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CRITICAL ANALYSIS STATUS OF UNBORN PERSON

Avimanyu Behera
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ABSTRACT

An unborn child is not a person in the eyes of law, hence not capable of having fundamental and human rights and therefore devoid of effective legal protection. The right of unborn to live and to be born may a time and her privacy. The woman who carries this tiny being is not its only rival, there are more issues of settling third party liabilities both civil & criminal as against the unborn victims of injury and violence. Whenever a person suffered damage he will look to the law for redresses. The law of torts is that branch of law which governs sections for damage for injuries. When child is the injured person, to what extent he can sue in law of torts. A child can sue and be sued in law of torts. Because the law of torts does not make any distinction on the basis of age.

Key Words: Unborn Child, Legal Status of Urban Person, Pregnancy Act.
Foetus is another life in the woman and it comes as a baby is the course of time. Though foetus grows in the body of the woman, it can not be equated to or considered to be a part of the body of the woman. In effect, loss of the foetus consequent upon the death of the pregnant woman is actually loss of child in the offspring for the husband of the woman.

An unborn child aged five month on words in the mother’s womb till its birth can be treated as equal to a child in existence. The unborn child to whom the live birth never comes can be held to be a ‘person’ who can be the subject of an action for damages for his death. A person means a human being regarded as an individual and as individual’s body, concealed on his person. Life begins as soon as an infant is able to stir in the mother’s womb. For if a woman is quick with child and by a portion, or otherwise, killed it in her womb, or if any one beat her, whereby the child death in her body, and she is delivered of a dead child; this not murder, was by accident law of homicide or manslaughter.

LEGAL STATUS OF UNBORN CHILD

Salmond defines the legal status of urban person in Salmond jurisprudence.³

“Though the dead possess no legal personality, it is otherwise with the unborn. There is nothing is law to prevent a man from doing property before he is born. This ownership is necessarily contingent, indeed, for he may never be born at all, but it is none, the lesess a real and prevent ownership. A child in its mother’s womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, nasciturus pro jam nato habetur. In the words of Coke: “The law in many cases hath consideration of him in respect of the apparent expectation of his birth”. Thus in law of property, there is a fiction that a child venturture sa mere is person in being for the purpose of (1) the acquisition of property by the child itself; or (2) being a life chosen to form part of the period in the rule against perpetuities.”

PROPERTY LAW

For property matters, the child in the mother’s womb (and even the child yet to be conceived), is given personhood to a great extent ensuring the legal capacity to own/inherit property. The Transfer of property Act 1882 marks it permissible subject to conditions, the creation of an interest for the benefit of a person not in existence at the date of transfer.⁴ Also, the Indian Succession Act, 1925 allows a bequeathal to be made in favour of a person not in existence at the time of testator’s death.⁵ The Hindu succession Act, 1956 has conferred a right to succeed to the father’s estate on a child who was in the mother’s womb when the father died intestate.⁶ Under the Hindu Law, a child in the mother’s womb is treated as a coparcener and a share is kept reserved if the pregnancy is known at the time of partition. In case when a share is not so reserved or where the pregnancy was not

---

4. Sec 13 Transfer of Property Act; 1882. This section does not apply to Muslims on Mohammedan law strictly prohibits any gift to an unborn person.
5. Sec 11, Indian Succession Act; 1925.
known, the unborn son after birth is entitled to demand re-opening of partition.

It is submitted that these provisions are incorporated to avoid confusions relating to property and has very less to do with the right to be born of the child in the womb. The rights of an unborn person, whether proprietary or personal, are all contingent on his being born alive. The legal personality attributed to him by way of anticipations falls away ab initio if he never takes his place among the living. ³

**CRIMINAL LAW**

The Indian final code,⁸ addresses offences relating to miscarriage, subject to the overriding effect of Medical Terminations of Pregnancy Act, 1971. Special reference is made to Sec 312 of the Indian penal code ⁹ which makes causing miscarriage an offence punishable under the code. The explanation to the same section specifies that a woman, who causes herself to miscarry is within the meaning of the section. The maximum punishment varies in case the woman be quick with the child and otherwise.

When law decides to protect the interests of the woman in the above illustration, it is appreciable it is required a prisoner’s liberty is safeguarded under our democracy. To upload the Mother’s right over all above that of fetus is not in fact the point of dispute, as priorities can be rightly set by Law. The issue of is one of considering the unborn as inside with respect to Medical Termination of Pregnancy and protects the same being from execution u/s 416 of Cr P.C..

It is evident that the law is attempting to give a greater weightage here to be foetus during the later months of gestation as compared to the first months. It is also to be noticed that all these provisions dealing with miscarriage uses the word “child” instead of words like ‘foetus’ or ‘embryo’ which all trend to denote a formative stage of the human being, something less than a human. However it is regrettable that no minimum punishment was prescribed for these offences & thereby reduced child destruction to a crime but not equivalent to murder or manslaughter. However by virtue of Medical Termination of Pregnancy Act, 1971. As amended in 2002, a minimum punished of two years rigorous imprisonment is prescribed thereby modifying section 312 of India panel code as well.

It is pertinent to point out Sec 416 of the Criminal Procedure Code which states that “If a woman sentenced to death is found to pregnant, the High Court shall order the execution of the sentence to be postponed and may, if thinks fit commute the sentence to imprisonment for life”. ¹⁰ It is submitted that this provision is direct-

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³. Supra 3 at 298  
⁸. Sections 312-316, Indian Penal Code, 1860.  
⁹. Sec 312 states that – “Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years or with both, and, if the woman be quick with the child, shall be punished with imprisonment of either description for a term which may extend to seven years & also shall be liable with fine time”.  
¹⁰. Article 6 of International Covenant on Civil and Political Rights, 1966, Similar provision was contained in the Sentence of Death (Expectant Mothers) Act, 1931 (repeated in 1988 following the abolishing of death penalty in U.K.) & in Innocent Child Protect in Act, 2000 of USA.
ly aimed at protecting the life of unborn child, irrespective of the gestation period and afford full-pledged recognition of the unborn child, the foetus, the embryo or whatever cellular stage it may be in, as a human being who cannot be deprived of his right to life. The principle embodied in this provision is obvious; carrying out the execution would take two human lives, including one convicted of no crime. Here the law considers the unborn child as an independent personality and not as a limb of the mother. However if the mother (prisoner-convict) decides to end her pregnancy subject to the Medical Termination of Pregnancy Act, law will step aside & allow the unborn child to be killed & thereby pregnancy be put to an end. If at all any claim of independent human existence of the unborn is raised by someone. (The Petitioner, let us assume us an NGO bearing the same Society for the Protection of the Unborn Child), law will shy away from the petitioner & will oblige by the wishes of the prisoner woman, her privacy right, her human right to make a choice and decide about her body and her liberty.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The object of the Act that this law aims at liberalizing the provision of Indian penal code relating to miscarriage, to extend efficient medical facilities to a woman in need of abortion and thereby prevent avoidable wastage of mother’s health, strength and sometime life.” Which happens when their pregnant uteris are tampered with by inefficient hands. The Statement of Object justifies this liberalized stand by stating that “Furthermore most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.”

THE MTP ACT allows medical termination of pregnancy, not with standing the Indian penal code. Medical termination of pregnancy can be lawfully done only by a registered medical practitioner at a place approved for this purpose by the government or at a government hospital. The consent of the woman has not attained the age of 18 years and where the woman is mentally ill person, the written consent of the guardian is necessary.

The Act seeks to literalize medical termination of pregnancy in three cases. Firstly, as a health measure when there is danger to the life or risk to physical or mental health of the women. Secondly, on humanitarian grounds such as when pregnancy arises from a sex crime like rape. Thirdly, on eugenic grounds where there is substantial risk that the child, if born, would suffer from physical or mental abnormalities to be seriously handicapped. The assessment of these grounds is left to the opinion formed in good faith of one registered medical practitioner if the pregnancy is less than 12 weeks and of two registered medical practitioners if the pregnancy is more

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11. Sec 3(1) Medical Termination of Pregnancy Act, 1971
12. Sec 3(2) MPT Act, 1971
14. Sec 3 (4) MTP Act, 1971
15. Sec 3 (2) (i) MTP Act, 1971
16. Explanation 1 to Sec 3 (2) MTP Act, 1971
17. Sec 3 (2) (ii), MTP Act, 1971
18. Sec 3 (2) (a) MTP Act, 1971
than 12 weeks but does not exceed 20 weeks. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to mental health of the pregnant woman. Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

If the pregnancy exceeds 20 weeks it could be terminated only when the registered medical practitioners is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of pregnant woman. Here again, the consent of the woman or guardian, as case may be is necessary.

THE MTP ACT, VIS A VIS THE LEGAL STATUS OF THE UNBORN

It is strange that in a country where right to life is a guaranteed fundamental right under the Constitution and where the higher judiciary has expanded this right to include all rights that go to make life meaningful, such wide and unguided discretionary power is granted to one or two registered medical practitioners to form an opinion in good faith and thereby put an end to a growing life in the womb. Whenever a woman alleges rape, it shall be presumed that the pregnancy, results in grave injury to her mental health. In all cases of unwed pregnancy, this will be the projected ground for medical termination of pregnancy. Where the pregnancy is posed as the result of the failure of family planning scheme adopted by the married couple, grave injury to the mental health of the woman may be presumed. This is allowing married men and women to choose whether to want the pregnancy or stop the unwanted pregnancy after pregnancy has occurred. Whether they had in fact used any device or method or if used whether it was used to limit the number of children are all matters which are to be accepted as the face value. So the Act is in fact liberalizing the right of the married couple to kill the unborn child upto a gestation period of 20 weeks. The ground on which opinion is to be formed is the same where the pregnancy is upto 12 weeks or upto 20 weeks, except that the latter requires the opinion of two registered medical practitioner. Even though the Act uses the look good title, “Medical Termination of Pregnancy Act” things don’t look that good when one understands that no pregnancy can be terminated otherwise than by killing the growing foetus, or rather a child.

This law is lacking in clarity of purposes, contains no measure to prevent abuse of the permissible scheme, disrespects human life and dignity of the human person, allows the destiny of the unborn person to be subject to the arbitrary choice of the woman and allots unguided power to registered medical practitioners. This law is founded on the basis premise that the unborn child is not a person and therefore does not deserve to be granted any

19. Sec 3 (2) (b) MTP Act, 1971
20. Explanation 1 to Sec 3 of MTP Act, 1971
21. Explanation 11 to Sec 3 of MTP Act, 1971
22. Sec 5, MTP Act, 1971
legal protection at all. By calling a human foetus as unwanted pregnancy, the variable human existence of the unborn child is conveniently forgotten.

**LAW RELATING TO UNBORN CHILD**

As per section 6 of the limitation Act, 1963 provides that where a person entitled to institute a suit or make an application for execution of the decree is at the time from which the prescribed period is to be reckoned, a minor, he may institute the suit or make the application is within the same period after the disability has ceased.

1. Explanation is to sec 6 reads thus : “Explanation — For the purpose of this section ‘minor’ includes a “child in the womb.”

2. Sec 20 of the Hindu succession Act, 1956 recognizes the right of a child in the womb. Sec 20 reads thus : Sec 20 Right of child on womb. A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born, before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.”

3. Mulla on Hindus Law, Fifteenth Edition, contains a commentary by the author while dealing with Sec 20. The commentary reads thus : “It is by fiction or indulgence of the law that the right of a child born justo to matrimonio are regarded by reference to the moment of conception and not of birth and the unborn child in the womb if born alive is treated as actually born for the purpose of conferring on him benefits of inheritance. The child in embryo is treated as in esse for various purposes when it is for his benefit to be so treated. This view is not peculiar to the ancient Hindu law but one which is adopted by all mature systems of jurisprudence. This section recognizes that rule of beneficent indulgence and that the child in utero although subsequently born is to be deemed to be born before the death of the intestate of inheritance is to be deemed to vest in the child with effect from the date of the death of the intestate.”

4. In the Indian succession Act, 1925 ‘minor’ is defined under section 2(e) that minor means any person subject to the Indian Majority Act 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years and “minority” means the status of any such person.

5. Sections 13 and 20 of the Transfer of Property Act deal with situations in which an a transfer of property, an interest therein is created for the benefit of a person not in existence. As for section 20, where on a transfer of property an interest there in is created for an unborn person, he acquires on his birth, a vested interest.

**INTERNATIONAL HUMAN RIGHTS DOCUMENTS**

The important human rights documents mention about " all members of the human family". Art 3 of the Universal Declaration of Human Rights declares that everyone has the right to life, liberty and security of the person and Article 6 asserts that everyone has the right to rec-

WHY IS THE UNBORN INVISIBLE TO LAW?

The legal personality of the unborn child, would appear to be against the right to abortion of the woman. The taking away that right is not appropriate in a democracy recognizing the liberty of the woman over her own person. It is true that the fetus requires a woman’s body to complete its development and became viable enough to be born into the world. But it is wrong to consider the child as a trespasser into one’s body, because in a vast majority of cases, the woman is responsible for her pregnancy. Like how the woman has a right over her body, the child has a right over his body, which of course is not part of his mother’s body. It at all law permits one right to prevail over the other, which law can rightfully do, it should be on sound lines of reasoning and of course to apply in limited contexts.

In modern times almost all countries have recognized the right of unborn child to sue and recover damages from the wrong doer for injuries caused before its birth. The future development of the country will depend on the attitude of the children. Therefore children’s right should be protected to the maximum extent possible. They should not suffer & go without remedies for injuries.

WHY IS THE UNBORN INVISIBLE TO LAW?

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The consequence of denying legal personality to the unborn with the sole objective of addressing the superior rights of the woman is far reaching, abominable of devoted of respect for human dignity. This will deny to the fetus even a right to burial which every human being is entitled to, thereby making its mortal remains treated like any other biological waste. If a pregnant woman is murdered, the offender fetches punishment only for the murder of the woman, & not of the child. If a child in the womb dies as a result of violence inflicted upon the woman, the offender cannot be punished for the death of the unborn, as far as the offender is ignorant about the fact of pregnancy.

The Unborn Victims of Violence Act, 2004, of the United States which recognizes that when a criminal attacks a

24. J.J. Thomson ‘A Defence of Abortion’ in R.M. Dworkin (ed). The philosophy of Law (Oxford University, Press 1977) 112. Thomson uses a lot of rhetoric like equating a child as a third party in the mother’s house and claim that the woman should be given all liberty to unplug this person from mother’s body. But J. Fauing’s “The Rights and Wrongs of Abortion”, ibid 129. Finning’s examines the issue from a Honfeldian analysis of rights & renders a tit for tat reply to Thomson.

pregnant woman, and injuries or kills both her & her unborn child, he claimed two human victims. The law covers "the child in utero", defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb". However the law explicitly provides that it does not apply to any abortion to which a woman has consented, to any act of mother herself (legal or illegal) or to any form of medical treatment.

In the area of civil liability the age old dictum was that a child is entitled to compensation for injury caused to it while it was in the mother womb, provided the child is born alive. However a change is discerned in the decision of the Maharashtra State Consumer Redressal Commission. Where a fetus was held to be a consumer. In an insurance claim made by the mother for the loss of her unborn child of seven months gestation, the Commissioner took note of the American law. and ruled that the unborn child in the womb is living & entitled to personhood & thereby held that the claim in respect of the unborn child was maintainable.

Lastly, the denial of legal personality to the unborn will bring in a lot of uncertainty over its legal status. If the unborn child is not granted personhood does the status amount to thinghood ? If so, can the unborn be the subject matter of ownership? Or is the status a Sui generis, a unique class of its own. Law should not shy away from answering this crucial question which alone can put to rest the rights controversy.

**JUDICIAL DECISIONS ON THE RIGHTS OF UNBORN CHILD:**

In Elliot v. Lord Joicey and Ors. It was held that an unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question, though no one else can derive any benefit through the child before its birth. In A.C.Re., it was held by the court that the state has an important and legitimate interest in protecting the potentiality of human life, when the foetus has become viable. It had also been acknowledged earlier in Roe v. Wale that state’s interests in potential human life becomes compelling at a point of viability. This is a situation, which exists when a woman has carried and unborn child to viability, and when the unborn child reaches this stage the child becomes a party whose interest must be considered.

A similar approach has been adopted by the courts in Fowler v. Woodward and more recently in Whitner v. South Carolina. In all these cases it was opined that ‘viable foetuses’ are ‘persons’ in the eyes of law, certain legal rights and privileges and exclusion of viable foetus from status of person would be and “unsound, illogical and unjust”. It was unanimously held...

26. Ref. Supra n.3 at 314.
27. Kanta Mohanlal Kotecha V. Branch Manager, United India Insurance Co. Ltd. The prononcoment was made on November 6, 2006 from justice BB Vagyani, Times News Network March 5th & 6th 2007
29. 1935 AC 209.
30. 573A 2d 1235 (DC. Cir. 1990)
32. 38 SE 2d. 42 (SC 1964)
33. 492 SE. 2d. 42 (SC 1997)
that a foetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person.

After the perusal of the above-mentioned cases it would be safe to conclude that a foetus has the legal status of a fully born person in the eyes of law. And therefore state's interest in protecting the life and health of the viable foetus is not merely legitimate but compelling.34

CONCLUSION

Law needs to be changed to acknowledge the legal existence of the unborn child. The fact that the unborn child is physically dependent on its mother prior to birth need to not lead to the assumption that it has no moral legal significance.35 The child is in the mother's womb being very much a member of the human family ought to be granted entitlement to basic human rights. As between the unborn child & a third party, absolute person hood is to be granted to the unborn child. It is submitted that such a measure would ensure a day of care towards the unborn child imposing tortuous liability, not only on the mother but also on third parties in all cases of negligence including environmental pollution by industries.36 As between the woman and child in her uterus, law has to fix clear standards as to when the right & liberties of the woman as a person may prevail over the right to be born of unborn child. Any law which permits medical termination of pregnancy has to have due regard to the gestational development of the unborn child & allow terminates of pregnancy as an exception to the right to be born of the unborn child. Whenever choice is to prevail over life, law has to make sure that the choice is not an arbitrary choice.

34. Roe V. Wade; 410 US 113 (1973)
35. Jane E.S. Fortin, “Legal protection for the unborn child”, 51 Mod L. Rev (1988) 54. At – 82. Fortin suggests that a distinction should be drawn between the early human embryo & a foetus of more than 10 weeks gestational development, only the latter meriting recognition as a human being.
36. Union Carbide corporation V. Union of India AIR 1992 SC 2438, damages was awarded to children born with abnormality after inhaling the highly toxic gases.
RIGHT TO DEVELOPMENT IN A GLOBALISED WORLD

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ABSTRACT

The concept of ‘Development’ has always been a constant source of dispute amongst scholars. But with the passage of time it has crystalized around the idea of right and it has itself become a right encompassing within it a broad variety of rights. The Declaration on Right to development marked the culmination point inviting and inspiring the world to act upon to truly empower the people of the world. However, the neoliberal globalized world still grappling with the daunting task of underdevelopment, as it requires a lot global efforts to make it possible, making it difficult to realize the goal right to development a reality of the day. In this perspective this paper seeks to discuss the idea of development as a right, its evolution and position in a global scenario.

KeyWords: Cyber law, Cyber crime, Illegal Possession, Privacy Right, Information Technology Act.

INTRODUCTION

Traditionally the idea of ‘development’ and ‘right’ have been seen as diverse and non-related subject with no commonality between but post-war 1950s saw a trend of intersection and a paradigm shift leading to development as a basic human right. Post Second World War felt the need of a change in outlook towards the very idea of development and came up with a series of Resolutions and Declarations in tune with the United Nations Charter and Universal Declaration of Human Rights to achieve a peaceful world order. Declaration on Right to Development, 1986 marked the turning point in recognizing development as a very basic right stressing upon the centrality of human person in the process of development.

Concept of Development

So far the concept of ‘development’ has been a most debatable and contentious one. There is no consensus as to the meaning of ‘development’ amongst scholars and practitioners. The idea of ‘Development’ has always been associated with economics but of late it is being associated with something very vital for individual person, nations and world community.

Prof. Amartya Sen, noted economist and noble laureate, designated ‘development’
as expansion of real freedom and held: identifying development with the growth of gross national product, rise in personal incomes, industrialization, technological advances, or social modernisation is a narrow views of ‘development’. According to him development requires removal of major sources of ‘unfreedom’ like poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.1 His approach was a ‘capability approach in development’ wherein people’s capability would lead to their ‘entitlement’.

Another noted economist Gunnar Myrdal defined development as the ‘upward movement of the entire social system’. The social system comprises a number social condition like output and incomes, conditions of production, levels of living, attitudes toward life and work, institutions, and policies.

The idea of ‘development’ got a new meaning in a Symposium of experts chaired by the late Barbara Ward (1914 – 1981) (a British economist and writer interested in the problems of developing countries. She urged Western governments to share their prosperity with the rest of the world and in the 1960s turned her attention to environmental questions as well.), was held in Cocoyoc, Mexico. Organized by UNEP and the United Nations Commission on Trade and Development (UNCTAD), the symposium identified the economic and social factors which lead to environmental deterioration (UNEP/UNCTAD 1974) and came up with a declaration known as Cocoyoc Declaration, 1974. Redefining the purpose of development, the Declaration states “Our first concern is to redefine the whole purpose of development. This should not be to develop things but to develop man. Human beings have basic needs: food, shelter, clothing, health, education. Any process of growth that does not lead to their fulfilment or, even worse, disrupts them - is a travesty of the idea of development. We are still in a stage where the most important concern of development is the level of satisfaction of basic needs for the poorest sections in each society which can be as high as 40 per cent of the population. The primary purpose of economic growth should be to ensure the improvement of conditions for these groups. A growth process that benefits only the wealthiest minority and maintains or even increases the disparities between and within countries is not development. It is exploitation. And the time for starting the type of true economic growth that leads to better distribution and to the satisfaction of the basic needs for all is today. We believe that 30 years of experience with the hope that rapid economic growth benefiting the few will “trickle down” to the mass of the people has proved to be illusory. We therefore reject the idea of “growth first justice in the distribution of benefits later”.3

Adding to the above meaning, the Human Development Report 20004, which was prepared by a panel of eminent economist including Prof. Amartya Sen and distinguished development professionals,

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looks at human rights as an intrinsic part of development—and at development as a means to realizing human rights. It shows how human rights bring principles of accountability and social justice to the process of human development. The report observes: Human rights and human development share a common vision and a common purpose—to secure the freedom, well-being and dignity of all people everywhere. Further, it says, Human rights and human development are both about securing basic freedoms. Human rights express the bold idea that all people have claims to social arrangements that protect them from the worst abuses and deprivations—and that secure the freedom for a life of dignity. Human development, in turn, is a process of enhancing human capabilities—to expand choices and opportunities so that each person can lead a life of respect and value. When human development and human rights advance together, they reinforce one another—expanding people’s capabilities and protecting their rights and fundamental freedoms.

**Right based Approach to Development:**

Although the Declaration on the Right to Development, 1986 marked the culmination of the process of establishment of ‘development’ as a ‘human right’, its root goes much deeper to the Philadelphia Declaration of the International Labour Organisation, 1944 which affirmed that:

(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;

(b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

(c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective.\(^5\)

Similar ideas are echoed in the United Nations Charter, 1945 which expresses, inter alia, its determination to promote social progress and better standards of life in larger freedom and states “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development . (Article 55)\(^6\)

In the similar vein and approving the proclamation of UN Charter the Universal Declaration of Human Rights, 1948 (UDHR) states, “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality” (Article 22)\(^7\). This was


followed by two International Covenants i.e. Covenants on Civil and Political Rights and Economic, Social and Cultural Rights reiterating the commitment enshrined in UN Charter and UDHR.

Further, the Proclamation of Teheran, 1968 promulgates, “Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.”

For the first time the Commission on Human Rights recognized the right to development as a human right (res. 4 (xxxv)) of 2 March 1979. On the same day, the Commission adopted resolution 5 (xxxv) in which it, inter alia, reiterated “that the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations.”

Putting a full stop to the debate as to the nature and content of ‘right to development’ the United Nations General Assembly adopted vide Resolution no. A/RES/41/128 4 December 1986 the Declaration on the Right to Development, approving the all documents mentioned above, and confirmed that that “the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations... and proclaimed, inter alia the followings:

- The right to development is an inalienable human right;
- The human right to development also implies the full realization of the right of peoples to self-determination;
- The human person is the central subject of development and should be the active participant and beneficiary of the right to development;
- All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community;
- States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development;
- States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development;
- States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

The Declaration was further reaffirmed by Vienna Declaration and Programme of Action, 1993 re-emphasising that the human person is the central subject of development.

Echoing the idea of development, the agreement establishing World Trade Organisation (WTO), which paved the way for the onset of process of globalization and free trade, recognized that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.  

Constitutional Approach:
The Directive Principles in Constitution of India are fore-runners of the U.N.O. Convention on Right to Development as inalienable human right and every person and all people are entitled to participate in, contribute to and enjoy economic, social cultural and political development in which all human right, fundamental freedoms would be fully realised. It is the responsibility of the State as well as the individuals, singly and collectively, for the development taking into account the need for fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community which alone can ensure free and complete fulfillment of the human being.

