UJALA JUDICIAL AND LEGAL REVIEW

UTTARAKHAND JUDICIAL AND LEGAL ACADEMY
BHOWALI, NAINITAL

UJALA JUDICIAL AND LEGAL REVIEW

परित्यजेदर्थकामौ यौ स्यातां धर्मवर्जितौ।
धर्मं चाप्यसुखोदर्कं लोकसङ्क्रुष्टमेव च।।

Reject wealth/money and desires which are contrary to dharma. Reject also such rules of dharma, obedience to which lead to unhappiness of a few or which cause public resentment.

(Manu Smriti - IV, 176)

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UJALA : A PROFILE

Name of the Academy: Uttarakhand Judicial and Legal Academy, Bhowali, Nainital

Established in:	**2004.**
Inaugurated on:	**14 June, 2008.**
Contact No.	**05942 221375**
Website:	**www.ujala.uk.gov.in**
Administrative Setup:	
Director:	**Dr. Gyanendra Kumar Sharma**
Contact No:	**Office - 05942 221374** **Residence - 05942 220658** **Cellphone - 9411107752** **E-mail : sharmagk1962@gmail.com**
Faculty:	
1. Additional Director	**Shri Ashutosh Kumar Mishra** **Contact No: 9456596051** **E-mail : ashutosh.m@aij.gov.in**
2. Additional Director (Admin.)	**Sri Dharmendra Singh Adhikari** **Contact No. 9456597014** **E-mail : dsadhikari.judicial@gmail.com**
3. Joint Director (Administration)	**Ms. Ritika Semwal** **Contact No: - 9456596219** **E-mail : ritikasemwal@rocketmail.com**

Brief History of the Academy:

On November 9, 2000 the new State of Uttarakhand was carved out from State of the Uttar Pradesh. In year 2004, Hon'ble Mr. Justice V.S. Sirpurkar, the then Chief Justice of Uttaranchal High Court took keen interest in establishing an Academy for training to the judges of the State. The Judicial Academy for the State was conceptualized and was christened as Uttarakhand Judicial and Legal Academy (UJALA). The foundation stone of UJALA was laid on December 19, 2004 by Hon'ble Mr. Justice R.C. Lahoti, the then Chief Justice of India in the presence of Hon'ble Sri N.D. Tiwari, the then Chief Minister of Uttarakhand and Hon'ble Mr. Justice V.S. Sirpurkar. Subsequently the Administrative-cum-Training block, a Mess and a hostel was constructed in the first phase of infrastructure construction. Cradled in a valley of rolling pine forested hills of Bhowali, the Academy became functional on June 14, 2008 when it was inaugurated by Hon'ble Mr. Justice K.G.. Balakrishnan, the then Chief Justice of India in the presence of Hon'ble Sri B.L. Joshi, the then Governor of Uttarakhand and Hon'ble Mr. Justice V.K. Gupta, the then Chief Justice of Uttarakhand High Court.

Activities at UJALA: Training and Research

Primarily, the Uttarakhand Judicial and Legal Academy is meant for the training of judges of the Subordinate Courts of the State of Uttarakhand. The Academy organizes Induction/Orientation Training Programmes and Reflective Training Programmes for newly appointed judges. The Academy also organizes In-Service Programmes like Refresher Programmes, Workshops, Seminars, and Specialized Training Programmes for other judges of Subordinate Courts of the State. However, the ultimate goal of the Academy is "to strengthen the administration of justice as a whole". To ensure the achievement of the goal, efforts are made that every stake holder in justice delivery system may benefit from the resources of UJALA. In this process the public prosecutors of the State, police officers, officers of various Departments of State Government, who by virtue of their official position have to take judicial or quasi judicial decision, etc. are imparted training in UJALA to suit their needs.

Patron-in-Chief

The Hon'ble the Chief Justice of High Court of Uttarakhand is the Patron-in-Chief of the Uttarakhand Judicial and Legal Academy. The present Chief Justice of High Court of Uttarakhand is Hon'ble Mr. Justice Ramesh Ranganathan.

Judge-in-charge (Judicial Education)

The day-today-affairs of the Academy are monitored and approved by the Judge-in-charge (Judicial Education). The present Judge-in-charge (Judicial Education) of the Academy is Hon'ble Mr. Justice Alok Singh.

Governing Council

The strategic decision making body of the Academy is the Governing Council. The Governing Council sits twice in a year to discuss issues relating to the Academy and monitor the activities of the Academy. The composition of the Governing Council is as under:

1.	Hon'ble the Chief Justice of High Court of Uttarakhand	Patron-in-Chief
2.	Hon'ble Judge-in-Charge (Judicial Education)	Member
3.	Advocate General, Uttarakhand	Member
4.	Principal Secretary, Personnel, Uttarakhand	Member
5.	Principal Secretary, Law, Uttarakhand	Member
6.	Principal Secretary, Finance, Uttarakhand	Member
7.	Director General Police, Uttarakhand	Member
8.	Registrar General, High Court of Uttarakhand	Member
9.	Member Bar Council, Uttarakhand	Member
10.	Director, UJALA	Member Secretary

Founding Director:

The Founder Director of the Academy was Hon'ble Mr. Justice Umesh Chandra Dhyani.

Facilities at UJALA:

Library: The library of Uttarakhand Judicial and Legal Academy was inaugurated on 26 June' 2011 by Hon'ble Chief Justice Sri Barin Ghosh in presence of Hon'ble Judges of High Court of Uttarakhand, Nainital. The Library is spread over 4500 sq ft. and stacks more than 15,000 volumes of books, available in open access in subjects ranging from Law, Science and Technology, Economics, History, Sociology, Literature etc. The library subscribes to more than 75 periodicals in print. Besides, the library has 6000 bound volumes of journals. In order to keep pace with the current trends of access to information resources through tools of Information Technology, the Library of UJALA has acquired all major Indian electronic legal-data resources like AIR-Webworld, SCC online, Manupatra Case Locator etc., which are available on both stand alone and online mode. The library services have been fully automated with the web based Library Management Software KOHA.

Auditorium : The Academy has fully Air-conditioned (all weather) Auditorium which is a state of the art building with a seating capacity of 300 people; It is one of the largest auditoriums in the region, in perfect ambience. The aesthetically designed Auditorium is tastefully built up to meet the current and future requirements for holding national and international scientific, industrial and cultural meets. The Auditorium has fully automized stage with the digital projection facility and dolby digital sound with an electronic podium. Auditorium is also equipped with 250 kva silent genset for power backup.

The auditorium of the academy can be made available for educational, social and cultural purposes to the government institution of states and the Union of India statutory bodies, statutory units, universities of the state, Academies run by other states certain other institutions on prescribed charges. (For more information please log on to our website www.ujala.uk.gov.in or landline 05942-221375).

Guest House: The academy has 5 fully furnished and immaculately clean suites for accommodation of distinguished guest and faculty visiting the Academy. Set amidst the mountains all suites of the guest house are provided with twobed rooms, a drawing room and a kitchen to offer tranquillity and absolute privacy.

Hostel : At present the Academy has three hostel building namely Old hostel, New hostel and Married hostel with 18, 12 and 30 rooms respectively. Each of these rooms have an attached toile and are well equipped with all modern facilities like TV with DTH, Geyser, room heaters, Electric kettle etc. The balconies of all the hostel room offer picturesque scenes and provide ambient comfort to the guest.

Academy's hostel rooms, guest houses are now available for accommodation to the Judicial Officers across the country on payment of prescribed charges. (For more information please log on to our website www.ujala.uk.gov.in or landline 05942-221375).

Mess: The naturally illuminated and ventilated mess provides a meticulously chosen menu of Indian appetizers. Great care is taken while designing the menu to keep all essential nutritious elements in the diet. The mess offers an ambient atmosphere to the trainee officers/participants not only to unwind themselves from hectic training schedules but also to discuss and share experiences in an absolutely amicable environment.

Recreation Centre:

A well designed and equipped recreation centre has been made operational in the Academy premises having array of world class facilities for badminton, squash, snooker, table tennis and gymanasium to take care of fitness and well being of trainee during their stay in the Academy.

Journal:

To foster the spirit of research in the legal and judicial field, and to provide a platform for expressing legal/judicial thoughts and to promote research work in research inclined Judges and amongst the legal fraternity of the State, the Uttarakhand Judicial and Legal Academy has started publishing a journal **"UJALA-Judicial & Legal Review".**

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EDITORIAL

It is a matter of immense pleasure to write a few words in form of editorial for the new Issue of Biannual Journal "UJALA-Judicial and Legal Review".

For the last several years the Uttarakhand Judicial & Legal Academy has been making sincere efforts for activities leading to skilled nurturing of its Judicial Officers, as well grooming of the stakeholders of various Government departments.

Certainly, UJALA has been entrusted with the task of imparting training to the stakeholders of the justice delivery system and also of the machinery responsible for its effective enforcement, so as to strengthen the administration of justice as a whole, so that it may easily be accessible to the poorest of poor of the society.

Like the past issues, this Biannual Journal issue of UJALA covers the subject of various legal dimensions for legal enlightenment of judicial fraternity and its readers. This issue discusses some significant legal issues highlighting complexities and lacuna in the legal strata.

I believe that the Biannual Journal will be able to make its utmost contribution to the judicial fraternity of the State. Apart from this, all the persons interested in law and aim to venture in the researches of law, and stakeholders working in legal field would find the material useful and instructive towards better and speedy delivery of justice to all who trust the system of dispensation of justice of this great country of ours.

I extent my deepest gratitude and reverence for all those who have been consistently associated in the publication of this Journal and have rendered their unflinching contribution in its upliftment.

In fact it has been a matter of great pleasure and pride to write this editorial for the new Issue of Biannual Journal "UJALA-Judicial and Legal Review".

'Uttarakhand Judicial and Legal Academy', has been derives pride to take the task of imparting training to the Stakeholders of the justice delivery system and to ever strengthen the administration of justice dispensation system as a whole. This Biannual Journal issue of UJALA covers the subject of various legal dimensions for legal enlightenment of all the judicial fraternity and its readers who have faith in the Judicial System.

I am sure that this Journal will serve its purpose and the judicial fraternity of the State will find the material useful and instructive towards augmenting their ventures and capacity in better and speedy delivery of justice to all the needy who flock to the Courts for seeking justice.

I extend my earnest gratitude for all those associated in the publication of this Journal and have given their valuable guidance to make the publication worthy for its judicial utilization.

(Justice Sharad Sharma)
Editor in Chief

KILL THE FEAR BEFORE FEAR KILLS THE WORK CULTURE IN THE JUDICIAL ADMINISTRATION AT ITS THRESHOLD IN INDIA

[1]Dr. Gyanendra Kumar Sharma
[2]Prinita Vashishtha

Abstract

While giving trouble to the research conscience on this subject, author's memory went back to the short term research on application of 'rule of law' in the Courts at its threshold in India. Answering the research quest, whether 'rule of law' prevails in Indian Courts at its threshold, most of the respondents from the judicial galaxies answered negatively. Few respondents hesitantly with disturbed facial gesture replied, 'rarely'.

The term 'rule of law' for the purpose of this research paper should be taken in its generic sense. It means whether the judicial business in the Courts at its threshold is conducted as per the provisions of law, substantive and procedural? No! It is not. Adjournments on mere asking are a common feature in majority of the Courts. The discretionary powers vested in judges vide Section 165 of the Indian Evidence Act, Sections 311/313, Criminal Procedure Code etc. for the purpose of the justice delivery system (reaching to the truth) are rarely and exceptionally exercised. Very limited efforts are made to control the Court proceedings in a scientific manner. Judges are working day and night, but without developing any mechanism, scheme or/ and plan to control the Court proceedings to expedite the justice delivery mechanism in a smooth manner and with cordial atmosphere in the Courts. Day and night hard work is not achieving the desired judicial productivity. The Judicial Academies in India have yet not helped in developing such mechanism. In absentia of such mechanism, judicial labour is not converted to desired judicial productivity. Haphazard manner of working on the basis of technical mind set and traditional (as usual) work culture is a common feature. It is nothing but judicial inaction and laxity. There may be so many reasons for judicial inaction and laxity, but 'fear' amongst them is prominent. This research paper deals with the fears, which amount to judicial inaction

[1] Director, Uttarakhand Judicial and Legal Academy

[2] Psycologist, M.A. Psycology from Amity University Noida.

and laxity and also improvise remedial mechanism so that Courts may come out from fear tendencies.

I. Introduction:

It may be an unacceptable idea in the judicial galaxies whether Judges in India at its threshold are working under fear. As an academician and research scholar, the author can satisfy this quest of his soul affirmatively. Judges are human beings. They live in the society to discharge individual, family and social responsibilities. In the society, we live in a world that causes people to feel anxious on daily basis work.[1] Thus, while discharging individual, social and other responsibilities, Judges are also influenced with social atmosphere. Timorousness of work, work surroundings and its fruits are well within the ambit of social norms, which affect every individual Judge.

Hon'ble Supreme Court of India, through administrative arrangement has provided with a very soft target, *five plus zero*, to all the Courts at its threshold in India. This target is rarely and exceptionally achieved. Huge pendency is being held responsible as a big barrier to achieve this comfortable goal and target. But the research shows that this goal has yet not been achieved in the Courts having very less pendency. Accordingly, the pendency may have little nexus with achieving the five plus zero target. It is the judicial inaction and laxity, which is responsible for denial of timely justice. The Supreme Court of India has justified this concern in the latest judgment published in ***Gayathri versus M. Girish***[2]. In this judgment, Supreme Court encouraged to come up with the virus of adjournments and to control this virus. In ***Shiv Cotex Vs. Trigun Auto Plants (P) Ltd.***[3] , their Lordships Justice Dipak Mishra and Justice Rohinton F. Nariman, observed that it is said but true that the litigants seek-and the courts grant- adjournment at the drop of a hat. In the cases where the Judges should be little protective and refuse to accede to the requests of unnecessary adjournments, the litigants derived all sorts of methods in protecting the litigation. In ***Gayathri's case***[4] Supreme Court has encouraged the Judges with the principle of Geeta, *"Awake! Arise! O Partha."* This

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1 Kill Fear Before Fear Kills You, *The Times Of India*, New Delhi, 19th June 2012 at 10..

2 Special Petition No. 14061 of 2016 decided on 27th of July, 2016.

3 2011 (9) S.C.C. 679.

4 *Supra* note 4.

phrase of *Holy Geeta* referred by Supreme Court shows the requirement of social, ethical and legal training to the Judges, in spite of present legal training prevailing in all Judicial Academies that too without any scientific feedback and impact assessment mechanism.

II. Judicial Inaction and Laxity:

Inaction and laxity of the Judges is one of the prominent factors which prevent them in imparting inexpensive and timely justice. One of the reasons for inaction and laxity is the fear. Fear, in author's view is one of the biggest reasons for judicial inaction and laxity. Before explaining fear, it is proper to define the judicial inaction and laxity prevailing in the courts at its threshold. The Judicial inaction and laxity, in its general sense, may be defined the factors responsible for restraining the judges, without any justifiable reason, from proper judicial and administrative functions in violation of rule of law.[5] Every step of litigation has to be controlled strictly as per the provisions of law to maintain the rule of law in the Courts.

We cannot imagine rule of law where the Reader of the Court records evidence in the judicial environment, where the Judges with half conscience sitting at the dais doing another judicial business. Likewise, it cannot be said to be the rule of law in the Courts, where adjournment is granted just on asking. It is a common practice that one party moved adjournment, another endorsed *'no objection'* on the face of the application and Judges, in majority of cases, readily sitting on dais waiting for adjournment application, adjourn the cases. Likewise we cannot imagine rule of law where the Judges are not devoting proper time to litigants to hear them in person along with their duly appointed legal representatives and practitioners. We cannot also imagine the rule of law where the environment of the Court is not so cordial in which a litigant can freely to express his grievances to the judge and request to know the tentative judicial life of his case. We cannot further imagine the rule of law in Courts where the Judges have not adopted any mechanism for ensuring justice delivery as per the provisions of law and the litigants are under fear whatever nature of fear maybe, to redress their grievances. Problems mentioned above are common features of the Courts in India at its threshold.

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[5] Dr. Gyanendra Kumar Sharma, *"Quest For Justice At Its Threshold"* Sharda Publications, 2010 at 82.

III. Identification of Problem:

The author may not kindly be considered as a critic. If we want to improve the system of judicial administration, we have to first identify and recognize its problems. There cannot be any reformation without the scientific study for discovery of problem. Research reveals that problem is the fear which results in judicial inaction and laxity.

I recall and quote the words of American President Franklin D. Roosevelt, who delivered a memorable address on March 4th 1933 when America was facing the worst economic depression in its history, "Let me assert that the only thing we have to fear is fear itself, nameless, unreasoning terror which paralyzed needed efforts to convert retreat into advance."[6] In a lesser known, but eventually peaceful congressional address delivered on 6.1.1933, Roosevelt proclaimed for basic freedoms of speech, worship, freedom from want and from fear. Significantly, he included freedom from fear as something essential and fundamental to human happiness. He made it clear that fear was one of the greatest enemies of a free nation and free peoples.[7]

For the purpose of proper judicial productivity, the Judges also require freedom from want and from fear to protect the rights of litigants and for proper justice delivery. The Judges should be free from any kind of fear and on the other hand, must ensure that instrumentalities and/or stake holders of the judicial administration also enjoy the freedom from fear.

IV. Types of Fear:

The core issue is what type of fear is stirring the judicial thinking process, capacity and judicial productivity of the Judges in India at its threshold? In All India Judges Association versus Union of India,[8] the Apex Court has addressed the judicial system at its threshold to discharge the sovereign functions. Sovereignty lies in the people but on behalf of '*we the people*', the Judges discharge sovereign functions to redress the grievances of litigants and to keep them away from hardships, discomforts and miseries. For this function every Judicial Officer in the District is

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6 *Supra* note 3.

7 *Idid.*

8 AIR 1993 SC 2493.

supposed to do the minimum work in a day. Most of the Institutions (High Courts) have prescribed the minimum out turn. Judicial function is service to mankind and the system cannot survive if its components does not honour the hard work with dedication and commitment, which is necessary for service to mankind.

Author's research conscience is gripped with another research quest, what was the requirement of this Institutional out turn mechanism, which every Judge is supposed to comply with? The quest can be satisfied safely by stating that this Institutional out turn mechanism came into practice for inadequate work by the Judges on account of their judicial inaction and laxity. A dedicated Judicial server will never bother for this out turn mechanism. He will only serve the judicial system without trouble to his judicial conscience for the fruits of services he render. The deviation is due to the judicial inaction and laxity on account of fear. The fears responsible for judicial inaction and laxity may be discussed as under:

Fear of Adjudication:

In one of the training programmes on *'enhancing timely justice'* conducted by National Judicial Academy, in Jammu, in February, 2007, a discussion on enhancing timely justice was in progress amongst the participants. One of the resource persons, an Hon'ble Judge from Punjab and Haryana High Court, raised the issue whether the Judicial Officers of subordinate judiciary are adjudicating the matters without fear of High Court? The author, as one of the participants, tried to discuss the issue and talked about it with the then Director of National Judicial Academy, Shri Gopal Mohan, with the sensitive brain that if the Judges in the subordinate judiciary are under fear of deciding cases, we cannot think for an independent, free and fair judiciary. The Director of the Academy did not permit to discuss this issue for the reason that it was not within the purview of the agenda for discussion and if it is taken, there might be possibility of derailment from the core issues. My point for discussion still is that, if one of the Hon'ble Judges of the High Court has raised this issue, there must be some substance behind it. Judges of the subordinate courts are working under the administrative control of the respective High Courts. Their functions administrative and judicial are supervised by the High Court. This issue, as raised by one of the High Court Justice, requires detailed and scientific research, if Judges are under fear of adjudication? Some mechanism should be developed so that they may adjudicate without

any fear may be self perceived or institutional. Meaning thereby, the issue *'fear of adjudication'* should be open for research and discussion in judicial and administrative Academies, whether the Judges in the subordinate judiciary are passing orders and judgments under fear or they have their absolute independent judicial conscience to work?

Fear of Self Perception:

Fear is related with the mindset of the judges. Fear to begin and continue a work in an innovative way is intrusive and extrusive in the functioning of human being. The following issues will justify this self perception fear of judges in deciding the cases;

I. What will be the reflection of Advocates and litigants, if the order is passed in file?

II. What will happen if any party prefers appeal or revision against the order?

III. What will the people's approach and thinking about the integrity of the judge if the order is passed in the file?

These are some examples of fear of self perception. This fear of self perception can be seen at the stage of remand of accused, disposal of bail application and the trial. The traditional working and technical approach of the judges at its threshold is clearly reflected in majority of cases. The Hon'ble Apex Court in ***Gayathri's Case***[9] has satisfied this quest by motivating the judges with the say of *Gita, "Awake! Arise! O Partha"*. There cannot be any suggestion without reorganization of problem. The Apex Court has recognized the problem of self perception fear where the Judges are unable wisely to elevate and satisfy their judicial conscience to avoid unnecessary hardship for judicial inaction and laxity on account of fear of self perception. *Holy Gita* in its Chapter III, *'Karmayoga'* has stressed only on *Karma* (duty) not its effects and fruits. The Judges in the District Judiciary have been provided with the rules, regulations and the laws to conduct the judicial business. They must abide by them with the legal parameters to do the judicial business without giving trouble to their judicial conscience about its fruits. Appeals and revisions filed by the litigants are the legal process in the judicial system. This process should be used by the Judges as the feedback mechanism to

[9] *Supra* note 3.

improve their judicial productivity. If on account of fruits of judicial productivity, judicial conscience is effected, it will be *'Anadhikrit Cheshta'* by the Judges as mentioned in *Holy Gita*. The duty of the Judges is to maintain the rule of law, to do the judicial business as per law and passed the orders without fear, favour and troubling the brain on its fruits.

Fear of Elevation:

Fear of adjudication and fear of self perception are also linked with the fear of elevation to the Bench. When a Judge is elevated to the post of District Judge, he is encountered with the query, when is he going to be elevated as the Judge of the High Court, whereas, it is not the business of the District Judge or in his hand to get elevated to the High Court. Influenced with the numerous quarries, a policy of no work no risk is generally adopted. Experience of the Judges is a valuable asset, which should be utilized positively for judicial and administrative functioning. However, if a Judge works only for achieving the minimum *'Institutional'* out turn, it becomes injuries for healthy judicial system. Every Judge should keep in mind the principles of Gita enshrined in Chapter II *'Budhiyoga'* and Chapter III *'Karmayoga'* that only hard and dedicated work is in his hands. He should not bother for the fruits or result of this hard and dedicated work. He should work in Krishna conscience which means work dedicatedly, detachedly and without any desire of fruits. If a Judge effects his judicial function on account of his elevation, it is institutional disregards as well (High Courts and Supreme Court). A dedicated and detached Judge has always full confidence in and honour to the Institution and his duty is to work and work only for improvement of his day to day functioning. At the senior stage, Judges should not compromise with their capacity and efficiency to adjudicate the matters. This compromise may be termed as judicial inaction and laxity along with judicial dishonesty.

