money bill introducing the electoral bond scheme, alleging the amendments will result in opaqueness, produce conflicting interests, radically increase black money and corruption, lead to the creation of shell companies and rise of illegal transactions to channelize the undocumented money into the elections.[19]

In March 2019, Association for Democratic Reforms[20] filed an application for stay against the sale/purchase of electoral bonds for Lok Sabha 2019 elections contending that huge amount of company funding would be received by political parties during elections which would play a critical role in the elections.[21] In response, the Supreme Court in its interim order directed all political parties to submit details of donations received via Electoral Bonds to the ECI in a sealed cover on or before 30th May 2019.[22] The issue of whether these amendments can be passed as a money bill without the concurrence of the Rajya Sabha is also under challenge.[23]

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18. "Electoral bonds will not solve transparency issues in", available at:*https://www.outlookindia.com/newsscroll/electoral-bonds-will-not-solve-transparency-issues-in/1233317*
19. *Association for Democratic Reforms and Anr.* v. *Union of India and Ors*. Writ Petition (Civil) 333/2015.
20. A non- partisan NGO based in New Delhi working in the area of political and electoral reforms.
21. Available at: *https://adrindia.org/legal-advocacy/judgements-and-orders*[Accessed on 30 April 2019].
22. *Ibid*.
23. W.P.(C) 880 of 2017 filed by Association for Democratic Reforms and Common Cause; Notice was ordered by the Supreme Court on 3.10.2017 and tagged along with earlier pending petitions, namely, W.P.(C) 330/2015 AND SLP (C) NO. 18190/2014.

While there are some merits in having electoral bonds to infuse political system with "clean money" as the patrons of bonds will have to furnish KYC in the authorized bank and do the transactions, it is submitted that the anonymity clause for donor and political parties make it half attempt. Fact of the matter is anonymity clause or lack of disclosure requirement defeats the core principle of transparency in political finance. Making it even more arguable is the removal of 7.5% cap on corporate donations bringing changes in the Companies Act, 2013. This would allow for unlimited corporate donations even from the loss-making companies to gain favors in the longer run.

It is further counseled that anonymity provision is likely to attract corporate and wealthy donors to take this route as it protects their identities, may usher in unbridled corporate influence into politics via huge donations. The scheme may enhance chances of corporate- politics nexus get stronger. The danger inherent to Corporate- Political nexus was already highlighted way back in 1957 in *Jayantilal Ranchchoddas Koticha* v. *Tata Iron & Steel Co. Ltd,* by a bench headed by the then Chief Justice M.C. Chagla of the Bombay High Court where it issued an "early judicial warning" to Parliament about the grave danger inherent in permitting companies make contribution to the funds of political parties which may "ultimately overwhelm and even throttle democracy."[24] The Court noted- "democracy in this country is nascent and it is necessary that democracy should be looked after, tended and nurtured so that it should rise to its full and proper stature" and any "proposal or suggestion which is likely to strangle that democracy almost in its cradle must be looked at not only with considerable hesitation but with a great deal of suspicion."[25]

IV. RECOMMENDATIONS FOR REFORMS

In order to bring transparency and regulate election campaign financing to restore the faith of common electorate in democratic institution the following measures are suggested which are divided under five parameters to solve the issues that surround the controversy around electoral bonds and to better the electoral financing system of the country-

24. (1957) 27 Comp Cas 604.
25. *Ibid*.

a) Bringing in Transparency

i) Disclosure of Assets and Liabilities of Candidates

The Election Commission requires a candidate to file an affidavit containing information on assets and liabilities, apart from criminal antecedents and educational qualifications. The 2017 amendment to the Rules has now mandated the disclosure of the sources of the candidates and his spouse's income.[26] Consequently, a new entry 9A has been inserted into Form 26 affidavit.[27] To strengthen the movement towards accountability that has been largely there without legislative backing, it is recommended that necessary amendments to the RPA, 1951 be made at the earliest so that the entire burden does not lie onto the courts and the election regulatory body of the country**.**

ii) Regulating Political Parties

A comprehensive law for registering and regulating political parties, its internal democracy and means of its sponsorship and full disclosure of their financial structure to ensure accountability norms to be provided by statutory provisions.

iii) Stricter Auditing Process

Maintenance and submission of annual accounts by political parties and a complete disclosure of the funds received and expenditure incurred should be mandated to be disclosed.[28] The ECI should be required to upload these accounts on its website. At present, financial regulation is being done by the ECI through guidelines issued under their plenary powers under Article 324. The lack of legislative backing for these guidelines has been a concern and subject of litigation in the superior courts.These accounts ought to be certified by a chartered accountant and the ECI be authorized toissue accounting standards and rules in this regard.[29] Action

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26. The Conduct of Election (Amendment) Rules, 2017, Gazette Notification S.O. 1133(E), 7 April 2017, available at: *http://ceodelhi.nic.in/PDFFolder/Amendment%20.pdf*[Accessed on 16 April 2019].
27. The Election Commission of India Letter No. 3/4/ECi/LET/FUNC/JUD/SDR/Vol. 1/2016, available at: *http://eci.nic.in/eci_main1/current/ImpIns_12072017.pdf*[Accessed on 16 April 2019].
28. The Law Commission of India, *255th Report on Electoral Reforms*, March 2015, para 2.31(b)6.
29. SuchindranBaskar Narayan and Lalit Panda, "Money and Elections: Necessary Reforms in Electoral Finance", 2018, available at: *www.vidhilegalpolicy.in*

may be initiated against those failing to comply with such standards or guidelines.

iv) Applicability of RTI to Political Parties

Electoral bonds are premised upon the fundamental idea of voters' right to know and thus influencing policy outcomes. It is counseled that keeping in mind the influence and central role that political parties play in our democracy, they should be brought within the ambit of the RTI Act. This is the only way to ensure compliance with the disclosure requirements that are necessary in a modern democracy.

v) Furnishing monthly list of activities

The Commission could ask parties to furnish a monthly list of activities undertaken and expenditure incurred at each level from the Panchayat to Lok Sabha constituencies. The Commission may notify monthly expenditure figures and ask parties to supply sources of their income.[30] Though this could be a decent beginning, money spent on the candidate's personal drawings would however escape scrutiny.[31]

b) Managing Political Funding and Expenditure

i) Limiting Anonymous Donations

The bigger the sum of donation, the more influence one would be able to exert to get political favors. Anonymous donations are synonymous with political corruption and have the potential for a quid pro quo. There can be no justification for the facilitation of anonymous donations. The cap on anonymous donations has been reduced from Rs. 20,000 to Rs. 2000 with the introduction of electoral bonds scheme, so the anonymity it offers is a matter of concern. The Law commission of India's 255th Report counseled for a cap of Rs. 20 crores or 20% of the party's entire collections, whichever is lower. The same has been reiterated by the ECI in its proposed electoral reforms.[32] It is recommended that this proposal should be accepted at the earliest. Introducing financial transparency would be an excellent step towards addressing the dearth of accountability on political parties.