Referring to D.S. Nakara & Ors. v. Union of India [(1983) 2 SCR 165] explaining the meaning of ‘Socialism’ wherein the Court observed: ‘Democratic socialism achieves socio-economic revolution to end poverty, ignorance, disease and inequality of opportunity. The basic framework of socialism was held to provide security from cradle to grave’, the court declared right to development as one of the important facets of basic human rights and right to self-interest is inherent in right to life.

Post Globalisation Scenario
Current process of globalisation and free trade, which is not free from controversy, is premised on the neo-liberal theory on the belief that it will benefit everyone by bringing about greater wealth and well-being to all on a global scale. Further, it is proposed that it offers lot of opportunities with comparative advantage, development of human capital and promotes stabilisation of economic systems.

Post globalization world saw the adoption of United Nations Millennium Declaration which along with others declared:

- We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected.

We are committed to making the right to development a reality for everyone and to

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13. Ibid
freeing the entire human race from want.

- We resolve therefore to create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty.

And it further resolved, inter alia, to halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.

Again On September 25th 2015, countries adopted a set of goals to end poverty, protect the planet, and ensure prosperity for all as part of a new sustainable development agenda known as ‘Sustainable Development Goals’.

It goes without saying that the world has benefited enormously by the process of this globalization but many people raise questions as to which direction this benefit has gone or whether it has benefited the toiling masses or not. "Given the overwhelmingly positive effects of globalization, why hasn’t every country embraced it as the most powerful force for positive economic change, income growth, and the reduction of poverty? ... Although some states have been able to reap spectacular benefits from engaging in the global economy, most developing countries have been excluded from the economic benefits of globalization ..." 16

"The repercussions are an expansion of global inequality and concentration of abject poverty in the states that either have failed to board the globalization express or have joined the globalizing world order but have not been able to benefit fully from it." 17

According to 210 Oxfam Briefing Paper, 18 "Global growth and progress in human development give us good reasons to believe that we can achieve the goal of eradicating poverty for good. However, the reality of what billions of people in the poorest socio-economic groups have experienced, and what they can expect if current trends continue, is less encouraging. Digging behind the global and national aggregates reveals huge differences in income and wealth at the individual and household levels. Data on global income shares show that interpersonal income inequality is extremely high and that those at the top end of the income distribution benefit from a disproportionately high level of overall growth." The Paper further concludes "that the global economy has been growing, but as incomes and wealth have become detached from productivity and real added value in societies, people who work hard but who are not in positions of economic and political power have lost out. The share of income going to labour compared with capital is in decline, the gap between wages and productivity is growing and income inequality is slowing overall growth, further hurting the poorest people most and preventing millions of people from escaping poverty."

**CONCLUSION**

Now it appears since 1940s/50s the world is trying to cope with such a grim scenario. And, so far, tangible results are nowhere in the scene. The roads for the right

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16. Supra note 14 p. 66
17. Ibid p. 68
to development is tough ahead as it is beset with lot of challenges first one being to incorporate the true idea of development in the light of right and dignity orientation then bringing about equitable distribution of resources and sharing of technical knowhow and resources in a spirit of co-operation and brotherhood. Further, globalisation has not worked the way it proclaimed in the agreement establishing WTO; rather it has benefitted few people and nations. To implement the right in letter and spirit the member nations should come forward to truly empower their citizens to participate in the decision making and nation building process.

Various human rights declaration and covenants declare few rights, including the one under discussion, as inalienable and universal but those rights are exercised and enforced in national jurisdictions making it extremely difficult to realize the universal status.

Hence, half-hearted international action needs to be shed to make the goal of right to development a reality.
ENVIRONMENTAL POLICY IN INDIA AND JUDICIAL ACTIVISM IN IMPARTING ENVIRONMENTAL JUSTICE

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INTRODUCTION

Although Judiciary may be seen to have overreached its constitutional boundary (i.e. Separation of Power) by taking stern approach to protect the environment and ratifying the mistakes being committed by various government and private agents with their nefarious design but the desired result remains unfulfilled. It can be easily perceived that the last few years have been responsible for having considerable increase in number of decisive judgments pronounced by Supreme Court as well as National Green Tribunal in order to achieve the sustainable development as number of development projects have been put in waiting due to absence of having proper environmental compliance.

This paper will briefly examine the various environmental policies in India and their effectiveness by incorporating the critical approach of judiciary in interpreting these laws and assessing how far they are successful in substantiating the sustainable development goal. It will further investigate the role of various government agencies and their effectiveness in implementation process. Finally, this paper suggests some reforms and guidelines corroborated with the present scenario and conclude by stating that the role of the judiciary, amidst the arguments...
on overarching its powers, has been far reaching and impactful. However, judicial pronouncements remain paper tigers due to the lack of political and administrative will in implementing them.

**Exploitation of Natural Resources**

Clean and healthy environment is considered as sine qua non for the survival of all forms of life on this earth. Environment has become a buzz word across the globe. Greed of mankind to conquer the whole earth has accelerated the ruthless exploitation of natural resources thereby interfering directly with nature and resulting into severe depletion and deterioration of natural environment. The deterioration of quality of environment at such an alarming rate has created turmoil and compelled everyone to reinsure the human survival for the longest time period. In last three decades, Indian judiciary has played remarkable role in the field of environment. The decisions and orders given by the judiciary has been a matter of great debate among all legal scholars as well as other stakeholders. The people commonly refer this attempt of judiciary as “Judicial Activism”. The term judicial activism has been introduced by Arthur Schlesinger in Jan 1947 which means “a philosophy of judicial decision making whereby judges allow their personal view about public policy among other factors to guide their decision”.

In the words of Justice PN Bhagwati judicial activism has been explained in following words:

“The Indian Judiciary has adopted an activist goal- oriented approach in the matter of interpretation of fundamental rights. The Judiciary has expanded the frontiers of fundamental rights and in the process rewritten some part of the Constitution through a variety of techniques of judicial activism. The Supreme Court of India has undergone a radical change in the last few years and it is now increasingly being identified by the justices as well as “the last resort for the purpose of bewildered.”

Prof. Baxi while explaining judicial activism has used the word in a more descriptive sense where judges are evaluated as activists by various groups in terms of their interest, ideologies and values, on the other hand, they are admired or denigrated depending on whether judicial activism is seen as inimical or benign to the protection and promotion of these interests and ideologies and values.”

**Judicial activism and environment protection**

Judicial response in terms of judicial activism has started late in eighties after the Bhopal Gas Disaster case was brought before the court. This was one of the most famous and debated case in the history of environmental judgements in India. The case is an eye opener as it compelled everyone to think and consider the consequences of environmental mismanagement. There are numerous judgements delivered by Supreme Court, High courts and National Green Tribunal after the Bhopal gas Tragedy which continued to earn praises for being significant judgements in the area of environment Protection. For instance, the **TN Godavarman-Thirumalpad v. Union of India** and the Centre For **WWF-I vs U O I &Ors**, The Su-

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Supreme Court held that no forest, National Park or Sanctuary can be brought into use other than specified purpose without the approval of the Supreme Court. It further held that non-forest activity is not permitted without its prior approval in any National Park or Sanctuary even if prior approval under the Forest (Conservation) Act, 1980 had been obtained.

Some judgments though not directly connected to environmental cases, but have substantial repercussions for the establishment of environment as a basic human right. The special attention required to be sought on the cases where the Right to Life (Article 21 of Constitution of India) has been interpreted widely to include a series of basic rights that include environmental and basic livelihoods rights.

In the case of Francis Coralie v. Union Territory of Delhi\(^5\), Hon’ble Justice Bhagwati reiterated that: "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings."

In one of the monumental judgment, the Supreme Court held with majority that "An important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. That which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life." environmental crisis is causing enormous disruption of lives and livelihoods, threatening the collapse of its entire life-support system.\(^6\)

In another landmark case of Shantistars Builders vs. Narayan Khimalal Totame\(^7\), the Supreme Court observed: "Basic needs of man have traditionally been accepted to be three-food, clothing, and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in."

In Shanti Star Builders vs. Narayan Totame, the Hon’ble Supreme Court held that right to life is guaranteed in a civilized society would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in.

In one of the famous cases for right to have pollution free water as fundamental right, the Supreme Court held that right to life is a fundamental right under Art. 21 of the Constitution and it include the right to enjoyment of pollution free water and fresh air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws a citizen has recourse to Art.32 of the Constitution for removing the pollution of water or air which may be detrimental to life.\(^8\)

It is common knowledge that the role of judiciary is to ensure that the state is complying with its responsibility under

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\(^5\) AIR 1981 SC 746.
\(^6\) Olga Tellis & Ors vs Bombay Municipal Corporation &Ors. AIR 1986 SC 180.
\(^7\) AIR 1990 SC 630.
\(^8\) Subhash Kumar vs. State. of Bihar- (1991) 1 SCC 598.
constitution and portraying itself as an accountable government. The word judicial activism may import various meanings such as the enactment or creation of new laws, the interpretation of legislation or the exercise of policy by extensive judicial review of executive action. The innovative and revolutionary judgments of some tolerant and open minded judges took up the task of developing different mechanisms for putting a check and creating balance on environmental and human rights violation with the help of judicial activism.  

**The Concept of Sustainable Development and Judicial Activism**

In the early 1970s, several factors, such as public awareness regarding rapid environmental degradation, fast depletion of natural resources, poverty and social disruption, led states to realize the detrimental impacts of human activities to the environment. In year 1987, the world commission on Environment and development (hereinafter WCED) defined the term Sustainable development as “development that meets the needs to the present generation without compromising future generation to meet their own needs.” The above said definition of sustainable development makes it amply clear that the term sustainable development contains three basic components. First among these is precautionary principle, whereby the state must anticipate, prevent and attack the cause of environmental damages. The second component of the doctrine is “polluter pays” principle. This polluter pays principle states that “if you make a mess, it is your duty to clean it up.” The third component of sustainable principle is principle of inter-generational equity which is based on American proverb “We don’t inherit the planet from our ancestors but borrow it from our children”. Intergenerational equity is a concept that says that humans ‘hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future’.

**Precautionary principle and Judicial Activism**

The word “Precautionary Principle” is defined as “When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm”. Morally intolerable harm refers to harm to humans or the environment that is threatening to human life or health, or serious and effectively irreversible, or inequitable to present or future generations, or imposed without satisfactory consideration of the human rights of those affected.  

Precautionary principle is a translation of the German *Vorsorgeprinzip*. *Vorsorge* means, literally, fore-caring. It carries the sense of foresight and preparation not merely caution. It’s the common sense idea behind many adages: "Be careful." "Better safe than sorry." "Look before you leap." "First do no harm." The Rio declaration affirms the same principle under principle 15 as follows:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific-
ic certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

The supreme court for the first time in year 1996, took the cognizance of this principle in *Vellore Citizens Welfare Forum v Union of India*,\(^{13}\) where it was held that the precautionary principle, and the shifting of the burden of proof onto the developer or industrialist who is proposing to alter the *status quo*, are part of the environmental law of the country. It was further stated that environmental measures, adopted by state government and the statutory authorities, must anticipate, prevent and attack the cause of environmental degradation. The court also reviewed the development of the precautionary principle at international level, including reference to Principle 15 of the Rio Declaration. The Court identified inadequacies of proper technologies as the real hurdle that has led to the precautionary principle.

In the *Taz Trapezium case*, applying the precautionary principles the Supreme Court has directed a number of industries nearby Taj Mahal to relocate or introduce effective measures of pollution abatement in order to protect Taj from damage and deteriorate. In this case the onus of proof was shifted on the industries to show that its operation with the aid of carbon generating fuels is environmentally benign. It is however proved to the satisfaction of the court that the carbon emissions generated by those industries in Taz trapezium are primary and chief source of damage to Taj.\(^{14}\)

In *TN Godavarman Thirumalpad v. Union of India*,\(^{15}\) the Hon’ble Supreme Court gave due importance to the importance of India’s treaty obligations, recognizing the precautionary principle in the above said case in the context of the Convention on Biological Diversity. Despite India’s dualist legal tendencies and a lack of implementing legislation at the time, the government was held responsible for adhering to its treaty responsibilities that did not conflict with domestic statutes. The case was dealing with the mining issues in Kudermukh National park which was inconsistent with the precautionary principles as committed by India in its international treaty.

Even after having such strengthened precautionary statements, the underlying object under this principle has not sought to be achieved complete success in the Indian legal system. In particular, precaution has been waived in cases of dam building proposals. In 1992, the Tehri dam case suggested that a standard of “quite safe” was sufficient despite the tremendous potential damage.

likely if the dam broke. The Court seems to have moved on very little since then, declining to apply precaution because the case is not about a “polluting industry.” The Court suggests that the precautionary principle is only applicable where the science is uncertain and damages cannot be calculated. Somehow, it determines that the future impacts of dam construction on the Narmada River are clear, requiring mitigation to balance the harm rather than advance precaution. In addition to these judicial limitations on the

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precautionary principle, some commentators suggest that the courts’ environmentalism is somewhat irrelevant in light of enforcement difficulties.\footnote{16}{Available at \url{http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/1/0/pages73107/p73107-18.php}, (last Accessed on 12/01/2017).}

**Polluter Pays Principle and Judicial Activism**

The ‘polluter pays’ principle is the universally accepted practice whereby those who create pollution should bear the costs of managing it to prevent damage to human health or the environment. This principle underpins most of the regulation of pollution affecting land, water and air. The Environment Protection Act, 1986 defines "environmental pollutant" means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment; whereby the presence of these pollutant in environment commonly refer as environment pollution.\footnote{17}{See Section 2(b) & 2(c) of Environment (Protection) Act, 1986.}

Part of a set of broader principles to guide sustainable development worldwide (formally known as the 1992 Rio Declaration), the polluter pays principle confers the responsibly upon states as “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”\footnote{18}{See Principle 2 of Rio Declaration on Environment and Development.}

The Supreme Court of India while enforcing the polluter pays principles, has laid down the principles of absolute liability in [M.C. Mehta v. Union of India (Oleum Gas Leak Case)](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/1/0/pages73107/p73107-18.php). The exceptions such as Plaintiff’s own mistake, Plaintiff’s consent, Natural disasters, Third Party’s mistake and Part of a statutory duty has not been given due consideration under principles of absolute liability. On the question of developing a new doctrine to attach liability the Supreme Court commented that;

“We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or is injured. Does the rule in [Rylands v. Fletcher](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/1/0/pages73107/p73107-18.php) apply or is there any other principle on which the liability can be determined? The rule in [Rylands v. Fletcher](http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/3/1/0/pages73107/p73107-18.php) was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defense that the thing escaped without that person’s wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule evolved in the 19th...
Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country.  

Another very important judgment delivered by Supreme Court in the same line was Indian Council for Environ-Legal Action Vs Union of India, where a village was brutally suffered and highly polluted by the sludge of rogue industries licensed to produce some chemical and acid. The central government has been directed by Hon’ble Supreme Court to determine & recover the cost of remedial measure from the respondents correlated to the magnitude and capacity of enterprise in order to have it a deterrent effect.

The Indian Judiciary tried hard to make a strong effort following the Bhopal Gas Tragedy, December, 1984 (Union Carbide Company vs. Union of India) to enforce greater amount of protection to the Public. Showing complete disagreement with the government and Supreme Court has observed that “It is indeed a matter for national introspection that public response to this great tragedy which affected a large number of poor and helpless persons limited itself to the expression of understandable anger against the industrial enterprise but did not channel itself in any effort to put together a public supported relief fund so that the victims were not left in distress, till the final decision in the litigation.”

The Doctrine of Absolute Liability as evolved by Supreme Court can be said to be a strong legal tool against rogue corporations that were long negligent towards public health and safety.

**Principle of intergenerational equity and judicial activism**

The principle of intergenerational equity is another important component and deemed to be central ethical principle behind sustainable development. The commonly accepted definition of sustainable development as propounded by Brundtland Commission, which itself declares the notion of sustainable development defined it in equity terms as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

The report of the Brundtland Commission named as Our Common Future, was endorsed by the United Nations and its definition was adhered by all nations over the world. Since then the rhetoric of equity has been incorporated into numerous sustainable development strategies and policies. The Rio declaration in 1992 reaffirmed the centrality of equity in its Agenda 21 and the Rio Declaration. Principle 3 of the Rio

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there was a shortage in quantity of Khair trees across the state and hence permission for setting up new factories connected with the Katha production should not be granted. The Supreme Court in this case directed the State Government to conduct a survey of the availability of trees. In responding to the question of availability of resources, the Supreme Court made the following observations. “It is also violative of the National Forest Policy and the State Forest policy evolved by the Government of India and the Himachal Pradesh Government respectively - besides the fact that it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity. After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.”

In another important case of Enviro-Le- gal Action v Union of India also known as CRZ Notification Case, whereby the supreme court unanimously resolved that “A law is usually enacted because the Legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that the Parliament enacted the Anti-Pollution Laws, namely, the Water Act, Air Act and the Environment (Protection) Act, 1986.” This case was decided in 1996 and it further shows that Supreme Court has considered the principles of intergenerational equity by cautioning the government to preserve and protect the environment for future generation. It was a case concerning with Regulation Zones subjected to certain prohibitions. However exten-

22. 1996 3 SCC 212 (the Bichhri pollution case).
sive guidelines with respect to different areas, their classifications and the restrictions placed on development in these areas were laid down in the Notification. Over the couple of months, no state Government seems to be taking any action what so ever. No plans were formulated and even the Notification of 1991 was not enforced. In 1994, another Notification was sought to be passed, purportedly on the recommendations of the Vohra Committee Report relaxing the guide lines of 1991 and rendering the Notification of 1991 ineffectual. This action was challenged by a Writ Petition under Article 32 of the Constitution.  

The Supreme Court, in the case of A.P. Pollution Control Board v. M.V. Nayudu and Ors., it was held that: "The principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations. Principle 1 - Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations. Principle 2 - The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural systems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

**Doctrine of Public trust**

The doctrine of public trust is another important principle which has evolved over the couple of years and emerged as one of the cardinal principles whereby the judiciary to corroborate the legitimacy of governmental action that interferes with the use of natural resources by general public.

The incorporation of public trust doctrine into our legal system has resulted in the imposition of a prerequisite check upon governmental agency who consistently sought to divest the State control over state owned natural resources in favour of private parties. Though the origination of this doctrine can be traced to the Roman emperor, Justinian and it is of substantial vintage in the USA, its application in the Indian legal framework is a modern development.

The United Nations Conference on Human Environment (commonly known as Stockholm Declaration) clearly indicates and declares as: "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural systems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate..."

So far the application of this doctrine in India is concerned, it started in last two decades whereby the states has been conferred upon a duty to hold environment and public natural resources in-

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trust for the benefit of the common public. At its widest, it could be used by the courts as a tool to protect the environment from many kinds of degradation.

The doctrine seems to be the integral part of Article 21 of the Constitution (i.e. Right to Life) which widely acclaim the protection and preservation of nature’s gift and provide it to the citizen is basic and primary duty of every state.

The Indian Courts have exercised their jurisdiction by considering this Doctrine not only as an international law concept, but also, which is well established and recognized in our national legal system. Subscribing this public trust doctrine as a part of common law, the Indian courts have applied this explicitly in following recent cases.

In the case of M.C Mehta v. Kamal Nath24 where hon’ble Justice Kuldip Singh relied extensively on the doctrine of public trust while delivering this judgment. The case was concerning with certain forest land which was given on lease to the Motel by the state government situated at the bank of River Beas. The area which was ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains. The Supreme Court has observed that “our legal system is based on the English common law which in turn includes the doctrine of public trust intrinsic to its jurisprudence. The State is the trustee of all natural resources which are by nature meant for the use and enjoyment of the general public. Public at large is the beneficiary of the sea-shore, running waters, airs forests and ecologically fragile lands they have the right to access and enjoyment of such resources. The state is the trustee to such public resources and consequently it is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership”.

The court ordered and directed to the parties in this case that the public trust doctrine is a part of the law of the land and that the prior approval granted to the government to lease the forest land for the creation of the motel is quashed and that the government of Himachal Pradesh shall take over the areas and restore it to its original natural conditions. The Kamalnath case is not only restricted to ordering removal of hindrance to the environment but it went one step ahead and emphasized that violators should be made to restore it to the original position.

In another important case on the same point, The Supreme Court applied the public trust doctrine and held that that the whole structure to be dismantled and the park to be restored into original condition leaving a portion for construction for parking. In this case, full freedom was given to the builder to lease out the shops as per its own terms and conditions to persons of its choice on behalf of the Mahapalika under the agreement. The builder was also allotted the right to verify the agreement on behalf of the Mahapalika and was only required to a copy to the Mahapalika after its execution. And such terms were applicable to both the builder and the Mahapalika and hence, both were

bound by the terms of that agreement.\textsuperscript{25}

Chronologically, the another important case on this subject was \textit{Thakur Majra Singh v Indian Oil Corporation} \textsuperscript{26}, whereby the location of a plant for filling cylinders with liquefied petroleum gas was objected by the petitioner. It was directed by the Supreme Court that the High Court can only examine whether authorities have taken all precautions with a view to see that laws dealing with environment and pollution have been given due care and attention. However, the case was decided after taking the precautionary principle into consideration, but it was confirmed that the public trust doctrine has now become part of the Indian legal thought processes. In the High Court’s opinion, the doctrines was considered as part and parcel of Article 21 (i.e. Right to Life) of the Constitution and that undisputedly it can be admitted that the State is under an obligation to see that forests, lakes and wildlife and environment are remain protected and preserved. According to the Court, the idea that the public has a right to expect certain lands and natural areas to retain their natural characteristics is finding its way from the law of the land.

In other words, we can safely say this right to life under article 21 has been extended by judiciary to include the right to a healthy environment and the right to livelihood. The application of public trust doctrine to protect and preserve the public land is very important aspect of right to life. From the above discussions on the doctrine and various case laws, it is evident that the state is not the owner of the natural resources but it works as a trustee who holds fiduciary relationship with the public for which it holds. By accepting this role as a trustee, the government is expected to be trustworthy and accountable in favour of its citizens and to discharge its duty with the interest of the citizens. This Doctrine may provide the means for strengthening the effectiveness of Environmental and Social Impact Assessment (ESIA) laws. Thus, under this doctrine, the state has a duty as a trustee under Article 48A of the Directive Principles of State Policy in order to protect and improve the environment and safeguard the forests and wildlife of the country. The state’s trusteeship duties have been further expanded to include a right to a healthy environment in various judgments under Article 21 of the constitution of India.

**Recent activism of National Green Tribunal**

The National Green Tribunal (NGT) has been established under National Green Tribunal Act, 2010 with an objective of providing protection to environment and conservation of forests and other natural resources along with enforcement of legal rights for environment and giving relief and compensation for damages to persons and property.

NGT since its beginning have taken numerous steps in order to curb the menace of pollution and other connected activities which are adversely impacting the quality of environment. Some of the recent steps by the tribunal include order of putting a ban on diesel vehicles older than 10 years in the national capital region.

\textsuperscript{25} M.I. Buildpvt. Ltd. v. Radhey Shyam Sahu, AIR 1999 SC 2468.
along with ban on burning of solid waste. These bold steps have been taken with a view to reduce the rising pollution levels which are evident from the list of top most polluted cities where the national capital stands on the top. Other examples includes cancellation of coal block clearance in Hasdee-Arand forests overriding central government’s decision, Sterlite case and Meghalaya rat hole mining.

On December 11, 2015 the NGT had imposed a complete ban on use of plastic of any kind from Gomukh to Haridwar along Ganga with effect from February 1 while slapping a penalty of Rs 5,000 per day on erring hotels, dharamshalas and ashrams spewing waste into the river. Recently, it has set up a panel in a meeting that took place on May 20, 2016 whereby it was attended by Uttar Pradesh Chief Secretary, other secretaries concerned, Managing Director of Uttar Pradesh Jal Nigam, CEO of Uttar Pradesh Jal Sansthan and other senior most officers of public authorities directly or indirectly concerned with the Ganga cleaning, where the green panel constituted by green Tribunal has divided the work of cleaning the river into different segments - Gomukh to Haridwar, Haridwar to Kanpur, Kanpur to border of Uttar Pradesh, border of Uttar Pradesh to border of Jharkhand and border of Jharkhand to Bay of Bengal.

Delhi government is ready to implement NGT order but it has its limitation. To implement NGT order, amendments are required in motor vehicle act enabling them to implement order legally. Delhi government has only 150 staff to implement this order which is very less since Delhi shares its border with Uttar Pradesh, Haryana and Rajasthan.