Fear of mania of Integrity:

Integrity is inherent quality of a Judge. The Judicial Institution minus integrity cannot be imagined. The integrity must not lead to the policy of *'no work no risk'*. It is the feeling of insecurity under the guise of integrity by which the officers are suffering. A truly integrated officer is one who works dedicatedly, fairly, freely and without fear of the results of his activities. Fear of integrity may results fall in morality which may further result in decline of public faith and confidence. Speaking in tough

words what to say about those honest Judges who are most dishonest when it comes to judicial, administrative and other related functions? The fear of mania of integrity may sometimes extend to the feelings of judges not to work on account of the public opinion on their work. Meaning thereby, fear about the public opinion why a Judge has passed the order, may affect judicial functions. The Judges are accountable and responsible to *we the people* and Hon'ble High Courts and Supreme Court. Thus, work of every court is under the *'Institutional'* appraisal. The case being so, why to waste the valuable time and energy on thinking what will happen if the work is done in a particular way? The only Karma and Dharma of the Judges is to work dedicatedly, fairly and freely to implement the rule of law. It is not within their preview to think about the public opinion about his behaviour and conduct, which is bound to be good.

Fear of ignorance about new inventions and Judicial innovations:

In the present era of science and technology, in most of the courts at the district judiciary, proceedings are still carried on in the traditional manner. We still see hand written evidence of parties in the files, whereas, computers have been provided to every Court. It takes more time to read the handwriting of the Judicial Officers or the Readers. In most of the cases, reader of the court records the evidence. The Apex Court of India has provided with the Laptops to all the Judicial Officers with Internet connectivity. Moreover, under the e-governance, computers have been provided to every court. The new generation of the Judges who joined the District Judiciary with the knowledge of computers, to some extent, are accessing the computerization facilities but Senior Judicial Officers in District Judiciary still are not in the position to operate computers. Computerization of the courts can be said a half journey completed and rest is based on the awareness of these new innovations. The District Judiciary performs the difficult judicial task than the High Court and Supreme Court which are the Constitutional Courts where most of the cases are decided on the questions of law. Expert hands have also been provided to High Courts and Supreme Court for smooth discharge of judicial and administrative functions. The District Courts have been provided with bare expert human resources. Accordingly, the Judges in the District Courts have to be involved personally in e-court functioning while redressing the grievances of parties. If new innovations based on science and technology are adopted by them and made the integral part of judicial business, it will

enhance work culture in general and work capacity of the Judges in particular. Not utilizing or limited use of this new mechanism based on science and technology is also one cause for judicial inaction and laxity. It is also the *'Institutional'* obligation to provide quality services based on science and technology to motivate the judges.

Show off and fear of Modern Life Style:

In ***All India Judges Association Vs. Union of India,***[10] the Apex Court has said that the judicial service is not an employment. It is service to mankind and society. It cannot be compared with other stake holders under State employment. The Judges exercise sovereign powers, whereas, other stack holders under the State employment exercise administrative, political, economic and sometimes quasi-judicial functions under delegated authority.

Thus, on the basis of functions to be discharged by them, their mental behaviour and conduct have to be deferent. In the present time, majority of Judges at its threshold are adopting the modern life style then deserve for a Judge under comparison with other stake holders under the State employment, may be I.A.S., I.P.S., politicians etc. Judges cannot afford late night parties at the cost of their judicial works and time and life management. They have to develop the recreation and entertainment mechanism within as they have to be aloof as per the *'Banglore Principles'*. No doubt, Judges are also human beings. They have to live in the society with all possible family and social obligations. It requires the development of a mechanism by the Judges to make a balance between judicial work and the social and family obligation. This can only be developed through social, ethical, psychological and legal training nor merely by legal training.

V. How to kill fear:

The problem of fear and insecurity can be dealt with the branch of ethics to be exploration of mind. Everything of self preservation must come to play as a bull work against the shocks, he can accept from the undependable World we live in.[11] The feeling must be conveyed that think

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[10] *Supra* note 10.

[11] Deepak Chopra, Five Ways to Beat Fear in Scary World, *The Times of India*, New Delhi, Tuesday, July 26, 2016 at 10.

of yourself as the sky holding the whole universe. Deepak Chopra in his article[12] has mentioned five ways to beat fear in a scary world, namely;

(i) Become more rational, and let facts diminish irrational fears;

(ii) Takes yourself out of the anxiety loop;

(iii) Talk to someone who really listens. Share how you feel and ask for realistic feedback;

(iv) Build a healing connection between yourself and the threat; and

(v) Be a practical optimist. There's no need to bury your head in the sand, but psychologically, there's nothing to be gained by gloomily projecting future events that you have no control over.

It is very easy to highlight a problem but to suggest a mechanism to solve the same. In this research paper, the researcher is suggesting the following mechanisms to come over and to kill the fear, namely;

- Social, ethical, psychological and legal training to the Judges; an
- Role of Judicial Academies.

Social, Ethical, Psychological and Legal Training to the Judges:[13]

Before discussing the issue that Judges should be imparted ethical, social, psychological and legal training, it is necessary to mention what are the minimum expectations of the society from the Judges at its threshold. The minimum expectations of the society from the Judges[14] are;

1. District Judiciary, where the litigants can fairly asked the Judges in how many days their grievances will be redressed (information about tentative judicial life of the case)?
2. District judiciary, where the litigants approach the Court with the positive and assertive mind set for redressal for their grievances rather to return from Court with adjournments.
3. District Judiciary, where a Judge hears the public litigants in person to reach to truth of the case. It is a fundamental right of every litigants to be heard in person along with his duly appointed counsel.

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[12] *Ibid.*

[13] Dr. Gyanendra Kumar Sharma, *"Quest for Justice At Its Threshold"*, Sharda Publications, 2012 at 183.

[14] Dr. Gyanendra Kumar Sharma, *"Quest for Justice At Its Threshold"*, Sharda Publications, 2012 at (iv).

4. District judiciary where public litigants are heard in a very cordial and harmonious atmosphere by a committed impartial, dedicated and detached judge, where public litigants can fairly and strongly convey their views to Court without any fear.

5. District Judiciary where the litigants are given the right to comment on the functioning of the Judges (feedback mechanism) without any fear.

His Lordship, the then Hon'ble Chief Justice R.C. Lahoti, on training the Judges, expressed the views as follows:[15]

> "Excellence in performance is ensured by relentless hard work, constant up gradation of knowledge, punctuality, courteous and conscientiousness. Proper rest, relaxation and recreation help in judicial performance but a hectic social life and other distractions restricts from the discharge of judicial duties. A Judge need not to be a ascetic or sanyasi but certain degree of aloofness has to be observed by him to see that impartiality and objectivity are not maintained but also seemingly observed."

The above quote makes it clear that judicial training has two main objectives. The first object is impartially and second is objectivity. Objectivity is in terms of both quantity as well as in quality. Meaning thereby, the mere knowledge of law is not sufficient. Something more than legal knowledge is required, which can implement the knowledge of law differently.

The role of judges is not just to adjudicate the cases but to do justice. Adjudication of the case is the process to achieve justice by implementing the law substantive or procedural. The mechanism for effective implementation of knowledge of law, substantive and procedural, can only be developed through the 'social and ethical training' of the judges. A slight degree of aloofness but socially sensitized Judge is a better statutory amour to implement the law.[16]

Thus, social, ethical, psychological and legal training will effect work style of the Judges. It will unable a Judge distinguishing in *'doing*

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[15] Quest of Judicial Excellence, Journal of National Judicial Academy, Vol.1, 2005 on Judicial Reforms at 11.

[16] *Ibid.*

the work' and *'enjoying the work'*. Most of the Judges are simply doing their work to achieve the minimum institutional out turn with or without caring for justice delivery. On the other hand, a Judge, who is *'enjoying work'* will never bother for the Institutional out turn but for justice delivery.

The goal of social, ethical, psychological and legal training is to convert this *'doing work*' cultural in to *'enjoying work'* cultural. It is only possible when the work is done with dedicating to Almighty God without fear of its consequences, results and fruits. To achieve this, a Judge has to be disciplined in all the vocations of life and this discipline has to be developed by Judicial Academies and transform to all the Judges through the social, ethical, psychological and legal training. The judges need to be trained to think with open and ease brain and to live in the present, instead of following traditional and technical practices. They should walk with the pace and understand the demand of the society in the present scenario.

Role of Judicial Academies:-

Judicial Academies to be scientific, practical and real. In the present scenario, Judicial Academies through seminars, conferences, regular training programmes, short term training programmes and/or refresher training programmes are training the Judges for upgradation of knowledge or up to some extent for change of traditional mindset.

The phrase *'change of mindset'* is used almost in all the training programmes without developing any mechanism by the judicial Academies how to change it? There is no feedback mechanism developed by any of the Judicial Academies in India. There may be some reports which may mention the *'feedback mechanism'* and *'impact assessment mechanism'*. But the reports are on papers. In practice no mechanism seems to be adopted or developed by Academies to assess the impact of training programmes on the Judges.

Research and analysis part is also neglected in Academies. No *'empirical study'* is conducted by any of the Academies on intellectual requirement of Judges, which can change their *'work done'* culture to *'work enjoy'* culture. It is the duty and responsibility of Academies to design the curriculum in the way so that the change should be reflected in the work culture in Courts. This change may be useful in the behaviour of the Judges, in the knowledge of the Judges (as most of the Judges have

neglected the reading habits) their temperament, approach in family and society and the way they conduct the Court proceedings which includes their out turn. It is only possible through social, ethical, psychological and legal training, not by the technical and traditional way of training, which is being adopted by most of the Judicial Academies, established in India. The training should tempt the judges for individual beginning. In individual beginning, judges will be inspired within by, *'I have to change my mindset', 'I have to serve', 'I will do justice', 'I will not leave any stone untouched to provide service to the society to the best of my ability and capacity'* and *'I know I can do it.'*

Let them reconcile their duties and responsibilities through intrinsic voice of their souls. If it is done, without too much change in infrastructure and the number of judges, the problem of arrears and pendency will be over very shortly. In this regard, it will apt to quote a poem of Pablo Neruda, Spanish Poet, Noble Prize for Literature in 1971;

'You start dying slowly' You start dying slowly;
If you do not travel, If you do not read,
If do not listen to the sounds of life,
If you do not appreciate yourself.
When you kill your self-esteem,
When you do not let, others help you.
You start dying slowly;
If you become a slave of your habits.
Walking everyday on, the same paths...
If you do not change, your routine,
If you do not wear, different colours
Or you do not speak to, those you don't know.
You start dying slowly,
If you avoid to feel passion
And their turbulent emotions;
Those which make your eyes glisten
And your heart beat fast.
You start dying slowly.
If you do not go after a dream,
If you do not allow yourself,

At least once in your lifetime, to run away....
You start dying Slowly.....
Love your life Love yourself....."

In the last, the researcher being a member of judicial fraternity as well, inspire himself and all the judges at its threshold in India with the say of Holy Gita mentioned by Hon'ble Apex Court, ***"Awake! Arise! O Partha."***

Special thanks to Miss Prinita Vashishtha for her intellectual contribution on research part of this research paper.

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REMEDY AGAINST ACQUITTAL UNDER SECTION 138 NEGOTIABLE INSTRUMENT ACT

[1]Ajay Chaudhary

The complaint u/s 138 N.I. Act is dealt with like others complaint cases under Indian Penal Code (IPC) and tried by the magisterial court according to the provisions of Code of Criminal Procedure, 1973(CrPC) for summons cases contained in Sections 251 to 259.

After completion of trial, the Magistrate records the order either of acquittal or of conviction under Section 255, CrPC.

In the case of non-appearance of complainant, when the summons have been issued and on the day appointed for the appearance of the accused or for the hearing, if the Magistrate does not adjourn the case or dispense the attendance of the complainant, the Magistrate can dismiss the complaint and acquit the accused.

In the case of conviction, the accused may file an appeal against the conviction to the Court of Session under Section 374(3) CrPC.

But in case of acquittal recorded under Section 255 or 256 CrPC, it is often seen that there exists confusion in regard the remedy against order of acquittal. It has been the experience that in case of acquittal under Section 256 CrPC, the complainant of complaint under Section 138 N.I. Act, files revision against the order of acquittal under Section 256 CrPC, whereas in case of acquittal under Section 255 CrPC, the complainant files an appeal against the order of acquittal to the court of Session.

But in both cases, procedure adopted to seek the remedy against order of acquittal under Section 255 or 256 CrPC. is contrary to law.

So far as the revision filed by the complainant against the order under Section 256 CrPC is concerned, the Magistrate dismisses the complaint in default for non-appearance of complainant under Section 256 CrPC and the dismissal of complaint in default under Section 256 CrPC

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[1] Judge, Family Court, Vikas Nagar, Dehradun

amounts to acquittal of accused and only appeal lies against acquittal of accused under Section 256 CrPC and no revision lies.

In this regard, Section 401(4) CrPC provides that "Where under this code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

Thus, Section 401(4) CrPC prohibits maintainability of any revision in case of acquittal recorded in a case instituted upon a complaint as the complainant has got a right to file special leave to appeal before the High Court. The said Section interdicts revisional power of High Court as well as of Session court. This is the import of joint reading of Sections 378(4), 397, 399(1) and 401(4) CrPC in conjunction with each other.

In ***Krishna Kumar Gupta v/s Mohammed Jaros and another, 2003 CRI.L.J. 149 (Delhi)*** Hon'ble Delhi High Court held that revision against order of dismissal of complaint under section 256 CrPC is not maintainable- said order amounts to acquittal of accused against which an appeal is maintainable.

In ***Vinay Kumar v. State, 2007 CrLJ 3161(All)***, the Hon'ble Allahabad High Court held that when because of absence of the complainant the Magistrate, dismissed the complaint under Sec. 256, CrPC and ordered the acquittal, the complainant had the right to file special leave to appeal under Sec. 378(4) CrPC. But no appeal was filed. No revision would be maintainable at his behest before the Sessions Judge in view of the bar of Sec. 401(4) CrPC.

In ***Veena S. Rajnalkar Vs. N. Bhargavi Devi and another 2012(2) ALT(Cri)78 (AP)***, the Hon'ble Andhra Pradesh High Court held that in view of the provisions of section 401(4), a revision against dismissal of complaint u/s 256 CrPC is not maintainable.

Thus, it is settled that no revision lies against the dismissal of complaint in default under Sec. 256 CrPC and only remedy against it is a appeal against acquittal.

An appeal against acquittal in a complaint case is provided under Sec. 378 (4) CrPC.

Section 378(4): If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it

by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

Thus, an appeal against order of acquittal in a complaint case lies to High Court.

It is often submitted that the appellant is complainant and the complainant of the complaint case under Section 138 N.I. Act is victim and the victim has right to file appeal against the order of acquittal in court of Session according to Proviso to Section 372 of CrPC.

Section 372 CrPC. provides as:

No appeal to lie unless otherwise provided — No appeal Shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:

Provided that victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinary lies against the order of conviction of such Court.

Thus, the Proviso to Section 372 CrPC gives right to victim of a criminal case to file appeal against order of acquittal or conviction for a lesser offence or imposition of inadequate compensation in a Court where an appeal ordinary lies against order of conviction. But this proviso does not say about a situation where complainant may be victim also.

In ***Subash Chand Vs State (Delhi Administration (2013)2 SCC 17***, The Hon'ble Supreme Court held that "Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court."

Thus, the Hon'ble Supreme Court laid down the law that an appeal against the order of acquittal in a complaint case shall be filed to the High Court.

It is pertinent to mention here that the right to file appeal in three conditions has been given to the victim by inserted proviso to Section 372 of CrPC through CrPC (Amendment) Act, 2008 and this amendment is based on the recommendation of Law Commission, given after considering the plight of victim and this proviso is a general provision, while the provision of Section 378(4) of CrPC is a special provision. The rule is that special provision prevails over general provision. Besides, only Section 372 of CrPC has been amended through CrPC(Amendment) Act, 2008 and no amendment has been made to Section 378 of CrPC which clears that the intent of Legislature was not to amend the provision of Section 378(4) of CrPC and not to nullify it . Besides, if the complainant person also happens to be victim person, he may avail the benefit of the proviso to Section 372 of CrPC in following two conditions only :

(1) Conviction for lesser offence,

(2) Inadequate compensation

The proviso to Section 372 of CrPC does not apply in case of acquittal, because it is a general provision and in such case, the provision of Section 378(4) of CrPC applies because it is a special provision. Thus, where the complainant is also a victim, he shall file appeal against order of acquittal under provision of Section 378(4) of CrPC to High Court after availing special leave from High Court.

In ***M/s Tata Steel Ltd. Vs. M/s Atma Tube Products Ltd. & Ors., Crm. no. 790-MA of 2010 decided on 18.03.2013,*** Full Bench of Hon'ble Punjab and Haryana High Court held that,"(83) The above discussion thus can be summed up to say that-

(i) the "complainant" in a complaint case who is a "victim" also, shall continue to avail remedy of appeal against acquittal under Section 378(4) only except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an adequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372;

(ii) the "victim", who is not the complainant in a private complaint case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the un-amended provisions read with Section 378(4) of the Code;

(iii) the Legislature has given no separate entity to a "victim" in the complaint-case filed by a public servant under a special Statute and the appeal against acquittal in such a case can also be availed by the "complainant" of that case under Section 378(4) of the Code only.

(iv) those "victim" of complaint-case whose right to appeal have been recognised to seek "leave" and "special leave" to appeal from the High Court in the manner contemplated under Section 378(3) & (4), for the Legislature while enacting proviso to Section 372 has prescribed no such fetter nor has it applied the same language used for appeals against acquittals while enacting sub-Section (3) & (4) of Section 378 of the Code."

In ***Bhavuben Dineshbhai Makwana Vs. State of Gujarat & others, 2013 CrLJ4225 (Gujarat High Court)***, the Full Bench of Hon'ble Gujarat High Court while answering the reference on question number (3) "If the victim prefers an appeal before this Court, challenging the acquittal, invoking his right under proviso to Section 372 of CrPC, whether that appellant is required to first seek leave of the Court, as is required in case of appeal being preferred by the State?", held that "If the victim also happens to be the complainant and the appeal is against acquittal, he is required to take leave as provided in Section 378 of the Criminal Procedure Code but if he is not the complainant, he is not required to apply for or obtain any leave. For the appeal against inadequacy of compensation or punishment on a lesser offence, no leave is necessary at the instance of a victim, whether he is the complainant or not."

In ***Omana Jose Vs. State of Kerala, ILR 2014(2) Kerala 669***, the Division Bench of Hon'ble Kerala High Court held that "For the aforesaid reasons, we hold that the complainant in a case under Section 138 of the Negotiable Instruments Act can not challenge the order of acquittal before the Sessions Court under the proviso to Section 372 of the CrPC. and his remedy is only to file an appeal to the High Court with special leave under Section 378(4) CrPC."

In ***Bhajanpura Co-operative Urban Thrift and Credit Society Ltd. Vs. Shushil Kumar, Cri. Appeal No. 972/2012 decided on 03.09.2014***, the Hon'ble Delhi High Court held that "Considering all the relevant provisions, I am of the considered view that the remedy available to the complainants under Section 138 N.I. Act against order of acquittal is only to seek special leave before the High Court."

In ***Kailash Murarka Vs. K. Geet Srijan, 2015 Cr.LJ., 1627 (Chhattisgarh High Court)***, the Division Bench of Hon'ble Chhattisgarh High Court while answering the reference question- 'Whether complainant is entitled to prefer appeal under proviso to Section 372 of CrPC. before Court of Session against judgment of acquittal passed by subordinate criminal Court arising out of criminal complaint filed by complainant or he is required to prefer appeal under Section 378(4) of CrPC before this Court after obtaining leave?' held that "Section 378(4) of CrPC is special provision dealing specifically with appeal by complainant in case of acquittal of accused in complaint cases and as such it will have over riding as well as exclusive application and effect in cases of acquittal of accused in cases instituted upon complaint- Section 378(4) of the CrPC lays down twin criteria for tenability of appeal that it should be filed in High Court and that appeal will lie after obtaining special leave- Thus complainant is not entitled to prefer appeal under proviso to Section 372 of the CrPC before Court of Session against judgment of acquittal passed by subordinate Court arising out of criminal complaint filed by complainant and complainant is required to prefer appeal under Section 378(4) of the CrPC. before High Court after obtaining special leave."

In ***M.K. Products Vs. M/S. Blue Ocean Exports (p) Ltd. & Ors., CRR 3793 of 2014 decided on 01.09.2016***, the Hon'ble Calcutta High Court followed the ratio of judgment passed by Hon'ble Kerala High Court in Omana Jose's case.

In ***Anil Kumar Agarwal Vs. State of U.P. and Another, App. u/s 482 no. 3171 of 2016, decided on 25.01.2017***, the Hon'ble Allahabad High Court after referring and considering all relevant judgment on this subject held that, "Now the question arises that if the Legislature has given a substantive and unfettered right of the victim to file appeal which could not be subjected or subservient to the provision already existed in the CrPC under Section 378(4) CrPC, how the situation would dealt with. It is settled legal position that if the two provisions of any enactment appeared to be contradictory, in that situation rule of harmonious construction may be applied so that aim and object of the Legislature inserting new provisions can be achieved harmonising both the provisions. If the proviso inserted in Section 372 CrPC and the already existing provision under Section 378(4) CrPC both are minutely scrutinized / analysed, virtually there is no contradiction in both the provisions. In my opinion, victim in complaint case against the acquittal order can prefer appeal only before

the High Court without any application to grant leave. Further, if the complainant, who is another person, moves application to grant leave and the said application is allowed and appeal is admitted by the High Court, both the appeals may be decided by the same Court to avoid any conflict of opinion."

Now, in the light of above judgment and observations, it can be safely concluded that appeal against the judgment of acquittal in a complaint case can be filed only to the High Court with special leave as provided in Section 378(4) of CrPC by the complainant and it does not differ the situation when the complainant also happens to be a victim and the proviso to Section 372 of CrPC does not apply to such case. Same principle also applies to the complaint case under Section 138 N.I. Act. Hence, in the case of acquittal u/s 138 N.I. Act, the complainant shall have to file an appeal to the High Court u/s 378 (4) CrPC. This is only remedy available to complainant against order of acquittal u/s 138 N.I.Act and no appeal or revision lies against acquittal u/s 138 N.I. Act before Court of Session.