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30. TK Arun, "The Real problem with Electoral Bonds", *The Economic Times*. 22 November 2019.
31. *Ibid*.
32. The Law Commission of India, *255th Report on Electoral Reforms*, March 2015, at 43; the Proposed Electoral Reforms, December 2016 at 48.

ii) Regulating Corporate Donations

There needs to be a ban, complete or partial as per the need, on corporate donations on the premise that entities like companies and trusts not being the voters, cause an asymmetry and exercise disproportionate influence on the electoral processes. Conscious of there being evidence to counsel the ban on corporate donations tends to increase the use of black money in election financing, direct corporate funding of political parties does not seem to be a preferable path.[33] In the alternative, companies may be permitted to donate to an ECI controlled Electoral Trust or Corpus at the National or State Level availing the consequent income tax benefits.[34] The ECI can then distribute the amounts to regional and national parties on the basis of votes secured at the last election. This is in line with the recommendations arising out of the ECI's National Consultation on "Political Finance and Law Commission Recommendations."[35]

iii) Monitoring Campaign Finance

The agency to monitor campaign finance in United States is the Federal Election Commission, which has been entrusted with broad investigative powers including the authority to record deposition of witnesses, documents and answers to queries, and enforcing the subpoenas in Courts of US. Likewise, broader powers may be given to ECI to check violations of campaign finance laws.[36]

iv) State and Public Funding of Elections

The Law Commission of India's 255th report suggests that complete public funding of elections is not a practical solution.[37] Considering the prevailing economic conditions in the country, complete state funding of

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33. Rajeev Gowda and E. Sridharan, "Reforming India's Party Financing and Election Expenditure Laws", 11(2) *Election Law Journal*, 2012.
34. *Ibid*.
35. ECI Outcome paper of National Consultation (16 April 2015); National Consultation on "Political Finance and Law Commission Recommendations", available at: *https://eci.gov.in/files/file/965-draft-outcome-paper-national-consultation-on-political-finance-and-law-commission-recommendations-organised-by-eci-on-30th-march-2015*[Accessed on 24 April 2019].
36. *Ibid*.
37. The Law Commission of India, *255th Report on Electoral Reforms*, March 2015,at 57.

elections does not appear to be pragmatic. Practice of indirect grants and subsidies with tax exemptions, free public meeting rooms, public airtime, printing costs, free postage etc. can be adopted. Partial state funding through an electoral corpus or trust controlled by the ECI seems to be a better alternative.[38]

c) Deregistration of Political Parties as Penalty

While there are provisions in Representation of Peoples Act, 1951 for registration of political parties with the ECI[39]and the ECI guidelines for removal from the register if a party does not contest elections for a period of 6 years[40], the Supreme Court has categorically held that the ECI "has no power to review the order registering a political party for having violated the provisions of the Constitution or for having committed breach of undertaking given to the Election Commission at the time of registration."[41] However, entrusting the ECI with such power is still desirable to ensure that political parties are not used as a shield to park funds and claim income tax exemptions.

d) Empowering Election Commission of India

In light of the recommendations made above, ECI may be empowered to take action against political parties in case of violation of internal democracy and non- disclosure of source of funding which will ensure transparency and accountability as well as level playing field inter se the various political parties.

e) Need for Legislation and Other Recommendations

i) Legislation as to Public Disclosures

In US, strict public disclosure legislations on candidates and political committees are in place. Donations by corporations are disclosed by respective parties and disseminated by the media to aware the general

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38. *Id.,* pp.53-59.
39. The Representation of Peoples Act, 1951, Part IV was introduced by Section 6 of Representation of Peoples (Amendment) Act, 1988.
40. The Election Commission of India, "Guidelines and Application Format for Registration of Political Parties under Section 29A", available at: *https://adrindia.org/sites/default/files/guidelinesandformat_under_Section_29A.pdf* [Accessed 26 April 2019].
41. *Indian National Congress (I)* v. *Institute of Social Welfare*(2002) 5 SCC 685, 702

masses.[42] Similar such provisions can be incorporated in the funding regime under The Representation of People's Act, 1951.

ii) Setting up a Political Party Fund

If corporate funding in the country is to be streamlined, a political party fund may be created under the auspices of the Election Commission of India to which all companies can contribute.The amount could be disbursed to political parties for assigned purposes such as developmental reforms, organizational expansion etc.This model will counter the criticism that corporate funds to parties are only meant for securing the company's business interests rather than a real commitment to the pursuit of a healthy democracy and transparent election funding, that ought to be the objective of corporate funding.[43]

iii) Reforms within Electoral Trusts

At present, the electoral trusts do not provide the name of the company or groups that set up the trusts. To have transparency with details of companies that fund political parties, their names should be made available in public domain. This fund should facilitate better regulation of political parties and their spending habits.

iv) Other key trends that emerge from international experiences are:

* A regulatory body entrusted with investigative and executive powers;

* A pro-active media that publishes data related to expenditure of parties to sensitize citizens and ensure thorough public scrutiny of donations;

* Donors' names and donations regardless of the amount must be reported and made available in public domain;

* Appointing individuals and firms for auditing the accounts of political parties;

* Limiting party's expenditure limit to 50% or less of the aggregate spending permissible to parties;

* Regulation of individual spending depending upon the election (assembly or general elections) the candidate is fighting; and

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42. *Ibid*.
43. *Ibid*.

* Anonymous donations should be restricted to 20% of a party's total fund collections.

V. CONCLUSION

It is believed that no legislative changes are needed to bring these reforms into force if election regulatory establishment of a country is well empowered to function in an independent and well facilitated framework. However, certain crucial recommendations should be incorporated for a variety of legislations to ensure proper implementation and follow- up mechanism by the political parties, their candidates and other stakeholders involved in the electoral campaign financing system. Only after these changes are put in place will the discussion on other electoral reform issues such as ceilings on election expenses, disclosure mechanism, foolproof transparency and accountability norms in campaign funding, state funding of political parties, etc. shall be meaningful.