Role of NGO and environmental protection

The NGO among others had also played an important role in imparting environmental justice by seeking judicial interventions through the tools of public interest litigation. There are several initiatives in Public Interest Litigation (PIL) which shows the active role of NGO, media and other communities. Some of these include the cases against deforestation filled with the name of T. N GodavarmanThirumulpad vs. Union of India, a case that has since then produced some other orders concerning to forests in India; against the construction of the Tehri Dam commonly known as TehriBandhvirodhiSangharshSamiti vs. State of Uttar Pradesh and Narmada Dams also known as Narmada BachaoAndolan vs. Union of India; against mining in the Aravallis, the case was filled with the title of Tarun Bharat Sangh, Alwar vs. Union of India; against mining in the Dehradun hills, known as Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh; against mining in adivasi lands of Andhra Pradesh, the PIL was filled with the name of Samatha vs. State of Andhra Pradesh, 1997, a judgment with important consequences for acquisition or use of adivasi lands elsewhere too); on implementation of the Wild Life (Protection) Act 1972, WWF vs. Union of India; 26.

27. 2000 SC 1636.
29. AIR 1999 SC 3345).
31. AIR 1985 SC 652.
on putting into practice of Coastal Regulation Zone measures (Indian Council for Enviro-Legal Action vs. Union of India, on protection of the coastal area against destructive practices Sergio Carvalho vs. The State of Goa; on the right of citizens to inspect official records (this was before the Right to Information Act came into force) and Goa Foundation vs. North Goa Planning and Development Authority; against forest logging and other environmental aspects of Andaman and Nicobar Islands. The judgments in other cases have set important precedents and directions for the further development of policy, law and practice.

Recent controversy of judiciary and legislature

The laws dealing with environment may at some times create conflicts among judiciary and legislature in terms of usurping their jurisdiction. Referring to the Supreme Court ruling in the landmark drought case whereby the Court ordered the Centre to create a new policy on handling drought, and set up a new disaster relief fund. The court further observed that “Can we afford to ignore the plight of such a large population?” the Supreme Court asked the government. It accused the Centre of taking refuge in the concept of “federalism” to pass the buck to the States for declaring and managing drought and providing only financial aid. “The ostensible purpose of introducing this concept [of federalism] is to enable the Union of India to wash its hands of in matters concerning drought declaration and to give enough elbow room to a State Government to decide whether to declare a drought or not,” a Bench led by Justice Madan B. Lokur observed in the verdict. Mr. Arun Jaitley reverted to the Supreme Court and said, “Step by step, brick by brick, the edifice of India’s legislature is being destroyed. The Constitution gave the legislature, the executive and the judiciary primacy in their own domains, but the courts have been stomping all over legislative and executive territory, making laws rather than just interpreting them. And these interventions are not one-offs, occasional transgressions that may be necessitated by circumstances. It seems ‘The Brethren’ want to see themselves in the headlines almost daily, as if to prove they are the only worthies capable of running the country.” The said remark of Mr. Arun Jaitley has been welcomed by opposition and treasury benches by thumping on their desks in support.

The BJP spoke person Manish Tewari further remarked upon judiciary as “When the executive tried to wrest power through the NJAC, its striking down by the Supreme Court hardly created a ripple... while politicians wanted a say in judicial appointments, people didn’t.”

CONCLUSION

While there are numerous environment

32. AIR 1996(3) 579.
33. 1989 (1) GLT 276.
34. 1995(1) GLT 181.
35. The case came up before the apex court by way of a public interest litigation filed by non-profit Swaraj Abhiyan, which had asked the court to intervene in the prevailing drought situation in the country and direct governments to implement employment and food security schemes. This PIL was decided on 11th May 2016 by hon’ble justices Madan B. Lokur and N.V. Ramana.
protection laws of the country, the role of judiciary in interpreting these laws for protecting the environment is considerably admirable and applaud-able. During the last two decades, problems and cases that judiciary of this country has encountered is complex and complicated in terms of its nexus with the power lobbying and the political class. In such a scenario, conflict was bound to happen if stern and straightforward way to justice for the environment is subscribed by the judiciary. But the question remains whether the judiciary of this country is only well-wisher and protector of environment? Or the judiciary has showcased its power by encroaching the jurisdiction of legislature in the name of environment. It is the high time when the mutual conflicts are avoided and a balanced approach is adopted to protect our planet. At the end, the author concludes that the judiciary has applied principles of broad interpretation in order to interpret the black letter of the law and make the law more philanthropic and socially-relevant. This cannot be said to be "overarching" the jurisdiction of the Courts as some commentators seemingly argue, since the Courts have applied different methods of interpretation as per the needs of the society.
UNIFORM CIVIL CODE: Threat To Conservation or Way To Progression

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ABSTRACT

India is a country known for its cultural diversities. Different religious, ethical and linguistic groups are found here with their different cultural and traditional practices. They are also entitled to preserve their practices through the law of the land. The preamble of the constitution promises to secure the liberty of belief, faith, and worship to its citizens. On the other hand, the preamble also declares India as a secular state and provides directive provisions for establishing a uniform civil code to accommodate ritual diversities. This contradiction leads to a serious discussion that whether a uniform civil code is a genuine need of time to place India in the queue of so-called progressive societies or it is merely an illusory form of development that can become a threat for cultural diversities for which India is known across the world.

The present paper is intended to examine the extent of constitutional liberties regarding personal practices and implication of uniform civil code on the society at large.

Key Words: Cultural Diversities, Constitutional Liberties, Uniform Civil Code.
is the effect of implementation of the uniform civil code in the country. There is also conflict over the constitutional status of the uniform civil code as it is alleged to be the violation of fundamental right of freedom of religion.²

The issue also raises debate over the prevalence of secular laws over religion based personal laws, and in the end of all whether it is really a way of progression or merely a political agenda.

The debate over the uniform civil code is of no value until we don’t identify it, understand it and examine its implications in the context of the multicultural society of India. In the absence of a concept as to what the uniform civil code will be it is impossible to debate the issue.

**Uniform Civil Code: An Understanding of the issue.**

The Indian legal system provides uniform laws relating to crime and punishment for all its citizens. Likewise, laws relating to trade and commerce are also same for every citizen. But in the case of civil law, to some extent law is not uniform for every citizen.

This branch of civil law is known as **personal law or family law**. The personal law regulates family matters like marriage, divorce, inheritance, adoption, succession and guardianship.

The application of personal law varies from person to person with respect to their religion, cast, and beliefs. It varies because personal laws have genesis from religious texts and literature. It varies according to the religion of the person concerned. It also varies according to inter-religious practices.

There are mainly two religious communities are found in India, namely **Hindus** and **Muslims**. Apart from these two, there are also people have faith in Christianity, Zoroastrianism, and Judaism. Amongst Hindus, people are classified by their different beliefs such as Buddhism Jainism and Sikhism. Likewise, Muslims are also divided by their different practices.

These different class of people has their own cultural and traditional practices regarding marriage, divorce, adoption, inheritance and other familiar matters. Their religion and inter-religious beliefs are the basis of these practices.

Because these practices are not fully regulated by any legislature. The diversity of these practices creates a chaos when an issue arises before Indian courts to determine its legality. In answer to this chaos, the Indian courts have urged for implementation of a code that can provide uniformity to practices relating to family matters for all citizens irrespective of their religion, cast and beliefs.

Thus, a uniform civil code generally refers to the part of civil law that is concerned with family affairs of an individual and seeks to enact uniform personal laws for all citizens irrespective of their caste, religion, tribe and beliefs. The objective of uniform civil code is based on the concept that there should be no connection between religion and personal law in a civilized society based on the principle of secularism.

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The Constitution of India also urges for Uniform civil code. It directs the state to ‘endeavor to secure for its citizens a uniform civil code throughout the territory of India’. 3

Secularism and Freedom of Religion

The preamble of India declares it a secular state as well as it also guarantees freedom of religion.

Uniformity in personal laws may be necessary for maintaining the secular character of state but in the context of India, the term secularism has a different connotation from its general usage.

Unlike the west, in India secularism was never born out of the conflict between the church and state it was perhaps rooted in India’s own past history and culture, a very likely response to her pluralism or the desire of the founding fathers to be just and fairs to all communities irrespective of their numbers. Very often, in our common parlance, the term secularism, therefore, is used merely as an opposite of communalism. 4

On contrary, to it, religion is in the essence of societal life in India.

The term religion is defined nowhere in the constitution. The Supreme Court in Common. HRE v. L.T. Swami 5 defined religion as:

"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well-known religions in India like Buddhism and Jainism which do not believe in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms of observations might extend even to matters of food and dress”. 6

Freedom of religion means ‘freedom to profess, practice, and propagate one’s religion.’ Rituals, ceremonies, and modes of worship are considered to be a part of religion. What constitutes an integral and essential part of religion or a religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices regarded by the community as part of its religion. 8

Freedom of Religion also includes freedom to manage religious affairs. 9

The right to freedom of religion under the Constitution of India is fundamental in nature and can be enforced by the court in the case of its violation. But this right is subjected to public order, morality and health and other fundamental rights. 10 The state also is empowered to regulate or restrict any secu-
The debate over uniform civil code was on the issue of the making of the constitution. The chief conflicts were as to its position in the constitution and its status as compared with that of fundamental rights contained in part third of the constitution.

The Article 44 is contained in the fourth part of the constitution. The decision to place it in the Directive Principles of State Policy, Article 35 in the draft and Article 44 of the final Constitution was based on the assurance given by Nehru and Gandhi to the ulema that the enactment of a Uniform Civil Code would be postponed although it would remain an aspiration of the state.

However, there were many who believed its position in the part fourth to be against social reform. Ambedkar was also firm in the view that it was permissible for the state to intervene in the religious domain by formulating laws especially when this intervention promoted the cause of social justice. For him, it was a clear modernist project of aspiring for equal citizenship. As Chairman of the Drafting Committee, he was unwilling to countenance any undermining of this power of the state to intervene in matters of societal injustice.

By adopting uniform civil code as a directive to state, founding fathers was clear to their intention that while seeking to protect the fundamental rights of people, they wanted the Constitution to become an effective instrument of social revolution.

Uniform civil code was not merely a directive but a positive mandate, the courts but required to be implemented by the legislature on the time when society is ready to accept the changes.

The position of Article 44 does not derogate the constitutional status of the uniform Civil Code as the Directive Principles are Fundamental in the governance of the country and it shall be the duty of the state to apply this principle in making law.

11. Art 25 (2), The Constitution of India, 1950
12. Kashyap, Supra note 5 at 67
15. Id., at 52
There is a no of cases in which the Supreme Court has tried to explain the intention of founding fathers behind the incorporation of Uniform civil code in the Constitution of India.

On the question that whether Uniform Civil Code would infringe the fundamental right of freedom to religion mentioned in Article 25, the apex court opined that the directive contained in the Article 44 is no way infringe the freedom of religion guaranteed by Article 25. Clause (2) of the article specifically saves secular activities associated with religious practices from the guarantee of religious freedom contained in clause (1) of the Article 25. 17

The freedom of religion and secularism does not overlap so as to the application of the uniform civil code. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law.

In Sarla Mudgal v. The Union of India the Supreme Court of India explained that Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal laws of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists, and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a “common civil Code” for the whole of India.18

CONCLUSION

On the basis of above-mentioned analysis, it can be concluded that on the basis of constitutional provisions, the Uniform Civil Code contained in Article 44 of the Indian Constitution is not merely a directive as intended by founding fathers, so it needs to be implemented according to the demand of time with the consensus of society at large.

But on the basis of the present structure of society and the social scenario, it’s highly impractical to implement any code that provides secular status to personal laws. In India, people are highly sentimental to their religion and religious practices.

In fact, there is no genuine need to adopt any uniform civil code. The legislature is already in capability to make secular laws for religion-based issues. Over the period the legislature has attempted to codify personal laws of each religious group. Such as;

- The Indian Christian Marriage Act of 1872 (applicable to whole of India except areas of erstwhile Travancore-Cochin, Manipur and Jammu & Kashmir).
- Anand Marriage Act, 1909 (For Sikh marriages).
- Cochin Christian Civil Marriage Act of 1920 (applicable for Travancore-Cochin areas).
- Muslim Personal Law (Shariat) Application Act, 1937 (making Shariat

17. John Vallammatton v. Union of India,(2003) 6SCC 611 (Supreme Court of India)
laws applicable to Indian Muslims),
- The Parsi Marriage and Divorce Act, 1937
- Hindu Marriage Act, 1955 (applicable to not merely Hindus, Buddhists, and Jains but also to any person who is not a Muslim, Christian, Parsi or Jew, and who is not governed by any other law).

Other than this there is also secular law available for those who don’t want to follow any personal law. The Special Marriage Act, 1954, The Indian Succession Act 1925 and provisions relating to maintenance under section 125 Corps are the example of laws that are available for every person irrespective of their religion and personal beliefs.

On the question that personal laws contain social defects it must be taken into account that for the issues like 4 wives and triple talaq (Recently the Supreme Court reserved its verdict on a batch of petitions challenging the constitutional validity of triple talaq)\(^\text{19}\), reform of personal laws would be a better solution than uniform civil code as the efficacy of any law lies in its implementation and not in its enactment. For instance, there are laws for the prohibition of child marriage and dowry but the practice is still continued to exist.

In answer to the most debatable conflict between progressives and conservatives, it can be argued that a complete deviation from conservation of culture and religious customs can result in a huge loss of heritage. Those who advocates unification of personal laws on the basis of western ideology, they have the opportunity to be governed by secular laws.

It is also argued by the advocates of uniform civil code that personal laws contain discriminatory provisions as to women rights. It must be noted that the Constitution itself has provided women, equal status and equal opportunity and the Uniform civil code is no answer to the existing inequality to the women.

In such a case, before adopting Uniform civil code or any common civil code for unifying personal laws, a complete research should be made by the concern authorities as to what practices are count as religious and what can be count as purely secular. In addition to this, there is also need to have a complete understanding of issues like secularism, freedom of religion and what amount uniformity of personal laws.

India that is Bharat embodies the age-old concept of Sarv-Dharm-Sambhav. The cultural and religious diversity of India is a part of its identity across the world. Conservation of this diversity is the prior most aim of the society. One cannot suppose to relinquish it on the name of development and progress. However, the evils present in any personal law must be removed and the legislature cannot be interfered in doing so. There can be reforms of personal laws and enactment of secular laws on every family issue so that it can be a voluntary choice for every individual that how he wants to be governed. But a uniform civil code without the consensus of society would

\(^\text{19}\) 18 May 2017 SCC online
amount to tyranny. National unity is an essential element for the application of any uniform civil code that does not seem to be existing in present time. Thus, accommodation of personal laws should be delayed for foreseeable future unless the consensus of the majority does not emerge.
CHALLENGES, CONSTRAINTS AND WAY FORWARD IN THE WORKING OF FAMILY COURTS IN INDIA

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ABSTRACT

The dynamic step to establish “The Family Courts” is to assist the speedy, smooth and effective disposal of cases relating to family matters. The Family Courts Act 1984 was introduced as a legal reform to facilitate satisfactory resolution of family disputes and ensuring maximum welfare and bonding of society and social relationships while maintaining the dignity of individual. A non adversarial approach should be adopted by a Family Court Judges. Law Commission in its 59th report has emphasized that family court judges have to adopt a radical approach rather than following existing civil proceedings. In reference to this different High Courts have laid down different rules of procedure for the speedy and amicable settlement of family disputes. In the first instance it is the duty of the family court judge to make every endeavor to bring about a reconciliation between the parties.1 A duty is cast on the family court to make endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject- matter of the suit or proceedings and if there is a reasonable possibility of settlement between the parties, proceedings have to be adjourned for a reasonable period to enable the parties to effect such settlement.2

Key Words: Family Court, Proper Counselling, Custody of Child, Maintenance.

INTRODUCTION

The Act3 emphasizes on settling the disputes by conciliation and mediation instead of traditional formal legal system and regular process of adjudication. Family Courts are equipped with learned judges, counselors, mediators and psychologists, who play important role in deciding family matters with mutual settlement.4 When the dispute is taken up by the Family Court, in the first hearing, it must be referred to mediation centers particularly cases related to custody of child, maintenance, etc. which are preeminently fit for mediation5. All mediation centers should set up pre- litigation desks/clinics and give wide publicity to make bests efforts to settle matrimonial

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2. R. Durga Prasad V. Union of India A.I.R. 1998 Andh. 29: Also see Section 9
3. The Family Court Act 1984
5. BhavanaRamaprasad v. YadunandanParthasarathy (AIR 2015 Kant 6)
disputes at pre-litigation stage. In matrimonial disputes the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. As far as possible adjournments should not be granted in a routine manner and family judge should facilitate conciliation procedure to deal with family disputes in a speedy and expeditious manner. A Judge is expected to be very sensitive in dealing with the extremely delicate family issues. The Family Court Act provides that no party to a suit or proceedings, before a family court shall be entitled as of right, to be represented by a legal practitioner. However, where the matters in issue are complicated or serious allegations have been leveled which may affect the reputation of any of the parties to the dispute, the party should be permitted to engage counsel and the rejection should not be in a mechanical manner.

Family Courts have been set up to protect social values, dignity of persons and welfare of the society but there are matters of concern which adversely affect the effective resolutions and disposal of family disputes. There are certain issues which became a matter of concern and often create hurdle in speedy and effective working of family courts. Some major challenges and the way forward for the speedy and effective disposal of family matters are as follows.

Need to be equipped with special knowledge and skills of human psychology and personality disorders

Family disputes are concerned with human relationship that includes mother/father-child relationship and welfare of a child. The duty holders, those who involved are family court judges, counselors and mediators usually do not have special training and knowledge of various behavioral and personality disorders. All these stakeholders should be given proper and exhaustive training on the subjects of human nature and psychology. Thus, Judges, counselors, mediators and psychologists are supposed to act in the best interest of family, child and society and must be educated and sensitized about human psychology. They should be equipped with the special knowledge and skills to control the desperate emotions and personality disorders. They should also be acquainted with the development of social changes alongwith new laws which determine and affect the custody or guardianship of child and relationship in the nature of marriage. Thus, more proper and exhaustive training should also be provided to the family court judges on interdisciplinary approach which includes understanding self, others, relationships, conflicts and personality disorders.

Good Coordination Between The Stakeholders of The Family Courts

- It has been seen that many times there is lack of coordination and co-operation among duty holders of the family court namely councilors, mediators and psychologists. Sometimes they challenge the authority and ability of each other

6. Supra 4
8. Bhuwan Mohan Singh Vs. Meena 2014(8) SCALE573
9. Section 13 of The Family Court Act, 1984
10. Unous Mia Vs. Shelina Aktar; MANU/TR/0317/2014 (Tripura High Court)
and their ego prevails over the welfare of family as a social institution. The family court judges should be very cautious in dealing with the sensitive matrimonial matters. Thus, good coordination between the stakeholders is very important for the smooth working of the family courts.

Proper selection/recruitment and permanent appointment of counsellors:

It is also an important factor that selection of counselors, mediators and psychologists is not aimed at welfare of parties but to oblige some untrained and inefficient persons from the society who do not take care of their pious job and just show their formal presence. Most of the cases can be solved through proper counselling. The counsellor can also take the help of any other institution or organization if necessary for effective counselling and amicable settlement of the disputes. Non appointment of counselors for a long time is a major issue which obstruct the very purpose of counseling. In many States counsellors are appointed on a temporary basis and for specific period. Insecurity and uncertainty of the job prevent counsellors to serve dedicatedly and religiously to counsel and resolve the matrimonial disputes. In some states there are no permanent counselling centers which forfeit the basic purpose of the Family Courts to resolve the disputes through reconciliation and mediation. Proper selection/recruitment process and permanent appointment of the counsellors is the need of the hour and it will help to make the counselling and resolution of the matrimonial dispute effective. Thus, counselors should be permanently appointed and should be given training. Judges may also act as a counselor when required, may be at the second stage of the counselling.

Minimum intervention of the advocates in family disputes

Bar is another major problem in settling the family disputes amicably. The advice of the advocates to the parties many time adversely affects the congenial atmosphere to resolve the family disputes amicably. Cases which are pending in Family Courts have their many more companions like cases under section 498A (Cruelty), domestic violence cases etc. which are pending in other Courts. In these cases both parties are represented by their pleaders who keep advising their parties out of court for related cases pending in Family Court also. Interventions and directions of advocates to their parties frustrate the procedural liberty and the basic object of the family court. This indirect adversarial process brings out the worst behavior of parties with personality disorder and they become more defensive and furious also. Thus, generally there should be minimum interference of the lawyer in family courts so as to make non-adversarial approach and informal process in resolving family dispute. However, on the other hand parties who are from weaker sections or illiterate if not represented by legal experts/lawyers gets their matter defeated due to some procedural lapses/rules and complicated legal issues. Therefore, judicious discretion has to be exercised by the presiding officer in allowing and assisting the party through a lawyer.

Uniform and simple procedures to be followed by family court

The Act and Rules exclude representation by lawyers, without creating any alternative and simplified Rules. Merely stating that proceedings should be conciliatory
and not adversarial does not solve the problem. Different High Courts have laid down different rules of procedure. When parties come from different regions and get represented by their lawyers of their region, different applications under different rules lead to confusion in implementing the Family Court Act in its true spirit. There should be a uniform set of rules throughout the country to achieve the object of the Act. It is needless to say that family courts should follow simple procedures.

**Separate family Courts in every district with exclusive jurisdiction to deal with family court matters**

- Though the Act laid down broad guidelines, it was left to the State Government to frame the rules of procedure. Till date there are some States where separate family courts have not been established and judges apart from other jurisdiction also takes the charge as family court judge which makes practically impossible for them to switch instantly from adversarial approach to non-adversarial. Thus, every district should have separate family courts. Necessary infrastructure should be provided at the time of establishment of the family courts. Children’s complex etc. as exist in Mumbai should be introduced in all the family courts.

**A relook on the matters that come before the family court**

The matters concerning women and children, judicial separation, divorce, maintenance, decree for nullity of marriage, restitution of conjugal rights, dissolution of marriage, declaration of matrimonial status of any person, matrimonial property matters come within the purview of the family courts. The Act however, does not define ‘family’. Matters of serious economic consequences, which affect the family, like testamentary matters are not within the purview of the family courts. Family Court Act does not explicitly empower courts to decide issues of contempt, grant injunctions etc. like other Magistrate and Civil Courts and even do not have assistance of police/police station extra staff etc. which adversely affect the execution proceedings pending in these courts. The scope, power and ambit of the family court should be widened.

**Laws and procedure for inter-country adoptions**

Inter-country adoption and custody law and procedure is a new emerging trend in resolution of family dispute. Family court judges should be well versed with international laws on this subject in order to resolve these disputes speedily and amicably. Service of summons and other processes is a major hurdle in speedy trial of Inter-country family disputes. Service through embassy consumes lot of time and extra ordinary delay occurs in pre-trial procedure.

**CONCLUSION**

To conclude, for a speedy settlement of the matrimonial dispute the family court should adopt an informal atmosphere and should not adhere to the strict procedures of the civil courts which frustrate the basic object of the Act. It is very important that judges and other court staff must be gender sensitized. Family courts may align themselves with women’s organizations for guidance in matters related to gender issues. Family courts can also take help NGOs in the settlement of disputes. Thus, family court should adopt innovative methods to resolve the family disputes.
PASSING-OFF ACTION: A COMPARATIVE STUDY
ABOUT IT IN THE FINANCIAL AND MERCANTILE
ARENA OF TRADEMARK

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ABSTRACT

Passing-Off Action is a common law remedy, provided under the law of Torts. False representation is the basis for a passing-off action. The plaintiff in a 'passing-off' action has to show that the defendant is representing the goods of plaintiff as the goods manufactured by the defendant. The principle on which the passing-off action is depended is that, nobody has a right to represent his goods as the goods of somebody. We can say that even in respect of an unregistered trademark also, the proprietor may initiate passing-off action against those who try to pass of their goods or services as those of the proprietor of unregistered trademark. The manufacturers or the suppliers of goods have provided different identifying marks to their goods. They have started to do it to make it sure that although the goods produced by them are similar to those manufactured by others, but their distinguishing marks are different. It helps the consumers to identify the products easily. From this point of view we can say that passing-off action helps to protect the trademarks in the financial and mercantile arena of trademark. The aim of this Article is to discuss it properly. If we make a comparative study about the passing-off action between India and the other countries of the world it clearly shows us that the main objective of passing-off action is to protect and secure the reputation and goodwill of the trademarks of the manufacturers relating to their goods or services. The rights of the real trade mark holder are protected by the passing-off action throughout the world. We must remember that trademark is a kind of property and is entitled to protection under the law and the passing-off action endeavours to protect the trademarks of the traders in the financial and mercantile arena of trademark.

Key Words: Jurisdiction Of Courts Under Passing Off Action, Infringement, Trademarks, Globalization.

INTRODUCTION

In the matter of passing-off action it is said 1- "Nobody has any right to represent his goods as the goods of somebody else.” - Halsbury 2

This means that no one has right to represent one's goods as the goods of someone else. People have the misconception in mind that the remedy to stop anyone to use his/her mark is available to one who has registered the trademark but the Trade Mark law provides the same remedy in form of passing off to unregistered trademark holder also. Passing Off is a common law tort which protects the goodwill and reputation of trademark holder against damage caused by misrepresentation by defendant. It is based on a principle that "A man may not sell his own goods under the pretence that they are the goods of another man". The Supreme Court has defined passing-off action in Cadila Healthcare Ltd v. Cadila Pharmaceuticals Ltd as "the species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the reputation, which the other has established for himself in a particular trade or business". The action of passing off can be done by using the trade name, trade mark or other get up of the plaintiff as to induce in potential purchasers the belief that his goods or business were those of plaintiff. The tort lies in misrepresentation by the defendant. The misrepresentation is aimed at the potential buyers of the goods or services, who are invited to buy the goods believing that the goods are of the plaintiff. This might be done through confusing or deceitful use of the trade names, marks or other indications used by the plaintiff in respect of such goods or services.