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POLITICAL MORALITY WITHIN THE BOUNDS OF AN EVOLVING LAW

[1]Mahesh Chandra Kaushiwa
MSc. LL.M (University of Delhi)

Law and morality are often interwoven. There are acts which may be considered as strictly moral but may not be within the purview of legalities. However, the law makers are always influenced in law making process, to bring the moral Acts within the legal strides due to natural disposition towards the moral values especially in Indian Culture. The legislations in India are mostly the works of British but in the independent era, the societical demands, public opinion and political will are manifested in some legislations which are in a metamorphic stage and in process of evolution, as can be tested only with times and their workability with the contemporary social change. The rising corruption resulted into Prevention of Corruption Act 1988, when the trite legal provisions in our Penal Code were found to be insufficient. Similarly some of our great leaders of freedom struggle had emphasized on the high moral standards of the people, who are elected. Dr Ambedkar had a vision and a deep concern about the constitutional morality which is evident from Constitutional Assembly Dibates. The political change of instability resulted in the formation of coalition governments, which is further resulted in the white collar criminality by heterogeneous elements, cherishing the dream to Rule with an underlying Constitutional immorality. The malaise in the national life led to formation of Committee of constitutional experts and political representatives in March 1968 viz Chavan Committee, on whose recommendations, a Constitution Amendment Bill was referred to a Joint Committee but never saw the light of the day. It was again introduced in 1978 but could not satisfy the opposition and some ruling party members and the law remained a s'till born baby.'

In the Presidential Address of 17th January 1985, an assurance was given by the then Ruling Government, that Government intended to introduce a Bill to outlaw defections. The Bill made suitable provisions with respect to 'mergers' and 'splits' of political parties. A numerical

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[1] Judge Family Court U.S. Nagar

criterion was adopted to check the unethical defections and the question, if a member of House of Parliament or State legislature became the subject to the disqualification and it was left to the Presiding officer of the House. The Government dropped the controversial clause relating to the disqualification of a member on his expulsion from his political party for his conduct outside the House. Constitution (52nd Amendment) Act 1985 amended Articles 101, 102, 190 and 191 of the Constitution and added the Tenth Schedule to the Constitution, in the wake of *Aya Ram Gaya Ram* Politics plaguing the country. The same rampant crossover of politicians, after being elected, was a matter of serious concern. The Tenth schedule prescribed disqualification for legislators who commit the "constitutional sin" of defection. The power to adjudge disqualification was vested in the speaker of the house. Besides many vices in the legislation, the biggest vice in the Anti Defection Law was the non specification of the procedural role of Speaker/presiding officer, in deciding the disqualification petitions, no time limit was prescribed.

The Law was questioned on many grounds that it was violative of the basic structure of the Constitution, it was beyond the legislative competence and it gave preferences to expediency over the Principles. In **Kohita#Hollohan vs Ziachullu, 1992 Supplement 2 SCC 1992** the Hon'ble Supreme Court, considered the constitutionality of Paragraph 7 of the Tenth Schedule which barred the jurisdiction of the Courts under Article 136, 226 and 227 of the Constitution of India. The majority decision was given by Hon'ble Venkatchalliah, Reddy and Agarwal JJ. It was held that para 7 of the Tenth Schedule was unconstitutional being violative of basic structure but applied the Doctrine of severability and only the offending part of the Amendment which had effect of altering the basic structure was struck down. The Court was of the view that para 7 destroys the remedy, thereby making total exclusion of judicial review. As the question of disqualification of a member on the ground of defection requires adjudication, it results in "Extinction of remedy" and thereby resulting in making a change in Article 136, 226 and 227 of the Constitution and accordingly 'proviso' to Article 368 is attracted, requiring 'Ratification'. The Power to decide the question of disqualification is a judicial power and Speaker sits as a tribunal and hence amenable to judicial review. The most important aspect which was laid down was that the power of Speaker was not vitiated on the grounds of political bias and violation of basic feature of the constitution in view of high office held by him. The Majority

was of view that Speaker held a pivotal position in scheme of Parliamentary democracy and a guardian of rights/privileges of the House and it would be highly unfair as to the high traditions of the 'great office' to say that investiture in it of the jurisdiction would be vitiated for violation of basic feature of democracy. The majority judges of the bench also rejected the argument that the speaker could not provide for an independent adjudicatory mechanism on the ground of political bias the court observed that it is "in appropriate to express distrust in the high office of the speaker". The court expressed the hope that "the robes of the speaker do change and elevate the man inside." The dissenting Judges however were of the view that Speaker being an authority whose tenure depends on the will of majority and there is likelihood of suspicion of bias which could not be ruled out.

The State of Uttarakhand, also faced the problem of defection in the recent past. The Speaker on the basis of a jointly signed memorandum (as signed by the members of opposition party) by nine members of ruling party took those members within the purview of "voluntarily given up their membership" as per para 2(a) the Tenth Schedule (Anti defection law) of the Constitution of India. However, the same day the Centre imposed President Rule. Both the matters were challenged in the Hon'ble High Court of Uttarakhand. The decision of Hon'ble Speaker was upheld by Hon'ble Single Judge. The controversy was resolved by the Hon'ble Supreme Court on the basis of floor test, regarding who should be in governance, as they also were prima facie convinced with the fact of jointly signed memorandum and Hon'ble Supreme Court refused to pass any interim order against the order passed by Hon'ble single bench and finally the Hon'ble Apex Court has upheld the order passed by Hon'ble Single Bench. The Division Bench headed by Hon'ble Chief Justice set aside the imposition of President Rule. However the matter is still sub-judice in Honb'le Apex Court.

Post Kohita#Hollohan, the country has seen several cases, where this constitutional trust reposed in the high office of the speaker being breached by the "man inside" And almost two and half decades after Kohita Hollohan.

Recently in the background of the political turmoil of Arunachal Pradesh, the Hon'ble Supreme Court considered, the situation when there was a notice of resolution for removal of Speaker-NebamRebia, addressed

by 13 MLAs, to the secretary of the legislative Assembly in the case of **NebamRebia and Bamang Felix vs Deputy Speaker and others**. The fact situation was that, it was in the understanding of Governor, it would constitute constitutional impropriety, if the aforesaid Resolution was not taken up for the removal of Speaker forthwith ie. immediately after the expiry of 14 days, provided for in the first proviso of Article 179. Hon'ble Chief Justice J.S. Khehar (as his Lordship Then was) was of view that the participatory role of Governor in the removal of Speaker can neither be understood or accepted. Governor has no role in the outcome of disqualification proceedings under Tenth Schedule. However, it was held that when the position of Speaker is under challenge through notice of resolution for his removal, it would seem just and appropriate, that Speaker first demonstrates his right to continue as such by winning the majority in the State Legislature The action of Speaker in continuing, with one or more disqualifying petitions under Tenth Schedule, whilst a notice for his own removal is pending would appear unfair. The Hon'ble Chief Justice was of view that, if the disqualification petition is taken up first and the motion of Speaker is taken up thereafter, there is possibility of disqualification petition being decided on political considerations.

However, that could be a loophole for unprincipled politicians to frustrate the working of the anti-defection law. While interpreting Article 179(C) and the Tenth schedule of the constitution court has held that it is "Constitutionally impermissible" for a speaker to proceed with the disqualification proceedings, if a no confidence motion against him is pending. The process of a no-confidence motion begins with a notice of 14 days under Article 179(C) the speaker can, thereafter, be removed by a no confidence resolution passed against him by a majority of "all the then member of the assembly". The Nebam-Rebia Judgement interprets the term "all the then members of the assembly" to mean the composition of the house at the date time of giving the notice for removal of the speaker. Consequently it held that no change in the composition of the house is permissible once such a notice is given, till the outcome of the resolution, so the Court concluded that a speaker can not disqualify a member under the Tenth schedule, for defection, once there is a notice for his removal. That view seems to have junked the "robes" principle and has attempted to place legal fetters on the "man inside" it has incapacitated the speaker from deciding any disqualification petition under the Tenth Schedule, if a no confidence resolution is pending against him.

The Court has sought to base this on a principle that a person whose authority is under a cloud sought not to decide the fate of others till the cloud is removed. The Principle is indeed salutary, but whilst putting fetters on the speaker on trial, that could be used as a safety valve by the 'Potential defectors to escape the consequences of the Tenth schedule. A Legislator, by simply giving a notice for removal of the speaker, can bring the constitutional mechanism of disqualification under the anti-defection law to a grinding halt. All that a "constitutional sinner" has to do is to give a notice for removal of the speaker and then let raw unprincipled politics to take over as long as the resolution for removal of the speaker is pending, any act of defection by a legislator can not attract the penalty of disqualification.

Hon'ble Justice Deepak Misra (as his Lordship then was), relying and considering the Kohita#Hollahan case about the position of Speaker ëmphasised the "repose of confidence" in his position and stated about this constitutional fiction. He was of view that the constitutional adjudication has constitutional value in parliamentary democracy and constitutional values sustain the democracy in sovereign republic. He further observed that the words of the high constitutional functionary should remain embedded to the same with humility because it is humility that forms the foundation of regard. It is the ultimate constitutional virtue.

With great respect to the views and law laid down by the interpreters of the Constitution, the idealism and morality have been read in the office of Speaker in light of the Constitution bench decisions of Kohito#Hollahan and decision in Nebam Rebia. Only time would test the ground realities of politics, after all Speaker is a person with his own political ideologies howsoever he may have been deemed to sever his political affiliations. But undoubtedly again, 'Morality' is read into the law, which is inextricable in our personalities due to deep rooted Indian culture. Yet, we have a long way to go and to evolve the law in this regard.

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PRISON SYSTEM IN INDIA AND PROTECTION OF HUMAN RIGHTS OF PRISONERS

[1]Ritesh Kumar Srivastava

"What should our jails be like in free India? All criminals should be treated as patients and the jails should be hospitals admitting this class of patients for treatment and cure. No one commits crime for the fun of it. It is a sign of a diseased mind. The causes of a particular disease should be investigated and removed. They need not have palatial buildings when their jails become hospitals. The prisoners should feel that the officials are their friends. They are there to help them regain their mental health and not to harass them in any way. The popular governments have to issue necessary orders, but meanwhile the jail staff can don't a little to humanize their administration."

Mahatma Gandhi (Gandhi, n, 02-11-1947, pp.)

(I) INTRODUCTION:

According to Constitution of India "Prison"? is subject matter of the State as Entry 4 List II-State List of 7th Schedule provides ***"4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein, arrangements with other States for the use of prisons and other institution".*** *Therefore, State Government can legislate on the subject of "Prison" and the Central Government cannot legislate on the subject or pass any binding directions but may issue advisories to the State Governments.*

A prison or a jail is a place where inmates are forcibly confined and denied a variety of freedoms under the authority of the state in the form of punishment. The most common use of prisons, as part of the criminal justice system, is confinement of individuals officially charged with or convicted of crimes.

Legal imprisonment is devised as mode of punitive as well as corrective method by the Judicial systems evolved in the civilized society.

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[1] Add. Secretary, Law Govt. of Uttarakhand

It is closely linked to jurist theory of Pain and Pleasures. In earlier societies, there were few alternatives to the punitive reaction, so that usually criminals were either punished or nothing was done to them. At present, however, when punitive reaction decreases, a "treatment" reaction usually increases. While in some cases there is still no positive alternative to the punitive reaction, the trend during the last century has been towards a societal reaction in which the criminal is treated rather than punished. This treatment reaction presupposes extension of due regard for the dignity of human being for those who have been deprived of their liberty as a result of violating the laws made by the State. Progressive criminologists across the world will agree that the infliction of harsh and savage punishment is a relic of past and regressive times.

Convicts means any prisoner under sentence of a Court exercising criminal jurisdiction or court martial and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1973 and the Prisoners Act, 1900. Detenue means any person detained in prison on the orders of the competent authority under the relevant preventive laws. Undertrial Prisoner implies a person who has been committed to judicial custody pending investigation or trial by competent Courts. They are technically under judicial custody but for all practical purposes are kept in the same prison like in India. In many countries there are separate institutions for under trials. Delay in trial of cases is the main human rights issue of Under Trials. The purpose of keeping Under Trials in the custody is to ensure fair trial so that they cannot be in a position to influence or induce the witnesses. Imprisonment or incarceration is a legal punishment that may be imposed by the state for the commission of a crime or disobeying its rule.

The Preamble of the Constitution of India ensures that Constitution is made to defend and protect its people and to establish peace and harmony in the society. It aims to make the country safe to live in by the citizens. Article 14 says "The State shall not deny to any person equality before law or the equal protection of laws within the territory of India". The article 14 has been a very useful guide for the courts to determine the category of prisoners and their basis of classification in different categories. Article 19 of the Constitution guarantees six freedoms to the citizens of India. According to the Article 20(1) "No person shall be convicted of any offence except for the violation of law in force at the time of the commission of the act charged as an offence, nor be subject

to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence". It restricts the power of legislature to implement any criminal law retrospectively. Article 20(2) protects against double jeopardy. Article 20 (3) prohibits against self incrimination. *Article 21 says, "No person shall be deprived of his life or personal liberty except according to procedure established by law".*

There is no guarantee of prisoner's right as such in the Constitution of India. The right to personal liberty has now been given a very wide interpretation. This right is available not only for the free people but even to those behind bars. The right to speedy trial, free legal aids, right against torture, and right against inhuman and degrading treatment accompany a person into the prison also. Article 21 of the Indian Constitution has been a major centre of litigation so far as the prisoners rights are concerned. It embodies the principle of liberty. This provision has been used by the Hon'ble Apex Court of India to protect certain important rights of the prisoners. After ***Maneka Gandhi Vs. Union of India (1978) 1 SCC 248*** decision it has been established that there must be a fair, just and reasonable procedure for the deprivation of the life and the personal liberty of the individuals. The Hon'ble Apex Court of India, by interpreting Article 21 of the Constitution, has developed the human rights theology for the preservation and protection of prisoner's rights to maintain human dignity. Article 22 (1) of the Constitution directs that no person who is arrested shall be denied the right to consult and to be defended by the legal practitioner of his choice as well. When an accused is undefended, it is the duty of the Court to appoint a counsel on Government expenses for his defence. When the personal liberty of a person is deprived by the officials illegally, the remedy available to them is by way of Writs under Article 226 of the Constitution before the Hon'ble High Courts and under Article 32 of the Constitution before the Hon'ble Apex Court. Article 39-A embodies principle of fair procedure during trial by courts and ensure free legal aid to prisoners.

Prisons Act, 1894 is the first legislation regarding prison regulation in India. This Act mainly focus on reformation of prisoners in connection with the rights of prisoners. The provisions of the Prisons Act, 1894 related with the reformation of prisoners are:- Accommodation and sanitary conditions for prisoners (Sec 4), provision for the shelter and safe custody of the excess number of prisoners who cannot be safely kept in any prison (Sec 7), provisions relating to the examination of prisoners by

qualified Medical Officer (Sec 24), provisions relating to separation of prisoners, containing female and male prisoners, civil and criminal prisoners and convicted and under trial prisoners (Sec 27), provisions relating to treatment of under-trials, civil prisoners, parole and temporary release of prisoners (Sec 31 & 35).

(II) HUMAN RIGHTS:

"Human Rights" entered the political discourse only three centuries ago but it does not mean that it was not in existence. Although there is no precise starting pint of the Human Rights movement in history, the concept is as old as humanity. Human rights are inherent entitlements that come to every person as a consequence of being human, and are founded on respect for the dignity and worth of each person. They are not privileges, nor gifts given at the whim of a ruler or a Government. Nor can they be taken away by any arbitrary power. They cannot be denied, nor can they be, because an individual has committed any offence or has committed breach of any law. Human Rights become operative with the birth of an individual and continue even after death.

A very comprehensive definition of human rights is to be found in the Protection of Human Rights Act, 1993 enacted by our Parliament. Under section 2(1)(d), "Human rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Court in India. "Human Rights", thus, "reflects what a person needs in order to live a meaningful and dignified existence."

Universal Declaration of Human Rights, 1948 provided the world with a "Common standard of achievements for all peoples and all nations", based on the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" Hon'ble Apex Court in ***Ram Deo Chauhan vs. Bani Kanta Das (2010) 14 SCC 209*** has observed: "Human rights is a broad concept and cannot be straitjacketed within narrow confines. Any attempt to do so would truncate its all-embracing scope and reach and denude it of its vigour and vitality."

(III) PRISON PHILOSOPHY:

As per Section 3(1) of the Prison Act, 1894, "Prison" means any jail or places used permanently or temporarily under the general or special

orders of a State Government for the detention of prisoners. It includes all lands and buildings appurtenant thereto. But the following do not fall within the definition of "Prison"-

(i) any place of the confinement of prisoners who are exclusively in the custody of the police;

(ii) any place specially appointed by the State Government under Section 417 Cr.P.C, 1973; or

(iii) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail.

Despite being a corrective measure, the most intricate problem involved in imprisonment as a measure of punitive reaction to crime is the "Prisonisation" of offenders. The Prisoner is confronted with the most crucial problem of adjustment to new norms and values of prison life. He loses his personal identity in the process of adjustment and is converted into a mere impersonal entity. Yet another setback of imprisonment is its damaging effect on family relationship of the offender. Not only his family suffers misery, starvation and financial crisis, but long deprivation of the offender creates new problems for prison discipline in form of homosexuality, bribery, corruption, revolt etc. The social stigma attached to prisoners makes their rehabilitation more difficult. Negative attitude of jail authorities towards inmates is also a big issue. Emphasizing the need for change in the attitude of jail authorities towards the prison inmates, The Hon'ble Apex Court in ***Mohammad Giassuding v. State of Andhra Pradesh (1978) 1 SCR 153*** observed: "Progressive criminologist across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals - mental or moral - is the key to the pathology of delinquency and the therapeutic role of punishment…. Our prison should be correctional houses, not cruel iron arching the soul."

(IV) HUMAN RIGHTS ISSUES OF PRISONERS:

As per Prison Statistics of India, 2015 from National Crime Record Bureau, 1,34,168 convicts; 282076 under trial prisoners; 2562 Detenues and 817 others persons were languishing in different Prisons of India.

The following are the major human rights issues involved pertaining to the prisoners in India.

1. Delay in Trial of Cases: a Major Human Rights Issue

It is one of the gravest area of concern and contribute greatly to the burgeoning jail population mostly of under trial prisoners. Because of delay in trial, the under trials have to languish a considerable period of time in prisons.

2. Causes of Delay in trial:

There are many causes of delay in trial but the following reasons are identified:

1.Shortage of judges 2. Non-service of summons of witnesses and Non-appearance of Witnesses 3. Non-appearance of Police witnesses on the pretext of VIP duty, transfer to other places, etc. 4. Non-production of accused from the jail because of unavailability of escort 5. Delay tactics by advocates and the accused 6. Non-production of Case property 7. Undue adjournments 8. Lack of co-ordination between various organs of Criminal Justice Administration

3. Actual Confinement more than the Pronounced Sentence

There are instances where certain undertrials spent more time in the judicial custody than their pronounced sentences. This is a serious breach of human rights.

4. Acquittal after Confinement

It is very common in the criminal justice administration of India that under trials are confined under judicial custody for a long time and after the trial they are declared innocent. This is a major human rights violation and especially poor persons are such victims. In many cases influential and rich people go for compensation but the poor remain silent as they are not in a position to engage lawyer and pay court fee for this purpose.

5. Vexatious Arrests

As pointed out by the National Police Commission, 1977, 3rd report the powers of the arrest available to the police give ample scope for harassment and humiliation of persons, prompted by malafide considerations. In actual practice, several persons who ought to be arrested are let free on account of political influence or other considerations, while harmless persons who need not be arrested at all are often arrested and even remanded to police custody on inadequate grounds.

The National Human Rights Commission of India in its *Annual Report 2004-2005* has also pointed out that unnecessary and unjustified arrests made by the Police and slow judicial process causing congestion of undertrial prisoners are the main causes of overcrowding in jails. Hon'ble Apex Court has also taken strong view on unwarranted arrests and has issued broad guidelines in ***Arnesh Kumar Vs. State of Bihar and Anr, (2014) 8 SCC 273.***

(V) PRISON SYSTEM AND PRISON REFORMS IN INDIA:

The modern prison system in India is essentially based on the British prison model which in itself is an outcome of prison developments in America during the eighteenth century.

1. Prisons in Ancient India:

A well-organized system of prisons is known to have existed in India from the earliest times. It is on record that Brahspati laid great stress on imprisonment of convicts in closed prisons. However, Manu was against this system. Kautilya in his *Arthshastra* has stated that ruler in ancient India made frequent use of fortresses to lodge their prisoners. He was personally of the view that as far as possible prisons should be constructed by the road side so that monotony of prison life is reduced to a considerable extent. The object of punishment during the Hindu and Mughal period in India was to deter offenders from repeating crime. The recognized modes of punishment were death sentence, hanging, mutilating, whipping, flogging, branding or starving to death. During the Mughal rule in India the condition of prisons was awfully draconic. The prisoners were ill-treated, tortured and subjected to most inhuman treatment. They were kept under strict surveillance and control. The prisons were places of terror and torture and prison authorities were expected to be rough and tough in implementing the sentences.

2. Prisons in British India:

The British colonial rule in India marked the beginning of penal reforms in this Country. They introduced radical changes in the then existing prison system keeping in view the sentiments of the indigenous people. The Prison Inquiry Committee appointed by the Government of India in 1836 recommended the abolition of the practice of prisoners working on roads. Adequate steps were also taken to eradicate corruption among the prison staff. An official ‘Inspector General of Prisons’ was appointed for

the first time in 1855, who was the Chief Administrator of Prisons in British India. His main function was to maintain discipline among the prisoners and the prison authorities. With this appointment, the jailer and other officials of prisons could no longer abuse their power and authority. The second Jail Inquiry Committee in 1862 expressed concern for the insanitary conditions of Indian Prisons which used to be one of the causes death of several prisoners due to illness and disease. It emphasized the need for proper food and clothing for the prison inmates and medical treatment of ailing prisoners. Thereafter, certain recommendations were also made by the third Jail Enquiry Committee in 1877 followed by further suggestion in 1889 and 1892. As a result of these recommendations, the Prisons Act, 1894 was enacted to bring about uniformity in the working of prisons in India. It empowered the then existing Provinces to enact their own prison rule for the prison administration. Despite these changes, the prison policy as reflected through the Act, by and large remained deterrent. After 1907, vigorous efforts were made to improve the conditions of juveniles and young offenders. They were now kept segregated from hardened adult offenders so as to prevent their contamination. A number of reformatories and Borstal institutions modelled on British pattern were established for the treatment of juvenile delinquents during early twentieth century. The Government of India Act, 1935 allowed the subject of jails from the Centre List to the control of provincial governments and hence further reduced the possibility of uniform implementation of a prison policy at the national level. State governments thus have their own rules for the day to day administration of prisons, upkeep and maintenance of prisoners, and prescribing procedures.

3. Prisons in free India:

In 1951, the Government of India invited the United Nations expert on correctional work, Dr. W.C. Reckless, to undertake a study on prison administration and to suggest policy reform. His report titled 'Jail Administration in India' made a plea for transforming jails into reformation centres. He also recommended the revision of outdated jail manuals. In 1952, the Eighth Conference of the Inspectors General of Prisons also supported the recommendations of Dr. Reckless regarding prison reform. Accordingly, the Government of India appointed the All India Jail Manual Committee in 1957 to prepare a model prison manual. The committee submitted its report in 1960. The report made forceful pleas for formulating a uniform policy and latest methods relating to jail administration, probation,

after-care, juvenile and remand homes, certified and reformatory school, borstals and protective homes, suppression of immoral traffic etc. The report also suggested amendments in the Prison Act 1894 to provide a legal base for correctional work.