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CAPITAL PUNISHMENT CASES : A CONSTITUTIONAL IMPERATIVE FOR EFFECTIVE LEGAL AID

*M.V. SUBHASHINY**

ABSTRACT : : Access to Free legal aid under Article 39-Aof the Constitution has been interpreted as a fundamental right under Article 21. Free legal aid to marginalized sections who are accused in criminal cases is imperative for fair and just trial. This article demonstrates how urgent the need for legal aid in capital offences is and raises realistic expectations about what the constitutional provision can be achieved in this regard. In stressing the effective legal aid in capital offences three sensational cases are analyzed. The article deals with position of legal aid under international instruments and guidelines on legal aid, constitutional and statutory position of legal aid in India, judicial interpretation of legal aid under Article 21, legal aid for poor and marginalized sections . It also makes an endeavor to assess as to how far its object is achieved, and finally free legal aid vs. effective legal aid in capital punishment cases

KEY WORDS : Capital Punishment, Free Legal Aid, Human Rights, Access to Justice, National Legal Services Authority

I. INTRODUCTION

Every human being is equally entitled for inalienable rights and freedoms to lead just and decent life at all times and at all places. The right to access to justice is one of the fundamental human rights. The exercise of this right is connected to and depends on the availability of legal services for all citizens, regardless of their material and social position. Access to justice for all citizens depends on the efficiency and quality of the free legal aid system. Access to justice is fundamental to

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the rule of law. The ultimate purpose of all our legal institutions is to secure justice. It is the obligation of government to secure justice for those who are poor, weak and illiterate and who find it hard to protect their own rights. This obligation needs to be fulfilled very carefully by the state in capital punishment cases as the life of the person is directly going to be at risk in such criminal cases. Any accused should not get punishment because of his economic inability to hire efficient advocates in criminal cases.

An accused should be punished for the offence he committed but not for his financial incapacity to prove his innocence or to prove his case beyond reasonable doubt. In post-independence period, the accused in capital punishment cases are mostly from marginalized sections. Fair trial is the heart of criminal justice system. Fair trial can be expected only when an accused has access to effective legal assistance. Fair trial shouldn't depend on whether an accused can afford to pay for a lawyer or not. India being a country with poverty and illiteracy, it becomes an obligation for a state to provide effective legal aid to achieve fair trial and justice. Lack of access to a lawyer or reliance on poor-quality or under-funded legal services remain a sad reality in our country. As a result, thousands of marginalized people are being detained illegally, tortured, and convicted wrongfully. The issue is not just related to defendants but the functioning of our criminal justice systems as a whole.[1] Legal aid services are not "quality" if they do not involve vigorously challenging detention, challenging prosecution arguments for detention and gathering evidence to argue effectively for release.

An accused is innocent until proven guilty. The onus of proving guilt of the accused is on the prosecutor and burden of proving innocence of the accused is on himself either on his own or on his council. The conflict between proving guilty and innocence is upon the counsels of both the parties who may be unequal in their professional experience (when the accused is from marginalized section). Argument between unequals will lead to unfair trial which might result in injustice to the accused. Any accused convicted due to lack of effective legal aid can be rightly described as nothing but the "state killing" and complete failure of justice.

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1. https://www.fairtrials.org/news/role-quality-legal-aid-services-fair-criminal-justice

II. WHAT IS LEGAL AID?

Legal aid is an assistance provided by the State to the people who are not in a position to engage the lawyer to represent their case. The financial incapacity is an obstruction to get justice in the court of Law. Legal aid includes "Giving legal advice and legal assistance in negotiation and litigation to poor persons, without cost to them or at a minimum cost which they can afford, in matters where no other assistance is available".

III. INTERNATIONAL INSTRUMENTS AND GUIDELINES ON LEGAL AID

Legal aid is not the new concept; it had been given a prominent place in international conventions and instruments. The Articles of Universal Declaration of Human Rights (UDHR) deals with rights of the arrested, detained and convicted persons. Articles from 9 to 12 of UDHR may not directly deal with legal aid in criminal cases but it is implicit in the wordings of the articles[2].

A person who has been detained on any criminal allegation, such detainee is not having financial capacity to hire the services of a legal counsel to challenge his detention, and continues to be in the Jail, or if hires an advocate for representing the detainee who could not vigorously challenge the detention, could not counter the prosecution argument for detention and who could not argue effectively for his release will lead to complete violation of the object of the Articles 9 to 12 of UDHR. The

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2. Article 9 of Universal declaration of Human Rights says that "No one shall be subjected to arbitrary arrest, detention or exile".

   Article 10 of UDHR says "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him";

   Article 11(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

   Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

economic weakness of the detainee and absence of effective legal aid from the state to the accused, will lead to unfair hearing, unfair trial which violates fundamental rights of a human being recognized under these provisions of UDHR.

The International Covenant on Civil and Political Rights, 1966 states that everyone charged with a criminal offence shall be entitled to be tried in his or her presence and to defend himself or herself in person or through legal assistance in a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14 (3) (d) specifically deals with legal aid by the State to the person who has no sufficient means to pay for his defense[3].

The United Nations Office on Drugs and Crime published Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems , in which it is emphasized that "legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law" and that "it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process"[4].

IV. CONSTITUTIONAL AND STATUTORY POSITION OF LEGAL AID IN INDIA

Article 39A of Part IV, the Directive Principles of the State Policy of the Indian Constitution deals with Equal Justice and free Legal Aid. It states that "the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other

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3. The International Covenant on Civil and Political Rights Article14(3) (d) states " To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;" (source: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf)
4. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. United Nations, June 2013, Publishing and Library Section, United Nations Office at Vienna. (Resolution adopted by the General Assembly [on the report of the third committee (A/67/458)]).

way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities[5].

In pursuance of the above objective, Legal Services Authorities (LSA) have been constituted at National, State and District levels under *the Legal Services Authorities Act*, 1987 with a vision *to promote an inclusive legal system in order to ensure fair and meaningful justice to the marginalized and disadvantaged sector and with a mission* of legally empower the marginalized and excluded groups of the society by providing effective legal representation, legal literacy and awareness.

V. JUDICIAL INTERPRETATION OF LEGAL AID UNDER ARTICLE 21[6].

The Supreme Court in *M.H.Hoskot*v. *State of Maharashtra*[7] held that "Every step that makes the right of appeal fruitful is obligatory and every action or inaction which stultifies its unfair and unconstitutional and held that there are two ingredients of a right of appeal in criminal cases- (i) service of a copy of the judgment to the prisoner in time to file an appeal, and (ii) provision of free legal services to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.

Both these are State responsibilities under Art. 21 and apply where procedural law provides. Regarding the right to free legal aid Justice Krishna Iyer declared that "this is the State's duty and not government's charity".