**Essentials that constitute Passing off Action**

The law of passing off arises when there is misrepresentation, goodwill is harmed in the course of trade, which causes damage to the trade or goodwill of the trader by whom the action is brought. The characteristics of passing–off are discussed and explained in number of cases. Lord Diplock in Erven Warnik B.V. v. Townend defined passing-off action in Harrods v. Harrodian School as:

1. Misrepresentation;
2. Made by person in course of trade;
3. To prospective consumers of his or ultimate consumers of goods or services supplied by him;
4. Which was calculated to injure business or goodwill of another trade (in the sense that this is reasonably foreseeable consequence); and
5. Which caused actual damage to a business or goodwill of a trader by whom the action was brought.

There are three main elements of the tort of passing off which were also referred as "classical trinity" in Harrods v. Harrodian School is: 1. Reputation; 2. Deception; and 3. Damage.

In India Passing off action was prevalent even before the enactment of the Trade Marks Act, 1940. It was the way to assert the trade marks...
right. To institute a suit one should establish the title on the trade mark. Secondly, the one must show that the mark has obtained a reputation and goodwill. Thirdly, it was to be shown that the defendant has used a mark similar to the mark of complaining plaintiff and has thereby actually passed off his goods or has been seeking to pass off his goods as those of the complainant. The modern law of passing off and its development as part of Common law may be understood as follows. It originated as an action in tort, to redress the wrongful conduct of the defendant in passing–off his goods as the goods of the plaintiff, by using the trade name or trade mark of the plaintiff so as to induce in potential purchasers the belief that his goods or business were those of the plaintiff. The tort was in the misrepresentation by the defendant to the potential buyers of his goods that the goods were of the plaintiff. Defendant achieved this result by deception and deceitful use of the trade names, marks or other indications of the plaintiff. The Trade Marks Act, 1958 and Trade Marks Act of 1999 provides for passing off. Section 27 preserves the rights and remedies of the prior user. It states as even if the application for the registration of trade mark has been filed by the subsequent user and the same got the registration, even then the prior user can file for passing off action under Section 27(2).

In Koninkhijke Philips Electronics v. Kanta Arora, Justice Thakur laid down proposition as "Section 27(2) makes it abundantly clear that registration of a mark in the trade mark Registry is irrelevant in an action of passing off and the mere presence of the mark in the Register does not prove its user by the person in whose name the same has been registered."

In N.R. Dongre v. Whirlpool, the question was whether an action for passing off could be maintained against the registered proprietor of a Trade Mark. Reliance was placed on Sec. 28(1) of the 1958 Act to argue that the registration of the trade mark gave to the registered proprietor an absolute right to use the trade mark in relation to goods in respect of which the trade mark was registered and to prevent infringement in the manner provided in the Act. The court repelled the contention and held that “The rights of action under Section 27 (2) are not affected by Section 28 (3) and Section 30 (1) (d) of the 1958 Act. Therefore, registration of a trademark would be irrelevant in an action of passing off. Registration of a trademark in fact does not confer any new right on the pro-

15. AIR 1995 Del 300.
The above concept of passing off was also explained in the case of Honda Motors Co. Ltd V Charanjit Singh & Others, wherein Plaintiff was using trade mark “HONDA” in respect of automobiles and power equipments. Defendants started using the mark “HONDA” for its pressure cookers. Plaintiff bought an action against the defendants for passing of the business of the plaintiff. It was thus held that the use of the mark “Honda” by the defendants couldn’t be said to be an honest adoption. Its usage by the defendant is likely to cause confusion in the minds of the public and the injunction was granted for the same.

In the case of Rupa & Co. Ltd v. Dawn Mills Co. Ltd., the Gujarat High Court found that the plaintiff’s well-known trade name/mark to describe the underwears produced by them was “Dawn”. While dealing with the similar goods, the defendants have registered their trade mark as “Don”. In this case the defendants’ action was found to be an act of passing-off.

**Difference between Law of Passing off and Infringement**

The registered trade mark holders have a remedy to get injunction and damages caused by the defendant by using deceptive similar or identical trade mark to deceit or cause confusion amongst consumers. But the remedy of infringement is not provided to the unregistered trade mark holders. The difference between infringement and passing has been identified by the Supreme Court of India in the case of Durga Dutt v. Navratna Pharmaceuticals Laboratories, as while an action for passing off is a common law remedy being in substance an action for deceit, i.e. a passing off by a person of his own goods as the goods of another, it is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of his exclusive rights to the use of the trade mark in relation to those goods. The use by the defendant of the trade mark of the plaintiff is not an essential in an action for passing off, but is the sine qua non (absolute necessary) in the case of infringement. In the case of infringement the use by the plaintiff is not necessary but in the case of passing off the plaintiff has to show usage which lead to grow its reputation and goodwill.

**Jurisdiction of courts under Passing off Action**

Section 134(2) of the Trade Marks Act, 1999 states that “for the purpose of clauses (a) and (b) of sub-section (1), a” Dis-
trict Court having jurisdiction” shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.” It means that the suit for passing off can be filed where the proprietor(s) or the owner(s) lives or carries the business. In the case of Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited, the Defendant was carrying his business from Bombay and had managed to get a registration of domain name www.casioindia.com and Defendant no. 2 was the Registrar of the trade mark. The Plaintiff, on the other hand, was 100% subsidiary of Casio Computer Ltd., Japan (Casio Japan) which was the registered owner of the trade mark Casio in India used for a large number of electronic and other products. They had also obtained the registration of large number of domain names in India like CasioIndiaCompany.com, CasioIndia.org, CasioIndia.net as well as Casio India.info, CasioIndiaBiz and CasioIndia Co. Defendant no. 1 got the registration of the above mentioned domain names during the time when he was in distributorship agreement with the Plaintiff. It was held by the learned single Judge after referring to the decisions in Rediff Communication Ltd. V. Cyber Booth, that “once access to the impugned domain name website could be had from anywhere else, the residence of the Defendant”. According to the learned single Judge since a mere likelihood of deception, whereby an average person is likely to be deceived or confused was sufficient to entertain an action for passing off, it was not at all required to be proved that “any actual deception took place at Delhi. Accordingly, the fact that the website of Defendant no. 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this Court”.

In the case of (India TV) Independent News Service Pvt. Limited v. India Broadcast Live Llc And Ors., the Court laid down a test in order to determine jurisdiction i.e. “Sliding Scale test” by which the plaintiff has to prove that the damage due to use of identical and deceptively similar trade mark is caused in the same State Forum where the case has been instituted.

**Remedies under Passing off Action**

Section 135(1) lists the reliefs, which may be granted to the plaintiff who established his case by the court in case of infringement and passing off, are: 1. An injunction restraining further use of trade mark; 2. Damages or an account of profits. However, in the case of innocent infringement or passing off, if the conditions laid down in Section 135(3) are satisfied, the court will not grant relief by way of damages other than the nominal damages, or an account of profits; but 3. An order for delivery-up of the infringing labels and the marks for destruction or erasure.

21. 2003 (27) PTC 265 (Del)
22. AIR 2000 Bom 27.
23. 2007 (35) PTC 177 (Del).
24. Section 135 read with Section 134 of TMA, 1999; Section 106 read with Section 105 of TMMA, 1958.
Injunction: - The grant of injunction is a right expressly provided by the TMA, 1999. The rules governing the grant of injunctions in trade mark cases are based on the provisions contained in Section 36 to 42 of the Specific Relief Act, 1963 and Order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure. 25

In Aristo Pharmaceuticals v. Wockhardt, 26 the plaintiff-respondent had filed suit and was granted injunction against SPASMOFLEXON when it was manufacturing under the registered trade mark SPASO PROXYVON. On appeal the single judge vacated the injunction, but division bench restored the injunction. In SLP filed in Supreme Court said that it was necessary for the court to allow the parties to lead evidence before grant of injunction by the division bench.

In Wander Ltd. v. Antox India, 27 the Supreme Court said that an interlocutory remedy is intended to preserve status quo and if such an order is not granted the plaintiff could not be adequately compensated in terms of damages recoverable in the action, if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated.

Damages: - The grant of damages is an award for compensatory damages to the plaintiff with an aim to compensate him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded for indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of other with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feel concerned about those also who are not party to the dispute but suffers breach. In the case it is not the plaintiff alone who has suffered the infringement but also the readers of the magazine under the impression that it is being published from the same publishing house. 28

United Kingdom: The provisions of passing off

Passing off – relevant legal considerations

Its underlying principles are now well established, having been formulated in the famous case of Reckitt & Colman (which related to the sale of lemon juice in plastic packaging highly similar to the Jif lemon):

- The claimant must enjoy goodwill in the sign in question;
- The defendant must have made a misrepresentation that is likely to deceive

27. 1991 PTC 1 (SC).
the public into believing that the goods or services it is offering are those of the claimant; and
• The misrepresentation must damage, or be likely to cause damage to, the claimant’s goodwill.

The term ‘goodwill’ is often used interchangeably with ‘reputation’; although both are generated by the same commercial activity, there is a distinction. Whereas ‘goodwill’ is typically defined as the “attractive force that brings in custom” (IRC v Muller & Co’s Margarine [1901] AC 217) and embodies the commercial connection generated between consumers and goods or services present within the jurisdiction itself, reputation in a mark can subsist even where the goods are not in circulation.

**Provisions of Passing off in the United States**

The tort of passing off has been discussed before, yet the tort primarily exists in that form in some common law countries, such as the United Kingdom and Australia, but takes a different form in the US. The term more commonly used in America is not ‘passing off’, but ‘misappropriation’. Misappropriation falls under the tort of unfair competition in the US, made even more complex through the existence of varying laws in all US States pertaining to unfair competition. The common law origins of misappropriation stem from a decision which is made in the early 20th century.

The milestone case concerning misappropriation was **International News Service v Associated Press**, decided in 1918 by the US Supreme Court. Both parties in the case dealt with the distribution of news in the US, both of which exist even today as independent news agencies or having merged with others. The Associated Press at the time of the case was a representative organization of 950 newspapers all over the US. News items were shared between its members through a bulletin boards, some of which were taken by the International News Service (in addition to news from early editions of newspapers), rewritten and published in different parts of the US for sale, fully utilizing the time differences in the vast country. The Associated Press did not take to this kindly and took the International News Services to court, finally reaching the US Supreme Court. The Supreme Court had to look at whether International News Services infringed the Associated Press’ property rights in their literary work, and whether this amount to unfair competitive practices in business. The Court shortly touched on the existence of copyright in news, and saw no breach of it in International News Services’ practices; however what was paramount to the Supreme Court was whether this would be unfair competition. The Court admitted there was no breach of confidence, although it was speculated that some of the news published by International News Services was obtained through paying some of Associated Press’ employees to obtain early copies of news articles.

The Court’s focus turned to the effort and expenditure used by the Associated Press to acquire their news, stated by Justice Pitney: "Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of

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money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it”. News as a copyrighted work has very little value, but its main value is in its initial delivery and punctuality; one which was clearly abused by International News Services by obtaining and publishing the Associated Press’ news. Due to this expenditure and labour which has been placed into the collection of the current news, and without International News Services actually contributing to it and still using it, they are “...endeavouring to reap where it has not sown”, which amounts to “...an unauthorized interference with the normal operation of [Associated Press’] legitimate business precisely at the point where the profit is to be reaped”. To further his point, Justice Pitney saw that this was underpinned by the equitable consideration of consideration, or in other words: “...he who has fairly paid the price should have the beneficial use of the property”. Clearly the Associated Press should be able to enjoy the fruits of their labor, whereas if International News Services were allowed to swoop in and utilize that work and benefit, it would undermine the Associated Press’ equitable interest; making International News Services’ actions unfair competition.

In Germany, as in many other European jurisdictions, claimants may not only rely on registered design rights in order to attack pirated or otherwise copied products German courts have established a wide body of case law shaping the unfair competition claim of passing off, which has proved to be a remarkably important ‘last resort’ for companies who—for one reason or another—do not possess the necessary design rights in order to fend off competitors. In principle, the manufacturer of a product may have a claim for passing off if his product is sufficiently ‘original’ in the sense that it possesses distinctive characteristics that set it apart from competitors’ products in the same area; and if there are special circumstances that justify the verdict that the distribution of the attacked product constitutes unfair competition. The second pre-requisite can be established if the design of the attacked product is so close to the original that there is the imminent risk that the consumer will be unavoidably deceived about its origin.

**French court protects a TV programme format using passing off laws: Saranga Production v Canal Plus**

We look at a French decision which shows how a programme format can be protected by using the laws of passing off. The Paris High Court has given protection for a television programme format under the law of passing off. In this case the court held that the broadcast of the defendants’ programme had caused the claimants loss in that it had deprived them of the opportunity of marketing their format to another broadcaster. The defendants were ordered to pay damages of 150,000 Euros and other relief was granted.

**CONCLUSION**

The general principle of law of passing-off is that no person is entitled to repre-
sent his goods as being the goods of another person and no person is permitted to use any sign, symbol, mark, device or any other means, by which a direct false representation is made to a purchaser who purchases from him. The purpose of passing-off action is to protect commercial good-will and to ensure that a trader’s business reputation is not exploited. Business good will is an asset and therefore it is a species of property, the passing-off action tries to protect it from an encroachment by the other dishonest traders. The passing-off action helps in the development of economic policy and it helps in maintaining commercial stability. It is therefore can be said that the passing-off action helps to protect the reputation of the plaintiff’s business in the open field of mercantile market in the era of globalization. After making a comparative study about the passing-off action between India and the other countries of the world it is seen that the main objective of passing-off action is to protect and secure the reputation and goodwill of the trademarks of the manufacturers relating to their goods or services throughout the world. Though laws relating to passing-off actions are made but sometimes it is seen that it is not always enough to protect the trade marks properly. So, more rules regarding the passing-off actions are necessary for the proper substantial protection of trademarks in the financial and mercantile arena of trademarks. The Supreme Court of India and the High Courts of India occupy an important position in applying the passing-off actions properly for protecting the trademarks in the financial and mercantile arena of trademarks in our country in the era of globalization.
IPR V. COMPETITION LAW
: Has The Fight Ended?

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ABSTRACT

Intellectual property rights offer a period of exclusive rights to exploit the property in question.1 Competition law, on the other hand, seeks to maintain effective access to the market.2 To state it simply, intellectual property ("IP") protects individual interest, while competition protects the market. Prima facie this leads to an inference that there is a conflict between the two sets of regulatory mechanisms.3

An intellectual property right holder is granted a legal right by way of monopoly to exclusive possession and enjoyment of his intellectual property. Herein competition law plays a major role by ensuring that such monopolistic power is exercised in a restricted manner in the market.


INTRODUCTION

Are IP law and Competition law, two parallel lines that never meet or do they intersect each other at some point? On one side stands the IP law which bestows monopoly as a reward upon the person, who through his hard labour and skillbrought into existence a new invention. This person has served the society at large by disclosing his invention to the market where people can access it. So he needs to be rewarded for it and thereby conferment of monopoly is the reward which he gets by the society itself for making something known to the public which would otherwise be a secret. On the other side, stands competition law, the guardian of the market whose sole purpose is to ensure that monopolistic behaviour should be uprooted from the market wherever possible. Now is this a deadlock? One prescribes monopoly, other proscribes monopolistic behaviour. What one bestows, the other condemns. There is a need to understand this dichotomy.

1.1 Intellectual Property Rights: A brief understanding

What is property? Whenever we hear the

word ‘property’ the first thing that strikes our mind is tangible immovable property like a house or a land. By tangible we mean that it can be seen, felt and touched. But is it only the tangible things that constitute property? And why is property so important to a person?

An insight into the definitions of property given by jurists would be helpful. According to Hobbes: *Of things held in propriety; those that are dearest to man are his own life and limbs; and in the next degree, in most men those that are conjugal affection and after them riches and means of living*. Further, according to Locke: “Every man has a property in his own person. Every individual has a right to preserve his property that is his wife, liberty and estate.” Thus, it is certain that property is something a man earns by his skill and labour and is the dearest thing to him after his life and limb. But the meaning of property is not restricted to tangible properties anymore. Rather with the development of jurisprudential wisdom it has been extended to domains covering intangible properties also.

Property, by its very nature, carries several rights with it. A person who is the owner of a property has the exclusive right to its possession and enjoyment. He has a right in rem over his property and can take action against any person who tries to interfere with it. Only he has the right to its beneficial enjoyment and it is a duty upon every other person to not to interfere with his enjoyment. But if his property is beneficial to the society at large then should not the owner be rewarded if he allows access to his property? The IP law answers in the affirmative. IP law, by conferring monopoly rewards a person for disclosing his invention to the public thereby serving social interest. But with the advent of time, the roots of reward theory have weakened and it is no longer the invention that is sought to be rewarded but the necessity to promote innovation and creativity through incentives. Intellectual property is a kind of intangible property. It has an abstract existence. It can be in the form of a patent for an invention or a copyright for any literary, artistic or musical work. It can also be in the form of goodwill like brand reputation, consumer sentiments and the like. So it is present in the form of a material value rather than physical form.

A simple example of an intellectual property would be an author’s copyright over his literary work or a distinctive logo designed on the products of a manufacturing company, unique design of a car, or a patent in mobiletechnology. However intellectual property being intangible in nature is always suspected to misuse. Intellectual property is a person’s creation and if his creations are easily accessible to others without his permission then why would he be interested in investing his time, energy and resources on it. His right has to be protected and thus the State protects the right of the authors, by way of legislation, over their creations by grant-

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5. Ibid
6. Although there can be no single moment marked as the point when the change came about, the Statute of Monopolies enacted in England in 1624 is considered to be influenced, inter alia, by the idea that in certain circumstances, a market monopoly would be necessary as an incentive to innovate (§ 6 of the Statute) (See Holyoak&Torreman, Intellectual Property Law 5 (Paul Torremans Ed., 2008).
ing monopoly to them for a specified limited period. This is an assurance provided by the State to the authors that their creations are not used by any other person without their permission. This is the aim and purpose of Intellectual Property law.

1.2 Intellectual Property Law: Role and Purpose

Intellectual property law protects the rights of person who have contributed original work to the society. The main purpose for providing protection is to encourage innovation. And this encouragement in turn helps the society at large because people invest in furthering new innovations. The development of IP law over the time has motivated people to develop new technologies, write books, produce films and compose music, the beneficiary of which is ultimately the society itself.

Thus the intellectual property laws protect the rights of the inventor, author, or creator. IP laws are generally negative in nature because they impose a duty upon the others to not to interfere with an author’s right to monopoly over his work.

For example, the owner of a registered trademark has the exclusive right to use it and can refrain any other person from infringing his trademark in relation to any goods or services. Similarly a copyright holder has every right to refrain any person from making, producing or selling infringed copies of his work without his permission. The IP laws are not uniform throughout the world and vary in different jurisdictions with regard to their enforcement, registration and acquisition.

The sole purpose of intellectual property law is to encourage innovation in the form of new technologies, artistic expressions and inventions while promoting economic growth. When people know that their creations are protected by law they are more likely to create more. This in turn will benefit the society at large as new technologies will be more economical and efficient.

2.1 Competition Law: Nature, Goals and Methods

As the very word suggests, Competition law is a law that promotes competition in the market and at the same time ensures that such competition is carried out in a fair manner by regulating anti-competitive practices by companies. An efficient market emerges when there is free flow of trade without any barriers. Competition law acts as a guardian of the market which ensures that no particular player exercises his dominance in the market thereby restricting the free flow of trade and services. The beneficiaries are ultimately the public itself and competition law can thus be termed as a social legislation which seeks to provide consumers access to best products and services at reasonable cost.

Some notable features of Competition Law are -

- Prohibiting practices that restrict free trading and competition between businesses.
- Banning the abuse of dominant position held by a firm or carrying of any such anticompetitive practices which lead to such a dominant position. Herein practices that are sought to be curbed include predatory pricing⁸, tying arrange-

⁸ Predatory pricing refers to conduct, where a dominant undertaking incurs losses or foregoes profits in the short term
ment 9, price gouging 10, refusal to deal 11 etc. All these practices are prohibited under the competition law.

- Supervision of mergers and acquisitions of large corporations, including joint ventures.

The need for competition law arises from the fact that market is always susceptible to failures and players may leave no chance to exploit these opportunities by resorting to anti-competitive practices thereby creating monopoly and distorting the free flow of trade and services in the market. Thus, Competition law acts as a check on such monopolistic tendencies of companies by providing a right to the consumers and business houses to challenge the actions of any business entity, which in their view is carrying on its activities in an anticompetitive manner. Herein, anticompetitive manner may mean conduct of any business entity which seeks to destroy its competitor’s position in the market thereby ending competition. In the absence of competition law there is a great chance of potential abuse of monopoly by dominant firms with respect to pricing especially in developing countries where effective substitutes to IPR protected products might not be easily available.

2.2 Competition Law: Consequences of its absence

If there is no competition law present for regulation of the market the following things would take place -

- Business entities that are not a party to the anticompetitive agreement will be severely affected by the abuse of a dominant position because they would have to cease their operations as they will be priced out or otherwise driven out of the market.
- There will be widespread consumer dissatisfaction as they will have fewer choices with regard to goods and services which may be of inferior quality and excessively priced.
- Other business enterprises which are dependent on goods and services in the course of their own trade will be adversely affected as they would be either deprived of them or provided to them only on unreasonable and unfair terms.

The biggest drawback of having absence of competitive market is that the growth of the economy would be severely hampered as new enterprises would be barred from stepping into the market and the existing ones will have no incentive to be innovative.

3.1 TRIPS in relation to IPR & Competition Law

With the aim of foreclosing its competitors, MCX Stock Exchange Ltd &Ors. v. National Stock Exchange of India Ltd &Ors., Dissent Order, Case No. 13/2009. See also explanation (b) to Section 4(2) of Competition Act 2002

9. An agreement in which the seller conditions the sale of one product (the “tying” product) on the buyer’s agreement to purchase a separate product (the “tied” product) from the seller. Available at https://www.law.cornell.edu/wex/tying_arrangement Last accessed 27/3/17

10. Price gouging is a term that refers to the practice of raising the price of goods, services, or commodities, to an unreasonable or unfair level. Such an increase in price is often a result of a sudden increase of demand and shortage of goods, such as in the event of a natural disaster or other crisis, and it is illegal in most jurisdictions. Available at https://legaldictionary.net/price-gouging/ Last accessed 27/3/17

11. A refusal to deal is an agreement between competing companies, or between a company and an individual or business, that stipulates that they refuse to do business with another. A refusal to deal violates the Sherman Antitrust Act and other antitrust laws, and is illegal in the United States. Available at http://business-law.freedadvice.com/business-law/
sufficient guidelines and safeguards so that they can set up their norms in conformity with the international standards. Basically it provides three fundamentals which member nations must adhere to –

(i) It is upon each member nation to determine its IPR-Competition policy.
(ii) There must be consistency and conformity of such policy with the TRIPS Agreement principles of IP Protection.
(iii) Primarily the target is on those practices that restrict dissemination of protected technologies.12

A bare perusal of TRIPS Agreement elaborates the role of IPR and supporting character of Competition policy to avoid the impasse between the two domains.13 But since the instruments of International law are not binding, so the role of TRIPS is merely facilitating in nature. Thus, the objectives and principles laid down in TRIPS act as guiding factor in attaining the competitive balance required for facilitating innovation along with economic growth.14

Under Article 6 of TRIPS Agreement the aspect of exhaustion of rights is dealt with. Exhaustion of rights has a significant role in Competition Law. Its main purpose is to ensure the balancing of rights, duties and liabilities under the two realms.15

Under Article 8.2 the other objectives and principles enumerated under the TRIPS Agreement are dealt with.16 This article is of great importance from the standpoint of developing nations because it helps them in justifying their provisions and stand in competition law for dealing in areas that are silent under TRIPS agreement like abuse of dominant position in the relevant market and IPR.17 Article 40 deals with conditions for the grant of compulsory licenses aimed at protecting the legitimate interests of rights holders.

Article 40 of TRIPS18 Agreement is the point of intersection between IPR and competition law and helps in providing flexibility to the developing nations with regard to their domestic legislations.19 It enumerates provisions like code of conduct for transfer of technology for the developing nations and equitable principles for regulating anti-competitive and restrictive practices that were adopted by the UN General Assembly in 1980.20

Lastly, Article 7 facilitates the interpretation of trade regulation/refusal_deal.htm#ixzz4cXg6Iowa Last accessed 27/3/17
16. InfraNote 18
tion of provisions pertaining to IPR and competition law under TRIPS. Further, Article 31(k) also acts as a strong provision to counterbalance the adverse effect of IPR on competition law.