The Committee prepared the Model Prison Manual (MPM) and presented it to the Government of India in 1960 for implementation. The MPM 1960 is the guiding principle on the basis of which the present Indian prison management is governed. On the lines of the Model Prison Manual, the Ministry of Home Affairs, Government of India, in 1972, appointed a working group on prisons. It brought out in its report the need for a national policy on prisons. It also made an important recommendation with regard to the classification and treatment of offenders and laid down principles.

In 1980, the Government of India set-up a Committee on Jail Reform under the chairmanship of Justice Mr. A. N. Mulla. The basic objective of the Committee was to review the laws, rules and regulations keeping in view the overall objective of protecting society and rehabilitating offenders. The Mulla Committee submitted its report in 1983. In 1987, the Government of India appointed the Justice Mr. Krishna Iyer Committee to undertake a study on the situation of women prisoners in India. It recommended induction of more women in the police force in view of their special role in tackling women and child offenders.

(VI) RAMAMURTHY VERSUS STATE OF KARNATAKA CASE:

The Hon'ble Apex Court in ***Ramamurthy Vs. State of Karnataka (1997) 2 SCC 642*** observed as under:

> *"**49.** We have travelled a long path. Before we end our journey, it would be useful to recapitulate the directions we have given on the way to various authorities. These are:*
>
> *(1) To take appropriate decision on the recommendations of the Law Commission of India made in its 78th Report on the subject of 'Congestion of under-trial prisoners in jail' as contained in Chapter 9. (Para 20A).*
>
> *(2) To apply mind to the suggestions of the Mulla Committee as contained in Chapter 20 of Volume I of its Report relating to*

streamlining the remission system and premature release (parole), and then to do the needful. (Para 23). (3) To consider the question of entrusting the duty of producing UTPs on remand dates to the prison staff. (Para P7).

(4) To deliberate about enacting of new Prison Act to replace century old Indian Prison At, 1894. (Para 31). We understand that the National Human Rights Commission has prepared an outline of an All-India statute, which may replace the old act; and some discussions at a national level conference also took place in 1995. We are of the view that all the States must try to amend their own enactments, if any, in harmony with the All India thinking in this regard.

(5) To examine the question of framing of a model new All India Jail Manual as indicated in para 31.

(6) To reflect on the recommendations of Mulla Committee made in Chapter 29 on the subject of giving proper medical facilities and maintaining appropriate hygienic conditions and to take needed steps. (Paras 35 and 36). (7) To ponder about the need of complaint box in all the jails. (Para 37).

(8) To think about introduction of liberalization of communication facilities. (Para 40).

(9) To take needful steps for streamlining of jail visits as indicated in para 42.

(10) To ruminate on the question of introduction of open air prisons at least in the District Headquarters of the country. (Para 48).

***50.** The end of the journey is in sight. We conclude by saving that the cognizance of the letter written by Rama Murthy and the efforts made thereafter to find out what was realty happening in the Central Jail of Bangalore, resulting in submission of a voluminous report by District Judge, would not prove to be an exercise in futility, if what we have stated above is taken in all seriousness and our prisons become reform houses as well, in which case the social and economic costs of incarceration would become more worthwhile. There seems to be no cause for disillusionment, despite what has been stated in this regard by*

Roy D. King and Rod Morgan in `The Future of Prison System'. According to us, talk about treatment and training in prisons is not rhetoric; it can prove to be real, given the zeal and determination. And we cannot afford to fail in this sphere as a sound prison system is a crying need of our time in the backdrop of great increase in the numbers of prisoners and that too of various types and from different strata of society.

51. *Let us, therefore, resolve to improve our prison system by introducing new techniques of management and by educating the prison staff with our constitutional obligations towards prisoners. Rest would follow, as day follows the night. Let the dawning ray (of hope) see the end of gloom cast on the faces of majority of prisoners and let a new awakening percolate every prison wall. Let it be remembered that, "where there is will, there is way". Will there is, way would be found.*

52. *We had desired to dispose of the writ petition accordingly. But as we could not hear all the States, because of constraint of time and as they have to be heard before giving directions as detailed above, let notices be issued on the Secretary to the Government of India, Ministry of Home and the Chief Secretaries of all the States and Union Territories, as to why they should not be asked to act for above. Let causes be shown within three months and let the case be planed for further hearing thereafter soon."*

Following the direction in ***Ramamurthy Case (1997) 2 SCC 642*** to bring about uniformity nationally of prison laws and prepare a draft model prison manual, a committee was set up in the Bureau of Police Research and Development (BPR&D). The Jail Manual drafted by the committee was accepted by the Central Government and circulated to State Governments in December, 2003. With passage of time and after having gained a better understanding of ground realities, a need was felt to revive and update the Manual to reflect the development of the past decade. In the meantime, Hon’ble Apex Court had also issued several directions. An expert Committee was constituted in 2014 to revamp the Model Prison Manual prepared in 2003. The expert committee extensively reviewed the Model Prison Manual and came up with a draft Model Prison Manual in 2016.

The Hon'ble Apex Court of India has however expanded the horizons of prisoner's rights jurisprudence through a series of judgments. In its judgments on various aspects of prison administration, the Hon'ble Apex Court of India has laid down three broad principles regarding imprisonment and custody.

(i) a person in prison does not become a non-person;

(ii) a person in prison is entitled to all human rights within the limitations of imprisonment; and,

(iii) there is no justification for aggravating the suffering already inherent in the process of incarceration.

(VII) STATUTES:

The existing statutes which have a bearing on regulation and management of prisons in the country are:

(i) The Indian Penal Code, 1860.(ii) The Prisons Act, 1894. (iii) The Prisoners Act, 1900. (iv) The Identification of Prisoners Act, 1920. (v) Constitution of India, 1950. (vi) The Transfer of Prisoners Act, 1950. (vii) The Representation of Peoples Act, 1951. (viii) The Prisoners (Attendance in Courts) Act, 1955. (ix) The Probation of Offenders Act, 1958. (x) The Code of Criminal Procedure, 1973. (xi) The Mental Health Act, 1987. (xii) The Juvenile Justice (Care & Protection) Act, 2015. (xiii) The Repatriation of Prisoners Act, 2003. (xiv) Model Prison Manual, 2003. (xv) Model Prison Manual, 2016.

(VIII) JUDGMENTS:

Following are the prominent judgments of the Hon’ble Apex Court pertaining to Human Rights of Prisoners and Prisons System:

Charles Sobraj Vs. Superintendent Central Jail, Tihar, New Delhi 1978 (4) SCC 104; Francis Coralie Mullin Vs. Union Territory of Delhi & Ors. 1981 (1) SCC 608; Hussainara Khatoon & Ors. (iii) Vs. Home Secretary, Bihar, Patna 1980 (1) SCC 93, 1980 (1) SCC 81 and 91 also; Hussainara Khatoon (iv) & Ors. Vs. Home Secretary, Bihar 1980 (1) SCC 98, 108, 115; Jayendra Vishnu Thakur Vs. State of Maharashtra 2009 (7) SCC 104; Khatri (i-ii) & Ors. Vs. State of Bihar & Ors. 1981(1) SCC 623, 627; MH Hoskot Vs. State of Maharashtra 1978 (3) SCC 544; Mohammad Giasuddin Vs. State of Andhra Pradesh 1977(3) SCC 287; News Item “38 Years In Jail

without Trial" Vs. Union of India 2007 (15) SCC 18; Pradha Dutt Vs. Union of India (1982) 1 SCC 1; Prem Shankar Shukla Vs. Delhi Administration 1980 (3) SCC 526; Rakesh Kaushik Vs. BL VIG Superintendent Central Jail, New Delhi 1980 (Supp) SCC 183; Ramamurthy Vs. State of Karnataka 1997 (2) SCC 642; RD Upadhyay Vs. State of Andhra Pradesh & Ors. 2007 (15) SCC 337; Sheela Barse Vs. State of Maharashtra 1983 (2) SCC 96; State of Gujarat & ANR Vs. Hon'ble High Court of Gujarat 1998 (7) SCC 392; Sunil Batra Vs. Delhi Administration & Ors. 1978 (4) SCC 494; Sunil Batra (ii) Vs. Delhi Administration 1980(3) SCC 488; Supreme Court Legal Aid Committee Vs. Union of India & Ors. 1994 (6) SCC 731; Re-Inhuman Conditions In 1382 Prisons Cases etc.

It must be stated that the freedom movement had a direct impact on prison conditions in India. The dimension of national movement during the first half of the twentieth century brought the Indian prisons into social limelight. After the Indian Independence, the constitution of India placed "Jail" along with "Police and law and order" in the State List of the Seventh Schedule. As a result of this, the Union Government had literally no responsibility of modernizing prisons and to look after their administration. Unfortunately, even the Five Year Plans offered a very low priority to prison administration and jail reforms.

(IX) MODEL PRISON MANUAL, 2016:

The Government of India revised the 32 chapters of Model Prison Manual, 2003. The new Model Prison Manual, 2016 aims at bringing uniformity in laws, rules and regulations governing prison administration and management of Prisoners all over the country. The revisions and additions made to the Model mainly cover the followings:

1. **Access to free Legal Service:** A new chapter on Legal Aid (Chapter XVI) has been incorporated in the Model Manual. Article 39A of the Constitution of India calls for free legal aid to the poor and weaker sections of society and seeks to ensure justice for all. The chief additions include: Appointment of jail visiting advocates; setting up of a legal aid clinic in every prison; Legal literacy classes in prisons; constitution of under-trial review committee and provisions to ensure legal services for under-trial prisoners who have undergone half of the maximum sentence for that offence.

2. **Additional provisions for Women Prisoners:** Safety and reformation of women prisoners are of utmost importance in prison administration. Health of women prisoners has also been recognized as a focus area warranting special attention. With this in mind, the following have been provided in the revision: Comprehensive health screening for women prisoners, including tests to determine presence of sexually transmitted or blood-borne diseases, mental health concerns, existence of drug dependency, etc. This is drawn from the United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders adopted by the UN General Assembly (UN Bangkok Rules); Sensitizing the staff and imparting training relating to gender issues and sexual violence; Educating women about preventive health-care measures; Enabling proper counselling and treatment for those suffering from psychological disorders; Focused after-care and rehabilitation measures to ease women's re-integration into society; Restrictions on certain kinds of punishments being awarded to women, for instance, punishment by close confinement should not be awarded to pregnant women, women with infants, etc.; Counselling programmes focused on women, especially those who have been victims of abuse and focus on removing any further damage that imprisonment may have on a female inmate.

3. Rights of Prisoners Sentenced to Death: The Hon'ble Apex Court, in ***Shatrughan Chauhan Vs. Union of India and Others (2014) 3 SCC 1*** observed that "… the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable and the protection of Article 21 of the Constitution of India inheres in every person, even death-row prisoners, till the very last breath of their lives". To this end, the Court laid down certain guidelines in respect of prisoners sentenced to death which have been echoed in the Manual recognizing the necessity of ensuring the human rights of such prisoners. These have been incorporated in new Chapter XII (Chapter XI of the Jail Manual, 2003) and broadly include: Provision of legal aid to prisoners sentenced to death at all stages, even after rejection of mercy petitions; Regular mental health evaluation for death row prisoners; Physical and mental health reports to certify that the prisoner is in a fit physical and mental condition; Procedure and channels through which mercy petitions are to be submitted;

Communication of rejection of mercy petitions; Furnishing necessary documents, such as court papers, judgments, etc. to the prisoners; Facilitating and allowing a final meeting between a prisoner and his family.

4. **Modernization and Computerization:** Additions have been made to the Manual to encourage use of technology/software systems where possible, including introduction of a Personal Information System for recording information relating to inmates (incorporated in Chapter V - Custodial Management). Also, any register required to be maintained by the prison authorities has also to be in an electronic form. In line with the Hon'ble Supreme Court's directions in ***D.K. Basu Vs. State of W.B., (1997) 1 SCC 416 : AIR 1997 SC 610*** provisions have been included (in Chapter II - Institutional Framework) for installation of CCTV cameras in work sheds, kitchens, high security enclosures, main gate, etc. of prisons to prevent violation of human rights.

5. **Focus on After-Care Services:** The Manual recognizes that it is the States' responsibility to devise and develop mechanisms for rehabilitation of released convicts (in Chapter XXII - After-Care and Rehabilitation). It is envisaged that special committees known as Discharged Prisoners' After-Care and Rehabilitation Committees should be set up at the district or State level for planning and devising appropriate mechanisms for rehabilitation and after-care assistance to prisoners.

6. **Provisions for Children of Women Prisoners:** In ***R.D. Upadhyaya Vs. State of A.P. (2007) 15 SCC 360*** and Others the Hon'ble Apex Court issued guidelines in respect of children of women prisoners. While acknowledging some positive steps taken in this regard, the Court noted that, "a lot more is required to be done in the States and Union Territories for looking after the interest of the children" and went on to issue guidelines to ensure holistic development of children of women prisoners inside prisons and pregnant prisoners. While certain guidelines already found mention in the 2003 Model Manual, several States are yet to have adopted these. Additional provisions (in line with the Supreme Court guidelines) have been incorporated in Chapter XXVI - Women Prisoners (Chapter XXIV of the 2003 Manual) and include: Provisions

for holistic development of children, including provision of food, medical care, clothing, education, and recreational facilities; Providing pre-natal and post-natal care to pregnant women offenders; Taking care of nutritional requirements of children and provision of clean drinking water; Ensuring a well-equipped crèche and a nursery school for children to be looked after.

7. **Organizational uniformity and increased focus on Prison Correctional Staff:** The organizational hierarchy set forth in Chapter III (Headquarters Organization) has been streamlined with increased focus on the Correctional Wing, and engagement of professionally qualified counsellors/ psychiatrists for counselling needy prisoners, especially those suffering from substance-related addictive disorders.

8. **Inspection of Prisons:** A new chapter on inspection of prisons has been incorporated as Chapter XXVIII providing for (a) informal inspections to be carried out by senior prison officers, and (b) formal inspection to be carried out by a designated Inspector Officer. The formal inspection (which is more detailed) covers aspects such as mess facilities, medical facilities, hygiene, high security enclosures, etc. and would be a thorough review of the prison. This could help identify existing issues and deficiencies which could then be remedied through appropriate action.

9. **Other Prominent Revisions:** Insertion of a new chapter on repatriation of prisoners (Chapter X) in line with the advisory issued by the Ministry of Home Affairs on the subject dated 10 August, 2015; Bringing uniformity and clarifying provisions regarding remission (Chapter XVIII), Usage of the commonly used terms ‘parole’ and 'furlough' in place of leave and special leave (Chapter XIX) and setting out in detail the objective behind parole and furlough and the procedure for the same; Bringing medical services within the domain of the State Medical Services/ Health Department instead of the prison department (Chapter VII); A more comprehensive and relevant security classification for high-risk offenders. (Chapter XXV);

(X) RE - INHUMAN CONDITIONS IN 1382 PRISONS CASE:

The Hon’ble Apex Court in the matter of ***Suo-Moto Writ Petition (Civil) No. 406/2013***, ***Re - inhuman conditions in 1382 prisons (05.02.2016)*** has asked to Under-trial Review Committee to meet every

quarter and directed to Centre Government and all the States to implement the Manual, 2016 and ensure a similar Manual to be prepared for in respect of juveniles who are in custody either in Observation Homes, Special Homes or Place of Safety in terms of Juvenile Justice (Care & Protection) Act, 2015. The Hon'ble Apex Court observed as under:

> *"**55.** In a similar vein, it has been said, with a view to transform prisons and prison culture:*
>
> ***56.** The sum and substance of the aforesaid discussion is that prisoners, like all human beings, deserve to be treated with dignity. To give effect to this, some positive directions need to be issued by this Court and these are as follows:*
>
> *The Under Trial Review Committee in every district should meet every quarter and the first such meeting should take place on or before 31 March, 2016. The Secretary of the District Legal Services Committee should attend each meeting of the Under Trial Review Committee and follow up the discussions with appropriate steps for the release of under trial prisoners and convicts who have undergone their sentence or are entitled to release because of remission granted to them.*
>
> *The Under Trial Review Committee should specifically look into aspects pertaining to effective implementation of Section 436 of the Cr.P.C. and Section 436A of the Cr.P.C. so that under-trial prisoners are released at the earliest and those who cannot furnish bail bonds due to their poverty are not subjected to incarceration only for that reason. The Under Trial Review Committee will also look into issue of implementation of the Probation of Offenders Act, 1958 particularly with regard to first time offenders so that they have a chance of being restored and rehabilitated in society.*
>
> *The Member Secretary of the State Legal Services Authority of every State will ensure, in coordination with the Secretary of the District Legal Services Committee in every district, that an adequate number of competent lawyers are empaneled to assist under-trial prisoners and convicts, particularly the poor and indigent, and that legal aid for the poor does not become poor legal aid.*

The Secretary of the District Legal Services Committee will also look into the issue of the release of under-trial prisoners in compoundable offences, the effort being to effectively explore the possibility of compounding offences rather than requiring a trial to take place. The Director General of Police/Inspector General of Police in-charge of prisons should ensure that there is proper and effective utilization of available funds so that the living conditions of the prisoners is commensurate with human dignity. This also includes the issue of their health, hygiene, food, clothing, rehabilitation etc. The Ministry of Home Affairs will ensure that the Management Information System is in place at the earliest in all the Central and District Jails as well as jails for women so that there is better and effective management of the prison and prisoners.

The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The Model Prison Manual 2016 should not be reduced to yet another document that might be reviewed only decades later, if at all. The annual review will also take into consideration the need, if any, of making changes therein. The Under Trial Review Committee will also look into the issues raised in the Model Prison Manual 2016 including regular jail visits as suggested in the said Manual.

57. A word about the Model Prison Manual is necessary. It is a detailed document consisting of as many as 32 chapters that deal with a variety of issues including custodial management, medical care, education of prisoners, vocational training and skill development programmes, legal aid, welfare of prisoners, after care and rehabilitation, Board of Visitors, prison computerization and so on and so forth. It is a composite document that needs to be implemented with due seriousness and dispatch.

58. Taking a cue from the efforts of the Ministry of Home Affairs in preparing the Model Prison Manual, it appears advisable and necessary to ensure that a similar manual is prepared in respect

of juveniles who are in custody either in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.

59. Accordingly, we issue notice to the Secretary, Ministry of Women and Child Development, Government of India, returnable on 14th March, 2016. The purpose of issuance of notice to the said Ministry is to require a manual to be prepared by the said Ministry that will take into consideration the living conditions and other issues pertaining to juveniles who are in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015."

In **Re - Inhuman Conditions In 1382 Prisons Case (15-09-2017)** for protecting human rights of inmates the Hon'ble Apex Court issued directions to the Hon'ble High Courts, Central Government, NALSA, SLSA and all the States and observed as under:

*"**57.** We are of the view that on the facts and in the circumstances before us, the suggestions put forward by the learned Amicus and the learned counsel appearing for the National Forum deserve acceptance and, therefore, we issue the following directions:*

1. The Secretary General of this Court will transmit a copy of this decision to the Registrar General of every High Court within one week with a request to the Registrar General to place it before the Chief Justice of the High Court. We request the Chief Justice of the High Court to register a suo motu public interest petition with a view to identifying the next of kin of the prisoners who have admittedly died an unnatural death as revealed by the NCRB during the period between 2012 and 2015 and even thereafter, and award suitable compensation, unless adequate compensation has already been awarded.

2. The Union of India through the Ministry of Home Affairs will ensure circulation within one month and in any event by 31st October, 2017 of (i) the Model Prison Manual, (ii) the monograph prepared by the NHRC entitled "Suicide in Prison - prevention strategy and implication from human rights and legal points of view", (iii) the communications sent by the NHRC referred to above, (iv) the compendium of advisories issued by the Ministry

of Home Affairs to the State Governments, (v) the Nelson Mandela Rules and (vi) the Guidelines on Investigating Deaths in Custody issued by the International Committee of the Red Cross to the Director General or Inspector General of Police (as the case may be) in charge of prisons in every State and Union Territory. All efforts should be made, as suggested by the NHRC and others, to reduce and possibly eliminate unnatural deaths in prisons and to document each and every death in prisons - both natural and unnatural.

3. The Union of India through the Ministry of Home Affairs will direct the NCRB to explain and clarify the distinction between unnatural and natural deaths in prisons as indicated on the website of the NCRB and in its Annual Reports and also explain the sub-categorization 'others' within the category of unnatural deaths. The NCRB should also be required to sub-categorize natural deaths. The sub-categorization and clarification should be complied with by 31st October, 2017.

4. The State Governments should, in conjunction with the State Legal Services Authority (SLSA), the National and State Police Academy and the Bureau of Police Research and Development conduct training and sensitization programmes for senior police officials of all prisons on their functions, duties and responsibilities as also the rights and duties of prisoners. A copy of this order be sent by the Registry of this Court to the Member-Secretary of each SLSA to follow-up and ensure compliance.

5. The necessity of having counsellors and support persons in prisons cannot be over-emphasized. Their services can be utilized to counsel and advice prisoners who might be facing some crisis situation or might have some violent or suicidal tendencies. The State Governments are directed to appoint counsellors and support persons for counselling prisoners, particularly first-time offenders. In this regard, the services of recognized NGOs can be taken and encouraged.

6. While visits to prison by the family of a prisoner should be encouraged, it would be worthwhile to consider extending the time or frequency of meetings and also explore the possibility of using phones and video conferencing for communications not

only between a prisoner and family members of that prisoner, but also between a prisoner and the lawyer, whether appointed through the State Legal Services Authority or otherwise.

7. The State Legal Services Authorities (SLSAs) should urgently conduct a study on the lines conducted by the Bihar State Legal Services Authority in Bihar and the Commonwealth Human Rights Initiative in Rajasthan in respect of the overall conditions in prisons in the State and the facilities available. The study should also include a performance audit of the prisons, as has been done by the CAG. The SLSAs should also assess the effect and impact of various schemes framed by NALSA relating to prisoners. We request the Chief Justice of every High Court, in the capacity of Patron-in-Chief of the State Legal Services Authority, to take up this initiative and, if necessary, set up a Committee headed preferably by the Executive Chairperson of the State Legal Services Authority to implement the directions given above.

8. Providing medical assistance and facilities to inmates in prisons needs no reaffirmation. The right to health is undoubtedly a human right and all State Governments should concentrate on making this a reality for all, including prisoners. The experiences in Karnataka, West Bengal and Delhi to the effect that medical facilities in prisons do not meet minimum standards of care is an indication that the human right to health is not given adequate importance in prisons and that may also be one of the causes of unnatural deaths in prisons. The State Governments are directed to study the availability of medical assistance to prisoners and take remedial steps wherever necessary.

9. The constitution of a Board of Visitors which includes non-official visitors is of considerable importance so that eminent members of society can participate in initiating reforms in prisons and in the rehabilitation of prisoners. Merely, changing the nomenclature of prisons to 'Correction Homes' will not resolve the problem. Some proactive steps are required to be taken by eminent members of society who should be included in the Board of Visitors. The State Governments are directed to constitute an appropriate Board of Visitors in terms of Chapter XXIX of the Model Prison Manual indicating their duties and responsibilities. This exercise should be completed by 30th November, 2017.