In *Hussainara Khatoon* v. *State of Bihar*[8], the Supreme Court held that when the accused is unable to engage a lawyer owing to poverty or similar circumstances, the trial would be vitiated unless the State offers free legal aid for his defense by engaging a lawyer to whose engagement the accused does not object. Free legal services to the poor and the needy are an essential element of any reasonable fair and just procedure. A

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5. Instituted by the Constitution (42nd Amendment) Act, 1976, S. 8
6. Article 21 deals with protection of life and personal liberty and states that "No person shall be deprived of his life or personal liberty except according to procedure established by law"
7. *M H Hoskot*v. *State of Maharashtra* AIR 1978 SC 1548
8. *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1369: 1979 SCR (3) 532

prisoner who is to seek his liberation through the courts process should have legal services available to him.

The Supreme Court declared the object of Article 39A read with Article 21 in *State of Maharashtra*v. *ManubhaiPragajiVashi*[9]. It held that "We have to consider the combined effect of Articles 21 and 39A of the Constitution of India. The right to free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution" and also that "it is the obligation of the state to provide free legal aid by suitable legislation or by schemes or in any other way so that the opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

In *Bar Council of India* v. *Union of India*[10] the court said that Article 39A came to be inserted in the Constitution by the Constitution (42nd Amendment) Act 1976, which enjoins the State to secure that the operation of the legal system promotes justice on the basis of equal opportunity and in particular to provide free legal aid by suitable legislation or schemes or in any other way and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. "*Justice and the Poor*", an article written by Reginald Heber Smith, Director of the Boston Legal Aid Society in the year 1919 completed its 100th year of publication in the year 2019. His writing influenced many countries to start legal aid to provide professional services to the money less people who cannot afford to engage the services of advocates. India being a country of poor and marginalized, access to effective legal aid in capital offences is imperative. These sections have to depend upon the Legal Aid provided by the state. The question of the day is that, the legal aid provided by state is a charity? or an obligation?

Emphasizing the importance of legal aid, Smith opined- "A system which created class distinctions, having one law for the rich and another for the poor, which was a respecter of persons, granting its protection to one citizen and denying it to his fellow, we would unhesitatingly condemn as unjust, as devoid of those essentials without which there can be no

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9. *State of Maharastra* v.*Manubhai PragajiVashi,*AIR 1996 SC 1:(1995) 5 SCC 730
10. *Bar Council of India* v. *Union of India,* (2012) 8 SCC 243

justice".[11]

If the State fails to provide equal protection of the laws or fail to carry out their intent by reason of inadequate machinery, is to weaken the entire structure and threaten it with collapse. For the State to create an uneven partial administration of justice is to renounce the very responsibility for which it exists, it is nothing but narrowing down of fundamental right which the State is forbidden to infringe. To deny law or justice to any persons is, in actual effect, to outlaw them by stripping them of their only protection. It is for such reasons that freedom and equality of justice are essential to a democracy and that denial of justice is the short cut to anarchy.

Recalling the prophecy of Reginald Heber Smith in his 100 years old celebrated article "Justice and Poor" on the necessity of legal aid to poor, John M.A. Dipped, assessed the current status of legal aid to the poor in the world in the following words- "Sadly, we are no closer to providing equal justice under the law to people without means than we were in 1919. Indeed, we may be worse off today than we were when Smith wrote his book. This is due in part to structural changes in the administration of justice and in law firms. But it is also because providing the poor access to the court system is not politically neutral, as Smith thought. Rather, providing legal assistance to the poor is freighted with political meaning that has not been lost on the opponents to the legal services program"[12] and held Smith's vision was one of equity and justice, and, 100 years later, it remains only partially realized".

VI. ESTABLISHMENT OF NATIONAL LEGAL SERVICES AUTHORITY

The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society. With the aim of reaching

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11. Reginald Heber Smith, the carnegie found. for the advancement of teaching, justice and the poor: a study of the present denial of justice to the poor and of the agencies making more equal their position before the law with particular reference to the legal aid work in the united states (1919) [hereinafter Justice and the Poor].
12. John M.A. DiPippa, Reginald Heber Smith and Justice and the Poor in the 21st Century, 40 Campbell L. Rev. 73 ().

out to the diverse people belonging to different socio-economic, cultural and political backgrounds. Equal justice to all and free legal aid are the hallmark of Art 39A[13] . Legal aid became a statutory right in 1980s[14].

VII. PERSON ENTITLED TO FREE LEGAL AID

The persons who can avail legal aid from the concerned Legal Services Authority are identified by the Legal Services Authorities Act 1987. As enlisted under Section 12 of the Legal Services Authorities Act, the following are the persons entitled for free legal services:

(a) A member of a Scheduled Caste or Scheduled Tribe.

(b) A victim of trafficking in human beings or *begar* as referred to in Article 23 of the Constitution.

(c) A Woman or a Child.

(d) A Mentally ill or otherwise disabled person.

(e) A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) An industrial workman; or

(g) In custody, including custody in a protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956(104 of 1956); or in a juvenile home within the meaning of clause(j) of Section 2 of the Juvenile Justice Act, 1986 (53 of 1986); or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of Section 2 of the Mental Health Act, 1987(14 of 1987);or

(h) a person in receipt of annual income less than the amount mentioned in the ....schedule (or any other higher amount as may be prescribed by the State Government), if the case is before a Court other than the Supreme Court, and less than Rs 5 Lakh, if the case is before the Supreme Court.

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13. Durga Das Basu, Commentary on the Constitution of India 9th Edition, Volume 7, Articles 36 to 78 , LexisNexis

14. With the passage of the Legal Services Authorities Act, 1987

The Income Ceiling Limit prescribed u/S 12(h) of the Act for availing free legal services in different States[15]

VIII. FREE LEGAL AID VS. EFFECTIVE LEGAL AID IN CAPITAL PUNISHMENT CASES

Though legal aid is construed as a fundamental right; its implementation in India has been considered more a formality rather than a responsibility of state. The establishment of legal services authority at national, state and district level has been made only to increase the access to legal aid, but not to ensure that the quality of such services is adequate with the elementary standards of fair and just lawyering. Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters. This fact is confirmed in case after case. It is not the facts of the crime, but the quality of legal representation. Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. Essential guarantee of fair trial may be ignored because counsel failed to assert them, and judges may be deprived of important facts needed to make reliable determinations of guilt or punishment. The failure of defense counsel to present critical information is one reason for capital punishment.

Capital punishment cases are assigned in a casual way to the practitioner who had never tried a capital case. Inadequate legal representation does not occur in just a few capital cases but there are numerous cases. In many cases the poor were defended by lawyers who lacked even the most basic knowledge, resources, and capabilities needed for the defense of a capital case. There are several interrelated reasons for the poor quality of representation in these important cases. Most fundamental is the wholly inadequate fee paid for the defense of indigents. As a result, providing legal aid became an eye wash rather than a protected fundamental right of an accused.