As seen above, TRIPS provide a wide ambit to member nations for inclusion of provisions pertaining to IPR and Competition Law. It also provides flexibility to each member nations to frame their domestic laws as per prevailing conditions in their market economy. Though TRIPS is facilitative in nature but there are chances of inclusion of mandatory provisions in it owing to the growth of jurisprudence in legal systems of developed nations. But it may have adverse effect on the developing countries as TRIPS mostly focuses on the developed nation's policy framework. Thus, the developing nations should construct a framework for analyzing the parameters under which IPR would override the competition law and regulatory measures for facilitating economic growth and development. In relation to technological transfers, the developing nations find themselves in a disadvantaged position in comparison to the developed nations and hence, there is a call for taking stern measures by the developing nations to avoid further exploitation.

Further, there is a need for regulation in licensing, assignments and agreements issue in cases of conflict between IPR and competition law. In addition to it, developing nations should frame their competition law in such a way as to directly deal with all anti-competitive practices, predatory pricing, collusive practices, tying-arrangements, etc. which can cause adverse impact on the welfare of customers and economic development.

4.1 Competition Law in India: Genesis and Growth

Before the commencement of the Competition Act 2002, the monopolistic and restrictive trade practices were governed by the Monopolies and Restrictive Trade Practices Act of 1969, in short the MRTP Act. This legislation was effective till 1999 when it was realised that there was a need for a transition from curbing monopolies to promoting competition.

The roots of the Competition law can be traced back from the soil of United States wherein Sherman Antitrust Act of 1890 was enacted in Theodore Roosevelt's presidency under the belief that the government must regulate big business for the welfare of the society. But Competition law also finds reference under Article 38 and 39 of the Constitution of India. There are various provisions under the

22. Supra Note 16, Article 31(k), TRIPS Agreement
23. Supra Note 19 at pg. 304
27. Supra Note 15 at pg. 8
28. KK Sharma, Competition Commission Cases, Lexis Nexis, 2014, pg 2
29. Ibid
Competition law to keep a check on the activities of business entities with regard to abuse of dominant position and anti-competitive agreements. Anticompetitive agreements are dealt with under Section 3 of the Competition Act 2002. These agreements may be horizontal or vertical in nature. Horizontal agreements relate to limitation on production and supply, fixed pricing, bid rigging etc. Vertical agreements pertain to tie-in arrangements, exclusive supply-distribution agreement, refusal to deal etc. Cartels also contained under Section 3 of the said Act. Basically cartels are trade restrictive agreements entered into by between persons or enterprises to limit production or supply thereby manipulating prices to their advantage.  

Abuse of dominant position is dealt with under Section 4 of the said Act. In India we use the word ‘dominant position’ but in US it is referred to as ‘attempt to monopolize’ and in Australia as ‘abuse of market power’. The definition of Dominant position under Section 4 is “A position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to:  

(i) Operate independently of competitive forces prevailing in the relevant market; or (ii) Affect its competitors or consumers or the relevant market and operate independently”.

It is pertinent to mention here that the jurisdiction of Competition Act does not extends to government functions and “any activity of the government relatable to sovereign functions” is thereby excluded from the purview of Competition Act. But most importantly, under Section 3(5) of the said Act, there is a exception carved out for IPR on the principle that IPR’s deserve to be protected for furtherance of innovation. The reason behind it is that if the Act interferes in innovation then the resultant product would not possess the novelty which it intends to provide. But this is not a blanket exception. If any IPR holder imposes unreasonable or unfair conditions for grant of licence then it may be challenged under Section 3(5) of the Competition Act 2002.

IP Law & Competition Law: Two divergent roads with converging destinations?

Competition law and IP laws are the two pillars on which the framework of modern economy stands. Both of them have evolved as separate jurisdictions of law.
each seeking to protect its subject. IP law confers monopoly. Competition law condemns monopolistic behaviour. We have on one hand the necessity to create monopolies through IP law in order to promote innovation and creation. But on the other hand there is an utmost necessity to keep the markets competitive also. Which is more important?

Though both the laws may look inversely proportional to each other but they do coincide at some point and that is enhancing consumer welfare and promoting innovation. IP law protection provides incentives for innovation and this in turn promotes competition in the market place. An insight into the judgments given by the European Court of Justice would establish the fact that the real concern of competition law is not with the existence of IPR but with its exercise.

Competition laws were never intended to serve the interests of envious competitors who wanted a successful competitor to redistribute lawfully earned wealth. The desired goal of competition law is the promotion of efficiency and innovation through the protection of the competitive process itself, rather than any particular competitor; thus, competition law seeks to protect competition, not competitors.

Competition law has never interfered with the most primary function of IP law: preventing free riding of creative achievements and/or the firm’s identity and reputation, acting as an incentive to innovate.

In fact, the former acknowledges the role of IP in promoting competition because by preventing free-riding, firms are encouraged to produce their own goods, which necessarily leads to competition.

Though Competition law and IP law may seem adversaries of each other but their ultimate goal is enhancement of consumer welfare and innovation. Competition law has its own approach of maximizing social welfare by prohibiting monopolies whereas intellectual property law also tries to achieve the same by granting monopolies for a specific period. Though difference is apparent but compromise is possible.

IP law seeks to provide purposeful monopolies which serve the greater public good and competition law seeks to ensure that this purpose is achieved. Competition law does not condemn the possession of monopolistic powers in the hands of an enterprise but prohibits its abuse. Thus monopolistic powers should be exercised in such a manner that neither the consumers nor competitor’s interest is affected. Conclusively, it can be said that Competition law is a watchdog which ensures that the benefits conferred under IP law are not used to the detriment of general public.

**Growth of Competition Law through Judicial Precedents**

Since the emergence of Competition Law a plethora of cases have emerged which have laid the foundation of subject mat-

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39. Ibid
ter of both IPR and Competition law. An insight into several landmark judgments related to the conflict between IPR and Competition law would be useful. Aamir Khan Productions Pvt. Ltd. v. Union of India\textsuperscript{40} is a landmark judgment, wherein the Bombay High Court ruled that CCI has the jurisdiction to deal with all cases concerning competition law and IPR. Further in Kingfisher v. Competition Commission\textsuperscript{41} of India also, the Court reiterated that the CCI is competent to deal with all the issues that come before the Copyright Board. Such cases enumerate the fact that the Indian Courts are ready for dealing with emerging cases of competition law involving IPR.

Cartel is also a significant issue that always gained attention under the competition law. Formation of cartels is a prevalent practice among industries and firms. It is a common practice for proprietors owning IPRs to indulge in formation of cartels and thereby resulting in distortion of competition in the market. A suitable example of the cartels can be traced from the film industry as it involves both issues i.e. copyright along with competition law provision affecting the industry. In the case of FICCI Multiplex Association of India v. United Producers/Distributors Forum (UPDF),\textsuperscript{42} the petitioner (FICCI) filed a complaint against the UPDF alleging that they indulged in formation of market cartels in the film industry. It was also alleged that in order to boost their revenue UPDF refused to strike deal with the multiplex owners. This led to devastating effects on the multiplexes as their income was solely dependent on the film industry. Consequently, this resulted in anti-competitive practice of refusal to deal leading to distortion of competition adversely for gaining profits. Further, it was also alleged that defendants owned 100 per cent share in the industry and thus indulging in limitation of supply of films in the market qualified as an anti-competitive practice. It was in violation of S. 3(3) the Competition Act. The parties on delivery of the show cause notice filed a petition in Bombay High Court on the pretext of lack of jurisdiction of CCI to decide a matter pertaining to IPR. The Court referring S. 3(5) of the Competition Act 2002 read with S. 3(1) ruled that the latter section cannot curtail the right to sue for infringement under IPR, and further CCI has jurisdiction to entertain all matters that can be presented before the Copyright Board.

Recently, CCI ruled that copyright is not an absolute right but is merely a statutory right under the Copyright Act, 1957.\textsuperscript{43} Further, in Microfibres Inc v. Girdhar & Co., the Court observed that:

"The legislative intent was to grant a higher protection to pure original artistic works and lesser protection to the activities that are commercial in nature. Thus, the intent of the legislature is explicitly clear that the protection provided to a work that is commercial in nature is at lower pedestal than and not to be equated with the protection granted to a work of a pure Article."\textsuperscript{44}

\textsuperscript{40} 2010 (112) Bom L R 3778\textsuperscript{41} Writ petitions no. 1785 of 2009.

\textsuperscript{42} FICCI Multiplex Association of India v. United Producers Distribution Forum (UPDF), Case No. 1 of 2009, CCI order dated 25 May 2011.

\textsuperscript{43} Gramophone Company of India Ltd. v. Super Cassette Industries Ltd., 2010 (44) PTC 541 (Del).

\textsuperscript{44} Microfibres Inc v. Girdhar & Co., RFA (OS) no. 25/2006 (DB), decided on 28 May 2009.
Thus from the aforesaid, it is clearly evident that CCI is slowly emerging as a quasi judicial authority to settle disputes between Competition and IP law. It shall be interesting to observe how effectively it carries out its functions in the future.

**CONCLUSION**

The roots of Competition law in India can be found from the precedents laid down upon the soil of US and EU jurisdictions. Though not firmly fixed, but they are slowly penetrating the crust of Indian jurisprudence. It would be interesting to observe how deep they go. Through complex litigation in ECJ and other US courts the terminology of Competition law has expanded greatly, still the bedrock of regime is simple. The Indian Competition regime is building its jurisprudence brick by brick and it will be interesting to observe how far its journey goes. If the economy in India is a race course, then it is the aim of Competition law to ensure that all the riders get the opportunity to compete in fair and transparent manner.  

An enterprise may possess dominant position in the market by virtue of its Intellectual Property Rights. But it is not the dominant position which concerns the Competition law but rather the abuse of such position to threaten the competition in the market. Thus whenever there is an abuse of dominant position, it is irrelevant what property right allowed the enterprise to attain such position.

Competition law and Intellectual Property are complementary to each other. IP further innovation which subsequently results in promotion of competition in market. Though both may seem completely opposite to each other, but over time their differences have been reconciled and a middle path has been adopted. IP law confers rights holder for disclosure of his invention which would otherwise had remained a secret. But competition should not interfere with the exercise of such rights in such a manner that results in absolute curtailment. Competition law should impose restrictions on the IPR holder only to the extent of interference in the domain of competition law. There is a need to maintain a balanced relationship between the two so that the long term goal of innovation and protection of consumer welfare can be achieved.

To achieve the aforesaid goal, the following factors may be taken into account. Firstly, since the jurisprudence pertaining to effect of IPR competition law is derived mainly from the US or EU regime, necessary amendments should be made in both the laws to avoid overriding conflict. Secondly, IPR laws must be regulat-
ed in those spheres where conflict with Competition law is apparent. Thirdly, amendments should be brought in IP law itself to keep a check on concentration of power in the market by any enterprise(s) due to abuse of its dominant position. Lastly, the scope of powers granted to Competition Commission of India should be broadened with respect to disputes arising between IP and Competition law.46

From the above discussion, it is clear that IP law and Competition law are two divergent roads but their destinations are converging. Though there are sensitive issues and intricacies involved in their operations but still they have managed to reconcile wherever possible in order to achieve the ultimate goal of protection of consumer welfare and innovation.

In a developing country like India where competition jurisprudence is at a juvenile stage, guidance from European jurisdictions is very much needed. Presently, the legal framework in India is ill-equipped to handle such complex mechanism. So resort to the precedents laid down by the ECJ and US Courts should made. A true understanding and effective application of the law laid down through such precedents would help in ensuring smooth functioning of the two domains. As it is said, that Rome wasn’t built in a day, so the development of Competition law in consonance with Intellectual Property law would require patience.

ROLE OF PUBLIC DISTRIBUTION SYSTEM IN BATTLE FOR LIFE: Is Aadhar A Tool Of Shifting The Onus Of Liability?

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ABSTRACT

Any law to be effective must be adaptable to changing circumstances and the law of torts as well as Consumer Protection laws or the Criminal laws which embraces the change as per the need of the society are not different. Changes in policy need to be reflected in the implementation which is not possible if the law exists in a vacuous state. The law of tort has the potential to empower individuals, to instil respect for the consumer as well as the victims or his/her family in unscrupulous corporate concerns. It is a law that protects personal autonomy and dignity, even in the absence of appreciable harm or condemnable wrongdoing. In a society that is increasingly fraught with consumer disputes, tortuous actions and inactions of individuals as well as governments, have given the growing natures of such transactions, the legislature needs to awaken and take action because now more than ever, the tortuous actions and inactions are increasing.

Key Words: Public Distribution System (PDS), War-Time Rationing Measure.

INTRODUCTION

In countries with an under-developed tort system accommodating and encouraging class actions results in total disregard of the rights of common individuals. The activities of Union Carbide Corporation and Enron Corporation in India, Unocal Corporation in Myanmar, Nike and Reebok in Asia, Shell Oil Company in Nigeria, Texaco in Ecuador, and Freeport-McMaran in Indonesia, to name a few, are living testimony to this.¹ The similar wrongdoing of different nature are being realized in our great nation also. In the absence of any effective legal or social sanction, the regime is spineless in terms of implementation and the government official have turned deaf ear towards the life, death or pain or pleasures of common or downtrodden masses of the country.

Several more than the ever grown situations have occurred in India also which have shaken the conscious of the society of even brutal nature if any. One of the incident is of Sept. 28, where a girl named

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¹ Chronicled in detail by Surya Deva, Human Rights Violations by Multinational Corporations and International Law: Where from here?
Santoshi Kumar, an 11 year old girl of Simdega district of Jharkhand died because of starvation of about 8 days. Her family had not received, ration for months as their ration card was cancelled after being struck off the Public Distribution system (PDS) for not linking their ration card with Aadhar. Some other cases of similar nature have also come into pictures. Since then the system of Aadhar has been under continuous criticism for depriving the most vulnerable people of their grain entitlements. As per the decision of honorable highest court of the country right to food is fundamental right.

This lack of legislative infrastructure is best highlighted with reference to two principal events in the past decade. The first incident is that of worms being found in Cadbury’s chocolates. The second is the recurring issue of pesticides in cold drinks. In both cases, the MNCs faced relatively little discernible loss, at least not of a financial nature. Statements were issued and the matter was challenged in a suit for libel. Had a machinery been in existence that encouraged class action suits, Pepsico and Coke would both have taken to court by aggrieved consumers unless they chose to settle. The shortsighted nature of the steps taken by the Government and consumer protection agencies is demonstrated by the recurrence of the same complaint. But there were a few only who were to raise a voice against such acts. At the same time there are only a few potent legislations which can be effective. Therefore, a valid tort law has the task of attempting to balance consumer/citizens’ interests with corporate incentive. The language that corporates understand is the language of profits. If an action is financially viable then that is the sole consideration for its adaptation. Therefore, if it is profitable (or less financially damaging) to be ethical then companies shall pay greater heed to it.

Former Karnataka HC judge, KS Putta swamy, filed the PIL in 2012 challenging the Aadhaar scheme, saying it violates fundamental rights to privacy and equality. SC has linked all the 20+ Aadhaar cases to this main case. Petitioners include activists Bezwada Wilson, Aruna Roy and Nikhil Dey. For Putta swamy, this was reportedly the first time he felt need to petition the courts in any matter. The nine-judge bench of the Supreme Court has unanimously delivered its judgment in Justice K.S. Putta swamy (Retd.) v. Union of India holding that privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the constitution, but also arises in varying contexts from the other facets of freedom and dig-
nity recognised and guaranteed by the fundamental rights contained in Part III of the Indian constitution.

The bench has overruled its decisions in M.P. Sharma v Satish Chandra, District Magistrate, Delhi, rendered by a bench of eight judges and, in Kharak Singh v State of Uttar Pradesh rendered by a bench of six judges, which contained observations that the Indian constitution does not specifically protect the right to privacy.

Justice D.Y. Chandrachud, while delivering the main judgment, on behalf of the Chief Justice J.S. Khehar, Justice R.K. Agarwal, himself and Justice S. Abdul Nazeer has held that privacy is intrinsic to life, liberty, freedom and dignity and therefore, is an inalienable natural right. Justices Chelameswar, Bobde, Sape and Kaul have also agreed with Justice Chandrachud's judgment.

**Game of Aadhar and Status of APL and BPL**

All elements of India's food security policy are today being dismantled. In 1942, more than three million people died in Bengal and Orissa due to starvation. Nobel Prize winner Amartya Sen showed that it was not a lack of food but a lack of food entitlements and food rights which caused starvation deaths. And he also showed that famine did not occur in post-colonial India because people's rights were protected. The Public Distribution System (PDS) in its original form was widely criticised for its failure to serve the below poverty line (BPL) population, its urban bias, negligible coverage in the states with the highest concentration of the rural poor and lack of transparent and accountable arrangements for delivery. Realising this, the government streamlined the system by issuing special cards to BPL families and selling food grains under PDS at specially subsidised prices with effect from June 1997. Under this Targeted Public Distribution System (TPDS), each poor family was entitled to 10 kg of food grains per month at specially subsidised prices. This was expected to benefit about 60 million poor families. The state-wise poverty estimates of the Planning Commission, based on the methodology of the expert group on the estimation of the proportion and number of poor chaired by late Prof. Lakdawala, defined the number of poor in each state. The identification of the poor...
As Tendulkar Committee, report of 2011-12 estimates, a total of 21.9 percent of the national population is below the poverty line. This indicates a decrease of nearly 15 percentage points in poverty from 2004-05. MSP is the price at which the centre buys food grains from farmers. Typically, the MSP is higher than the market price and is intended to incentivise production. The MSPs for various agricultural commodities are fixed by the central government based on rates recommended by the Commission for Agricultural Costs and Prices (CACP). The CACP considers certain factors such as the cost of cultivation and remunerative prices for farmers on their produce while determining the MSP. The MSPs recommended by the CACP are finally approved by the Cabinet Committee on Economic Affairs.

The food subsidy is the difference between the cost (MSP and handling and transportation costs) and the issue price done by the states. The emphasis is on including only the really poor and vulnerable sections of the society such as landless agricultural labourers, marginal farmers, artisans/craftsmen (potters, tappers, weavers, blacksmiths, carpenters etc.) in the rural areas and slum dwellers and daily wagers in the informal sector (porters, rickshaw pullers and handcart pullers, fruit and flower sellers on the pavements etc.) in the urban areas. During September 2013, Parliament passed the National Food Security Act (NFSA), 2013. The NFSA seeks to make the right to food a legal entitlement by providing subsidised food grains to nearly two-thirds of the population. The Act relies on the existing Targeted Public Distribution System (TPDS) mechanism to deliver these entitlements. This note describes the functioning of the existing TPDS mechanism and the role played by the centre and states. It also explores challenges in the effective implementation of TPDS and alternatives to reform the existing machinery. The article further explores and tries to fix the vicarious liability of the government for death in case of failure on the part of the government in providing grains to the public.

The existing TPDS operates through a multi-level process in which the centre and states share responsibilities. The centre is responsible for procuring or buying food grains, such as wheat and rice, from farmers at a minimum support price. It also allocates the grains to each state on the basis of a formula. Within the total number of poor in each state, state governments are responsible for identifying eligible households. The centre transports the grains to the central depots in each state. After that, each state government is responsible for delivering the allocated food grains from these depots to each ration shop. The ration shop is the end point at which beneficiaries buy their food grains entitlement.

**HISTORICAL OUTLOOK OF THE PDS SYSTEM**

India's Public Distribution System (PDS) is the largest distribution network of its kind in the world. PDS was introduced around World War II as a war-time rationing measure. Before the 1960s, distribution through PDS was generally dependent on imports of food grains. It was expanded in the 1960s as a response to the food shortages of the time; subsequently, the government set up the Agriculture Prices Commission and the Food Corporation of India to improve domestic procurement and storage of food grains for PDS. By the 1970s, PDS had evolved into a universal scheme for the distribution of subsidised food. In the 1990s, the scheme was revamped to improve access of food grains to people in hilly and inaccessible areas, and to target the poor. Subsequently, in 1997, the government launched the Targeted Public Distribution System (TPDS), with a focus on the poor. TPDS aims to provide subsidised food and fuel to the neediest in the country.

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11. As Tendulkar Committee, report of 2011-12 estimates, a total of 21.9 percent of the national population is below the poverty line. This indicates a decrease of nearly 15 percentage points in poverty from 2004-05. MSP is the price at which the centre buys food grains from farmers. Typically, the MSP is higher than the market price and is intended to incentivise production. The MSPs for various agricultural commodities are fixed by the central government based on rates recommended by the Commission for Agricultural Costs and Prices (CACP). The CACP considers certain factors such as the cost of cultivation and remunerative prices for farmers on their produce while determining the MSP. The MSPs recommended by the CACP are finally approved by the Cabinet Committee on Economic Affairs.

12. The food subsidy is the difference between the cost (MSP and handling and transportation costs) and the issue price.
poor through a network of ration shops. Food grains such as rice and wheat that are provided under TPDS are procured from farmers, allocated to states and delivered to the ration shop where the beneficiary buys his entitlement. The centre and states share the responsibilities of identifying the poor, procuring grains and delivering food grains to beneficiaries. In September 2013, Parliament enacted the National Food Security Act, 2013. The Act relies largely on the existing TPDS to deliver food grains as legal entitlements to poor households. This marks a shift by making the right to food a justiciable right. In order to understand the implications of this Act, the note maps the food supply chain from the farmer to the beneficiary, identifies challenges to implementation of TPDS, and discusses alternatives to reform TPDS. It also details statewise variations in the implementation of TPDS and discusses changes to the existing system by the Act.

TPDS is administered under the Public Distribution System (Control) Order 2001, notified under the Essential Commodities Act, 1955 (ECA). The ECA regulates the production, supply, and distribution of essential commodities including edible oils, food crops such as wheat, rice, and sugar, among others. It regulates prices, cultivation and distribution of essential commodities. The PDS (Control) Order, 2001 specifies the framework for the implementation of TPDS. It highlights key aspects of the scheme including the method of identification of beneficiaries, the issue of food grains, and the mechanism for distribution of food grains from the centre to states.

In 2001, the People’s Union for Civil Liberties (PUCL) filed a writ petition in the Supreme Court contending that the “right to food” is essential to the right to life as provided in Article 21 of the Constitution. During the ongoing litigation, the Court has issued several interim orders, including the implementation of eight central schemes as legal entitlements. These include PDS, Antyodaya Anna Yojana (AAY), the Mid-Day Meal Scheme, and Integrated Child Development Services (ICDS). In 2008, the Court ordered that Below Poverty Line (BPL) families be entitled to 35 kg of food grains per month at subsidised prices.

**Supreme Court order on rotting of food grains in CAP storage.** In August 2010, in the ongoing case of **PUCL vs. Union of India**, the Supreme Court found that food grains were rotting due to inadequate storage. It directed the central government to adopt long and short term measures to store and preserve procured food grain, and prevent rotting, including: (i) constructing adequate FCI storage facilities in each state and division, (ii) increasing allocation to BPL families, (iii) opening FPSs for all days in the month, and (iv) distributing food grains to beneficiaries at low or no costs.

**National Food Security Act, 2013** The

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14. **PUCL vs. Union of India, 2001**.
15. **PDS (Control) Order 2001 (E)’Antyodaya families’ means those poorest families from amongst Below Poverty Line (BPL) families identified by the State Governments and entitled to receive foodgrains under the Antyodaya Anna Yojana;**
National Food Security Act gives statutory backing to the TPDS. This legislation marks a shift in the right to food as a legal right rather than a general entitlement. The Act classifies the population into three categories: excluded (i.e., no entitlement), priority (entitlement), and Antyodaya Anna Yojana (AAY; higher entitlement). It establishes responsibilities for the centre and states and creates a grievance redressal mechanism to address non-delivery of entitlements. It is yet to be implemented.

**RECIPROCITY BETWEEN LIABILITY OF THE STATE AND PDS**

A number of statutes impose liability to pay compensation for the tortious acts of persons which cause death or injury to the person or property of others. Such actions in private law are permitted by the Fatal Accidents Act 1855 (“FAA”), Motor Vehicles Act 1988 (“MVA”), Consumer Protection Act 1986 etc. An examination of the cases brought under these statutes shows that general principles of tort law are relevant in identifying the liability of the defendant in tort. The state, like any other private person, can be sued under these statutes. Thus, vicarious liability of the state can arise under these statutes for tortious acts or omissions of its employees in the course of their employment. However, the contours of vicarious liability of the state under these statutes are determined in accordance with A. 300 and the case law thereon. Thus, cases under these statutes have relied on the distinction between sovereign and non-sovereign functions of the state to determine whether the state was vicariously liable in tort.

**Is PDS a ‘Right of Public or ‘Duty’ of the State?**

The legal regime governing state liability for tortuous acts of its employees is based on Article 300 of the Constitution of India which allows for actions to be brought by and against the Government of India or the Government of a State in the name of the Union of India or the State respectively. This provision expressly permits the imposition of civil liability on the Government of India and the Government of every state. Further, Article 300(1) delineates the scope of such liability by imposing liability on the Government of India and the Government of every state to the same extent as the liability of the Dominion of India and the corresponding provinces or the corresponding Indian states. A. 300(1) also makes the scope of liability thus defined subject to any legislation made by the Parliament of India or the legislature of any state.