10. The suggestion given by the learned Amicus of encouraging the establishment of 'open jails' or 'open prisons' is certainly worth considering. It was brought to our notice that the experiment in Shimla (Himachal Pradesh) and the semi-open prison in Delhi are extremely successful and need to be carefully studied. Perhaps there might be equally successful experiments carried out in other States as well and, if so, they require to be documented, studied and emulated.

11. The Ministry of Women & Child Development of the Government of India which is concerned with the implementation of Juvenile Justice (Care and Protection of Children) Act, 2015 is directed to discuss with the concerned officers of the State Governments and formulate procedures for tabulating the number of children (if any) who suffer an unnatural death in child care institutions where they are kept in custody either because they are in conflict with law or because they need care and protection. Necessary steps should be taken in this regard by 31st December, 2017.

***58.** We expect the above directions to be faithfully implemented by the Union of India and State Governments. In the event of any difficulty in the implementation of the above directions, the Bench hearing the suo motu public interest litigation in the High Court in term of our first direction is at liberty to consider those difficulties and pass necessary orders and directions.*

***59.** List for follow-up in December, 2017."*

(XI) HUMAN RIGHTS OF PRISONERS:

The following are some of the basic human rights of prisoners which find their manifestation in several International and National enactments. They are basic as they restore the dignity of human beings in spite of being deprived of the liberty in accordance with the procedure established by law.

(i) Rights to physical and moral integrity:

The genesis of Human Rights exists in the inherent dignity of the human person as because all human beings are born free and are equal in terms of dignity and of rights. Any human being deprived of his/her liberty

shall be treated at all times with humanity and dignity imbibed in his/her persona. The Preamble to the Universal Declaration of Human Rights, 1948 and the two International Covenants on Human Rights emphasize that recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

(ii) Prohibition of Torture and Ill-treatment

The established rule is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. There are no exceptions to this rule. Any act of torture committed as part of a widespread or systematic attack directed against the civilian population with knowledge of the attack is a crime against humanity.

No prisoner shall be subjected, even with his or her consent, to any medical or scientific experimentation which may be detrimental to health. Like torture and ill-treatment, enforced disappearance and summary executions are completely prohibited. All law enforcement officials shall be fully informed and educated about the prohibition of torture and ill-treatment. Any statement made as a result of torture shall not be invoked as evidence in any proceedings, except as evidence to bring the perpetrators to justice. Orders from a superior officer may not be invoked as a justification for torture. All deaths in custody, incidents of torture and ill-treatment, and disappearance of prisoners shall be properly investigated.

(iii) Admission in recognized places of safety:

As soon as a person is apprehended by the law enforcement agencies, it becomes a basic human rights of him to get admittance in a place for his stay which is officially recognized as places of custody. The prisoner shall be provided promptly with written information about the regulations which apply to his/her treatment and about his/her rights and obligations. The families, legal representatives, and if appropriate, diplomatic missions of prisoners are to receive full information about the fact of his/her detention and place of custody. All prisoners shall be offered a proper medical examination and treatment as soon as possible after admission.

(iv) Right to an Adequate Standard of Living

The prisoners because of their current legal status cannot be denuded of the basic human rights of getting an adequate standard of

living, including adequate food, drinking water, accommodation, clothing and bedding. These bare minimum requirements are necessary to respect for the inherent dignity of the human person. The deprivation of adequate food, water, clothing and proper accommodation can often result in ill-treatment of prisoners which may amount to torture in severe cases.

(v) Accommodation

Keeping the prisoners in safe place of custody do not absolve the State authorities from its other duties which encompasses giving of accommodation to prisoners to a place which should provide adequate cubic content of air, floor space, lighting, heating and ventilation. Since Prisoners in most cases are required to share sleeping accommodation as such fellow inmates shall be carefully selected and supervised at night.

The standard Minimum Rules for the Treatment of Prisoners *(Nelson Mandela Rules)* require that were sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself and where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions.

(vi) Right to Adequate Food and Drinking Water

All prisoners have the right to wholesome and adequate food at the usual hours, with drinking water available whenever needed. The right to adequate food is a component of right of everyone to an adequate standard of living. It is the fundamental right of everyone to be free from hunger. The right to adequate food is further developed by the Committee on Economic, Social and Cultural Rights in its General Comment No.12 (1999) on the subject which provides: The rights to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.

(vii) Right of clothing and Bedding

In most of jails the prisoners are now allowed to wear their own clothing. In such cases there should be adequate provisions for suitable clothing for the prisoners. Supplying clothing is not enough, the clothes must be of adequate size and fitting. There shall be facilities for keeping clothing clean and in proper condition. The prisoners who are using their own clothing shall keep those clothing in clean manner so that any germ

infection do not get spread. Similarly, getting bedding for rest and sleep is also a basic necessity for all prisoners. There should be provision for a separate bed and clean bedding, with facilities for keeping bedding clean. There must be facilities to wash and dry clothing and bedding regularly. The International Covenant on Economic, Social and Cultural Rights, 1966 provides for the right to clothing as a component of the right of everyone to an adequate standard of living.

(viii) Heath Rights of Prisoners

Without ensuring standard physical and mental health, the component of assuring dignity is meaningless. The International Covenant on Economic, Social and Cultural Rights, 1966 recognizes the right of everyone to that enjoyment of the highest attainable standard of physical and mental health. The highest attainable standard of physical and mental health should be the yardstick to which rights of each prisoner should match. Prisoners shall have free access to the health services available in the country. Decisions about prisoner's health should be taken only on medical grounds by qualified medical practitioners. The Universal Declaration of Human Rights, 1948 guarantees to everyone, including prisoners, the right to a standard of living adequate for health and well-being including medical care and necessary social services. In addition, Article 12, Paragraph 1, of the International Covenant on Economic, social and Cultural Rights, 1966 recognizes the right to health of everyone, including prisoners.

(ix) Hygiene

Sustaining a standard physical and mental health is a distant dream unless the prisoners are provided with the basic facilities to meet the needs of nature in a clean and decent manner and to maintain adequately their own cleanliness and good appearance.

(x) Making Prisons Safe Places

Some prisoners are violent individuals who pose a grave danger to themselves or to other inmates. Such prisoners required to be segregated and kept in separate cell. The prison staff can impose control over prisoners by coercive means but this should not be the norm. Good order presumes the existence of a set of rules and regulations which govern the daily lives of those who are in prison in order to ensure that everyone- staff, prisoners and visitors can go about their business without fear for their personal

safety. Both staff and prisoners have to operate within the context of these rules and regulations.

(xi) Prisoners' Contact with the Outside World

Almost all prisoners has family, friends, relations whom they care or who has the cares about the prisoners. Imprisonment does not severe his relation from his family and friend circles. Any endeavour to put an end to these tie amounts to arbitrary interference with his or her privacy, family, home or correspondence. All Prisoners shall have the right to communicate with the outside world, especially with their families. The Universal Declaration of Human Rights provides that no one shall be subjected to arbitrary interference with his privacy, family home or correspondence.

The International Covenant on Civil and Political Rights states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference or attacks. The Body of Principles for the Protection of 'All Persons' under 'Any Form' of Detention or imprisonment provides that the detained or imprisoned persons shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations. If a detained or imprisoned persons so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

(xii) Special Categories of Prisoners

In addition, there are certain categories of prisoners who are entitled to specific consideration because of their gender, age, race, culture or legal status. Special categories of prisoners include (i) women; (ii) juveniles in conflict with law; (iii) prisoners under sentence of death; (iv) life and long term prisoners. It is imperative that there should be specific care that their basic Human Rights are properly realized.

(xiii) Non-Discrimination

All persons are equal before the law and are entitled, without discrimination, to equal protection of the law. Everyone has the right to freedom of thought, conscience and religion, and persons from ethnic,

religious or linguistic minorities have the right to their own culture, religion and language. A prisoner who does not adequately understand or speak the language used by the authorities is entitled to receive relevant information promptly in a language which he understands. The Universal Declaration of Human Rights confirms that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status. The Universal Declaration of Human Rights also provides that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

(xiv) Women in Prison

The dignity of women, whether she is an accused of crime, or convict or living a normal life must always be protected within the legal parameters. Every women prisoner is equally entitled to enjoyment and protection of all human rights in the political, economic, social, cultural, and civil and all other fields. Women prisoners shall not suffer discrimination and shall be protected from all forms of violence or exploitation. Women prisoners shall be detained separately from male prisoners. Women prisoners shall be supervised and searched by female officers and staff. Pregnant women and nursing mothers who are in prison shall be provides with special facilities which they need for their condition. The Universal Declaration of Human Rights states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth or other statute.

(xvi) Access to Lawyers and the Outside Word

It is important basic requirement that all arrested or detained persons should have access to a lawyer of or other legal representatives and adequate opportunity to communicate with that representative. Untried prisoners should be allowed immediately to inform their families of the detention and should be given all reasonable facilities for communicating with their families and friends.

(XII) CHALLENGES AND ISSUES:

The following are some of the main problems of the prisons and related issues, having a bearing on prisoners' rights, which are discussed herein below:

(i) Overcrowding

Overcrowding in Indian prisons is seen as the root problem that gives birth to a number of other problems relating to health care, food, clothing and poor living conditions. The majority of the jails are overcrowded by about three times against the sanctioned capacity. In some of the prisons the problem of overcrowding is so acute that inmates often had to sleep in shifts of 3-4 hours due to lack of space. The occupancy of many jails changes on daily basis. Overcrowding results in inadequate infrastructural facilities and lack of essential facilities to jail inmates. Overcrowding has also begun to affect the attempts of the prison administration to empower prisoners with skills that would involve them in gainful employment after release.

(ii) Classification of Offenders

Individualization of treatment of offenders means that the personality of each offender is to be assessed and prison programmes designed to meet the individual requirement as far as possible. For that it is of utmost importance that the offenders are classified. Classification of offenders involves consideration at two different stages. Firstly, at the time of determining which particular type of prison the offender is to be sent to and, secondly, within a given prison the offenders are to be classified through medical, psychiatric and psychological examination, through educational and vocational studies and through case-work interviewing.

(iii) Under trials and Legal Aid

The problem of under-trial prisoners has assumed new proportions in recent years. Thousands of under-trial prisoners are languishing in various jails in different States for periods much longer than the maximum term for which they could have been sentenced, if convicted. There are several reasons for this miserable plight of the under-trials, some of them being, Court's inability to take up the cases because of their busy calendar, the prolonged police investigation, unsatisfactory bail system and legal representation being beyond the meagre means of poor offenders. Legal

aid is a fundamental right of an indigent person in the USA and in UK. In India also, the State is obliged to provide free legal aid to the poor, as the Indian Constitution makes it one of the Directive Principles of the State Policy to do so. However, as 70% of the prison population is illiterate, lacking in an understanding of their basic rights, the poor do not always get the benefit of the provisions of law in this regard.

(iv) Health Care and Medical Facilities

The state of health of prisoners is also an important issue which needs attention. The problems relating to the health of prisoners and lack of adequate medical facilities in Indian prisons is glaring. A recent study of custodial deaths in judicial custody done by the National Human Right Commission, revealed that a high percentage of deaths were attributable to the incidence of tuberculosis amongst prisoners. In recent times, there has also been a disturbing rise in the percentage of HIV positive inmates. Special and urgent care is required to look after such cases. Due to overcrowding, inmates have to live in extremely unhygienic conditions, with little concern for health or privacy. Often cells built to house one or two persons now accommodate twice or three times the number. Most toilets are open, denying the prisoner his basic right to privacy and human dignity, and are also dirty. Water shortage is a rule rather than the exception and the toilets prove to be the ideal breeding grounds for health hazards and epidemics.

(v) Custodial Torture and Deaths

The challenge posed to the basic human rights of prison inmates is that of the torturous treatment meted out to during the custody and in extreme situation death following such treatment. They are the biggest hurdles in realization of the basic human rights of the prison inmates. There are instances of prison injustice being reported in media and Courts are also seen to have been very stern towards any case of inhuman and torturous treatment, but this goes abated and human rights are violated blatantly within the four walls of the prison.

Beating is the usual mode of torture of the prisoners. The detenues are kept without any food and water days after days and mercilessly beaten up continuously. In many democratic countries handcuffing of prisoners, gruesome interrogation in police custody, inhuman and humiliating treatment of under-trials and detenues in jails, and physical violence and

mental torture are still the order of the day. In expressive words of **Hon'ble Justice Krishna Iyer, J.:**

> ***"In our world prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrum of inmates range from driftwood juveniles to heroic dissenters." (Sunil Batra V. Delhi Administration (I), (1978) 4 SCC 494.)***

Prison authorities should change their attitude towards prison inmates and protect their human rights for the sake of humanity.

(vi) Prison Education

Imparting some sort of education whether it be fundamental academic education, or vocational education or it may be social, health or cultural education is conducive for realization of basic human rights. Academic education, gives a sense of achievement to the prisoner which goes a long way in exercising corrective influence.

(vii) Inability to provide security

Many poor people are detained in prisons for alleged involvement in bailable offences primarily because they are unable to furnish surety. This is a serious concern because in such cases bail is a matter of right and people end up spending long periods in jail merely because they are poor. They legislature should take initiative in this regard.

(viii) Delayed investigation and trial

Many prisoners are constrained to languish in prisons for long because the police do not finish investigation and file the charge-sheet in time. This is a very serious matter because such people remain in prisons without any inkling of a police case against them. It is also noticed that many prisoners are charged with a non-bailable offence which is not very serious and is triable by a Magistrate. They remain in prisons for long period because of the delay in trial. Many under trial prisoners are detained in prisons for long periods, which in some cases extend beyond the maximum period of imprisonment prescribed for the offence with which they are charged.

(ix) Women Prisoners

The pathetic situation of women prisoners languishing in jails is a serious social problem. The problems faced by them are outcome of the

general societal indifference towards them. The concept of human rights is totally alien to such women. Though there are elaborate rules in the jail manuals to protect women, very few women know about them. The imprisonment of mother with dependent child is a problematic issue. The general health care of women prisoners is not up to the mark. Majority of women prisoners are from rural background, illiterate, shy and do not have courage to communicate their needs and grievances to the prison staff and transmit the same to higher authorities.

(x) Prison Discipline

The problem of prison discipline has always been engaging the attention of penologist throughout the world. The prison personnel are usually untrained without any specialized training in their field. Although with the modern facilities are available to inmates, the rigorous of prison life are considerably mitigated nevertheless they are likely to become restive if not kept under proper discipline. One thing is certain that the life inside prison necessarily presupposes certain restrictions on the liberty of inmates against their free will. This consciousness of subjection to compulsive forces of the State through the agency of prison leads to scuffle between prison officials and the inmates. The custody of prisoners should, therefore, ensure their safety and security as also minimize the chances of conflict with the prison administration.

(xi) Criminality in Prisons

Yet another problems that is a great threat to the basic human rights is relating to the growing criminality among the inmates inside the prison. The continuous long absence from normal society and detachment from family deprives prisoners of their vital biological urges of human life. Their inability to control their sex desire, the prisoners quite often resort to unnatural offences such as homosexuality, sodomy, etc.

(xii) After-care and Rehabilitation

The problem of released prisoners being manifold, they need to be attended with humanistic approach. The released prisoners are generally shunned by the society and sometimes even by their family. Thus they require proper after-care and for this the government, voluntary social organizations and society as a whole must come forward to help the released prisoner in solving their woes. They, being mostly poor, illiterate and helpless, need care and sympathy of the people. Since ultimate objective

of the prison and correctional administration is rehabilitation of offenders in the main stream of social life, after-care can be the harbinger of any rehabilitative process and a link in the correctional program to reduce the offender's social isolation and dependence.

(XIII) CONCLUSION AND SUGGESTIONS:

One of the best tenets of human rights law is that human rights are inalienable and under no circumstances can any authority take away a person's basic human rights. The fact that this tenet is not sometimes made applicable to prisoners is well documented.

The Constitution of India confers a number of fundamental rights upon citizens. The Indian State is also a signatory to various international instruments of human rights, like the Universal Declaration of Human Rights,1948 which states that: **"No one shall be subject to torture or cruel, inhuman or degrading treatment of punishment".** Also important is the United Nations Covenant on Civil and Political Rights which states: ***"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human-persons".*** Both under national as well as international human rights law, the State is obliged to uphold and ensure observances of basic human rights. The remedial rights of the prisoners require deeper understanding. The problem is not with the principle, but with the implementation.

In spite of the fact that there are several maladies in the prison system in the country, it would not be appropriate to totally condemn the whole set-up. Obviously, there are difficulties of man-power, funds, training and right kind of attitude to deal with socially handicapped inmates, but all these need to be corrected with the joint effort of the government, the people and the staff manning prison institutions.

The following modifications in prison administration may be suggested for the effective protection of the human rights of the prisoners:

(i) First and foremost thing is that the existing The Prisons Act, 1894 which is more than a century old, needs to be thoroughly revised and even restated in view of the changed socio-economic and political conditions of India over the years. Many of the provisions have become obsolete and redundant. The State should amend Prisons Act, 1894 as per their need and suitability. In order to ensure basic uniformity in prison rules and regulations,

all States should revise their existing Prison Manuals by adopting the provisions of Model Prison Manual, 2016.

(ii) It is further suggested that the offenders should be confined for a minimum period which is absolutely necessary. On the completion of the term of sentence the inmates should be placed under an intensive after-care. This will help them in their rehabilitation.

(iii) Prison staff should be made aware of the international prohibition on torture and cruel, inhuman or degrading treatment or punishment. That prohibition should be incorporated into national legislations, prison rules and all training materials for prison staff. The use of any instrument which might be employed as a weapon by staff should be carefully regulated. There should be a formal and open set of procedures which prisoners may use to complain to an independent authority against any incident of torture or cruel, inhuman or degrading treatment or punishment without any fear of recrimination. Arrangements should be in place to provide regular access to prisons by a Judge, Legal Service Authorities, Non-Governmental Organizations or other independent persons to ensure that torture or cruel, inhuman or degrading treatment or punishment does not take place.

(iv) There should be close liaison between the prison and the legal authority that has sent the person to prison. Prison officials should be aware of the need for the legal authority to provide a legally valid document which stipulates the reason for detention and the conditions of detention in the case of pre-trial prisoners, and the length of sentence in the case of convicted prisoners. All staff, particularly those who work in the reception area of a prison, should be specially trained to recognized prisoners who are most at risk of harming themselves or of being harmed by other prisoners. As soon as a person is admitted to prison, his or her next of kin, partner or legal representative should be informed where he or she is. There is a specific requirement for all prisoners to be seen on admission by a properly trained medical officer.

(v) There should be basic standard for prison cell space, for both males and females. Where accommodation is overcrowded and

does not meet the international standards, staff can make arrangements to reduce the time, prisoners spend in their cells or dormitories. Care should be taken when selecting prisoners for shared accommodation in the interests of health, safety and security. The accommodation should have access to natural light and that prisoners should have some control over lighting and ventilation: light switches should be inside cells and prisoners should be able to open and close windows and shutters.

(vi) In many prisons there is land either inside the prison perimeter or immediately adjacent to the prison which can be used for cultivation. Wherever possible, prisoners should be encouraged to grow their own food. Any excess can be given or sold to the local community, where appropriate. Consideration should be given to the dietary requirements of particular groups of prisoners. There should be proper sanitary conditions in prison kitchens and good ventilation in order to prevent infestation and to maintain culinary hygiene.

(vii) All prison staff should receive training in health matters, including first aid, suicide prevention and issues relating to HIV/AIDS and other transmissible diseases. Prisoners should receive health information and education when they arrive in prison, particularly in respect of about matters such as HIV/AIDS infection. Thus the task of prison health-care services should not be limited to treating sick patients, but should extend to social and preventive medicine, including supervising proper hygiene in prisons, preventing transmissible disease, suicide and violence, and limiting the disruption of social and family ties.

(viii) Staff should ensure that all available lavatory and washing facilities are in working order and should arrange for groups of prisoners to keep them clean. Dormitories should have sufficient sanitary and hygiene facilities for the numbers held in them.

(ix) That all prisoners, including those undergoing cellular confinement as punishment, should have at least one hour of exercise outside every day, where there is enough space to exert themselves physically. An exercise area should be identified within the prison which is secure and easy for staff to observe. Ideally, it should be provided with a lavatory and

drinking water. The route to it from the prisoners' accommodation should be secure and easy for staff to supervise. Young prisoners tend to be more volatile and impulsive. They may need more organized exercise, possibly in the form of physical exercise or competitive games to channel their surplus energy into constructive activity.

(x) If prisoners are kept occupied and are given the opportunity to use their time positively they will respond to the reasonable and justifiable rules and regulations which are necessary in any large group of people in order to ensure that good order is maintained. Prisoners should not be used to make up for a shortage of staff. Staff should be trained in control and restraint techniques.

(xi) It seen that long-term imprisonment can have a number of de-socializing effects on inmates. Long-term prisoners become institutionalized, experience a range of psychological problems and have a tendency to become detached from society to which almost all of them will return. It is thus suggested that the prisoners concerned should have access to a wide range of purposeful activities of a varied nature (work, preferably with vocational value; education; sport; etc.) and that prisoners should be able to exercise a degree of choice over the manner in which their time is spent, thus fostering a sense autonomy and personal responsibility.

(xii) Prison authorities should be aware of national legislations regarding health and safety at work. This legislation should also apply in prisons. There may be opportunities to involve private commercial and industrial companies in providing work for prisoners. In these cases, prisoners should be paid the full rate for the work they do.

(xiii) Prisoners often benefit greatly when their teachers are not direct employees of the prison administration but teachers normally working for the local education authorities. As far as possible, education provided in prisons should be integrated with the educational system in the community. This will make it more likely that prisoners will continue with education after they are released from prison. Where there are insufficient resources, educational programes can be provided by inviting prisoners with academic ability to teach other prisoners free of charge

and under supervision.

(xiv) Where there is little money to spend on activities, local cultural organizations can be invited to visit the prison and provide cultural activities for prisoners. Provision should be made in cultural activities for the needs of ethnic minorities. This may best be done by involving outside groups representative of the ethnic minorities in the institution.

(xv) Existing rules regarding restrictions and scrutiny of postal mail of the inmates should be liberalized. This would also infuse trust and confidence among the inmates for the prison officials. Prisoners should be able to have confidential communication by letter with their legal advisers. With the exception of a small group of very high-security-risk prisoners, there is little need for any reading or censoring of mail.

(xvi) The appropriate authorities must exercise good judgment in deciding who may go on home leave or temporary conditional release. There should be a proper procedure to assess the risk posed by any prisoner. Prisoners can be granted temporary conditional release to work with local firms or to go to college or a training centre to acquire additional skills.