Tata Institute of Social Sciences, Bombay organized a workshop in the month of April 2019 from 17thto 22nd, on the topic "Defending Capital

15. See https://nalsa.gov.in/services

Punishment Cases"[16]. The participants were provided with material of four sensational cases for case study and case analysis. The cases are *Surendra Koli*v. *State of U.P. and others*[17]. *Ankush Maruti Shinde* v. *State of Maharastra*.,[18]and *The State of Maharashtra* v. *Atul Rama Lote*[19]. The main resource person Dr. Yug Mohit Chowdary[20], was the *pro bono* advocate who represented accused in last two cases and he is an activist against death penalty. He threw light on many of the lapses and flaws in the investigation and on substantive and procedural violations of law which are not raised by the legal aid advocates at trial stage, which resulted in the arbitrary imposition of capital punishment on the accused. The conviction of the accused in the above mention cases is not for proving the offence they are charged for, but it is for ineffective representation by legal counsel at trial stage.

IX. FAILURE OF LEGAL AID ADVOCATES IN RAISING PROCEDURAL AND SUBSTANTIVE LAPSES IN THE TRIAL:

In The State of Maharashtra vs Atul Rama Lote[21], the Court of District Judge and Special Judge (POCSO), Thane convicted[22] the accused under Sections 363, 376 (2)(f), 302 and 201 of IPC and under Section 3 (a) punishable under section 4 and 5 (i) and section 5(m) punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) sentencing him to death for offence punishable under section 302 of IPC.

16. The author was one of the participants of the 6-day workshop in the month of April 2019 from 17th to 22nd.
17. *Surendra Koli*v. *State Of U.P. and others*.,SLP (Crl) NO. 608 of 2010.
18. *Ankush Maruti Shinde* v. *State of Maharastra*Criminal Appeal Nos. 1008-1009 of 2007.
19. *The State of Maharashtra* v. *Atul Rama Lote*, Confirmation Case No.5 of 2016.
20. Dr. Yug Mohit Chaudhry began practicing law in Mumbai in 2001 after securing his degree of law from University of Cambridge. Leading the Abolitionist Movement in India, he played a major role in staying the; execution of Maganlal Barela. Barela who was pulled away from the gallows just seven and a half hours before he was to be hanged, Dr, Chaudhry pleaded the case of Murugan, Santhan and Perarivalan-sentence to death for the assassination of former prime Minister Rajiv Gandhi- who too were spared the noose.
21. *The State of Maharashtra* v. *Atul Rama Lote*Conformation case No 5 of 2016 in Bombay High Court, , Available at https://indiankanoon.org/doc/51044443/
22. In Special Case No.107/2014, vide judgment delivered on 28/9/2016

In the above case the charges were altered on 26/9/2016 and the judgment was delivered on 28/9/2016. According to Section 216[23] of the Code of Criminal Procedure 1973, charges can be altered by the trial court at any time before judgment is pronounced. Till 26/9/2016 the charge under section 366A[24]of Indian Penal Code was against the appellant and though section 376[25] was mentioned, the indication was of commission of alleged rape by somebody else. The altered charge for the first time introduced Section 376(2)(f) [26] of IPC.The prosecution did not lead any

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23. Section 216 in The Code of Criminal Procedure, 1973 Court may alter charge
(1) Any Court may alter or add to any charge at any time before judgment is pronounced.
(2) Every such alteration or addition shall be read and explained to the accused.
(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defense or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.
(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.
(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.
24. Section 366A of IPC- Procuration of minor girl.—Whoever, by any means whatso-ever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.
25. Section 376 of IPC- Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.
26. 376(2)(f) commits rape on a woman when she is under twelve years of age; or

evidence and no further opportunity under Section 313 of Cr.P.C. was given to the appellant. Additional material which becomes relevant after 26/9/2016 therefore had not been put to the appellant at all and hence cannot be used against him. When the charges are altered the defense counsel must insist on invoking section 217[27] of Cr.P.C. which allows for recall of witness when charge was altered.

Dr.YugMohitChoudary represented accused/respondent, in Conformation Proceedings in High Court of Bombay, and the High court quashed and set aside the order convicting the accused and restored back the file for proceedings further from the stage of alteration of charge and ordered that the accused shall continue as under trial prisoner, during the trial;

In the above case, 3 legal aid advocates were changed, and their ineffective representation resulted in the conviction of the accused which was purely unfair trial.

In *Ankush Maruti Shinde* v. *State of Maharastra*[28]the Sessions Court sentenced all the 6 accused to death for the offences punishable under Section 302 read with 34 of the IPC. In Criminal appeal beforethe High Court of Bombay against the order of conviction and sentence imposed by the learned Sessions Court. The High Court, while upholding the conviction and death sentence of original accused nos. 1, 2 & 4, altered the death sentence in respect of original accused nos. 3, 5 & 6 to life imprisonment along with fine.

Feeling aggrieved and dissatisfied with the impugned judgment and

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27. Section 217 of the Criminal Procedure Code: Recall of witnesses when charge altered

    Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

    1. to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

    2. also, to call any further witness whom the Court may think to be material.

28. *Ankush Maruti Shinde* v. *State of Maharastra*Criminal Appeal Nos. 1008-1009 of 2007

order passed by the Division Bench of the Bombay High Court, original accused nos. 1, 2 & 4 had preferred Criminal Appeal before Supreme Court. The Supreme Court restored the order of Sessions Court setting aside the order of High court. Review petition filed in Supreme Court was allowed. In this case the identification of the accused by PW1 in the Test Identification (TI) parade created a serious doubt, apart from the fact that there was a delay in conducting the TI parade, and that there was no explanation by the prosecution in conducting the TI parade belatedly.

Identification parade cannot be treated to be substantive evidence and at the most it could be used for the limited purpose of corroboration or contradiction of the testimony of its maker and in any case it cannot be admissible under section 6 or section 32 of The India Evidence Act

Test Identification parade is for the purpose of investigation and not for the judicial purpose and the dummies were chosen by the police but not by the magistrate which are serious violations under Indian Evidence Act. This case was represented by DrYugMohitChoudary in Supreme Court; and the SC acquitted all the accused and also ordered Maharashtra state to pay compensation of Rupees 5 Lakh to each of the accused.

In the case of *Surendra Koli*v. *State of Uttar Pradesh*[29], one Surendra Koli was accused for raping, murdering and cannibalizing a girl named RimpaHaldar and for allegedly killed several children from 2005 onwards, and he appeared to be a serial killer.He had been convicted with death by hanging, categorized his case as "rarest of the rare"[30]. His confession, given during custodial interrogation and subsequently confirmed as legally valid by a magistrate, formed the sole basis for holding that the charges were proved beyond reasonable doubt.The evidence against Koli was purely circumstantial—there was no unimpeached eyewitness testimony or forensic evidence to link him to the offences alleged. All through the proceedings in the various courts, Koli had maintained that the confession was extracted under torture, none of the three judgments rendered by the courts even addressed the issues of a confession obtained by duress and possible mental illness. Here the important question was "did his defense

29. *Surendra Koli*v. *State of U.P. and others*.,SLP (Crl) NO. 608 of 2010.