The implication and interpretation of these constitutional provisions is that the scope of liability of the Government of India and the Government of every state is defined by reference to the scope of liability of the Dominion of India and the corresponding Indian princely states or provinces respectively, as it stood prior to the enactment of the Constitution. Therefore, in order to determine the scope of such liability, reference must be made to

16. Article 300(1) clearly states that: “The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue to be used in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.”

the Government of India Act, 1935 to assess the scope of liability of the Dominion of India and the corresponding provinces. Section 176(1) of the Government of India Act, 1935, which is the relevant provision, ultimately refers to Section 65 of the Government of India Act, 1858. Section 65 of the Government of India Act, 1858, while dealing with the scope of liability of the Secretary of State for India, merely stipulates that the scope of liability of the Secretary of State for India would be the same as that of the East India Company.18

The first and the most important legal development in the field of tortuous liability of the government can be traced back from the key judgment of Peninsular and Oriental Steam Navigation Company, vs Secretary of State.19 This case involved a claim for damages for injury caused to the appellant’s horse due to the negligence of workers in a government dockyard. The issue was whether the Secretary of State would be liable for the negligence of the workers. Peacock C.J. held that the Secretary of State would be liable for negligence. Peacock C.J. reasoned that state liability for tortious acts of public servants would arise in those cases where the tortuous act would have made an ordinary employer liable. Peacock C.J. recognised a crucial distinction between sovereign and non-sovereign functions - thus, if a tort was committed by a public servant in the exercise of sovereign functions, no state liability would arise. This distinction was made on the basis that the East India Company20 could be held liable for torts committed by its employees during the course of its commercial and trading activities and not for the acts it performed as a delegate of the Crown.

This distinction between sovereign and non-sovereign functions was followed in Nobin-Chunder Dey v Secretary of State.21 In this case, a claim for damages was brought in connection with the issuance of a government licence. The claim was ultimately rejected by the court as it related to the exercise of a sovereign function.

Subsequently, this distinction was relied on to repel state liability for tortious acts of public servants where injury was caused in connection with the maintenance of military roads,22 wrongful conviction,23 wrongful confinement,24 maintenance of public hospitals,25 etc.

In contrast to the above trend, a few High Courts26 adopted a much narrower view

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18. Section 65, Government of India Act 1858 explains that “The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company, have been liable, to in respect of debts and liabilities lawfully contracted and incurred by the said Company.”

19. 5 Bom HCR App. 1.

20. The Secretary of State’s liability was coterminous with the liability of the East India Company under Section 65 of the Government of India Act, 1858.

21. (1876) ILR 1 Cal. 12.

22. Secretary of State v Cockraft, AIR 1915 Mad 993.

23. Mata v Secretary of State, AIR 1931 Oudh 29.


25. 11Etti C v Secretary of State, AIR 1939 Mad 663.

26. Ross v Secretary of State, AIR 1915 Mad 434; Kishanchand v Secretary of State, (1881) ILR 2 All 829; State of
of the ambit of sovereign functions. The most significant example of this trend is the decision in Secretary of State v Hari Bhanji\textsuperscript{27}. In this case, Turner C.J. rejected the plain distinction between sovereign and non-sovereign functions, and held that immunity from liability for tortious acts of public servants would only be available in respect of acts done in the exercise of sovereign power and without the sanction of a statute ("acts of State"). For acts done pursuant to a statute, or in exercise of powers conferred on a public servant by a statute, no immunity would be available, even though such acts might be done in exercise of sovereign powers.\textsuperscript{28}

Law and Policy of the Central and State Governments

The Government of India has recognised the Right to Food as a basic Human Right, it is enacting a Food Security Bill. It would be a historic implementation of social protection programme against hunger. The Hon'ble Supreme Court in the case of Centre for Environment and Food Security v. Union of India and others\textsuperscript{29}, has held as under in regard to the "Right to livelihood" which is an integral part of the "right to life". The Framers of the Constitution, in the Preamble to the Constitution, guaranteed to secure to its citizens justice social, economic and political as well as equality of status and opportunity but the "right to employment" was not incorporated in Part III of the Constitution as a fundamental right. By judicial pronouncements, the Court expanded the scope of article 21 of the constitution of India and included various facets of life as rights protected under the said Article despite the fact that they had not been incorporated by specific language in Part III by the Framers of the Constitution. Judgments of this Court in Ogla Tellis v. Bombay Municipal Corporation\textsuperscript{30}, and Narendra Kumar Chandla v. Site of Haryana\textsuperscript{31}, expanded the scope of Article 21 and held that "right to livelihood" is an integral part of the "right to life". The Constitution Bench of the Hon'ble Supreme Court in the case of Ogla Tellis and Others v. Bombay Municipal Corporation and others\textsuperscript{32}, has held as under in regard to right to life, which is guaranteed by the article 21 of the Constitution of India. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If

\textsuperscript{27} (1882) ILR 5 Mad. 273.
\textsuperscript{28} This decision seems to be one of the earliest indications of the distinction between executive acts and acts done under a statute, a distinction which seemed to have been glossed over in the later judgment in Kasturilal Ralia Ram Jain v State of Uttar Pradesh, AIR 1965 SC 1039. As quoted in supra note-8
\textsuperscript{29} (2011) 5 SCC 676
\textsuperscript{30} (1985) 3 SCC 545
\textsuperscript{31} (1994) 4 SCC 460
\textsuperscript{32} (1985) 3 SCC 545
the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live. Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas J. in Baksey\footnote{Barsky v. Board of Regents, [(1954) 347 MD 442]}, that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois\footnote{[(1877) 94 US 113]}, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh v. State of U.P.\footnote{[(1964)1 SCR 332; AIR 1963 sc 1295]} article 39(a) of the constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any Court, are nevertheless fundamental in the governance of the country. The Principles contained in Arts. 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21. Learned counsel of the Union of India has raised an objection in regard to maintainability of this Public Interest Litigation petition on the
CONCLUSION

Looking to the aforesaid alarming situation and the fact that the right to food is a basic human right and necessary for right to life, the author is of the opinion that this Court can issue direction to the respondents in regard to removal of anomaly of number of BPL and APL card holders in the State. By interpreting the theories of responsibility, it seems necessary to note that the distinction made between the ‘governmental’ and the ‘corporate/other’ functions of the State. The history and theory of public responsibility, as in the case of our municipal corporation, are closely identified with this distinction. It was deemed indispensable, because of the historical identification of “sovereignty” with irresponsibility and because of the growing recognition. The State, continually broadening its activities, must assume responsibility for the torts of its officers too.

To a great extent the author also agrees with the opinion of Justice D.Y. Chandrachud in the Aadhar case that privacy which is a powerful guarantee but it does not mean that states were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. He further claims that the pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals. I hereby also agree with the opinion of Jus-
tice Khanna that right in holding that the recognition of the right to life and personal liberty under the constitution does not de-nude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the constitution, the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the rule of law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual. No any system whether it be an Aadhar or any other government evolved system can give power to any individual or state to take away the life of an individual because of poverty the most potent right on the earth particularly because of the lapses of government officials in the largest democracy where life of even the enemy is bestowed with blessings if it is surrendered to others. Here such poor people can be supposed that they have surrendered the right to life in the hands of democratically elected government who are supposed to be the protector and if they fame civil as well as criminal sanctions are the only remedy left for the persons on default. Since the Constitution guarantees the right to life, and the right to food is at the heart of the right to life, the State has a related duty to ensure that no one goes hungry. Food for work programmes, the Public Distribution System (PDS), price regulation and anti-hoarding measures have been diverse policy components of ensuring that people’s food entitlements are protected which the author hopes that it will be ensured by the present government.
PARDONING POWER AND
THE WAY FORWARD

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ABSTRACT

On analysis of the Constitutional Scheme of “Pardon” under Articles 72 and 161 and judicial trends, the author is of the opinion that an independent Advisory Board may be constituted at National and State level to examine the intricacies of the mercy petitions and human rights jurisprudence at global level so as to assist the President of India and/or Governor of a State. Such a system would not only avoid any instance of getting wrath of judiciary but it would also save the precious time of judiciary from peeping time and again into the political vagaries causing calculated assault on human dignity and pushing civilization a step backward. The quest for justice demands an immediate action in this regard. The ship of humane justice should not sink; humanity should not be forced to fly its flag half-mast; and before such an eventuality, in tune with the maturing society at global level, let’s hoist the flag of humanity.

“Mercy is not a thing opposed to justice. It is an essential part of it.”

- Edmund Burke -

Key Words: Constitutional Scheme of “Pardon”, Mercy, Clemency, Petition For Mercy.

INTRODUCTION

There can be no attributes more important than the life and liberty of a citizen in a civilized society. Article 21 of the Constitution of India provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. The imposition of death penalty on a convict is the procedure established by law which is subject to appeal and review. After exhausting all legal remedies, a convict has an option to seek remedy under constitutional scheme of “Pardon” by moving a petition for mercy before the President of India or the Governor of a State, as the case may be.

According to Enrico Ferri, in social life, penalties have the same relation to crime that medicine has to disease. After a disease has developed in an organism, we have recourse to a physician. To cure the disease in criminals, we need to adopt therapeutic attitude like medical profes-

1. FERRI, ENRICO, The Positive School of Criminology, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ed), (LONDON INDIANA UNIVERSITY PRESS 1971) p. 119
sionals. According to Karl Menninger, "there is another element in the therapeutic attitude i.e. the quality of hopefulness. If no one believes that the patient can get well, if no one – not even the doctor – has any hope, there probably won’t be any recovery. Hope is just as important as love in the therapeutic attitude." This theory of "Love and Hope" seems to be the guiding factor running in the background of the concept of "Pardon" to a convict.

Based on the analysis of the chequered history of the Constitutional Scheme of Pardon, the author of this paper peeps into the concept of "Pardon" and the present day crusade to streamline the benevolent provision.

WHAT IS PARDON?

"Pardon" is an act of mercy or clemency by which a criminal is excused from a penalty that has been imposed by a Court. It wipes away guilt and makes the person who committed the crime as innocent as though a crime has not been committed. A pardon may be conditional or absolute.

Executive clemency, says William Howard Taft, exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy it has always been thought essential in popular governments ... to vest in some authority other than the courts power to ameliorate or avoid particular criminal judgments.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself. It does not amount to an acquittal unless the court otherwise directs. Pardon is to be distinguished from “amnesty” which is defined as "general pardon of political prisoners; an act of oblivion". As understood in common parlance, the word “amnesty” is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned.

CONSTITUTIONAL SCHEME OF PARDON

The power to pardon is a constitutional responsibility of great significance. The Constitution of India vests this power in the Head of the State. Article 72 of the Constitution of India provides the following:

2. MENNINGER, KARL, Love Against Hate, THEORIES OF PUNISHMENT, GRUPP, STANLEY E (ED), (LONDON INDANA UNIVERSITY PRESS 1971) p. 248
5. Govt. of NCT of Delhi v. Prem Raj, (2003) 7 SCC 121
6. Article 72. Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases. – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence – (a) in all cases where the punishment or sentence is by a Court Martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) in all cases where the sentence is a sentence of death. (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law
Constitution of India invests the President of India and Article 161 of the Constitution of India invests the Governors to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person.

The provision corresponding to Article 72 in the Government of India Act, 1935 was section 295 which read thus:

1. Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all such powers of suspension, remission of commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province.

Provided that nothing in this sub-section affects any powers of any officer of His Majesty’s forces to suspend, remit or commute a sentence passed by a court-martial.

2. Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

There was no provision in the Government of India Act 1935 corresponding to Article 161 of the Constitution.

CONSTITUENT ASSEMBLY DEBATE

The provisions relating to Pardoning Power were discussed in the Constituent Assembly at great length. On 28th December 1948, the issue in question was discussed in the Constituent Assembly. The debate was started by Mr. Tajamul Hussain by proposing Amendment No.1286 seeking deletion of clause (3) of Article 59. He opposed vesting of the power of pardon in any authority other than the Head of the State. He urged:

“Sir, in my opinion, the President only should have power to suspend, remit or commute a sentence of death. He is the supreme Head of the State. It follows therefore that he should have the supreme powers also. I am of opinion that rulers of States or Provincial Government should not be vested with this supreme power. The President of the Federation should be the supreme authority in respect of offences committed against Federal Subjects. I say that there must not be divided loyalty on this subject. When the States came into the Federation they accepted the operation of the Federal Laws in their States and they accepted to that extent that the Federal Government was supreme and the President of the Federation as representing the Federal Government can alone be the authority who can grant pardons. In the USA, the President grants pardon in all the States. These are matters of the most vital importance to the existence of the Centre and, therefore, the power of pardon could not be given to anybody except the Head of the Federal Government, that is the President of the India.

7. Article 161. Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.— The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

dian Union or the Indian Republic. If the ruler of a State exercised powers of pardon in respect of offences relating to those subjects which they themselves had conceded to the Federation it would amount to taking away with one hand what they had given with the other. In regard to the subjects conceded by the State to the Union the States ceases to be sovereign to that extent. The Federal Law is binding upon every citizen and there is a direct relation between the citizen and the Federal Government. When there is a breach of the Federal law the representative of the Federation must have the inherent power of pardon. Therefore, I think where the question of pardon is involved the more serious the of fence the higher should be the authority to grant the pardon. I have already pointed out about America. In England too the pardon is granted only by the King on the advice of his Home Minister, but pardon is granted only by the representa
tive of the State. In those days when there was no talk of partition of this country they were thinking of a weak Centre with three or four subjects like Communications, Defence, Foreign Affairs, etc., and the provinces were to enjoy complete autonomy. Now that the country has been partitioned we people who are the citizens of this country have decided once for all that the Centre will not be weak but a strong one, that we would have the strongest possible Centre. If this is our aim the head of the Central Government must have this power.”

Mr. R.K. Sidhwa opposed the amendment moved by Mr. Tajamul Hussain and urged thus:

“Sir, my honourable Friend Mr. Tajamul Husain has proposed to delete clause (3) of article 59 and his argument was that he wanted to keep the authority of the President supreme. Nobody denies that if the honourable Member would see article 59(1) it says:

‘The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence. ....”

Similarly powers are vested in the Governors and they can also suspend, remit or commute a sentence of death. In my opinion it is very healthy they should continue to vest this power which existed under the old regime in the Governors of the provinces, for this reason that the Governor of a province is better informed of a particular case of pardon which is referred to him. As far as that President is concerned when the question goes to him, he has to refer the matter first to the Governor and if the Governor has not exercised his right properly the President goes into the whole matter and exercises his right. In the matter of commuting a sentence of death it is only fair that the powers should also be with the Governor and the supreme power should remain with the President. The Governor is a popular governor and is responsible in a sense to the legislature, as he is the nominee of the Premier or the Prime Minister. If he acts wrongly, as my friend fears, then the legislature is there to keep a vigilant watch over him. Therefore, I do feel that the present position which is retained in the Draft Constitution is very desirable and we should retain those powers.

As far as rulers are concerned I am not very clear. But I do feel that in the constitution that will be framed by the various constituent assemblies of the States they will see that the ruler is made responsible to the legislature and he will also be like the head of provinces a mere figurehead of the State. From that point of view I would support even the power being vested in the ruler, although I make a qualification to my statement that at present I do not know what the position of the ruler is. If the ruler is autocratic and not responsible to the legislature certainly I would not like to give him that power. But as-
Thereafter, Dr. B.R. Ambedkar was invited to explain the scheme embodied in Article 59. He explained the scheme as follows:

“The power of commutation of sentence for offences enacted by the Federal Law is vested in the President. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the State.

In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned. This is the scheme.

With regard to the amendment of my friend, Mr. Tajamul Husain, his object is that the power to commute sentences of death permitted to the Governor should be taken away. Now, sub-clause (3) embodies in it the present practice which is in operation under which the power of commuting the death sentences is vested both in the Governor as well as in the President. The Drafting Committee has not seen any very strong arguments for taking away the power from the Governor. After all, the offence is committed in that particular locality. The Home Minister who would be advising the Governor on a mercy petition from an offender sentenced to death would be in a better position to advise the Governor having regard to his intimate knowledge of the circumstances of the case and the situation prevailing in that area. It was therefore felt desirable that no harm will be done if the power which the Governor now enjoys is left with him. There is, however, a safeguard provided. Supposing in the case of a sentence of death the mercy petition is rejected, it is always open, under the provisions of this article, for the offender to approach the President with another mercy petition and try his luck there. I do not think there is any great violation of any fundamental principle involved or any inconvenience that is likely to arise if the provisions in the draft article are retained as they are.”

The amendment moved by Mr. Tajamul Husain was finally negatived and the motion to add Article 59 to the Constitution came to be adopted.

On 17th October 1949, in the Constituent Assembly, Shri T.T. Krishnamachari moved an amendment seeking substitution of the following sub-clause for sub-clause (b) of clause (1) of article 59:

“(a) in all cases where the punishment or sentence is for an offence under any law relating to a matter to which the executive power of the Union stands.

(b) in all cases where the punishment or sentence is for an offence under any law relating to a matter to which Parliament has, and the Legislature of the State in which the offence is committed has not, power to make laws.

This means that the concurrent field would be left in a very nebulous position. In article 60 it is provided that in matters
where Parliament so decides the executive power of the Union will extend to the States in respect of subjects falling within the concurrent field. This position will be left nebulous. Therefore the amendment seeks to remedy that defect, making the power of the President to grant pardon to extend to all matters to which the executive power of the Union extends.

There will have to be a consequential amendment in regard to article 141 where the power of pardon is given to the President, which I shall move presently if this amendment is approved by the House.

The amendment was finally adopted by the Assembly."

**INTRODUCTION OF ARTICLES 72 AND 161**

In this background of facts, Articles 72 and 161 were introduced in the Constitution to cover the former Royal prerogative relating to pardon. Article 72 confers upon the President power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence enumerated in clauses (a) to (c) to Article 72(1). Article 72(2) states that the power conferred by law on any officer of the Armed Forces for the purpose of suspending, remitting or commuting a sentence passed by a Court Martial would not be affected by the power of the President contained in Article 72(1)(a). Article 72(3) further provides that the power of the President to suspend, remit or commute a sentence of death under Article 72(1)(c) would not affect the power of the Governor of a State to suspend, remit or commute a sentence of death under any law for the time being in force. Likewise, Article 161 of the Constitution confers upon the Governor of a State in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision. The necessary sequel to this logic is that notwithstanding any statutory provision, the President and the Governor continue to exercise their power, as the case may be, on the advice of the Council of Ministers.

A plain reading of the above provisions makes it crystal clear that the power conferred upon the President of India under Article 72 is of widest amplitude in comparison to the power conferred upon the Governor of a State.

Article 74(1) of the Constitution states that the Council of Ministers headed by the Prime Minister would aid and advise the President, who shall, in the exercise of his functions, act in accordance with such advice. Likewise, Article 163(1) of the Constitution states that the Council of Ministers headed by the Chief Minister would aid and advise the Governor in the exercise of his functions.

The Supreme Court of India has reiterated the well settled legal position that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided
within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.9

RATIONALE FOR GRANTING OF PARDONS

The philosophy underlying the policy of pardon, in a democratic system, provides a fillip to the constitutional scheme of exercising an act of humanity leading towards achieving perfection over imperfect judicial decisions based on the strict criminal laws thereby achieving the vision of the makers of the constitution by granting mercy, scrutinizing the validity of the threatened denial of life and personal liberty and correcting possible judicial error, on undeserving people adopting Gandhi philosophy with hope that good will finally prevail and rule over devils and evils. The rationale behind granting of pardons by the executives exercising the sovereign power mentioned above has been tested on the anvil of truth time and again and the Courts have hammered it being absolute and unfettered power, but of course on different theories and reasonings in tune with the maturing and developing society keeping in view the arena of international level. The show of diverisive theories on the highest pedestal is still on and time is far away before we put blinkers on the varied stories and could say that there is no space for opining “I am right – You are wrong” or “I am the best or He is the best” or “Might is right”, rather to wait till we say and make all feel that “We are right and We are the best” thereby enlightening the humanity throughout the universe.

The principle of checks and balances in a democratic society like ours has great significance as it not only controls the chariot but also the myriad kinds of theories sprouting in the mind of the charioteer thereby cautioning him to only follow the assigned path and finally setting the alleyway in an orderly fashion, failure of which may invest the charioteer to run amok. The framers of our Constitution were not oblivious of these checks and balances and, therefore, the scheme of granting pardons was subjected to the aid and advise of the council of ministers, meaning thereby that “the satisfaction of the President or the Governor required by the Constitution is not their personal satisfaction but the satisfaction of the Council of Ministers on whose aid and advice they exercise their powers and functions” 10 and “it is not up to them to take independent decisions while deciding whether to pardon an individual, since they are bound by the advice of the Council of Ministers”. 11

At this stage, it is pertinent to refer to some other provisions of Indian Penal Code and the Code of Criminal Procedure concerning remission, suspension, commutation of sentences.

Section 54 of the Indian Penal Code is one of the important provisions. It relates to

commutation of sentence of death without the consent of offender.

“54. Commutation of sentence of death.— In every case in which sentence of death shall have been passed, the appropriate government may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.”

Section 55 of the Indian Penal Code is another important provision which empowers the appropriate Government to commute the sentence of imprisonment for life to imprisonment of either description for a term not exceeding 14 years.

Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years.

Besides Articles 72 and 161 of the Constitution of India, there are provisions in the Code of Criminal Procedure which provide for grant of pardon. Sections 337 and 338 of the CrPC provide for release of a lunatic under certain conditions. Similarly, section 306 deals with tendering of pardon to accomplice. It empowers a Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into or the trial of the offence, with a view to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, to tender pardon.

Sections 432, 433, 433A, 434 and 435 of the Code of Criminal Procedure are important provisions concerning suspension, remission, commutation of sentences and the power of the State Government and the Central Government.

INSTRUCTIONS OF GOVERNMENT OF INDIA ON MERCY PETITIONS

At this stage, it is pertinent to refer to the Instructions of Government of India relating to mercy petitions. Paragraphs I to VII of the instructions issued by the Government of India regarding the procedure to be observed by the States for dealing with the petitions for mercy from or on behalf of the convicts under sentence of death are extracted below:

"INSTRUCTIONS REGARDING PROCEDURE TO BE OBSERVED BY THE STATES FOR DEALING WITH PETITIONS FOR MERCY FROM OR ON BEHALF OF CONVICTS UNDER SENTENCE OF DEATH AND WITH APPEALS TO THE SUPREME COURT AND APPLICATIONS FOR SPECIAL LEAVE TO APPEAL TO THAT COURT BY SUCH CONVICTS.

A. PETITIONS FOR MERCY

I. A convict under sentence of death shall be allowed, if he has not already submitted a petition for mercy, for the preparation and submission of a petition for mercy, seven days after, and exclusive of, the date on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal or of his application for special leave to appeal to the Supreme Court.

Provided that in cases where no appeal to the Supreme Court has been preferred or no ap-

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12. Section 55. Commutation of sentence of imprisonment for life.— In every case in which sentence of imprisonment for life shall have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

13. Section 57. Fractions of terms of punishment.— In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

application for special leave to appeal to the Supreme Court has been lodged, the said period of seven days shall be computed from the date next after the date on which the period allowed for an appeal to the Supreme Court or for lodging an application for special leave to appeal to the Supreme Court expires.

II. If the convict submits a petition within the above period, it shall be addressed: -
(a) in the case of States to the Governor of the State (Sadar-i-Riyasat in the case of Jammu and Kashmir) and the President of India; and
(b) in the case of Union Territories to the President of India.

The execution of sentence shall in all cases be postponed pending receipt of their orders.

III. The petition shall in the first instance: -
(a) in the case of States be sent to the State Government concerned for consideration and orders of the Governor (Sadar-i-Riyasat in the case of Jammu and Kashmir). If after consideration it is rejected it shall be forwarded to the Secretary to the Government of India - Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be withheld and an intimation of the fact shall be sent to the petitioner;

Note:—The petition made in a case where the sentence of death is for an offence against any law exclusively relatable to a matter to which the executive power of the Union extends, shall not be considered by the State Government but shall forthwith be forwarded to the Secretary to the Government of India, Ministry of Home Affairs. If the sentence of death was passed by an appellate court on an appeal against the convict's acquittal or as a result of an enhancement of sentence by the appellate court, whether on its own motion or on an application for enhancement of sentence, or
(ii) when there are any circumstances about the case, which, in the opinion of the Lieut.-Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, render it desirable that the President should have an opportunity of considering it, as in cases of a political character and those in which for any special reason considerable public interest has been aroused. When the petition is forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the execution shall simultaneously be postponed pending receipt of orders of the President thereon.

V. In all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lieut.-Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, shall forward such petition as expeditiously as possible along with the records of the case and his or its observations in respect of any of the grounds urged in the petition. In the
case of States, the Government of the State concerned shall, if it had previously rejected any petition addressed to itself or the Governor/Sadar-i-Riyasat, also forward a brief statement of the reasons for the rejection of the previous petition or petitions.