(xvii) Prisoners should be able to purchase their own books and newspapers. Consideration should also be given to allowing them to purchase or rent a personal radio or television, if living conditions make this appropriate. There should also be access to radio and television provided at public expense. Newspapers should also be available in prison libraries. Access to the World Wide Web for the purpose of gathering information and keeping up to date with the news should be available to prisoners.

(xviii) It is also suggested that those responsible for prison inspections and investigations should visit regularly, preferably weekly or at least monthly. Local Non-Governmental Organizations can play an important part in independent inspection of prisons, both through direct action and inter Governmental inspectors. The best safeguard of human rights in a prison setting is when the prison is open to reasonable public scrutiny and when the local community is encouraged to become involved in the activities of the prison.

(xix) Women are particularly vulnerable in the closed environment of a prison. They should never be placed in a situation where they are at risk of abuse or harassment by male members of staff. When male staff deal with women prisoners, there should always be a female member of staff present. All the international standards clearly require that imprisoned women must be protected from sexual harassment and exploitation by men. Because of their small numbers, women prisoners are often disadvantaged either by being kept in hastily adapted, makeshift, unsuitable buildings or by being placed many miles from their homes. This makes visits from their families more difficult and more expensive. Arrangements can be made to compensate for this, by allowing prisoners' families and children to visit for a whole day or a whole weekend.

(xx) The international instruments make it clear that pregnant women should receive as high a level of care as is accorded in society outside. If babies remain with their mothers in prison, proper care has to be provided. It is suggested that lactating mothers should also be provided with proper care. The specific health-care needs of women prisoners should be recognized by prison authorities. Wherever possible, women doctors should be available for consultation. Their specific hygiene needs should also be properly addressed.

(xxi) All prisoners are individuals and prison authorities should treat them as such. All prisoners should be treated equally, including prisoners serving life or other long sentences. In many prison systems, no distinction is made between pre-trial prisoners according to the type of offence of which they have been accused. This means that prisoners who may be facing relatively minor charges are held in the same conditions of security as though facing serious charges. Consideration should be given to the appropriate degree of security for different groups of pre-trial prisoners. Prison authorities should do everything possible to ensure better conditions for pre-trial prisoners. It is important that the judiciary be empowered to administer a wide array of non-custodial measures representing the practice and traditions of all communities within society. Information should be available to legal authorities having the power to detain or

imprison about the possibilities for imposing non-custodial measures as an alternative to detention or imprisonment.

(xxii) The public in general need to be reassured that the use of non-custodial measures will not put their safety at risk. People often support imprisonment of offenders on the basis of fear that is not necessarily justified. They can be reassured of their safety by use of the mass media to explain the benefits of non-custodial measures. There should also be close contact with groups representing victims. Prison authorities and related agencies have an important role to play in preparing comprehensive reports on prisoners being considered for parole or conditional release.

(xxiii) To sensitize the prison administration on gender issues and the special needs of women prisoners legal literacy camp should be organized at regular basis in Prisons. Special facilities should be given for pregnant women and arrangements should be made to allow women to go back to their families for post natal care. It is also necessary to take special care to rehabilitate women prisoners, as it is harder for them to find acceptance in civil society after release than men. Thus women should be specially equipped with vocational skills to empower them to earn their livelihood on return to society.

(xxiv) As early as possible all the Prisons should be linked with Courts through Video Conferencing for expeditious trial and to save costs in escorting under-trials to Courts.

(xxv) Combined training programmes of Prison, Police, Health Department and Judiciary on under-trials Management to be conducted periodically. Programmes and training course on de-radicalization of prisoners should also be conducted.

(xxvi) Every State should establish a Welfare Wing under Prison Department comprising Welfare Officers, Law Officers, Counsellors and Probation Officers as suggested in the 5th National Conference on Prison Reforms.

(xxvii) All States should develop vocational training and work programmes in prisons for all inmates eligible to work.

(xxviii) Selected eminent public-men should be authorized by Government to visit prisons and give independent report on prison and prisoners condition.

(xxix) The Legal Services Authorities have a principal role in inculcating awareness among prisoners about their rights, especially provisions that entitle them to freedom.

(xxx) The Criminal Courts have a big role in protecting human rights of prisoners by expeditious disposal of cases of under-trial prisoners and also by visiting prisons in their jurisdictions to identify and release under-trial prisoners languishing for long periods as per provisions of Code of Criminal Procedure, 1973.

(xxxi) The ***Under-trial Review Committee*** have a big responsibility in protection of the human rights of prisoners by examining the cases of under-trials for release, who fall in the categories as described in the case of **Re-Inhuman Conditions In 1382 Prisons.**

"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

Nelson Mandela

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THE PROBLEM OF DRUG ABUSE AND NDPS ACT 1985 : AN OVERVIEW (WITH SPECIAL REFERENCE TO PROCEDURAL ASPECTS)

[1] Harsh Yadav

Abstract

The narcotic drugs and psychotropic substances have medicinal and scientific value for which they have been used since ancient time, But with the passage of time and development, the practice turned into illicit drug trafficking. Substance abuse is a growing problem in our country as well as in the world. It needs to be tackled on social as well as legal hand.

This article traces the roots of the drug Abuse, NDPS, legislative framework at Domestic as well as international level, specially NDPS Act 1985 and explains the important features of the Act, Procedure, safeguards under the Act etc.

What is Drug Abuse?

World Health Organisation defines Drug Abuse as *the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.* Addiction is an advanced stage of substance abuse where the addict develops a compulsion to take the drug, persists in its use despite harmful consequences and exhibits a determination to obtain the drug by almost any means. Psychoactive substance use can lead to dependence syndrome -a cluster of behavioural, cognitive, and physiological phenomena, which are marked by social withdrawal. The Symptoms of addiction include loss of appetite and weight, loss of interest in day to day work, sweating, reddening of eyes, nausea or vomiting and body pain, drowsiness or sleeplessness and passivity, acute anxiety, depression, mood swings among others. Followings are the most common banned drugs- Opiods-Heroin, Smack, Brown Sugar, China white, opium, Hallucinogens-LSD, mescaline, Canabis- Marijuana, *Hashish, Ganja,* inhalants- volatile substances such as paint, thinner and gasoline etc, cocaine, meow- meow, MDMA, Designer drugs. Some drugs also known as club drugs, rave parties drugs.

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[1] Civil Judge (S.D.) Khatima, U.S. Nagar

Problem and Impact of drug Abuse-

Drug abuse has become a universal and growing issue of concern to humanity. The illicit drugs have multiple consequences to health, society and economy. These consequences include Health: mortality, morbidity, psychiatric and physical disorders; Social: accidents, absenteeism, family disintegration, prostitution, organized crime etc; and Economic: finances spent on developing services, drain on national resources, loss of productivity etc. It has been causing serious physical, psychological, behavioural, social and financial problems for individual drug addicts as well as posing threat to economy of the country. Due to rising demands of drugs by users, drug peddling/smuggling of drugs from one part of the country to another has taken the shape of illicit trafficking of drugs at international level. These days drug trafficking has become a tool to make huge profit by organized criminals also. It is the third largest business in the world next to petroleum and arms trade with a turn over of around $ 500 billions. Drug abuse is a social malady. The illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. There is no doubt that drug trafficking, trading and its use, which is a global phenomena and has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. It has the effect of producing a sick society and harmful culture.

Extent of Drug Abuse in India

While the next survey is expected to be out in 2018, in 2004, the Ministry and the United Nations Office for Drugs and Crime jointly released the National Survey on the Extent, Pattern and Trends of Drug Abuse in India. In the National Survey on *"The Extent, Pattern and Trends of Drug Abuse in India", conducted by Ray R (2004) [2]* major findings were that alcohol, cannabis, opium and heroin were major drugs of abuse, The number of persons requiring treatment was large, drug abuse was seen in both rural and urban India and Injection Drug Use had been reported from various sites, including rural India. The duration of drug abuse was long with significant time gap between onset of drug use and treatment seeking. A large number of drug users engaged in unsafe sex practices. Congruence between treatment seeking and the extent of the problem in a given state was lacking with low enrolment in treatment. India is the biggest supplier of illicit demand for opium, required primarily for medicinal

purposes. Besides this, India is located close to the major poppy growing areas of the world, with **"Golden Crescent"** on the Northwest (*Iran, Afghanistan and Pakistan*) and **"Golden Triangle"** on the North-East (*Thailand, Laos and Myanmar*). These make India vulnerable to drug abuse particularly in poppy growing areas and along the transit/trafficking routes. The introduction of synthetic drugs and intravenous drug use leading to HIV/AIDS has added a new dimension to the problem, especially in the Northeast states of the country.

In 1987 the United Nations decided to observe June 26th as 'International Day against Drug Abuse and Illicit trafficking', to sensitize the people in general and the youth in particular, to the menace of drugs. About 230 million people across the globe use an illegal drug at least once a year and about 27 million people use drugs in a manner that exposes them to very severe health problems. The U.N. estimates that illicit drug use causes over 2 lakh deaths globally, most of them being in their mid 30's. Thus, illicit drug use is largely a youth phenomenon in today's world which increases during the adolescence and reaches its peak among persons aged 18-25. According to a survey by the Ministry of Social Justice and Empowerment, India has more than 70 million drug addicts. Different drugs are prevalent in different states of the country accounting for 1.62% of the world's seizures of illegal drugs. Our country records about 10 suicides daily due to drug or alcohol addiction and there were 3,647 such suicide cases in the country in 2014 with Maharashtra reported the highest such cases, followed by Tamil Nadu and Kerala.

International conventions-

The Single Convention on Narcotic Drugs 1961 aimed at preventing the production and sale of specified narcotic substances. It was far broader in its scope than previous treaties because it covered newer drugs that did not exist when the previous treaties had been drafted. The United Nations Conventions Against Illicit Trafficking In Narcotic Drugs & Psychotropic Substances, which was held in Vienna, Austria in 1988 was perhaps one of the first efforts, at an international level, to tackle the menace of drug trafficking throughout the comity of nations. India is signatory to the following treaties and conventions on narcotic drugs and psychotropic substances:

- 1961 U.N. Convention on Narcotic Drugs,

- 1971 U.N. Convention on Psychotropic Substances,
- 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,
- 2000 Transnational Crime Convention

Earlier Enactments on Drug Abuse

India's approach towards Narcotic Drugs and Psychotropic Substances is enshrined in Article 47 of the Constitution of India which mandates that the *"State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health"*.

Prior to the passing of the NDPS Act, 1985 control over Narcotic drugs was being generally exercised through certain Central enactments though some of the States also had enacted certain statutes with a view to deal with illicit traffic in drugs. The Opium Act, 1857 related mainly to preventing illicit cultivation of poppy, regulating cultivation of poppy and manufacture of opium. Opium Act, 1878, supplemented Opium Act, 1875 and made possession, transportation, import, export, sale, etc. of opium also an offence. The Dangerous Drug Act, 1930, was enacted with a view to suppress traffic in contraband and abuse of dangerous drugs, particularly derived from opium, Indian hemp and coca leaf etc. These Acts, however, failed to control illicit drug traffic and drug abuse on the other hand exhibited an upward trend. New drugs of addiction known as Psychotropic Substances also appeared on the scene posing serious problems. It was noticed that there was an absence of comprehensive law to enable effective control over psychotropic substances in the manner envisaged by the International Convention of Psychotropic Substances, 1971. The need for the enactment of some comprehensive legislation on Narcotics Drug and Psychotropic Substances was, therefore, felt. As a result to provide a comprehensive legislation on the subject, the Narcotic Drugs and Psychotropic Substances Act 1985 (popularly known as NDPS Act) was enacted on 16th September, 1985, and the Act came into force on 14.11.1985.

The NDPS Act of 1985:

A. Objects of the Act: NDPS Act is an comprehensive act to consolidate and amend the law relating to narcotic drugs, to:

1. Make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances.
2. Provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances.
3. Implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substance and for matters connected therewith.

B. Framework of the Act.-

Under The Narcotic Drugs and Psychotropic Substances (NDPS) Act all cases relating to possession, consumption, and sale of 'Narcotic drugs' are prosecuted. However, it is necessary to understand that this Act has evolved over the years, and has been amended thrice (1988, 2001 and 2014) which has changed its scope and direction. The Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act was passed in 1988 and was brought in to ensure full implementation and enforcement of the NDPS act. The Act, After being amended From time to time, now contains eight chapters. They are as follows-

CHAPTER I: Preliminary (Sections 01-03)

This chapter contains definitions of various terms and expressions used in the Act and also provisions enabling the central Government to add or delete from the list of psychotropic substances. Section 2 of the act defines as many as 38 terms [sub sections (i) to (xxix), (viia-d), (viiia-b), (xxiiia), and (xxviiia)]. Some of the important definitions under this act include:

1. *"Addict"* as a person who has dependence on any narcotic drugs or psychotropic substance.
2. *"Narcotic drug"* as coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods.
3. *"Psychotropic substance"* as any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances (n=110).
4. *"Controlled substance"* means any substance with possible use in the production or manufacture of narcotic drugs or

psychotropic substances or to the provisions of any international convention. The Central Government has so far notified Acetic Anhydride, N- Acetylanthranilic acid and Pseudoephedrine as controlled substances.

CHAPTER II: Authorities and officers (Sections 04-07)

Section 4 enables the central government to take measures necessary to prevent and combat drug abuse and illicit trafficking, including identification, treatment, education, aftercare, rehabilitation and social re-integration of addicts. Section 4(3) also authorizes the central government to constitute an authority or hierarchy of authorities for the purposes and objectives mentioned in details in the different subsections. Section 6 empowers the central government to constitute an advisory committee called "The Narcotic Drugs and Psychotropic substances Consultative committee" to tender advice on matters referred to it. The necessary rules were framed and a consultative committee was constituted in 1988.

CHAPTER IIA: National Fund for Drug Abuse (Sections 7A-7B)

This chapter was added by the amendment Act of 1989 to constitute a fund to be called the "National Fund for Control of Drug Abuse" with government and public contributions and also with the sale of proceeds of forfeited property derived from or used in illicit traffic with action predicated on criminal conviction, which shall be applied to meet the expenditure incurred in connection with the measures taken for combating illicit and controlling the abuse of narcotic drugs and psychotropic substances, identifying, treating and rehabilitating addicts, preventing drug abuse etc.

CHAPTER III: Prohibition, Control and Regulation (Sections 08-14)

The act empowers Central Government to permit and regulate by rules (i) the sale of opium and opium derivatives from the Central Government Factories for export from India or sale to State Government or manufacturing chemists; (ii) the manufacture of manufactured drugs, not including manufacture of medicinal opium or any other preparation containing manufactured drug from materials which the maker is lawfully entitled to possess. The State Governments may by rules permit and regulate (i) the cultivation of cannabis plant, production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase

and consumption of cannabis (Except Charas); (ii) The manufacture of medicinal opium or any preparation containing the manufactured drug from materials which the maker is lawfully entitled to process; (iii) the sale of opium and opium derivatives from the Central Government Factories for export from India or sale to State Government or manufacturing chemists; (iv) the manufacture and possession, of prepared opium from opium lawfully possessed by an addict registered with the State Government on medical advice for his personal consumption.

CHAPTER IV: Offences and penalties (Sections 15-40)

These offences are essentially related to violations of the various prohibitions imposed under the Act on the cultivation, production, manufacture, distribution, sale, import and export etc. of narcotic drugs and psychotropic substances. Most of these offences are triable by Special Courts and the punishments prescribed range from imprisonment from 10 to 20 years for first offences to 15 to 30 years for any subsequent offences together with monitory fines. The Act was amended in May 1989 to mandate the death penalty for second offences relating to contraventions involving more than certain quantities of specified narcotic drugs and psychotropic substances. The Act, however, makes a distinction between possession for personal consumption and trafficking, the punishment for the former being limited to between six months and one year only. The application of this provision is subject to the qualification that the quantity of the drug involved in the offence should be a small quantity as specified by the Central Government.

CHAPTER V: Procedure (Sections 41-68)

This Chapter V of the Act sets out the powers as well as the procedures for the investigation of offences under the Act. The provisions contained in this Chapter, intended for providing certain checks on exercise of powers of the authority concerned, are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required.

CHAPTER VA : forfeiture of illegally acquired property (Sections 68A-68Z)

A new Chapter, Chapter V-A, was introduced into the Act in May 1989 to provide for the investigation, freezing, seizure and forfeiture of property derived from or acquired through illicit trafficking in narcotic drugs and psychotropic substances. This Chapter prohibits any person

from holding any property derived from drugs trafficking and authorizes officers empowered under the Act to investigate, identify and seize such property.

CHAPTER VI: Miscellaneous (Sections 69-83)

Under section 70 central and state governments should have regard to international conventions while making rules. Section 71 of this act, empowers government to establish centers for identification, treatment, education, after care, rehabilitation, social reintegration of addicts and for supply, of any narcotic drugs and psychotropic substance (as prescribed by concerned Government) to the addicts registered with government and to others where such supply is a medical necessity. The list of psychotropic Substances is also annexed to the Act.

C- Important features Of the NDPS Act

(1) An interesting feature of this Act is that the government has been empowered to add and delete from the lists of manufactured drugs (narcotic drugs) and psychotropic substances through simple notifications in the official gazette on the basis of available information or a decision under any international convention (section 2(b) and 3). No formal bill or amendment is required for the purpose.

(2) The Narcotics Control Bureau was set up in 1986 with the broad object to coordinate drug law enforcement nationally. The NCB basically functions as *national coordinator international liaison and as the nodal point for the collection and dissemination of intelligence and assures coordinated implementation within the parameters of a broad national strategy.*

(3) The Narcotic Drugs and Psychotropic Substances Consultative Committee, makes significant contributions in shaping and developing a national policy and strategy and also in matters of amendments under section 2(b) and 3 for scheduling addition or deletion of drugs and substances for legal regulation and control.

(4) A reassessment of the Act in 2001 resulted in amendments relating to the length of imprisonment and the quantity and type of drug seized. Further changes in the law in 2002 created two categories that are based on quantity seized. These were defined as small quantities and commercial quantities.

(5) Section 31A provides that any person convicted by a competent court of criminal jurisdiction outside India under any corresponding law shall be dealt with as if he has been convicted by a Court in India. Thus international criminals are also dealt with effectively.

(6) An addict convicted under section 27 may be released on probation under section 39 after signing a bond with or without sureties, for detoxification or de-addiction from a hospital or an institution maintained or recognized by the Government. The conviction would stand and the sentence remains in abeyance to enable him to report back on successful completion of de-addiction treatment within one year. The court may direct the release of the offender after successful completion of de-addiction treatment and abstaining from the commission of any offence under Chapter IV for three years. On failure to do so, he would have to serve the sentence.

(7) The power to issue search and arrest warrants, has in terms of Section 41 been vested both in Magistrates as well as in specially designated (Gazetted) officers of the Central and State Governments. This is designed to ensure both timely and effective action in response to any information and to obviate the need for judicial satisfaction each time a warrant is required to be issued.

(8) Under section 64A, any addict, who is charged with an offence punishable under section 27 or with offences involving small quantity of narcotic drugs or psychotropic substances, who voluntarily seeks to undergo medical treatment for de-addiction from a hospital or an institution maintained or recognized by the Government or a local authority and undergoes such treatment shall not be liable to prosecution under section 27 or any other section for offences involving small quantity of narcotic drugs and psychotropic substances. This immunity may be withdrawn if the addict does not undergo the complete treatment for de-addiction.

(9) The statement recorded under section 67 can be used as a prima facie evidence as NDPS is a special Act. Chapter V-A, was introduced into the Act to provide for the investigation, freezing, seizure and forfeiture of property derived from or acquired through illicit trafficking in narcotic drugs and psychotropic substances.

(10) The 2014's amendment in the Act also created a list of '*essential narcotic drugs*' for giving the necessary leeway to the medical

usage of these substances and central Govt. Has notified the list of '*essential narcotic drugs*' on 5th May 2015 in exercise of powers conferred by clause (viiia) of section 2 of the NDPS Act.

Procedural Safeguards under NDPS Act-

Anti-drug justice is a criminal dimension of social justice. The NDPS Act prescribes stringent punishment, Hence a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other. This would mean that a balance must be struck in. The provisions contained in Chapter V, intended for providing certain checks on exercise of powers of the authority concerned, are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required. The statute mandates that the prosecution must prove compliance with the said provisions. Section 41 relates to power to issue warrant and authorization. Section 42 with which we are concerned relates to power of entry, search, seizure and arrest without warrant or authorization. Section 43 relates to power of seizure and arrest in public place. Section 50 refers to conditions under which search of persons shall be conducted.

A- Section 41: Power to issue warrant and authorization

This section can be divided into parts- first, power of issue of warrant and authorization to certain class of magistrate, gazetted officer and subordinate officers authorized by gazetted officers. Second, writing down the secret information. It empowers a Metropolitan Magistrate or a magistrate of the first class or any Magistrate of the second class to issue a warrant for the arrest of any person whom they have reason to believe to have committed any offense punishable under the NDPS Act or for search of any building, conveyance or place in which they have reason to believe that any narcotic drug or psychotropic substance in respect of which an offence punishable under this Act has been committed, is kept or concealed. It empowers gazetted officer of the department of central excise, narcotics, revenue intelligence or any department of Central Government including para- military forces or any department of State Government by special order of Central Government or in case of State by State Government if he has reason to believe from personal knowledge or information given by any person after writing down the information

that any person has committed any offence punishable under this Act or any document or article which may furnish evidences of the commission of any offence punishable under this Act. The gazetted officer may authorize any officer subordinate (superior to rank of peon, constable or a sepoy) to conduct search, seizure of any building, conveyance and arrest of any such person whom he has reason to believe of commission of any offence punishable under this Act. All Magistrates, empowered gazetted officers and authorized subordinate officers enjoy all the powers of an officer acting under Section 42 of the Act.

B-Section 42: Power of entry, search, seizure and arrest without warrant or authorization

This section can be divided into two parts. First is the power of entry, search, seizure and arrest without warrant or authorization as contemplated under sub-section (1) of section 42. Second is reporting of information reduced to writing to the higher officer inconsonance with sub-section (2) of the Section. Sub-section (1) of Section 42 lays down that the empowered officer, if has a prior information given by any person, should necessarily take it down in writing and where he has reason to believe from his personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without warrant between sunrise and sunset and he may do so after recording his reasons of belief.

The proviso to Sub-section (1) of Section 42 lays down that if the empowered officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. An officer writing down the information under sub-section (1) and an officer recording his reason of belief under proviso shall send a copy to their immediate superior officer.

C-Section 50:- Conditions under which search of persons shall be conducted.-Any Officer who is authorized to search under section 41, 42 and 43 shall without any delay take such person to the nearest magistrate or nearest gazetted officer of any departments of excise, customs, narcotics, revenue intelligence, or any other central or state department.

If the gazetted officer or magistrate cannot see reasonable grounds for search then the person shall be released immediately otherwise should be directed to search. Female can only be searched by female. If in case it is not possible for officer to take person to nearest magistrate or gazetted officer then he can proceed search by himself under section 100 of Cr.P.C. But within 72 hours, officer has to write a reason of his belief of conducting research and send copy of it to immediate superior officer.