30. The Supreme Court's criterion for awarding capital punishment. As laid down in *Bachan Singh* v..*State of Punjab,*(1980) 2 SCC 684.

counsel press these crucial contentions before the courts? If not, it can only mean that the legal representation Koli received was woefully inadequate and ineffective, especially in light of the allegations against him".

The facts suggest that from the beginning till the end, Koli, too indigent and struggling by circumstances to afford a lawyer, did not get the legal representation that would meet the minimum standards of litigating an adversarial criminal trial.

From above three cases it is evident that the legal aid was not effective. Though access to legal aid was obtained but the effective legal aid was denied. It appears that it had been provided as to comply with the statutory formality. It appears that the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010 are rarely followed in providing free legal aid in India.

1.Inadequate Fee paid to Legal Aid Advocate

The following is the piece meal rate payable to the legal aid advocate for their services[31].

High Court

Nature of Work entrusted to Free Legal Aid/Panel advocate	Amount of Fees Recommended
Drafting of substantive pleading such as Writ Petition, Counter Affidavit, Memo of Appeal, Revision, Reply, Rejoinder,Replication	Rs. 1,500
Drafting of Miscellaneous applications such as stay, bail, direction, exemption etc.	Rs.500/- per application subject to maximum of Rs.1,000/- for all applications.
Appearance	Rs.1,000/- per effective hearing and Rs.750/-for non-effective hearing subject to maximum of Rs.10,000/- (per case)

31. Recommendation of NALSA about Minimum Fee Payable to Panel Lawyers by SLSAs. Available at https://nalsa.gov.in/acts-rules/guidelines/minimum-fee-recommended-by-nalsa-for-panel-lawyers

Subordinate Courts at all levels including Tribunals

Nature of Work entrusted to Free Legal Aid/Panel advocate	Amount of Fees Recommended
Drafting of substantive pleading such as Suit, MatrimonialProceedings such as Divorce, Maintenance, Custody, Restitutionetc., Succession, Probate, Memo of Appeal, Revision, WrittenStatement, Reply, Rejoinder, Replication etc.	Rs. 1,200
Drafting of substantive pleading such as Suit, MatrimonialProceedings such as Divorce, Maintenance, Custody, Restitutionetc., Succession, Probate, Memo of Appeal, Revision, WrittenStatement, Reply, Rejoinder, Replication etc.	Rs.1200/-
Drafting of Miscellaneous applications such as stay, bail,direction, exemption etc.	Rs.400/- per application subject to maximum of Rs.800/- for allapplications.
Appearance	Rs.750/- per effective hearing and Rs.500/- fornon-effective hearing subject to a maximum of Rs.7,500/- (percase).

The NALSA recommended revision of these fees every three years but the revision doesn't appear to have taken place for a long time now. An analysis of the above fees recommended shows that it is grossly inadequate and no advocate with good filing would come forward to take-up any *pro bono* case. Exception could be certain die-hard advocates of free legal aid with humane approach and commitment.

X. CONCLUSION

Prescribing different rates of remuneration payable to the legal aid advocates appears to be arbitrary and puts a premium on the life of the accused in the capital offences. Therefore, it is imperative to impose eligibility conditions for panel advocates like minimum 10 years' experience as a trial court advocate, experience in criminal litigation, past experience in human rights advocacy and clean slate due to no previous charges or proof of professional misconduct. In maximum cases it may not possible to an accused to engage the services of stalwarts in every case. But there are many *pro bono* lawyers in India with adequate if not equal commitment to render effective legal aid in the needy cases. The real challenge is in identifying them, empanelling them and taking them onboard. In this connection the Legal Services Authority are required to play a proactive role. The situation will be different if crime victim is an influential person and either due to the pressure from victim's family,

public outrage or the over enthusiasm of the police and the prosecution to prove the accused guilty may result in miscarriage of justice. In such cases the responsibility of the legal aid advocate becomes more onerous and only an efficient counsel can do justice in effectively proving either the innocence of the accused or in reducing the chances of awarding death penalty. Judicial scrutiny of a counsel's performance must be careful, deferential and circumspect on the ground of ineffective assistance which could be easily raised after an adverse verdict at the trial.[32] The US Supreme Court held that the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence[33].

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32. *Strickland* v *Washington* 466 US 668 1984.

33. *Powell* v. *Alabama,* 287 U.S. 45 (1932)

BOOK-REVIEWS

Legal Research and Methodology: Perspective, Process and Practice, Edited by B.C. Nirmal, Rajnish Kumar Singh, and Arti Nirmal, Satyam Law International, New Delhi, 2019, xxv + 512, Hardbound, Rs. 1295. ISBN: 978-93-87839-36-6.

There is felt need for a sincere talk on legal research and methodology, especially keeping in mind the fact that there have been several research studies undertaken and accomplished every year. Yet in most cases, little or no attention is paid to the nuances of research methodology. As a result, much of research conducted appears to be a futile exercise of mere endless word-spinning record. It may be noted, in the context of planning and development, the significance of research lies in its quality and not in quantity. The need, therefore, is to pay due attention to designing and adhering to the appropriate methodology throughout for improving the quality of research. The methodology may differ from problem to problem, yet the basic approach towards research remains the same.

Regarding the organisation, the present edited volume is a collection of twenty-nine chapters, divided into three parts, each examining the importance and role of research methodology.[1] The book under review involves in as much as thirty-three authors, covering vast range of issues pertaining to legal research and methodology. The manner in which editors have selected and arranged chapters covering all the theoretical and practical aspects of the subjects, reminds the reviewer of the classic treatise on legal research methodology, published by Indian Law Institute in 2001.[2]

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1. B.C. Nirmal, Rajnish Kumar Singh, and Arti Nirmal eds., *Legal Research and Methodology: Perspective, Process and Practice* (Satyam Law International, New Delhi, 2019).
2. S.K. Verma and Afzal Wani (eds.), *Legal Research and Methodology* (Indian Law Institute, New Delhi, 2nd edition, 2001). In 1982 Indian Law institute brought a 'Special Issue' of its Journal on '*legalResearchandMethodology'* (Vol. 24 (Issues