VI. Upon the receipt of the orders of the President, an acknowledgment shall be sent to the Secretary to the Government of India, Ministry of Home Affairs, immediately in the manner hereinafter provided. In the case of Assam and the Andaman and Nicobar Islands, all orders will be communicated by telegram and the receipt thereof shall be acknowledged by telegram. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letter in the case of Delhi and by telegram in all other cases and receipt thereof shall be acknowledged by express letter or telegram, as the case may be.

VII. A petition submitted by a convict shall be withheld by the Lieut.-Governor/Chief Commissioner/Administrator or the Government of the State concerned, as the case may be, if a petition containing a similar prayer has already been submitted to the President. When a petition is so withheld the petitioner shall be informed of the fact and of the reason for withholding it.

SUGGESTIONS TO STREAMLINE THE SCHEME OF PARDON:

The Law Commission of India in its 35th Report considered one suggestion that in exercise of the prerogative of mercy by the President and the Governor, the Court should be consulted. However, the Law Commission rejected such a suggestion observing that no statutory provision is needed requiring the President or the Governor to consult the Supreme Court or the High Court. Such a provision would not, strictly speaking, be in harmony with the essential nature of the prerogative. What is essentially a prerogative should not be converted into a matter on which a controversy would arise. Not much difficulty has been caused by the absence of any such provision.

Prior to the enactment of 1973 Code, at the instance of the Ministry of Home Affairs, a reference was sent to the Law Commission of India for submitting a report on some questions under the Code of Criminal Procedure Bill, 1970. Pursuant to the said reference, the Law Commission of India submitted its 48th Report on 25th July 1972. In the said report, the Commission gave its suggestion relating to “Consultation by Government with the Court before exercising powers of pardon etc.” as follows:

“46. Under the Constitution and under the Criminal Procedure Code, Government has got a power to grant pardons, to remit or commute sentence and various other powers of a similar nature. The question of requiring consultation with the Court before the exercise of these powers by the Government, has received our attention. We may refer in this connection to the present provision authorising such consultation, though not requiring it and to the discussion in the previous Commission’s Report, as to con-
consultation before the grant of a free pardon.

47. It is our view that in order to avoid any appearance of arbitrary action, to remove any suspicions of political considerations and otherwise in the interests of justice, such consultation should, by a statutory provision, be made compulsory in the case of all powers exercised under the existing sections. 18 Of course, these sections do not affect the powers conferred by the Constitution, and the exercise of the constitutional powers cannot be legally regulated by a statutory procedure. But it is in our view desirable that the same practice should be adopted for exercising similar powers even under the Constitution.

In the Code of Criminal Procedure, 1973, no requirement of consultation in pardoning powers as suggested by the Law Commission in its 48th report came to be included.

It is worthy to mention here that Hon'ble Mr. Justice V. R. Krishna Iyer, a former Judge of the Supreme Court of India advocated for a high-level advisory board to advise the executive. 19 Per contra, former President of India Shri Venkataraman went a step ahead arguing that the conditions prevailing in the country require that this power of review should vest with the judiciary and not with the President i.e. the executive. 20

Inspite of the aforementioned developments, nothing came out to review the Constitutional Scheme of Pardon. However, the present day scenario seeks review of the said Constitutional Scheme.

**NO INTERFERENCE IN PARDONING POWER**

In certain cases, the Supreme Court has refused to intervene in the constitutional power of granting pardon.

In Nachhittar Singh v. State of Punjab 21 the Court held that the circumstances pointed out in the case do not constitute a ground sufficiently compelling for interference with the discretion of the courts below in the matter of sentence. If there are any commiserative factors which can be taken into consideration by the Executive Government in the exercise of its prerogative of clemency it is for that Government to do so.

In Bishan Dass v. State of Punjab 22, the Supreme Court while dealing with the question of sentence held that the appellant’s crime is cruel and inhuman and the consequential deaths dastardly and pathetic. The general trend in courts and among jurists as well as penal codes in this country and in other countries is towards abolition of capital punishment. The Court reiterated the decision in Ediga Anamma v. State of A.P., (1974) 4 SCC 443 by observing that it is entirely a matter for the clemency of the Governor or the President, if appropriately moved to commute or not to commute.

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18. Clauses 441, 442 Cr.P.C. Bill
In Shanker v. State of UP, the Supreme Court held that it is true that lapse of a long period between the award of death penalty and hearing of the appeal by this Court (Total: 13 months) is a factor which, in the context of a particular case, may, in conjunction with other circumstances, justify the commutation of the capital sentence by the Court. But this is not an absolute rule justifying interference with the discretion of the trial court in the matter of sentence in every case. Similarly, that the execution of the death sentence will render extinct the immediate progeny of the accused and will throw the family of the condemned prisoner orphaned and resourceless on the scrap heap of society, are matters extraneous to the judicial computer. Nevertheless these are compassionate matters which can be and we are sure, will be, considered by the Executive Government while exercising its powers of clemency.

In G. Krishta Goud v. State of Andhra Pradesh, the Supreme Court presuming clemency power of the President or the Governor a bona fide exercise held it falling outside the judicial review. The Court observed thus:

“... The Court cannot intervene everywhere as an omniscient, omnipotent or omnipresent being. And when the Constitution, as here, has empowered the nation’s highest Executive, excluding, by implication, judicial review, it is officious encroachment, at once procedurally ultra vires and upsetting comity of high instrumentalities, for this Court to be a superpower unlimited. The second limitation conditions all public power, whether a court oversees or not. That trust consists in the purity of public authorities. All power, however majestic the dignitary wielding it shall be exercised in good faith, with intelligent and informed care and honestly for the public weal.

Our reflections on hanging, our philosophy for mercy and our observations about death sentence being abolished in country after country and the irrevocable harm of a wrong execution — these great facts cannot deflect us from our constitutional duty not to interfere where we have no jurisdiction."

However, the Court sounding a note of caution observed that “absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established, the Supreme Court may not be silent or impotent.”

In Mohinder Singh v. State of Punjab, the Supreme Court reiterated its stand that legal justice belongs to the Court but compassionate commutation belongs to the top executive.

In Amrit Bhushan Gupta v. Union of India, the Supreme Court held that the question whether, on the facts and circumstances of a particular case, a convict, alleged to have become insane, appears to be so dangerous that he must not be let loose upon society, lest he commits similar crimes against other innocent persons when released, or, because of his antecedents and character, or, for some other reason, he deserves a different treatment, are matters for other authorities to consider after a

court has duly passed its sentence.

In Shiv Mohan Singh v. State (Delhi Admn.), 27 the Supreme Court once again acknowledged the power of the executive by observing that "Mercy, like divinity, is amenable to unending exercise but in this mundane matter it is for the Head of State to act and not for the Apex Court". The Court further observed that the judicial fate notwithstanding, there are some circumstances suggestive of a claim to Presidential clemency. The two jurisdictions are different, although some considerations may overlap. We particularly mention this because it may still be open to the petitioner to invoke the mercy power of the President and his success or failure in that endeavour may decide the arrival or otherwise of his doomsday. With these observations we leave the "death penalty" judicially "untouched".

In Joseph Peter v. State of Goa, Daman & Diu 28, the Supreme Court held that "Possibly, Presidential Power is wider but judicial power is embanked". The Court further observed that "a death sentence, with all its dreadful scenario of swinging desperately out of the last breath of mortal life, is an excruciating hour for the Judges called upon to lend signature to this macabre stroke of the executioner's rope. Even so, Judges must enforce the laws, whatever they be, and decide according to the best of their lights; but the laws, are not always just, and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice. We are bound by the Penal Code and the Criminal Procedure Code, by the very oath of our office."

JUDICIAL REVIEW OF THE SCHEME OF PARDON:

On numerous occasions, the executive power of pardon has been subjected to judicial review.

In K.M. Nanavati v. State of Bombay 29, the Supreme Court considered the question as to what is the content of the power conferred on the Governor of a State under Article 161 of the Constitution; and whether the order of the Governor of Bombay impinges on the judicial powers of this court, with particular reference to its powers under Article 142 of the Constitution. The Court after analyzing the factual and legal position of the case held thus:

"26. As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became sub judice in this court on the filing of the petition for special leave to appeal. After the filing of such a petition this court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply Rule 5 of Order 21 or to exempt the petitioner from the operation of that Rule. It would be for this court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this court."

The principle of checks and balances in a democratic society like ours has great significance as it not only controls the

27. Shiv Mohan Singh v. State (Delhi Admn.), (1977) 2 SCC 238
chariot but also the myriad kinds of theories sprouting in the mind of the charioteer thereby cautioning him to only follow the assigned path and finally setting the alleyway in an orderly fashion, failure of which may invest the charioteer to run amok.

In *Maru Ram v. Union of India* 30, the Supreme Court observed that wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. Finally, the Court formulated its findings and held thus: (para 72)

“The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.”

The ambit and scope of Articles 72 and 161 of the Constitution was extensively considered in *Kehar Singh v. Union of India & Another*. 31 The Court held that “the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State.” While answering to a question if the President is empowered to scrutinise the evidence on the record of the criminal matter and can take a different view, the Court observed thus:

“10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it.

11. The power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion

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that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

16. The power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.”

The Court further held that the question as to the scope of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review within the strict limitations defined in *Maru Ram*. The limited scope of judicial review is not affected by the accepted position that the power to pardon belongs to exclusively to the President and the Governor under the Constitution. There is also no conflict that between the powers of the President and the finality attaching to the judicial record. There is also no question involved in this case of asking for the reasons for the President's order.

In *Swaran Singh v. State of U.P.* 32, the Supreme Court rejected the contention that this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution and held that if such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.

In *Satpal v. State of Haryana* 33, the Supreme Court observed that there cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds.

In *Bikas Chatterjee v. Union of India* 34, the Supreme Court reiterated the settled legal position that although the decision of the President of India on a petition under Article 72 of the Constitution is open to judicial review but the grounds therefor are very very limited.

In *Epuru Sudhakar & Another v. Govt. of A.P. & Others* 35, the Supreme Court examined the pardoning power under Articles 72 and 161 of the Constitution of India in extenso. The Court observed that “exercise of executive clemency is a matter of discretion and yet subject to certain standards. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and

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should be adapted to meet the circumstances of the particular case”.

In Narayan Dutt v. State of Punjab 36, the Supreme Court reiterated the well settled legal position that considerations for exercise of power under Articles 72/161 “may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

**DELAY AS A GROUND FOR JUDICIAL REVIEW:**

There are numerous decisions where the hangman’s noose has been taken off the accused’s neck by the Supreme Court by altering death sentence to life imprisonment on the ground of delay. Delay in disposal of appeals or in execution of death sentences has been viewed seriously by the Supreme Court. By passage of time, a sea-change came to be seen in the decisions of the Supreme Court of India. On numerous occasions, the executive power of pardon has been subjected to judicial review for the alleged delay in disposal of mercy petitions.

In Sher Singh v. State of Punjab 37, the Supreme Court observed that “we must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously”. The Court further observed that “A self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice.

In K.P. Mohammed. v. State of Kerala 38, the Court observed that delays in dispensation of justice are becoming more and more chronic, whether the dispenser of justice is the executive or the judiciary. But there are at least some sensitive areas like those concerning life and death where the need for speedy justice is self-evident. It is perhaps time for accepting a self-imposed rule of discipline that Mercy Petitions shall be disposed of within, say, three months. These delays are gradually creating serious social problems by driving the courts to reduce death sentences even in those rarest of rare cases in which, on the most careful, dispassionate and humane considerations death sentence was found to be the only sentence called for. The Court finally commuted death to life during the pendency of mercy petition.

In Triveniben v. State of Gujarat 39, the Court held that “as between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him

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to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed”.

In Devender Pal Singh v. State (NCT of Delhi) 40, the Supreme Court examined the scope of the Court’s power of judicial review of pardoning power under Articles 72 and 161 of the Constitution of India in extenso. The Court also examined as to whether delay in deciding a petition filed under Article 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict; and whether the parameters laid down by the Constitution Bench in Triveniben case for judging the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences under TADA and other similar statutes? The Court held that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes.

In Mahendra Nath Das v. Union of India 41, the Supreme Court considered the question whether improper and long unexplained delay in disposal of mercy/ clemency petition was sufficient for commutation of the sentence of death into life imprisonment. The Court examined the matter minutely and found 12 years’ delay in the disposal of the appellant’s mercy petition sufficient for commutation of the sentence of death. The rejection of the appellant’s mercy petition was declared illegal and the sentence of death was commuted into life imprisonment.

In Shatrughan Chauhan v. Union of India 42, the ratio laid down in Devender Pal Singh has been declared per incuriam by observing that there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts. On the basis of the said decision, in Navneet Kaur v. State of NCT of Delhi 43, the Court deemed it fit to commute the death sentence imposed on Devender Pal Singh Bhullar into life imprisonment both on the ground of unexplained/inordinate delay of 8 years in disposal of mercy petition and on the ground of insanity.

In Shatrughan Chauhan, the Supreme Court observed that the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a Constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it.

In Shatrughan Chauhan (supra), the Su-
preme Court dealt with number of cases seeking commutation of death sentence to imprisonment for life on the ground of delay in disposal of mercy petitions. The Court observed that a series of the Constitution Benches of this Court have upheld the constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the constitutional mandate and not in violation of the constitutional principles. The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. Delay caused by circumstances beyond the prisoners’ control mandates commutation of death sentence. The mercy petitions under Articles 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the Ministry concerned to follow its own rules rigorously which can reduce, to a large extent, the delay caused.

**NO GUIDELINES FOR EXERCISING PARDONING POWER:**

In Shatrughan Chauhan, the Supreme Court reiterated the legal position declining to frame guidelines for the exercise of power under Articles 72 and 161 for two reasons, *firstly*, there is always a presumption that the constitutional authority acts with application of mind; and, *secondly*, considering the nature of power enshrined in Articles 72 and 161, it is unnecessary to spell out specific guidelines. Nevertheless, this Court has been of the consistent view that the executive orders under Articles 72 and 161 should be subject to limited judicial review based on the rationale that the power under Articles 72 and 161 is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. Accordingly, there is no dispute as to the settled legal proposition that the power exercised under Articles 72 and 161 could be the subject matter of limited judicial review.

**TODAY’S SCENARIO AND THE WAY FORWARD:**

From the foregoing, it transpires that initially the Court was reluctant to intervene as an omniscient, omnipotent or omnipresent being in the decisions of the President of India or any Governor of the State presuming it a *bona fide* exercise by the custodian of the power. The Court opined to interfere only in gruesomely established cases of absolute, arbitrary, law-unto-oneself *mala fide* execution of the power. Thereafter came a phase of review of the said power within the strict limitations or in other words with limited judicial review. Even though it has been a constant stand of the Supreme Court that the exercise of power under Articles 72/161 of the Constitution would be tested on the anvil of truth within the strict limitations yet in the recent phase it transpires that the Court in order

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to examine that the public power, including constitutional power, is not exercised arbitrarily or mala fide went on to check whole procedure of moving a mercy petition, its processing, notes prepared by the Ministry of Home, the papers placed before the President of India and final noting thereon. All this exercise was carried on after it was brought to the notice of the Court that the order passed by the President is an outcome of “non-application of mind” and the rejection of mercy petition is arbitrary and suffers from the vice of inequality and unfairness. The Court found it justified after examining all the material on record. The decisions were found to have been based on non-application of mind and arbitrariness suffering from the vice of inequality and unfairness, particularly on the unexplained reasons including the suppression of facts on the part of the aid and advice machinery of the Government on whose advice the President or Governor of a State has to base its opinion. The Court which was in the past reluctant to interfere in the process of pardoning power not only interfered but also laid down certain guidelines for smooth functioning of the constitutional scheme to uphold the de facto protection provided by the Constitution to every convict including those on death row. In nutshell, it transpires that, all is not well.

It is avowedly clear that judiciary has its limitations to comment on political scenario and its decision making power. The judges speak only through their decisions. Even though the President of India and the Governor of a State are ultimate custodians of the power but they exercise the power from ciphers with rubber stamp. The political imbroglios make their decisions to suffer by vice of arbitrariness, inequality and unfairness. The changing political scenario having a custodian with no legal background sometimes is bound to be misled by the inefficient or motivated aid and advice subjecting a decision for judicial review in future giving way to an accused to seek judicial pardon under the constitutional scheme flowing from Article 21 of the Constitution. Judicial pronouncements made in rarest of rare cases after long trials are thereby made non-est. When an accused gets benefit on account of the State’s inefficiency or arbitrariness or unfairness, the victims are left with nothing but gaping with awe on the sky with gloominess shining on their forehead. There is need to harmonise the interest of an accused and the fundamental interests of the society.

The framers of our Constitution had woven the democratic set up of our country in a fabric of golden thread providing an important scheme running under Articles 72 and 161 as one of the main arteries of our criminal justice system. The experience during last six decades shows that the arteries have slowly slowly got blockages and to rejuvenate the blocked arteries, the same have been operated number of times and every time the loosening space has been woven with golden thread. Once again it is being felt that the arteries have once again loosened and there is a need of a needle with golden thread to screw the loosening gap once and for all. The question arises as to how we can deal with the issue in question so as to provide a foolproof system where neither the accused nor the victims feel themselves robbed at the hands of Government machinery.

In view of foregoing judicial pronounce-
ments and opinion of the jurists, the author of this paper is of the considered opinion that it has become necessity to review and streamline the Constitutional Scheme of Pardon envisaged under Articles 72 and 161 of the Constitution of India, in the following manner:

1. DISPOSAL OF MERCY PetITIONS WITHIN A STIPULATED TIME:

- The Supreme Court of India in series of cases has strictly viewed the delay in disposal of Mercy Petitions and lastly in Shatrughan Chauhan, the Court held that the mercy petitions can be disposed of at a much faster pace than what is adopted now. Although, no time frame can be set for the President for disposal of the mercy petition but the Ministry concerned should follow its own rules rigorously which can reduce the delay caused. Accordingly, the Ministry of Home Affairs, Government of India should take all appropriate steps to ensure a timeframe for disposal of Mercy Petitions by the President of India and Governors.

2. STATISTICS OF MERCY PetITIONS:

- From a bare perusal of Mercy Petitions regime, it transpires that Indian criminal justice system lacks maintaining of day to day data and statistics concerning Mercy Petitions filed either before the President of India or the Governors. Statistics of Mercy Petitions must be maintained properly in digital form. Whenever an accused files a Mercy Petition, the data must reflect the status of the petition and action taken thereon not only to the accused but also to the public at large. This data must be linked up with the proceedings of the Sessions Court, High Court and Supreme Court of India and even with the Jail Authorities.

3. HEARING OF THE STATE AND THE VICTIMS OF CRIME:

- In Mofil Khan 45, the Supreme Court has observed that it stands as a fact that criminal justice reform and civil rights movement in India has historically only paid considerable attention to the rights of the accused and neglected to address to the same extent the impact of crime on the victims. It is not only the victims of crime only that require soothing balm, but also the incidental victims like the family, the co-sufferers and to a relatively large extent the society too.

- In Mukesh & Another46, the Supreme Court endorsing the opinion of Mofil Khan held that the Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case.

- In view of the above decisions, the author of this paper is of the considered opinion that none of the Authorities considering mercy petitions must pronounce final verdict without giving an opportunity to hear the victims of crime. The law must be changed accordingly. Further, a provision may be introduced empowering the victims or the State, who feel dissatisfied with the decisions of the High Court or the Supreme Court of India, to move a petition before the Governor or the

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President of India for enhancement of sentence of the accused from life imprisonment to death sentence. This kind of law will help to balance the scale of justice.

4. CONSTITUTING AN INDEPENDENT TEAM OF JURISTS TO ASSIST THE PRESIDENT OF INDIA AND THE GOVERNORS IN DEALING WITH MERCY PETITIONS:

- The power of clemency is exercised by the President of India under Article 72 and by the Governors under Article 161 of the Constitution of India. This is a constitutional duty to be exercised in aid and advise of the Council of Ministers. After exhausting all legal remedies, a convict has an option to seek remedy under constitutional scheme of “Pardon” by moving a petition of mercy before the President of India or the Governor of a State, as the case may be.

- As discussed above, a number of decisions concerning mercy petitions have been subjected to limited judicial review in the Supreme Court of India on the ground of long delays in disposal of mercy petitions or disposal of mercy petitions based on partial and incomplete summary thereby questioning the diligence exercised and procedures in adjudicating mercy petitions. The decisions in mercy petitions are usually based on the aid and advice of the Government. In absence of evidence of reasonable scrutiny of the documents of a mercy petitions, the Supreme Court has interfered in several decisions of the President of India or the Governors.

- The constitutional authorities (the President of India or the Governors) have no mechanism to get a matter examined independently and in addition to the usual exercise of the Government, which has led to the disparity in decisions disposing of mercy petitions. There may be certain unexplained reasons for such disparities which have never been brought to the knowledge of the Supreme Court of India. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise of power under Articles 72 or 161 of the Constitution.

- Keeping in view the fact that certain decisions of the President of India or the Governor have been subjected to judicial review and the Supreme Court of India has interfered on certain grounds accusing the Government for not fully updating the constitutional authorities while deciding mercy petitions, the question arises as to what mechanism can minimize such kind of issues where we may provide a foolproof system of mercy petitions providing no room for upsetting comity of high instrumentalities by the Supreme Court of India intervening with justification everywhere as an omniscient, omnipotent or omnipresent being. There is not only an expectation that all majestic powers must be exercised in good faith, with intelligent and informed care and honestly for the public weal, but such mechanism must be seen having tried to stand up by such an expectation of the people of this country.

- The answer to all ifs and buts which may result in achieving the lost path and re-shining the legacy and re-gaining the comity of high instrumentality of the nation which has been dragged...
into the Courts of law, is to have a path of eminence crafted for glorious ruling of the absolute powers. To say the least, time has come when the President of India or the Governors of the State must be equipped with independent teams of jurists to aid and advise them in decision making process on an extremely important subject - “mercy petitions” - which may answer all queries being raised in certain corners settling the uncertainties into certainties. In addition to the constitutional scheme, the Team of Jurists is need of the hour to aid and advise the absolute power to act absolutely. The constitution of such a team will well serve the issue even from human rights perspective.

CONCLUSION
As a corollary to the foregoing, the suggested way forward would not only streamline the Scheme of Pardoning as envisaged under the Constitution of India but it would also save the precious time of judiciary from peeping time and again into the political vagaries causing calculated assault on human dignity and pushing civilization a step backward. The quest for justice demands an immediate action in this regard. The ship of humane justice should not sink; humanity should not be forced to fly its flag half-mast; and before such an eventuality, in tune with the maturing society at global level, let’s hoist the flag of humanity.
CRIMINAL JUSTICE DELIVERY
SYSTEM AND SENTENCING
POLICIES IN INDIA

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ABSTRACT

Sentencing is that stage of criminal justice system where the actual punishment of
the convict is decided by the judge. It comes after the stage of conviction and the pro-
nouncement of this penalty imposed on the convict is the ultimate goal of any justice
delivery system. Having said this, no further explanation is required to understand how
much of attention needs to be paid to this stage. This stage reflects the amount of con-
demnation the society has for a particular crime.

In India neither the legislature nor the judiciary has issued structured sentencing
guidelines. Several governmental committees have pointed to the need to adopt such
guidelines in order to minimize uncertainty in awarding sentences. The higher courts,
recognizing the absence of such guidelines, have provided judicial guidance in the
form of principles and factors that courts must take into account while exercising dis-
cretion in sentencing.

Key Words: Criminal Justice System, Types of Punishment, Capital Punishment.

INTRODUCTION

The problem with the existing system as provided for in the criminal in the crimi-
nal procedure code is the variation in the result obtained from the same or similar
set of facts. The judges are allowed to reach the decision after hearing the par-
ties. However, the factors which should considered while determining the deci-
sion and those which should be avoided is not specified anywhere. This is where
the judges are expected to use his/her personal discretionary capacity to fix the
punishment. The discretion eventually gets abused in large number cases due
to irrelevant consideration and application of personal prejudices.

So far as sentencing guidelines in death penalty and sexual offences cases are
concerned, the Indian judiciary had strongly felt the need to have a sentenc-
ing guideline at least to the extent of imposition of death penalty. Therefore in the
case of Bachan Singh v. State of Punjab and subsequently in the case of Mac-

chi Singh v. State of Punjab, the court laid down the “rarest of the rarest” test by which death penalty should be imposed in only exceptional situations and such exceptional reasons must be recorded. This project provides for detailed study about the factors which are considered by judges while sentencing to offenders of death penalty and sexual offences cases.

CAPITAL PUNISHMENT

Of all types of punishment, capital punishment is perhaps the most controversial and debated subject among the modern penologists. There are arguments for and against the utility of this mode of sentence. The controversy is gradually being resolved with a series of judicial pronouncement containing elaborate discussion on these complex penological issues. However, looking to the variety of considerations involved in the problem, a detailed discussion on the subject is being provided to the succeeding chapter of the project.