D- Main Guidelines on procedural safeguards:

Though by the amendment Act of 2001, the strict procedural requirements as mendated by constitutional bench in Baldev Singh's case (1999 6 SCC 172) was avoided as relaxation and fixing of reasonable time to send the record to the superior official as well as exercise of section 100 Cr.P.C. was included by legislature but it cannot be said that the safeguards given to suspects have been taken away completely but certain flexibility in the procedural norms were adopted to balance an urgent situation. In my opinion following are the main guidelines which all the stakeholders should follow :

(1) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the concerned Register and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(2) If the information was received when the officer was out of the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior .

(3) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the

information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure where the question is one of urgency and expediency.

(4) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. Where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not, is a question of fact to be decided in each case.

(5) When an empowered officer or a duly authorised officer *acting on prior informatio*n is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing, failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;

(6) A search made, by an empowered officer, on prior information, without informing the person of his above right and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act; it is also worth mentioning that section 50 would come into play in the case of search of a person as distinguished from any premise etc.

(7) The investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously, inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy

cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards as provided by Act, would render the trial unfair.

(8) Whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- short a criminal trial, failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(9) An illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(10) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

Special Provisions For Bail-

After the Amendment Act of 2001, Parliamentary intent underwent a significant change, in respect of the sentencing policy, *(in that a graded response was thought of, by introducing a quantitative approach, i.e.*

"small" and "commercial" quantities- and by implication the "in-between" or "intermediate" quantity). This policy and legislative change was also automatically reflected in the bail regime. Now the category of offences where bail could be granted after applying additional norms or conditions are *"offences under section 19 or section 24 or section 27 A and also for offences involving commercial quantity"*. Section 37 (2) is also instructive, which provides that the conditions in respect of offences covered by Section 37 (1) (b) are in addition to other provisions of the Code of Criminal Procedure.

It is worth mentioning that the First schedule to the Cr.P.C.,1973 classifies offences. The offences listed are dealt with for the purpose of showing whether they are cognizable and bailable. Part I of the First schedule deals with offences under the Indian Penal Code while Part II deals with offences under other laws. Item 3 in the list (in Part II of the First Schedule) provides that if the offence concerned (under the other law) is punishable with imprisonment for less than 3 years, it is bailable and non-cognizable. By virtue of Section 37 (1) of the NDPS Act, every offence under NDPS Act is cognizable. However, except in respect of offences specifically enumerated under Section 37, the normal law, i.e. the Criminal Procedure Code, 1973 is applicable, whenever the question of bail arises. Thus, if any of the offences are punishable up to three years (like in the case of possession of small quantities of the concerned substance or drug, under Section 21 and 22), the suspect or accused is entitled to bail, in terms of Section 436, Cr.P.C., read with Item 3 of Part II to the First Schedule of the Cr.P.C.,1973.

The shortcomings :

1. Lack of skills and knowledge on the part of the Investigators and Lack of Tools/ software/ hardware for monitoring and forensic analysis.
2. Lack of co-operation between Nations as well as Different agencis dealing with issue and Lack of co-operation from public in general to agencies.
3. Lack of Awareness in the society at large about the consequences of drug abuse.
4. Lack of awareness among the postal and courier staff regarding the criminal nature of some transactions.
5. Lack of awareness among the financial institutions, credit card companies, banks etc.

6. Lack of awareness among the citizens regarding the criminal law, of this business as many may think it to be a legal pharmaceutical trade.
7. Some amount of religious sanctity to *charas*, *bhang* and *Ganja* because of its association with some Hindu deities.

Suggestions for improvements

1. Comprehensive Efforts should be made to understand patterns and trends of drug abuse.
2. Effective Methods for supporting social-cultural controls on drug use should be developed.
3. The demand for drug treatment should be assessed and the coverage of treatment interventions should be increased.
4. A coherent policy about drug usage should be developed as it cannot be approached purely as a health problem.
5. There must be comprehensive efforts for enforcement of NDPS Act beginning with the police, infrastructure, courts, community awareness and regular review backed by mid-course corrections.
6. The Government should also shift resources to focus on treating it as a health issue with social and economic *implications with* law enforcement.
7. Formation of specialized unit to cyber-patrol the world wide web to detect websites that are selling narcotic and psychotropic drugs online. Special Teams would be formed to investigate such cases.
8. Real time sharing of intelligence and information with Narcotics control Bureau (NCB) and National Crime Bureau (in C.B.I.) for Interpol's assistance.
9. Supply reduction, Demand reduction and Harm reduction tools will also have important role to tackle the problem.
10. Prevention as well as Social awareness Programmes involving school, family, community, media and also International co-operation between nations.

Conclusion

The spread and entrenchment of drug abuse needs to be prevented, as the cost to the people, environment and economy will be monstrous. The unseemly spectacle of unkempt drug abusers dotting lanes and by

lanes, cinema halls and other public places should be enough to goad the authorities to act fast to remove the scourge of this social evil. Moreover, the spread of such reprehensible habits among the relatively young segment of society ought to be arrested at all cost. There is a need for the government enforcement agencies, the non-governmental philanthropic agencies, and others to collaborate and supplement each other's efforts for a solution to the problem of drug addiction through education and legal actions. The last 32 years have seen rapid growth in the combat against drug dependence especially the areas of policy formulation and growth of infrastructure. What now remains to be seen is the effectiveness and impact of the various measures initiated. It is imperative to have evaluation and subsequent modifications of plans and policies based on effective research. Without any systematic evaluation, plans would be just that - 'plans'.

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DOMESTIC VIOLENCE LAW : OVERVIEW AND IMPLEMENTATION

[1] Beenu Gulyani, [2] Anamika Singh, [3] Kapil Tyagi

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{The divine are extremely happy where women are respected;
Where they are not, all actions (projects) are fruitless}

This *shloka* is from manusmriti. From this, one can make out that from ancient times the respect of women has been an important subject for rishis and seers in India. But in the recent times, the statistics of crime against women are irrefutably confirming that women are victims of domestic violence in horrifying proportions. Domestic violence is a serious problem because many women remain silent and suffer an abusive situation, as they do not want to disrupt their children's lives. The United Nations Secretary General's Report on violence against women in 2006 clearly reiterates that the most common form of violence experienced by women globally is intimate partner violence. In the male dominated society, women have been victims of violence and exploitation. In India, domestic violence is widely prevalent, but largely invisible. The concept of gender equality, women empowerment, etc. is there under the Constitution of India, but equality of status guarantees by the Constitution is myth to million women, who are subject to various kinds of violence in their homes. Ordinarily, laws relating to cruelty, assault, etc. against women were inadequate to deal with violence against women within domestic relationship. However, keeping in view of rights guaranteed under Article 14, 15 and 21 of the Constitution, '*The Protection of Women from Domestic Violence Act, 2005'* was enacted to protect women from being victim of domestic violence in the society. The said Act came into force on 26th October, 2006. The Act is enacted for eliminating all sort of discrimination against women. It is a unique combination of civil and criminal laws. This Act supplements the existing laws governing marriage, divorce, maintenance,

[1] Civil Judge (J.D.), Bazpur, U.S. Nagar
[2] Civil Judge (J.D.), Rishikesh, Dehradun
[3] Civil Judge (J.D.) Roorkee, Hardwar

custody of children and property. The United Nations Committee on Convention on Elimination of all forms of Discrimination Against Women (CEDAW) also in its General Recommendation No. XII (1989) has recommended that state parties should act to protect women against violence of any kind especially that occurring within the family.

The Preamble of the Act states:

"An Act to provide for more effective protection of the rights of the women guaranteed under the Constitution who are the victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto."

SALIENT FEATURES OF THE ACT

1. Domestic Violence (Section 3)

Any act, omission or commission or conduct of respondent shall constitute domestic violence in case it harms, injures, or endangers the health, safety, limb, life or well being of the aggrieved person or tends to do so and includes causing physical, emotional, sexual, verbal and economic abuse, or, harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security.

2. Beneficiary Under The Act : Aggrieved Person [Section 2 (a)]

"aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

3. Respondent: Section 2(q)

Respondent means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of marriage may also file a complaint against a relative of the husband or the male partner.

Recently, the Hon'ble Supreme Court in ***Hiral P. Harsora and others Vs. Kusum Narottam Das Harsora and others AIR 2016 SC 4774*** struck down the words "adult male" before the word "person" in

section 2(q) of the domestic violence act holding that these words discriminate between persons similarly situated and is contrary to the object sought to be achieved by the Domestic Violence Act. The court also said that the provision to section 2(q) of the Act, being rendered otiose, also stands deleted.

4. Duties of Service Providers/Protection Officers/Police Officers:

Under section 5, it is the duty of police officer, protection officer, service provider and the Magistrate to inform aggrieved person of her right to make an appreciation for one or more reliefs under the Act, the availability of service provider and protection officer and her right to avail free legal services under the Legal Services Authority Act, 1987 and her right to file a complaint under section 498A of the Indian Penal Code, 1860, wherever relevant. It is also provided that this section does not relieve any police officer from his duty to proceed in accordance with law on receipt of information as to the commission of a cognizable offense.

The Act lays down the duties and functions of Protection Officer to assist Magistrate in discharge of his function, make a domestic incident report to the Magistrate, make an application to the Magistrate, if the aggrieved person so desire praying for issuance of protection order, legal aid, to make available a safe shelter home and perform such other duties as may be laid down by the Central Government, by rules.

5. Application for obtaining Order or Relief/ Procedure:

(a) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under the Act, who shall fix the first date of hearing of the application ordinarily within three days of its receipt and shall endeavour to dispose off every application within sixty days of the first hearing (section 12). This is so because of urgency with which the proceedings under the Act are expected to be concluded in an expeditious manner. The proceedings may be held in camera if either party so desires. Application under section 12 of the Act is filed in Form II provided in the act.

(b) The Magistrate is empowered under the act to pass protection order, residence order, monetary relief, custody order, compensation order or interim or ex parte orders. As per rule 15(6) of the rules, the summary trial procedure should be followed.

(c) Under section 25 of the Act, the Magistrate may alter, modify, or revoke any order passed by him on receipt of application from aggrieved person or respondent.

(d) Under section 28 of the Act, the Court can lay down its own procedure for disposal of application for any relief or for an ex parte order.

(e) Under section 24 of the Act, Court can supply copies of order passed free of cost to the parties to the application, to concerned police officer and the service providers.

(f) In order to prevent filing of malicious and false complaint under the Act, a safeguard has been provided under section 12(1) that the Magistrate shall before passing an order granting a relief under the Act, consider the report of the Protection Officer appointed under section 8 of the Act.

6. Notice to respondent (Section 13 read with rule 12) :

The procedure for service of notice is provided under section 13 of the Act. The notice shall be served on the respondent (and the aggrieved person) within two days or such further reasonable time as may be followed by the Magistrate. Rule 12 of Protection of Women from Domestic Violence Rules, 2006 provides for mode of service of notice i.e., as per Order V of the Code of Civil Procedure,1908 and Chapter VI of Criminal Procedure Code, 1973. Hence, police machinery can also be used for service of notice under the Act.

7. Assistance to Court :

In any proceeding under the Act, the Magistrate may secure the services of suitable person, preferably a woman whether related to the aggrieved person or not, including a person engaged in promoting family welfare for the purposes of assisting the Court in the discharge of its function in view of section 15 of the Act.

8. Jurisdiction of Court:

The Court of Judicial Magistrate of first class or the Metropolitan Magistrate, as the case may be, within the local limits of whose jurisdiction. the aggrieved person permanently or temporarily resides or carries on business or is employed, or the respondent carries on business or is employed, or the cause of action has arisen, shall be the competent Court to grant a protection order and other orders under this Act and to try Offences under this Act, which shall remain enforceable throughout India (section 27).

9. Relief available under the Act :

Section 17: Right to reside in the shared household :

This section lays down that irrespective of any contrary provision in any other law, every woman in a domestic relationship shall have the right to reside in the shared household and the aggrieved person shall not be evicted or excluded from the shared household by the respondent except in accordance in accordance with the procedure established by law. Section 2(s) of the Act defines shared household. The Hon'ble Supreme Court in ***S.R. Batra Vs. Tarun Batra, 2007 (93) DRJ 405(SC)***, held that only a household owned by the husband could be described as the shared household and a household owned by in-law (in law's self acquired property) could not be described as the shared household. Shared household could be joint family property of which the husband is the member.

Section 18: Protection Order :

The Magistrate may pass any order prohibiting respondent from committing any act of domestic violence or aiding or abetting thereto.

Section 19 : Residence Order :

On being satisfied that domestic violence has taken place, the Magistrate may pass a residence order like restraining the respondent from disturbing the possession of aggrieved person from shared household, directing respondent to remove himself from shared household or directing the respondent to secure alternate accommodation of aggrieved person etc.. It is also provided that no order of removing from shared household shall be passed against a respondent if she is a woman.

Section 20 : Monetary Orders :

This section empowers the Magistrate to pass orders for grant of monetary relief to the aggrieved person from the respondent to meet the expenses incurred and loss suffered including loss of earnings, medical expenses, and loss to property and maintenance of the aggrieved person and her children. Provisions of Section 125(3) of Criminal Procedure Code, 1973 may be invoked for recovery of the monetary relief granted to the aggrieved person.

Section 21 :Custody Orders :

This section provides that notwithstanding anything contained in any other law for time being in force, the Magistrate may at any stage of hearing of application for grant of any relief, grant temporary custody of any child to the aggrieved person or to the person making an application on her behalf and specify arrangements for visit of such child by the respondent.

Section 22 : Compensation Order :

In addition to other relief under the Act, the Magistrate may, on application by the aggrieved person, pass an order directing the respondent to pay compensation or damages or both to the aggrieved person for the injuries including mental torture and emotional distress caused to her from domestic violence by the respondent.

Section 23: Interim and ex parte orders :

If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that the respondent may do so, he may grant an ex parte interim order on the basis of affidavit as prescribed in Form III, of the aggrieved person under sections 18, 19, 20, 21, or 22, against the respondents.

Section 31 : Penalty for breach of protection order :

Section 31 provides that a breach of protection order or an interim protection order by the respondent shall be an offence punishable with imprisonment of either description for a term which may extend to one year or with fine which may extend to twenty thousand rupees or with both. Section 32 provides that above offence shall be cognizable and non-bailable.

The above mentioned were the salient features of the Protection of Women from Domestic Violence Act, 2005.

Questions that arise in the court of magistrate while implementing Protection Of Women From Domestic Violence Act, 2005

1. Practice and procedure :

Magistrate shall issue a notice to respondent of the date of hearing fixed; the magistrate need not and shall not issue a warrant for securing the presence of respondent. Rule 12 provides that for service of notice provisions of Chapter VI are applicable, which only means that police machinery can be used for serving notice on the respondents, the rule nowhere incorporates the meaning that the magistrate may issue warrant for securing the presence of respondents. A close perusal of section 28 would show that though as per this section, the proceedings under sections 12, 18 to 23 and offences under section 31 of the Act are governed by the Cr.P.C., 1973, it is not an inscrutable rule in as much as section 28(1) is having a saving clause and is also subject to sub-section (2). When we analyse limitation of section 28(1) with reference to the civil nature of remedies under section 18 to 22 and saving provisions under section 13 and 23 of the Act, we can understand that, for conducting inquiry, Court need not insist the personal attendance of the respondent. Court shall fix a date for hearing and issue notice to the protection officer for serving it on the respondent(s), and if on the date fixed, the magistrate finds the notice to be duly served, but the respondents did not turn up and file their objection, the magistrate need not take coercive steps for securing their presence, rather he can treat them as non-contesting respondents and pass an ex parte order, or proceed ex parte against such respondents. The Hon'ble High Court of Uttarakhand in ***Nirmaljeet Kaur Vs. State of Uttarakhand, Crl. Msc. Application No. 833 of 2010 decided on 16.08.2012*** observed as follows:

"(7)..It is pertinent to mention here that proceeding based on an application under section 12, the Protection of Women from Domestic Violence Act 2005 are not the proceeding of trial of an offence. Rather such proceedings are quasi civil in nature in nature, like the one under section 125 of Cr.P.C. .."

Thus, it is clear that proceedings under section 12 of the Act are quasi civil in nature.

2. Whether a non-bailable warrant can be issued against the defaulters under Protection of Women from Domestic Violence Act, 2005

The Court cannot straight away issue a non bailable warrant against the respondent in default of obeying monetary order under the Act. Section 28 of the Act provides that the Magistrate may formulate his own procedure for implementation of the Act, but where the Act itself provides the procedure, the Magistrate need not formulate his own procedure. The Act provides procedure for recovery of arrears hence; the Magistrate need not directly issue a non bailable warrant against the defaulter. In this regard the Hon'ble High Court of Bombay in ***Sachin Bhodale Vs. Sushma Bhodale, Cr. Writ Petition No. 305 of 2014*** held that in case of default of paying monetary relief, the Magistrate has to issue a warrant for levying amount (i.e. the procedure u/s 125(3) Cr.P.C.1973) by attachment and sale of movable property, the other remedy available is to issue a warrant to the collector of the district, authorizing him to realize the amount as arrears of land revenue from the movable and immovable property, or both of the defaulter. If the whole amount is recovered by adopting the procedure under section 421 Cr.P.C., 1973, the question of putting the defaulter in prison does not arise. In case the amount is not recovered or if the part of it is recovered, then the question would arise as to how much sentence should be imposed on the defaulter as per the provisions laid down in Cr.P.C., 1973. The stage for issuing the warrant comes only after sentencing and not before that.

Thus, now it is clear that a Magistrate cannot directly issue a non bailable warrant against the defaulter under this Act

3. Section 31 Protection of Women from Domestic Violence Act, 2005 includes only 'Protection Order' :

Often in Courts we find that the counsels appearing for the aggrieved persons, file complaint under section 31 of the Act on behalf of the applicant/aggrieved person, in case of breach by the respondent of the monetary order or compensation order passed by the Court against the respondent, but it is important in this regard to consider that penalty

under section 31 of the Act is provided only for the situations where the respondents commit breach of the protection order and the protection order here refers to the order passed under section 18 of the Act. In this regard, the position was cleared by Hon'ble High Court of Rajasthan in ***Smt. Kanchan and anr. Vs. Vikramjeet Setiya, S.B. Cr. Msc. Petition No. 123/ (2013 CriLJ 85)*** by holding that the provision of section 31 of the Act of 2005 clearly spells out that the application under section 31 of the Act lies when there is breach of a protection order or an interim protection order. Section 2(o) of the Act says 'Protection Order' means an order made in terms of section 18. Section 18 does not deal with monetary relief. Monetary reliefs according to section 2(k) of the Act are reliefs granted by way of proceedings under sections 12 and 23 of the Act. An applicant, in whose favour the order of monetary relief has been passed, has to apply to the Magistrate for seeking execution of order as per section 20 of the Act; i.e., ultimately the court has to resort to the procedure provided under section 125 Cr.P.C., 1973 for execution of monetary order, or for that matter recovery of monetary relief.

Thus, it is clear that section 31 of the Act is evocable only in case of breach of protection order by the respondent and protection order here refers to the order passed under section 18 of the Act.

4. Whether filing of an application under section 12, Protection of Woman from Domestic Violence, 2005 has any limitation period?

From the preamble of the Act, it is clear that the Act is made for the benefit of the women and for their protection from all forms of domestic violence. The Act does not prescribe any limitation period for filing application under section 12 of the Act. The Hon'ble Supreme Court in ***Inderjeet Singh Grewal Vs. State of Punjab and another (para 24) (2012 CriLJ 309)*** held as follows-

"Submissions made by Sri. Ranjit Kumar on issue of limitation, in view of provisions under section 468 Cr.P.C., that the complaint could be filed only within a period of one year from the date of incident seem to be preponderous in view of the provisions of section 28 and 32 of the Act 2005 read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006, which make the provisions of Cr.P.C. applicable..."

The Hon'ble High Court of Andhra Pradesh, in ***A.T.G. Sriniwas Rao Vs. Smt. Pushkarini And Another 2014(2)ALD(Cri)629*** held:

"15. The portion of observation relied on by the ld. Counsel appearing for petitioner in Inderjeet Singh Grewal's case in my view is an obiter dictum but no ratio has been laid down by the Supreme Court as to the limitation applicable to the various provisions under the Act, 2005. The Supreme Court in my view obviously referring the penal provisions contained in the Act, 2005, but not to other provisions. The penal provisions under the Act are contained only under sections 31, 32, 33 and 34 of the Act. The penal provisions would get attracted only when a breach of order has been committed or when a protection officer has failed to discharge his duty assigned to him under the Act. The remaining provisions only provide for remedies of civil nature. Therefore, an aggrieved person can file a complaint notwithstanding the bar contained in section 468 of Cr.P.C. and the magistrate can grant those reliefs if the aggrieved person is entitled for the said reliefs."

The Hon'ble Supreme Court in ***Krishna Bhattacharjee Vs. Sarathy Chaudhary Dated 20.11.2015, Crl. Appeal No. 1545 of 2015 @ SLP (CRL) No. 10223/2014*** held :

"…it has been held in the Inderjeet Grewal case that section 468 Cr.P.C., 1973 applies to the said case under the 2005 Act as envisaged under section 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006. We need not advert to the same as we are of the considered opinion that so long as the status of aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under section 12 of the 2005 Act. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians."

Thus, it is clear from the above discussion that this beneficial legislation does not provide for any limitation period for filing application under section 12 of the Act.

5. Counseling : How to Refer the Matter for Counseling?

In this respect, section 14 of the Act provides: The Magistrate may at any stage of the proceedings under the Act, direct the parties either singly or jointly, to undergo counseling with any member of a service provider who possesses such qualifications and experience in counseling as may be prescribed. Where the Magistrate has issued any direction for counseling, he shall fix the next date of hearing of the case within a period not exceeding two months.

The Protection Officer forwards the list of Counselors to the court, and the Court shall then appoint a person as a counselor from the list of available counselors, under intimation to the aggrieved person (Rule 13). The procedure to be followed by the counselor is provided in Rule 14 of the Rules 2006.

6. Whether a woman is entitled to relief under the Protection of Woman from Domestic Violence Act, 2005 when she is already receiving/enjoying a relief under any relief under any other proceeding against the same respondent?

In this regard section 26 of the Act provides that, all the reliefs that can be obtained under this Act can also be sought by the aggrieved person in any proceedings pending before any other Court, civil or criminal, where the aggrieved person and the respondent are parties. But the party has to inform the Court under this Act, the relief which is provided to it by another court. This disclosure is also a necessity in filing an application under section 12 in Form II as provided by Rule 6 of the Rules 2006.

7. Modes, how an aggrieved person can move to the Magistrate under Protection of Woman from Domestic Violence Act, 2005

Victim can move directly to the Magistrate or through other agencies or through agencies under the Act, such as Police, Protection Officers, service providers, or any other person acting on behalf of the aggrieved person. The aggrieved person can herself also directly file an application to the Magistrate. At the time of filing of the application by the aggrieved person, the Magistrate can, however, ask the aggrieved person to get the Domestic Incident Report (DIR) recorded with protection officer along with the application, the magistrate himself may call the said DIR from the Protection Officer.