This was perhaps long due, keeping in mind the time gap of almost eighteen years and the changes in the present 'techno-digital cyber space'. In fact, the editors have rightfully asserted that the present anthology presents a realistic picture of the nuances of legal research. The text draws together experiences of undertaking, supervising and teaching qualitative research methods, which on the whole provide an extensive introduction to qualitative legal research. Professor Chia-Jui Cheng, in the 'Foreword' opines that "the book can rightly be described as a vade mecum for every scholar and researcher."[3]

Bringing a book on legal research and methodology is a tough task, especially with the limited expertise available in the area and the vast domain of the subject. On a closer look to other existing literature, the reviewer is of the opinion that much of the recent texts on the subject have merely provided a narrow analysis of the process of research. Acknowledging the limitation upfront, the editors have left little scope for fluctuation from the purpose. The lucid text with strategically arranged chapters covering topics in detail indicates that this book addresses the concerns and is prepared with an understanding that meets the requirements of the target group. This is reflected fairly well in the introductory chapter, wherein the editors, in a simplistic manner, explain the logic behind structuring the book into three parts, covering perspectives, process, and practical application of legal research methodology.

The present book has been written with three clear objectives, viz., (i) to enable researchers to develop the most appropriate methodology for their research studies; (ii) to make them familiar with the art of using different research methods and techniques; and (iii) to acquaint a researcher with different perspective of research. The eleven chapters in Part I of the volume deal with the perspective analysis of legal research.

2-4) 1982), and the following year *i.e.* 1983 it brought the first edition of the treatise, which was a collection of various selected papers published in acclaimed journals (both national as well as international), few selected from the Special Issue (1982) and certain new papers on research and methodology left in the Special Issue, *see* S.N. Jain, J.K. Mittal, Kusum and P. Kalpakam (eds.), *Legal Research and Methodology* (N.M. Tripathi, Bombay, 1st edition, 1983).

3. Chia-Jui Cheng, "Foreword", *Supra* note 1 at vi.

The chapter on sociological perspective[4] provides an insight into some pragmatic aspects of socio-legal research in India. The chapter presents a brief introduction to sociological jurisprudence and argues for developing a networked cooperation amongst the incongruous research entities to advance the scope of sociology of law. The next chapter on critical legal studies (CLS) movement[5] stresses upon the jurisprudential and practical significance of law and society from social and critical philosophy. Bringing a case for CLS in India, the author opines that there is strong need for integrating legal theory and social theory, particularly for exposing how law plays a pivotal role in encouraging the domination of rich and powerful. The next chapter[6] reveals how post modernity in the social sciences are witnessing crisis. The chapter on analytical legal research[7] stresses upon the analysis and synthesis of law and legal norms, techniques involved in understanding the meaning and status of legal norms, and consolidation of legal norms as a pre-requisite for constructing law. The chapter on historical approach,[8]provides an account of how legal institutions and the law have evolved with the march of time and reveal crucial facts that unravel many legal conundrums from the annals of legal history. The later chapter on comparative legal research,[9] philosophical approach[10] present fresh argument. The chapter on feminist perspective[11] appears to be thematically correct and offer cogent reasons for advancing feminist research methods. Another chapter[12] dwells upon the importance of

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4. R. Venkata Rao, "Sociological Perspective towards Legal Research", *supra* note 1, chapter 2.
5. B.C. Nirmal, "Legal Research and Critical Legal Studies Movement", *supra* note 1, chapter 3.
6. Vivek Kumar and Ashok Kaul, "Research Methodology : Terrain, Challenges and Directions (A Derivative Discourse)", *supra* note 1, chapter 4.
7. Kiran Gupta, "Analytical Perspective towards Legal Research", *supra* note 1, chapter 5.
8. Rabindra Kumar Pathak, "Historical Approach to Legal Research", *supra* note 1, chapter 6.
9. Amrendra Kumar Ajit, "Methodology of Comparative Legal Research", *supra* note 1, chapter 7.
10. Manwendra Kumar Tiwari, "Philosophical Approach to Legal Research", *supra* note 1, chapter 8.
11. Priyanka Anand, "Feminist Perspective in Research", *supra* note 1, chapter 9.
12. Arti Nirmal, "Understanding Hermeneutics for Research: An Interdisciplinary Approach", *supra* note 1, chapter 10.

hermeneutics in research. The last two chapters[13]while adequately addressing the perspective engage in accessing quality of research in India and notion/propositions formed against research community in general.

Part II comprises ten chapters that occupy major space of the volume under review. On a cursory look at the structural outlay, the arrangement of the chapters remains in consonance with the theme that starts with the chapter on new trends.[14]The chapter on process of legal research,[15]reveals how legal research may be safely considered universal and not at any time strictly localised. The other chapters speak on process of research,[16]on legal writing,[17]methodology of socio-legal research,[18]collection and interpretation of data,[19] and literature review.[20] The chapter on positive aspects of legal research methodology[21] deals with the essence and major stages involved in the research, which as per the authors, if addressed carefully by the researcher "can help in undertaking effective investigations leading to concrete finding."[22] The chapter on objectives of research and hypothesis[23] presents conclusive

13. Sayan Dey, "De-Indoctrination and Pluralization of Research Methodologies in India: Cultural Studies as a Contextual-Experiential Methodology of (Re) search", *supra* note 1, chapter 11; DebasisPoddar, "Beyond 'Interpreter of Maladies'" Perspective as a Canon of Intellectual Technology", *supra* note 1, chapter 12.
14. Ajendra Srivastava, "Principal Methodological Approaches to Legal Research: New Trends", *supra* note 1, chapter 13.
15. Olaolu S. Opadere, "Process of Legal Research: The Basics", *supra* note 1, chapter 15.
16. SisisrBasu, "Process of Research", *supra* note 1, chapter 14.
17. K.L. Bhatia and S.C. Srivastava, "Legal Research Methodology and Legal Writing: Contours, Techniques and Nuances", *supra* note 1, chapter 16.
18. Jatindra Kumar Das, "Methodology of Socio-Legal Research and its Importance", *supra* note 1, chapter 18.
19. Subhash Chandra Singh, "Collection and Interpretation of Data: Basics of Empirical Research", *supra* note 1, chapter 19.
20. Sanjay Prakash Srivastava and Digvijay Singh, "An Overview of Literature Review: The Foundation of Research", *supra* note 1, chapter 20.
21. Subham Rajkhowa and Stuti Deka, "A Foray into Positive Aspects of Legal Research Methodology", *supra* note 1, chapter 17.
22. *Id*. at 291.
23. Rajnish Kumar Singh, "Objectives of Research and Hypothesis", *supra* note 1, chapter 21.

explanation of hypothesis and its contours. Hypothesis perhaps remains a cause of concern for many researchers, the author rightly puts forth that it is a tentative or testable statement/proposition/prediction that can be put to test to determine validity. It may be proved/disproved, and in both occasions advances knowledge.[24] The last chapter in the cluster on judgment analysis[25] is a well-written piece that explains crucial difference between applying methods of legal interpretation and using methods of discourse analysis in the study of legal texts.