RETENTION OF CAPITAL PUNISHMENT- HOW FAR JUSTIFIED

The history of human civilization reveals that during no period of time death penalty has been discarded as a mode of punishment. This finds support in the observation made by Sir Henry Maine who stated, “Roman republic did not abolish death sentence though its non-use was primarily directed by the practice of self-banishment or exile and the procedure of quarantine.”

Nor does the ancient Indian civilization know of abolition of death sentence although its disuse at some point of time in history has been effected because the people were most truthful, soft-hearted and benevolent and to them vocal remonstrate sufficed. But in the event of failure of these measures, corporal punishment and death sentence were invoked to protect the society from violent criminals.

Penologists in India have reacted to capital punishment differently. Some of them have supported the retention of this sentence while others have advocated its abolition on humanitarian grounds. The receptionists support capital punishment on the ground that it has a great deterrent value and commands obedience for law in general public. Those who support capital punishment feel that death of a killer is a requirement of justice. They believe that death of victim must be balanced by the death of the guilty party, otherwise, the victim will not be avenged and the anguish and passions aroused by the crime in society will not be allayed.

The abolitionist, on the other hand, argues that enormous increase in homicide crime-rate reflects upon the futility of death sentence. Another argument generally put forth by abolitionists is that hardened criminals commit most cold-blooded murders in a masterly manner. They proceed with their criminal activity in such a way that even if they are caught, they are sure to escape punishment due to one or other procedural flaw in the existing criminal law.

Reacting sharply against the abolitionists view, the Law commission of India in its thirty fifth report observed:” Hav-

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ing regard to the condition of India, to the variety of the social upbringing of its inhabitants, to the disparity of the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the abolition of capital punishment. Arguments, which would be valid in respect of one area of the world, may not hold well in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved the commission is of the capital punishment should be retained in the present state of the country⁵. Supporting the aforesaid view of the law commission, the supreme court in Bachan Singh v. State of Punjab⁶, observed: Not with standing the views of the abolitionist to the contrary, a very large segment of people, the world over, including sociologists, legislatures, jurists, judges, and administrators still firmly believe the worth and necessity of capital punishment for the protection of society. The parliament has repeatedly In last three decades, rejected all attempts to abolish death penalty. Death penalty is still recognized as legal sanction for murder or some types of murder in most of the civilized countries in the world. It is not possible to hold that the provision of death penalty as an alternative punishment for murder in section 302 IPC is unreasonable and not in public interest.

RETENTION PREFERRED TO ABOLITION

The current wave of reformation in the field of criminal justice system has inspired parliamentarians in India to launch a crusade against capital punishment. They have been constantly struggling to repeal the relating to death sentence from the penal code for the past several years. The proposal on this issue was tabled on Lok Sabha in 1949 but it was subsequently withdrawn at the instance of the then Home minister Sardar Vallabhai Patel.

OFFENCES PUNISHABLE WITH DEATH SENTENCES UNDER IPC AND OTHER LAWS

It would be pertinent to refer to the relevant provisions of the Indian penal code which provide for death sentence for certain specified offences. These offences are: Capital Offences in IPC Until 1983, death sentence was mandatory only in one case namely, for murder committed by a person while he is already undergoing a sentence for life imprisonment. For other offences, the penal code did not make it obligatory for the courts to award death penalty and they were free to punish the offender with an alternative sentence. But the decision of the supreme court delivered on 7th April, 1983 disposing a writ petition filed by Mithu v State of Punjab,⁷ challenging the constitutional validity of section 303 of I.P.C on the ground that it violated Articles 14 and 21 of the constitution, the five judges constitutional bench presided over by chief justice Y.V. Chandrachud observed that section 303, I.P.C is unconstitutional and there shall be no mandatory sentence of death for the offence of murder by lifer. In other words,

5. 35th Report of Law Commission of India (Government of India, 197), 354.
6. Supra footnote-1
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<tr>
<th>S. No</th>
<th>Section Number</th>
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<tbody>
<tr>
<td>1.</td>
<td>Section 121</td>
<td>Treason, for waging war against the Government of India</td>
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<td>2.</td>
<td>Section 132</td>
<td>Abetment of mutiny actually committed</td>
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<td>3.</td>
<td>Section 194</td>
<td>Perjury resulting in the conviction and death of an innocent person</td>
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<td>4.</td>
<td>Section 195A</td>
<td>Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent Person</td>
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<td>5.</td>
<td>Section 302</td>
<td>Murder</td>
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<td>6.</td>
<td>Section 305</td>
<td>Abetment of a suicide by a minor, insane person or intoxicated person</td>
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<td>7.</td>
<td>Section 307 (2)</td>
<td>Attempted murder by a serving life</td>
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<td>1.</td>
<td>Sections 34, 37, and 38(1)</td>
<td>The Air Force Act, 1950</td>
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<td>Section 27(3)</td>
<td>The Arms Act, 1959 (repealed)</td>
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<td>Sections 34, 37, and 38(1)</td>
<td>The Army Act, 1950</td>
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<td>5.</td>
<td>Sections 21, 24, 25(1)(a), and 55</td>
<td>The Assam Rifles Act, 2006</td>
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<td>6.</td>
<td>Section 65A(2)</td>
<td>The Bombay Prohibition (Gujarat Amendment) Act, 2009</td>
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<td>7.</td>
<td>Sections 14, 17, 18(1)(a), and 46</td>
<td>The Border Security Force Act, 1968</td>
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VI. Capital Offences in other Laws:

8. Section 364A
   Kidnapping for ransom

9. Section 376A
   Rape and injury which causes death or leaves the woman in a persistent vegetative state

10. Section 376E
    Certain repeat offenders in the context of Rape

11. Section 396
    Dacoity with murder
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<td>8.</td>
<td>Sections 17 and 49</td>
<td>The Coast Guard Act, 1978</td>
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<td>Section-5</td>
<td>The Defence of India Act, 1971</td>
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<td>11.</td>
<td>Section-3</td>
<td>The Geneva Conventions Act, 1960</td>
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<td>12.</td>
<td>Section-3(b)</td>
<td>The Explosive Substances Act, 1908</td>
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<td>13.</td>
<td>Sections -16, 19, 20(1)(a), and 49</td>
<td>The Indo-Tibetan Border Police Force Act, 1992</td>
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<td>15.</td>
<td>Section-3(1)(i)</td>
<td>The Maharashtra Control of Organized Crime Act, 1999</td>
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<td>16.</td>
<td>Section-31A(1)</td>
<td>The Narcotics Drugs and Psychotropic Substances Act, 1985</td>
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<td>17.</td>
<td>Sections- 34, 35, 36, 37, 38, 39, 43, 44, 49 (2)(a), 56(2) and 59</td>
<td>The Navy Act, 1957</td>
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<tr>
<td>19.</td>
<td>Sections -16, 19, 20(1)(a), and 49</td>
<td>The Sashastra Seema Bal Act, 2007</td>
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| 20. | Section-3(2)(i) | The Scheduled Castes and Scheduled
hereinafter all murder cases would fall under section 302 which provides punishment for murder.

**SENTENCING IN DEATH PENALTY CASES**

The justification of capital punishment was in question in various matters before the apex court especially in the seventies and early eighties. The main reason which kicked the controversy was the question whether state has right to take life. The people opposing capital punishment have a sound argument with them that it is irrevocable. If later on it is found that there was error in the decision, the life lost cannot be recalled.

This argument is not merely hypothetical. The famous case on this point is of Dreyfus who was convicted by court martial for treason in France in 1884 for allegedly supplying secret information to the enemy country Germany. There was a public movement against conviction and capital sentence of Dreyfus which led to by famous writer Emile Zola. Finally he was cleared by the appeal court in 1906. Later on in 1930 papers of a German major proved the innocence of Dreyfus which showed that the documents on the basis of which court martial found Dreyfus guilty were all forged documents. A change in judicial approaches is also vital in many cases. This fact can be well exemplified by case of Attappa Couden v State of Madras. In this case the madras high court held Attappa and others guilty of murder and sentenced them to death. They were executed. 10 years later the Privy Council in its landmark decision of Pulkori Kottayya, overruled the full bench decision of Madras High Court and laid down correct law. Had this decision proceeded Attapas Case Attapa and others may not have to die. To quote words of Mr. Justice V.R. Krishna Iyer, "But dead men tell no tales and judicial guilt has no temporal punishment". The Supreme Court of India has upheld the constitutional validity of capital punishment primarily for the reason that so long as it is in the statute book it shall remain there. Judiciary normally hesitates to lay down any sentencing guidelines. The superior court requires the trial court to exercise discretion while sentencing along with judicial line.

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<td>21.</td>
<td>Section-3(1)(i)</td>
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<td>The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002:</td>
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<td>22.</td>
<td>Sections - 10(b)(i) and Section 16(1)(a)</td>
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<td>The Unlawful Activities Prevention Act, 1967</td>
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Tribes (Prevention of Atrocities) Act, 1989
be used according to principle and not according to humours of the judge arbitrarily and fancifully. Trial court is not expected to be influenced by public feelings is not admissible reason for refraining from passing severe sentence and vice versa. But the recent trend shows that public outcry plays significant role in deciding sentences.

In Jagmohan Singh v State of U.P.\(^8\), the Apex Court its inability to eliminate capital punishment from Indian penology and held that deprivation of life is constitutionally permissible provided it is done according to the procedure established by law. However, In Ediga Anamma v State of A.P.\(^9\) the Apex Court came closer to achieve this goal by means of statutory interpretation. In this case the convict Ediga Annamma was a young woman of the age of 24 years having one infant. Her conviction was confirmed, but the lordship faced, to quote his own words punitive dilemma. His lordship Mr J.V.R. Krishna Iyer was humane to consider the ethos of rural area where the murders occurred and was moved by the pathetic position of a youngwomen who was sex starved and was thrown out by her husband and father in law and who was living with her parents along with child. His Lordship also considered human significance in the sentencing context by appreciating the boarding horror of hanging haunting the prisoner in her condemned cell for over two years.

The significant feature of Rajendra Prasad v. State of U.P.\(^10\) is the aperture of its angle. The apex court in this case observed while considering the nature of special reasons required to be stated. “Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. The crime may be shocking and yet the criminal may not deserve death penalty. The crime may be less shocking and yet the callous criminal e.g. a lethal economic offender may be jeopardizing societal existence by his acts of murder. The apex court went a step forward and further observed. “But if the legislative understanding is not in sight, judges who have to implement the Code cannot fold up their professional hands but must make provisions viable by evolution of supplementary principle, even if they may appear topossess the flavour of the law making.”

Bachan Singh v. State of Punjab\(^11\), is a landmark judgment in the truest sense, as it stabilized use of discretion while sentencing within the tangible framework. The apex court while interpreting section 354 (3) and section 235 (2) Cr.P.C elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of extreme culpability and secondly, in making choice of sentence due to regard must be paid to the circumstances of the offender also. The court laid down aggravating circumstances such as-

1. If the murder has been committed after previous planning and extreme brutality.
2. The murder involves exceptional depravity.

\(^8\) Jagmohan Singh v State of U.P. AIR 1973 SC 874
\(^9\) Ediga Anamma v State of A.P. AIR 1974 SC 799
\(^10\) Rajendra Prasad v State of U.P. AIR 1979 SC 916
\(^11\) Supra note-2
3. The murder is of a member of armed forces of the union or of any police force or of any public servant and was committed-
I. While such member or public servant was on duty.
II. In consequence of anything done or attempted to be done by such member or public servant in discharge of his duty.

4. If the murder is of a person who had acted in the lawful discharge his duty u/s 43 Cr.P.C or section 37, 129 Cr.P.C
The apex court also noted relevant circumstances which must be given weight in determination of sentences such as-

a) That the offence was committed under the influence of extreme mental or emotional disturbance.
b) The age of the accused.
c) The probability that the accused would not commit criminal acts of violence as would constitute continuing threat to society.
d) The probability that the accused can be reformed and rehabilitated.

The state shall by evidence prove that the accused does not satisfy condition no (3) and (4).

5. That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

6. That the accused acted under duress or domination of another person.

7. That the condition of the accused showed that he was mentally defective and that said effect impaired his capacity to appreciate the criminality of his conduct.

The apex court in his prophetic observation said, “A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws in-

strumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed”

SENTENCING DISCRETION

In Machhi Singh v. State of Punjab, the Apex Court made an attempt to formulate as to what constitute “rarest of rare” case. The court laid down specific circumstances under which the collective conscience of the community may receive shock so as to constitute rarest of rare case. The circumstances are:

1. Manner of commission of murder.
2. Motive for commission of murder.
4. Personality of victim.

The apex court after formulating the modalities stated that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight age and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. Sections 235, 248, 325, 360 and 361 Cr.P.C deal with the power of the court relating to sentencing. However, Cr.P.C does not provide any guidelines for sentencing and gives an absolute discretion to the judge to award any sentence within given parameters.

The committee on reforms of the criminal justice system, 2003 established by the Government of India recommend changes in the criminal justice system in India, had observed that the judges were granted wide discretion in awarding the sentence within the statutory limits. The committee was also of the opinion that as there was no guidance in selecting the
most appropriate sentence in the given factual situation thereof, there was no uniformity in awarding of sentence as the discretion was exercised according to judgment of every judge. Thus, the committee emphasized the need for having sentencing guidelines to minimize uncertainty in awarding sentences. It recommended the appointment of a statutory committee to lay down the sentencing guidelines.

**DELAY IN EXECUTION OF DEATH SENTENCE**

A survey of available case-laws on death sentence would reveal that the attention of the Supreme Court was focused on the question whether inordinate delay in the execution of death penalty can be considered to entitle the convict to claim commutation of the sentence to that of life imprisonment. In *Triveniben v. State of Gujarat*, 13 the five judges bench of the supreme court overruled Vatheeswaram and Javed Ahmed to the extent they purported to lay down the two years delay rule, and held that no fixed period of delay could be held to make the sentence death inexecutable. The court, however, observed that it would consider such delay as an important ground for commutation of the sentence.

In *Madhu Mehta v. UOI*, 14 The Supreme Court held that a delay of eight years in the disposal of mercy petition would be sufficient to justify commutation of death sentence to life imprisonment since right to speedy trial is implicit in article 21 of the constitution which operated through all the stages of sentencing including mercy petition to the president.

The appeal related to question of consideration before the court whether 12 years delay in the disposal of the mercy petition filed by the appellant under article 72 of the constitution was sufficient ground for commutation of the sentence of death into life imprisonment and whether the division bench of the Gauhati High Court had committed an error by dismissing the writ petition filed by the appellant.

In this case, the appellant had killed one Ranjan das, secretary of Assam Motor workers union on December 24, 1990 and was convicted for offence under section 302, ipc. He was sentenced to life imprisonment by the session judge. While on bail, he had killed one Harekant Dass, a truck owner, for which he was tried and sentenced to death on the ground that it was the second murder, which was most foul and gruesome.

Both the appeals were dismissed by high court and the sentence of death was confirmed. The Supreme Court also dismissed the appeal filed by the appellant against confirmation of his death sentence by the high court.

The appellant in this appeal contended that despite the confirmation of death sentence by the Supreme Court, his clemency petition was delayed for twelve years and therefore, he was entitled to commutation of his sentence to life imprisonment. Delivering its judgment in this case the apex court observed.

“We are not laying down any rule of general application that the delay long years will entitle a convict, sentenced to death, to conversion of his

13. (1989)1 SCC 678
14. AIR 1989 SC 2299
15. AIR 1979SC798
sentence into one for life imprisonment, rather we have taken into account the cumulative effect of all the circumstances of the case”. The fact that the petitioner was continuously in prison since 1972, fact was a significant consideration to substitute the sentence of life imprisonment in place of death sentence. The decision in this case dispels the wrong impression among the people that delay of mercy petition automatically and necessarily leads to commutation of death sentence to that of life imprisonment.

In the case of Devendra pal Singh Bhullar v. State (NCT) Delhi, the court observed that due to growing obsession towards human rights concerns, “it has become fashionable to put capital punishment in the pigeon hole of human rights violation” which carries a wrong impression among public that inordinate delay in disposal of mercy petition necessarily results in commutation of death sentence to that of imprisonment for life. There are circumstances when delay in disposal of mercy petition does not affect the death sentence of the accused and terrorism is one such circumstance. Also where the delay was caused due to direct or indirect pressure upon the government by the convict through various channels likes NGO, sympathizer of the ideology or foreign government official e.g., it is not a delay simplicity. In the instant case, Bhuller was an engineer turned teacher turned terrorist and murderer. He was convicted under section 3(2) of TADA, for killing more than nine persons in two different bomb blasts in 1993. The conviction was upheld by high court and the Supreme Court. He filed an appeal before the apex court for commutation of his death sentence to that of life imprisonment on the ground of inordinate delay in disposal of mercy petition. Disposing the appeal, the Supreme Court noted that the convict Bhuller had neither shown any mercy to the victims nor had he expressed any sense of guilt, remorse, shame or regret for his deliberate killings.

He had not only challenged the sovereignty and integrity of India but also planned delay in disposal of his mercy petition. In these circumstances, there was no point in arguing human rights issues against death sentence cannot sustain in the wake of new forms of crimes like terrorism, bomb- blasts e.g. The appeal was therefore, dismissed by the court. More recently, the Supreme Court in its judgment handed down on January 21, 2014 commuted the death sentence of fifteen convicts to imprisonment for life because inordinate and unexplained delay in disposal of their mercy petitions extending from 6 to 12 years without any reason. The Apex Court referred to its two earlier decisions, viz, T.N. Vateesaran (1983) and Triveniben (1989) wherein death sentence was commuted to imprisonment for life because of undue delay in disposal of mercy petitions.

As a result of these two judgments of the supreme court, the time taken for deciding mercy petitions from 1989 to 1997 came down to an average of five months from the earlier four years. But unfortunately, the government had reverted back to their old habit of sitting over the mercy petitions for years together. Reacting sharply against the rising trend on the part of governments. The apex court lamented and observed, “History seems to be repeating
itself as how a delay of maximum twelve years is seen in disposing of mercy petitions under Article 72 (by the President of India) and Article 161 (by the Governors) of the Constitution. The court noted that the mercy petitions under these articles may be disposed of faster if the procedure prescribed by law is followed verbatim.

The Supreme Court further observed that right to life under article 21 is inherent in a convict till his last breath, therefore, he can approach the higher court even after the rejection of his mercy petition by the president and ask for commutation of death sentence on the grounds of supervening events and challenge the rejection of his mercy appeal. The superintendent of jail should intimate the rejection of mercy petition to the nearest legal aid centre apart from the convict.

**MODE OF EXECUTION OF DEATH SENTENCE**

Section 354 (5) of the code of criminal procedure, 1973 requires that when a person is sentenced to death, the judge in his sentencing order shall direct the condemned person be hanged by neck till he is dead. The constitutional validity of this mode of execution of death sentence was challenged in *Dina v. state of U.P.* on the ground that it was violate of article 21 of the constitution being barbarous and inhuman in nature. The Supreme Court, however, rejected the contention and held that hanging the condemned person by neck till he is dead was perhaps the only convenient and relatively less painful mode of executing of death sentence. The issue was once again raised in *Smt. Shashi Nayer v. Union of India.* But the Supreme Court upheld the validity of hanging by neck until death reiterating its earlier decision in Dinas case.

**Sexual offences and Sentencing**

With the advance of science, civilization and culture, the complexities of life have enormously multiplied. Modern mechanization and urbanization has brought about total disintegration of the family institution which has created social problems in human life. The control of parents over their wards has weakened considerably. In fact it is this parental negligence which is mainly responsible for growing indiscipline, Rowdyism and vagrancy among youngsters. Uncontrollable hooliganism among youths has become a serious problem for law enforcement agencies throughout the world. It has rather become a social disease. As a result of this unhappy development, the incidence of sex delinquency in the form of unmarried motherhood, abortion, rape, kidnapping, enticement, abduction, adultery, incest, indecent assault e.g. has become too common.

**Sexual offences under Indian Penal Code**

The Indian penal code recognizes eight major forms of sex offences which are punishable under the law. They are:

- Rape (sec- 75)
- Intercourse by a man with his wife during separation (sec- 376A)
- Adultery (sec- 497)
- Assault or criminal force to women with intent to outrage her modesty (sec- 354)
- Selling or buying minors for purposes of prostitution (sections 372 & 373)
- Unnatural offences such as carnal intercourse against the order of nature with any man, women or animal (377 I.P.C)

**Homosexuals**

The homosexual may be either a passive individual who assumes the role of female, regardless of his true-sex or he
Prostitution

Indian history reveals that prostitution has been an age-old practice in this country. The Maurya Period is well-known for its state-regulated prostitution. An analysis of the forces behind the causes of prostitution shows that nearly sixty percent of the prostitutes embrace this profession due to poverty while forty percent accept it due to hereditary influences or the force of circumstances. Besides sex gratification, these circumstantial causes include disturbed domestic life, mutual quarrels, cruelty and running away from home due to the fear of punishment and displeasure of members of the family. Though effective provisions exist under the Indian penal code for suppressing prostitution, it has not been possible to wipe it out completely because of its peculiar nature. There are specific provisions in the Indian penal code which seek to discourage prostitution. They are as follows:

Section 372, IPC- "Whoever sells, lets or hires, or otherwise disposes off any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any stage be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Section 373, IPC- "Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any stage be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Prostitutes can be male or female but more than 90% of them are females providing sexual pleasure by working in streets,(20%) massage parlour,(15%) brothels, (20%) bars (10%) hotels,(10%) or as call girls (15%) male prostitutes are usually homosexuals in the age group of 14 to 18 years. Many prostitutes have
pimps who usually recruit newcomers into the life of a prostitute any they share the earning of the prostitute.

In order to put an end to these kind of activities, the government of Maharashtra had banned dancing girls giving performance in bars, hotels, theatres, and eating houses throughout the state by introducing two new sections 33A and 33B in the Bombay police Act on July, 2005 and consequently all dance bar license stood cancelled from August 15, 2005. The hotel and restaurant association and some NGOs filed a writ petition against the ban on the ground that thousands of dance girls lost their livelihood which was violate of article 21 of the constitution. Allowing the petition, the Bombay high court set aside the ban on April 12, 2006 holding it as void and not in public interest.

Thereupon, the state moved in appeal against the order of the high court before the Supreme Court. The Supreme Court upholding the high court judgment quashed the ban on dancing girls and observed that the whole question of morality attached to bar dancers is unfounded. The two-judge bench of CJI, Altmas Kabir and justice S.S. Nijjar observed the ban imposed on dancing girls reflected a lack of thinking to search for viable alternatives for the women, and resulted in large scale joblessness among them. The restrictions in the nature of prohibition cannot be said to be reasonable inasmuch as there would be several other alternatives ensuring safety of women than to completely prohibit dance. The court directed the state to explore other alternatives to provide support and shelter to persons engaged in such trades and professions. The court in its order dated 16 July, 2013 opined that the ban imposed on dancing girls had an unintended effect of punishing the dance girls out of the relative security of closed door establishment to the streets. Commenting on the government banning the dancing girls, the women activist lawyer Flavia Agnes observed that the government should have banned men visiting dance bars instead of holding girls earning livelihood responsible. Besides the provisions of the Indian penal code, immoral traffic prevention Act, 1956 has also been enacted to suppress the menace of prostitution.

CONCLUSION

It may be reiterated that capital punishment is undoubtedly against the notion of modern rehabilitative processes of treating the offenders. It does not offer an opportunity to the offender to reform himself. That apart, on account of its irreversible nature, many innocent persons may suffer irredeemable harm if they are wrongly hanged. As a matter of policy, the act of taking another’s life should never be justified by the state except in extreme cases of dire necessity and self-preservation in war. Therefore, it may be concluded though capital punishment is devoid of any practical utility yet its retention in the penal law seems expedient keeping in view the present circumstances when the incident of crime is on a constant increase. Time is not ripe when complete abolition of capital punishment can be strongly supported without endangering the social security. It is no exaggeration to say that in the present time the retention of capital punishment seems to be morally justified.

So far as sentencing in death penalty cases is concerned, the problem with the ex-
isting system as provided in the criminal procedure code is the variation in the result obtained from the same or similar set of facts. The judges are allowed to reach the decision after hearing parties. However, the factors which should be considered while determining the decision and those which should be considered while determining the decision and those which should be avoided is not specified anywhere. This is where the judge is expected to use his personal discretionary capacity to fix the punishment. This discretion eventually gets abused in a large number of cases due to irrelevant consideration and application of personal prejudices. This is primary reason for advocating sentencing policy or guidelines.

It may be stated that like any other crime, sex crime cannot be eradicated completely. The modern change in living style has contributed to stimulate sex crime in varying degrees. It is, therefore necessary that apart from the legal provisions various other effective measures should also be utilized for repressing sex delinquency. The supreme court in its decision in the case of State of Himachal Pradesh v. Asha ram, recorded its displeasure and dismay at the accused father having raped his minor daughter and observed that there can never be a graver and heinous crime than the father being charged of raping his own daughter. He not only defies the law but it is a betrayal of trust. The father is fortress and refuge of his daughter in whom the daughter trusts. Quoting from its earlier judgment pronounced in State of Punjab v. Gurmit Singh" Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The court should, therefore, shoulder greater responsibility while trying an accused on charges of rape and sexual molestations."
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