The most highlighted part of the volume remains Part III that covers nine crucial chapters on practical application pertaining to the knowledge of research methodology. The chapter on writing research proposal[26]explains how systematic persuasion of research proposal. The next two chapters examine the importance of writing research proposal[27] and writing good research report.[28] The writing of both proposal and report is an art that requires skills of creativity and originality. There appears nothing comprehensive about the next chapter,[29]which appears to be a mere cut-copy-paste (it remains merely informative and nothing substantial) of various facets of academic writing and content analysis. The next two chapters[30] though interlinked, reveal much about the moral issue present noxiously deep inside the Indian academics i.e. the issue of plagiarism and its implication. The last essay of the volume offers instructive advice on referencing,[31] an area that is surprisingly given less importance in legal research.

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24. *Id*. at 363.
25. Yogesh Pratap Singh, "Judgment Analysis: A Neglected Tool of Doctrinaire Method of Legal Research", *supra* note 1, chapter 22.
26. Abdul Haseeb Ansari, Praveen Jamal and Muhamad Hassain Bin Ahmad, "Writing a Viable Research Prposal: An Appraisal", *supra* note 1, chapter 23.
27. Sisir Basu, "Writing of Research Proposal", *supra* note 1, chapter 24.
28. K.C. Sunny, "Writing of Research Report", *supra* note 1, chapter 25.
29. Sanjay Kumar Tiwari, "Academic Writing and Content Analysis: Academic Review", *supra* note 1, chapter 26.
30. Abhishek Kumar Pandey, "UGC Regulation on Plagiarism: What Does It Mean for Indian Academia and Research?,*supra* note 1, chapter 27; Prakash Sharma, "Legal Research via Digital Access: Analysis and Implications for Scholarship in a Networked Age", *supra* note 1, chapter 28.
31. Anoop Kumar, "The Rules of Referencing in Legal Research: Footnotes and Bibliography", *supra* note 1, chapter 29.

The chapters included in the volume not only give insight into the theoretical and practical aspects of the subject but also cover interdisciplinary, perspectives and approaches on legal research methodology. There are several fascinating discussions within this book on varied aspects of research methodology that it is difficult to cover in this brief review or do the text justice. On the whole, the present anthology is a comprehensive compendium in tune with its intent and objectives. Surely the book will be of great interest and benefit to the academics, lawyers, judges, researchers, and those who are interested in receiving a practical guide on how to conduct research, discuss modern methods, and learn tools and techniques of legal research.

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"Cyber Security and Cyber War: What Everyone Needs to Know" by Allan Friedman and P. W. Singer, 1st ed., (2013), Oxford University Press, Price- Rs.6,142 /-

The growing penetrations of internet and technological advancements around the globe have changed the way human have been interacting in their daily lifestyles with each other. Along with it however, concerns regarding cyber security and cyber warfare have increased manifold across the globe. The cases of Wiki leaks, Stuxnet, US presidential election rigging and lot of other prominent incidences have outlined the need to understand and address these issues. In the backdrop of these observations, this book jointly authored by Singer and Friedman should be appreciated widely because it covers variety of issues attached with cyber security and cyber warfare and highlights why it is important for state security apparatus and business institutions to pay attention towards these issues. It provides explanations of various case studies including interviews of experts and cites various statistics for raising awareness about the impacts of breach of cyber security. Since the topic is extremely important from technological and national security perspectives, it is important that people in general also need to have basic understanding of these issues. Ever since the problem relating to cyber security is known there has been a need for a comprehensive text to explain the concept to those unaware of technological complexities.

Apart from the technological understanding, these subjects also require minimum understanding of international security and politics. Linking those areas is what represents the initial point from which thinking and scholarship on cyber security can advance. This book, in my sincere opinion, is a successful attempt to decode and explain above mentioned issues in a fairly lucid manner.

The contents of this book cover all issues of cyber security and cyber war as well as public policies to solve the problems of cyber attacks. The format of this book is structured in conversational questions and answers from beginning to the end and it seems to be easy to read for who appreciate the importance of information security.

The texts of the book are designed such by the authors that they choose to educate in part 1 titled as "How it all Works", explain relevance in part 2 titled as "Why it Matters", and share prescriptions in part 3 titled as "What can we Do". This is an arc that makes sense, although they might have gone into even further detail on the functional details of computing and networking in part 1, but there is no significant omission on the topic.

This book in the part 1 begins with and overview of information technology and internet development. The authors' first section reads

more like a brief history of the Internet, and they happily admit, "In just a few pages, we have summed up what it took decades of computer science to create" (p. 25). Although, a fair share of internet history could have been explained more in detail, some of the history descriptions have been inadvertently placed in other sections of the book. It is worth mention that the necessary points are present and strung together well enough. Singer and Friedman also understand another point, the concept of cyberspace, something now considered a domain of conflict for the Department of Defense, emerged from a work of science fiction published little more than 30 years ago.

Under part 2 "why it matters' section of the book, descriptions of cyber attack and the attribution problem begin the section in fairly clinical language, but then the authors make the necessary case for why cyber security issues are important. Stuxnet, the first cyber attack known to have produced a significant kinetic effect, directed against the Iranian nuclear enrichment program, receives ample attention. Somewhat disappointing, however, is that Singer and Friedman miss another immensely important geopolitical cyber event: the 2012 Shamoon attack on Saudi Aramco.

In its part 3, the book also explains the necessity to rethink the way we look at the problems of cyber security and cyber war. I completely agree with the views of the authors that there is an increased necessity to utilize the potential of private sector for better coordination of defences. This part also advocates for fixing the accountability for cyber security and discusses the ways transparency can be ensured while moving for a well regulated cyber space.

In conclusion, this book is an impressively must-read for everyone who is interested in cyber security issues. Both authors provide a helpful guidance and informative breakdown of current cyber security and their suggestions to protect the cyber war, and which roles (or capabilities) of national and international institutions can play in cyberspace (such as cloud computing, big data, the mobile phone revolution) as we are living in the era of "internet of thing". The authors also make the convincing point that reengineering the Internet is not going to be a cure-all any time soon. While not explicitly stated, the authors recognize that solutions to cyber security issues do not generally fall in the areas of technology or policy alone but rather within some mixing of the two. Their inventory of major areas for possible mitigation of cyber security issues hits upon all of the significant topics, from Internet governance to information sharing initiatives.

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