8. Appeal from Orders:

The Act only provides for appeal from orders. In this respect section 29 of the Act provides that there shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.

Recently, it has been held by the Hon'ble Allahabad High Court, in case of ***Dinesh Kumar Yadav Vs. State Of U.P. MANU/UP/3228/ 2017,*** that a revision petition under section 397/401 of the Code of Criminal Procedure is maintainable against judgment and order passed by the Court of Sessions under section 29 of the Protection of Women from Domestic Violence Act, 2005.

9. Retrospective effect of the act :

The Hon'ble Supreme Court in ***Ld. Col. V. Bhanot V. Savita Bhanot (AIR 2012 SC 965)*** held that the past conduct of parties, even if prior to the Act coming into effect, were relevant, for passing orders under sections 18, 19, 20 of the Act.

10. Service of Notice (rule 12) :

A notice of date of hearing shall be given by the Magistrate to the Protection Officer who shall get it served on the respondent within a maximum period **of two days or within such reasonable time** as allowed by the Magistrate. A declaration of service of notice made by the Protection Officer shall be the proof of service of notice unless contrary is proved.

11. Enforcement of orders [rule 6(5)]:

Orders under Protection of Women from Domestic Violence Act, 2005 will be enforced in the manner laid down under section 125 of the Code of Criminal Procedure.

12. Domestic Incident Report (rule 5(17) :

Whenever an application is filed under the Act, the Magistrate should always consider the Domestic Incident Report (DIR) sent by the Protection Officer. It shall be in Form I of the Protection of Women from Domestic Violence Rules, 2006 and has to be prepared by the Protection Officer /Service Provider or the person-in-charge of

medical facility and forwarded to the police station in the jurisdiction where the violence has occurred, and to the concerned Magistrate. The police can also convert a complaint of domestic violence into DIR. Section 2(e) of the Act says that DIR means a report made in prescribed form (Form I) on receipt of a complaint of domestic violence from an aggrieved person.

13. Alteration of orders is possible under the Act (section 25):

A protection order made under section 18 shall be in force till the aggrieved person applies for discharge. Section 25 further provides that, if the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate .

14. Copy of Orders :

The Magistrate shall, in all cases, where he has passed any order under this Act, order that a copy of such order, shall be given free of cost to the parties on the application, the police officer-in-charge of the police station in the jurisdiction of which the Magistrate has been approached, and any service provider located within the local limits of the jurisdiction of the Court and if any service provider has registered a domestic incident report, to that service provider.

These were certain salient features of this Act and the law laid down by the Hon'ble Supreme Court and legal positions provided by Hon'ble High Courts from time to time clarifying/implementing the provisions under the Protection of Women from Domestic Violence Act, 2005. We can find out from above discussion that the basic aim of the Act is to protect the women from domestic violence, and thus, the Act should be applied by the Magistrates and other machineries under the Act, keeping in mind, the above object and spirit of the Act.

Conclusion:

The Act provides speedy remedy to women who are subjected to domestic violence within four walls of their house, however the law at present is inadequate to tackle the problem of domestic violence effectively. Implementation/enforcement of orders is a major hindrance though positive directions are given under the Act. The confusion regarding the scope of

the Act and nature of reliefs, has been removed to a certain extent by the interpretations and clarifications made by the Hon'ble Apex Court and Hon'ble High Courts. This Act is designed to serve the purpose viz. protection of women from domestic violence both explicit and dormant as the widespread evil in several families. This Act is passed in Parliament in response to a worldwide demand for such legislation to prevent such occurrences in future and to assure families' peaceful co-existence amongst their members. After realizing that such effective protection can be provided only by establishing adequate machinery to attend the difficulty of aggrieved woman and keeping this in mind, the provisions are made in the Act regarding service providers, protection officer, etc. and imposed several duties on them with the Magistrate. Thus, it is the duty of the Magistrate, Service Providers, Protection Officers to implement the Act in accordance with the object laid down in the Preamble of the Protection of Women from Domestic Violence Act, 2005 to make its purpose successful. Women are the important members of the society and their protection from all forms of violence is necessary for the society. It can rightly be summed up in the following words:

"A woman is the full circle. Within her is the power to create, nurture and transform."

~Diane Mariechild

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LOK ADALATS: AN ALTERNATIVE MODE OF DISPUTE RESOLUTION OUTSIDE THE ESTABLISHED COURT SYSTEM, A VIEW

[1]Shikha Bhandari

"Discourage litigation; persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time."[1]

Abraham Lincoln

With the changing time the paradigm of litigation is extending its scope. It is widely accepted and acknowledged in our society that with the changing scenario of the society our litigation system is also changing. In this context, today we can see that the burden on the Courts and the litigation is increasing day by day. In general parlance, it can be said that except for some litigants who believe to gain by delaying the process of justice, others do not feel motivated to take recourse of litigation which generally consumes innumerable number of years and considerable amount by way of expenses. It is a well-known fact that in India not many people can afford the lengthy, expensive and hence burdensome litigation. This kind of litigation is dangerous for the legal system and belief of citizen therein. With the bundling of cases, the Courts are burdening with the pendency, which leaves litigants loosely tied on a feeble string of hope for getting their matter decided. Soon a need was felt for a quick and effective alternative possibility to litigants which also ease the burden on the Courts.

Historical aspect of Lok Adalat:

Alternate Dispute Resolution (ADR) is not a new concept. It is well known for a longer period of time though in the present time it has been organized on more scientific lines and provided in more specific and clear terms. Also it is applied more extensively in dispute resolution in recent years.

In a book written by Priyanath Sen (1980), "The General principles of Hindu Jurisprudence", he has given an exposition of the dispute resolution

[1] Judicial Magistrate, Kotdwar, Pauri Garhwal

institutions prevalent during the period of *Dharmashastras*. He refers to the resolution of disputes between members of a particular clan or occupation or between members of a particular locality, by *Kulas* (assembly of the members of a clan), *Srenis* (guilds of a particular occupation) and *Pugas* (neighbourhood assemblies). In rural India, *Panchayats* (assembly of elders and respected inhabitants of a village) decided almost all disputes between the inhabitants of the village, while disputes between the members of a clan continued to be decided by the elders of the clan. One of the main characteristic of these traditional institutions was that they were recognized system of administration of justice and not merely 'alternatives' to the formal justice delivery system established by the sovereig lords, *Kazis*, the *adalat* system, introduced by the British and the existing court system. The two systems continued to operate parallel to each other. But as regard the procedure and the nature of proceedings, these institutions were very much similar to the alternate dispute resolution procedure i.e. simple, informal, inexpensive, quick, and the decisions were based not on abstract notions of justice but on the prevalent norms of expected behaviour.[2]

With the introduction of British rule in India the old system of justice dispensation got replaced by the formal system of administration of justice. As the time passed the need of society changed and so the new methods of justice delivery system introduced. We know them as Alternate Dispute Resolution (ADR) mechanism. Through this mechanism, State also provide free legal aid to ensure that opportunities for securing justice are not taken away from citizens due to reason of financial or any other constraints. This lead to the formation of Committee for Implementing legal aid schemes (CILAS) in 1980.

Lok Adalats:

Lok Adalats literally means “courts of the people”. The first Lok Adalat was held on March, 1982 at Junagarh in Gujarat. Lok Adalats have been very successful in settlement of motor accident claim cases, matrimonial/family disputes, labour disputes, disputes relating to public services such as telephone, electricity and bank recovery cases *etc*. The

[2] Edited by P.C. Rao and William Sehfield, Alternate Dispute Resolution What it is and How it works, 2011, “ADR: IS CONCILIATION THE BEST CHOICE?”, Sarvesh Chandra, Page no. 85-86.

advent of Legal Services Authorities Act, 1987 gave a statutory status to Lok Adalats, pursuant to the constitutional mandate in Article 39-A of the Constitution of India which contains provision for settlement of disputes through Lok Adalats. It is an act to constitute Legal Services Authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizens by reason of economic or other hardships. The Act further provides for organization of Lok Adalats to promote amicable settlement of disputes and justice on a basis of equal opportunity.[3]

State Legal Services Authorities and the District Legal Services Authorities constituted under the Legal Services Authorities Act, 1987 are empowered to organize Lok Adalats at such intervals and places, and for exercising such jurisdiction and for such areas as they think fit.

Under the Legal Services Authorities Act, 1987, Lok Adalats have the same powers as are vested in a Civil Courts under the Code of Civil Procedure, 1908. The proceedings before the Lok Adalats are deemed to be judicial proceedings within the meaning of section 193, 219 and 228 of the Indian Penal Code and are also deemed to be Civil Court for the purpose of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. As provided under section 23 of the Legal Services Authorities Act, 1987, the members of the Lok Adalats, are deemed to be public servants within the meaning of section 21 of the Indian Penal Code. Further, the Act provides that every award made by the Lok Adalat shall be final, binding and non-appealable.

The Lok Adalats have power to determine and arrive at a compromise or settlement in a dispute in respect of which any matter falling within the jurisdiction of any Court- civil, criminal or revenue or of any tribunal constituted under any law for the time being in force, for the area for which the lok adalat is organized. In doing so, it must be guided by legal principals and the principles of justice equity and fair play. If no compromise or settlement is arrived at between the parties then the matter taken up by the Lok Adalats goes back to the Court concerned where suit or proceeding continue. The disputes can be referred to the Lok Adalat by mutual consent, at the request of one of the parties or by the Court suo motu. Even private cases can be referred to and decided by it.

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[3] www.legalserviceindia.com ., Lok Aalats and Permanent Lok Adalats.

Lok Adalat and legislative provisions:

The Lok Adalats got statutory status after the enactment of the Legal Services Authorities Act, 1987. The source of inspiration and the Constitutional obligation for the formation of Lok Adalats is Article 39A. The purpose behind this was to quicken the process of justice, to provide access to justice for economically backward segment of the society, thus ensuring equal opportunity. The Code of Civil Procedure was amended in 2002 amended so as to provide for settlement of disputes outside the court by way of arbitration, conciliation, mediation and judicial settlement through Lok Adalat, when the court is prima satisfied that, there are chances of settlement including settlement through Lok Adalat. The Civil Procedure Code, 1908 has also recognized the rights of parties to affect compromise and withdraw from the suit under Order-23, Rule-3. While Order-32A, Rule-3(2) provides that if in any suit or proceedings, at any stage, the Court finds the possibility of settlement, it may adjourn such proceedings for a reasonable length of time to enable the attempts to be made to effect such an amicable settlement. Besides, as per Rules-1A, 1B, 1C to Order-10, after a suit is filed, the Court can direct the parties to opt for any of the methods of Alternative Dispute Resolution. Thus, the statutory recognition of settlement of disputes through Lok Adalat under section 89 of Civil Procedure Code has certainly added the much needed majesty to our legal system and increased a sense of confidence in public mind. Besides this, section 320 of the Code of Criminal Procedure provides a long list of compoundable offences, e.g., Assault, House Trespass etc., which falls within the purview of jurisdiction of Lok Adalats.[4]

Lok Adalats and NALSA:

National Legal Services Authority (NALSA) has been set up under section 3 of the Legal Services Authorities Act, 1987 to monitor and oversee the legal aid programmes throughout the country and to organize Lok Adalats for amicable settlement of disputes. NALSA consists of Hon'ble the Chief Justice of India as Patron-in-chief with a sitting or retired judge of the Supreme Court as Executive Chairman.

In every State, State Legal Services Authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct Lok Adalats in the State.

[4] Proviso to Section 19(2) of the Legal Services Authorities Act, 1987.

The State Legal Services Authority is headed by Hon'ble the Chief Justice of the respective High Court who is the Patron-in-chief of the State Legal Services Authority.[5]

In every District, District Legal Services Authority has been constituted to implement Legal Services programmes in the District. The District Legal Services Authority is situated in the District Courts Complex in every District and chaired by the District Judge of the district.[6]

Conclusion:

The alternative dispute resolution system of which Lok Adalat is an inseparable component has found its ground in our justice delivery system. Today Lok Adalat has become a widely known system of dispute resolution. The working of Lok Adalat seems to be both fruitful and successful in achieving those objectives and goals for which it was introduced. Thus, Lok Adalat acts as a tool for speedy and equitable justice delivery, where any person can approach to resolve his/her dispute in speedy and inexpensive manner, to his/her own satisfaction. No doubt Lok Adalat has been a boon to our legal system but today also there are certain grey areas which are need to be touched to make the full use of a tool like this in true sense. Proper impartation of information about such alternative resolution method must be the first and foremost need in today's scenario. Hence, all those entities which are related to the legal field, advocates, law students, legal firms etc., must strive for spreading the fuller information about these methods and their benefits. Today will bring a better future if the alternative dispute resolution mechanism is intertwined in the regular legal processes.

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[5] nalsa.gov.in
[6] Ibid 6.

ROLE OF INDIAN JUDICIARY IN PROTECTION OF ENVIRONMENT IN INDIA

[1]Rohit Joshi

Indian Constitution guarantees right to life and liberally under article 21. A healthy environment is a comprehensive term, encompassing all such natural and biotic factors that make possible to entertain right to life in true spirit. Without congenial environment human existence is not possible on earth.

Environment protection was the least priority in India's post independence due to the need of industrialization and other political disturbances. India was under British rule which plagued India and it lagged behind in Industrial growth. In 1947 when India became independent, a strong need for industrialization was felt not only for creating employment opportunities but to increase GDP as well. The Industrial policy resolution was adopted in 1947 and in 1956 resulted in large scale industrialization created an ecological imbalance which resulted in no real economic growth because of environmental destruction. During early years there was no candid environmental policy.

The year 1972 marked a revolution in history of environment management in India. It was the year in which a conference on human environment was held in Stockholm. To implement the decision taken at the conference, Indian Parliament introduced a landmark change in the field of environmental management. It was in this decade that environmental protection was accorded a constitutional status and environment was made directive principle of state policy by 42nd amendment. Article 48A (protection and improvement of environment and safe guarding of forests and wildlife) and 51A (g) (to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures) were inserted making state as well as the citizens, both under constitutional objection to conserve and improve the environment.

After Bhopal Gas Leak Tragedy incident judicial and legal relief came actively into play on environmental front. The inadequacy of

[1] Civil Judge (J.D.), Joshimath, Chamoli

environmental laws became painfully bare in 1984 when a large number of people either died or were injured seriously in Bhopal Gas Leak Tragedy. Bhopal disaster disclosed the malady of legal system that failed to stress on the mandatory need for an open Environment Impact Assessment (EIA).

The principal Indian Court were following was that of ***Ryland vs. Fletcher (1868) LR 3 HL 330*** which governs liability for escape from land used for non-natural purpose which causes damage. It was held by the Court although the defendants were not negligible they were still liable to pay damages to plaintiff. The case law thus established a doctrine of strict liability but only in limited circumstances.

In ***M.C. Mehta Vs. Union of India (1987 SCR (1) 819)***, Supreme Court of India got the first chance to review the rule of strict liability immediately after Bhopal Gas Leak Tragedy. The Court evolved a new jurisprudence of liability towards the victims of pollution caused by industries engaged in hazardous activity. The Court introduced the principle of absolute liability (liability without exceptions) on which quantum of compensation could be computed and paid. The Court emphasized that the compensation should be paid in proportion to the magnitude and capacity of enterprise.

The remedies available in India for environment protection comprise of tortuous protection as well as statutory remedies. The statutory remedies incorporates citizen's suit eg:

- An activity brought under section 19 of Environment Protection Act, 1986.
- An activity under section 133 Cr.PC., 1973 and
- Activity brought under section 268 for public nuisance under Indian Penal Code, 1860.

Apart from this a writ petition can be filed under article 32 in Supreme Court and under article 226 in the High Courts.

Tortuous Liability

Injunctions- The purpose of injunctions is to pervert continuing wrong. The grant of perpetual injunctions is governed by section 37 to 42 of Specific Relief Act, 1963.

Nuisance- It means an act which creates hindrance to enjoyment of person in form of smell, air, noise etc. It can be divided into two categories-

1. Private Nuisance- It is a substantial and unreasonable interference with the use of enjoyment of one's land.
2. Public nuisance- It is an unreasonable interference with general rights of the public.

Trespass- It means intentional or negligent and direct interference with personal and proprietary right without lawful excuses.

Negligence- It connotes failure to exercise care that a reasonably prudent person would exercise in like circumstances.

Some principles and doctrines propounded by Indian Judiciary:-

1) ***Union Carbide Corporation Vs. Union Bank of India (1989 SCC (2) 540) :*** Doctrine of absolute liability.
2) **Polluter pays principle-** It means if you make a mess it's your duty to clean it up. It supports a remedial methodology which is concerned with repairing harm or damage done to natural environment. In ***Vellore Citizen's Welfare Forum Vs. Union of India (AIR 1996 SC 2715),*** Supreme Court has declared that polluter pay principle is an essential feature of sustainable development.
3) **Precautionary Principal-** In Vellore citizen's welfare forum case Supreme Court developed 3 concepts for precautionary principal.
    a) Environmental measures must anticipate, prevent and attack the causes of environmental degradation.
    b) Lack of Scientific certainty should not be used as a reason for postponing measures.
    c) Onus of proof is on actor to show that his action is benign.
4) **Public Trust Doctrine-** It primarily rests on principal that certain resources like air, water, sea and forest have such a great importance to people as a whole that it would be wholly unjustified to make them a subject of private ownership ***(M.C. Mehta Vs. Kamal Nath and others (1997)1 SCC 388).***
5) **Doctrine of sustainable development-** It signifies development that meets the needs of the present without compromising the ability of future generations to meet their own needs. There is a need for Courts to strike balance between development and

environment. ***In Rural Litigation and Entitlement Kendra Vs. State of U.P. (1988) INSC 254***, the Court for the first time dealt with the issue relating to environment and development and held that it is always to be remembered that these are the permanent assets of mankind and not intended to be exhausted in one generation.

In ***Narmada Bachao Andolan Vs. Union of India, (2000) 10 SCC 664*** Supreme court upheld that water is a Basic need for survival of human beings and is a part of right to life and human rights as enshrined in article 21 of Indian Constitution.

In 2010, National Green Tribunal (NGT) was established for effective and expeditious disposal of cases relating to environment protection and conservation of forests and other natural resources. With the establishment of NGT, burden of the High Courts have reduced. The tribunal is not bound by the procedure laid down under the Code of Civil Procedure, 1908, but is guided by the principles of natural justice. The tribunal is mandated to make and endeavor for disposal of application or appeals finally within 6 months of filling of the same.

The tribunal consists of a full time chairperson, judicial members and expert members. The minimum number of judicial and expert members is ten and maximum member is twenty in each category. A chairperson may, if finds necessary, may invite any person or more person having specialized knowledge and experience in a particular case before the tribunal to assist the same in that case.

A Judge of Supreme Court of India or Chief Justice of High Court is eligible to be chairperson or Judicial member of the Tribunal. Even serving or retired Judge of High Court is qualified to be appointed as judicial member. The tribunal has original jurisdiction on matters of substantial question relating to environment and damage to environment due to specific activity.

In recent years there has been sustained focus on the role played by the Higher Judiciary in devising and monitoring the implementations of measures for pollution control, conservation of forest and wildlife protection. Indian Courts are cognizant and cautious about the special nature of environmental rights considering that loss of natural resources can’t be renewed. The Judiciary tries to fill in the gaps where there is a lacking of

legislation. There is no mean or any law unless it's an effective implementation and for effective implementation public awareness is a crucial condition. There is a need to strengthen the hands of Judiciary by educating public about environment. There is also a need for an effective and efficient enforcement of constitutional mandate and other environmental legislations. Judiciary is actively playing its role inspite of repetitive failure of other organs. In public opinion Judiciary is the last hope.

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SHIELD LAWS IN INDIA

[1] **Neelabh Kumar Bist**

ABSTRACT:

The Indian Constitution ensures freedom of speech and expression. The exercise of this right is all the more important for media houses who are entrusted with the responsibility of exposing the truth to the citizens of the country. In pursuance of it, they require free flow of information by their sources. It is these sources who many a times uncover news of international importance. However, India is yet to provide protection to these sources in terms of shield laws- legislative or legal. This is despite the existence of such laws in many democracies across the world, and two Law Commission reports advocating for the same. This paper argues for qualified protection of sources as recom-mended by the Law Commission. It can be achieved either through a statutory law or judicial pronouncement. The regime of shield laws across the globe shows the importance attached to it. With growing concerns for the free flow of information in the country, the enactment of shield laws is the need of the hour to protect our democratic framework.

INTRODUCTION:

It was in the year 1983 that the Pulitzer prizewinning journalist Seymour Hersh was accused of publishing defamatory statements against the Morarji Desai in his book, The Prince of Power.[1] The politician thereafter tried to seek the disclosure of the confidential source that had let the cat out of the bag, accusing Morarji of being a paid informant of the CIA during the Nixon Administration[2]. The case was ruled against him and therefore, it was hailed to be a victory of not only the author but the Fourth Estate itself, who has taken up the moral responsibility of ensuring accountability and transparency in the system.

The freedom of press is a well established principle of Constitutional jurisprudence, both in India as well as abroad. However, in India, shield laws or the protection of the sources of journalist have not

* BA LLB (Hons.), Maharashtra National Law University, Mumbai

1 S. HERSH, THE PRICE OF POWER 444-64 (1983).

2 N.Y. Times, June 19, 1983, § 1, at 5, col. 4.

been provided any form of protection, either by the judiciary or by the legislature. A valiant effort was made by the Law Commission both with their 93rd Report as well as their 185th Report. However, the government of the day had failed to adopt the same. This was despite the fact that there exists foreign jurisprudence on the protection of identity of a confidential source as being an essen-tial facet of the freedom to speech and expression.[3]

The need for the protection of the sources in times where State surveillance is on the rise, is important for a plethora of reasons. First, it is founded on the freedom of press. The problem associated with non protection of sources is that it endangers not only the life of the sources but the institution of free press altogether. An important facet of the freedom of press is the free flow of information to the press. This has been recognised by the Indian courts as being necessary for the citizens of the country to arrive at informed judgments on all issues touching them.[4] Even internationally, the principle of free flow of information finds its place in various Declarations and Conventions.[5]

Second, the sources can face retaliations by the people whose information they provided, which in most cases are influential people. If no protection would be provided to the journalist, then out of fear of retaliation, a news of national importance would not reach the public. The Courts in US in that regard have stated that "compelled disclosure would seem inevitably to lead to an excessive restraint on the scope of legitimate news gathering activity".[6]

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[3] Council of Europe, Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the Right of Journalists Not to Disclose their Sources of Information (2000); Dirk Voorhoof, The Protection of Journalistic Sources Under Fire? How Developments in European Rights Law Have Reinforced the Right of Journalists to Have Their Sources Protected, European Media Law: Collection of Materials 1 (2012); *Ernst v. Belgium*, (2003) ECHR 359; *Financial Times Ld. v. United Kingdom*, App. No. 821/03, Eur. Ct. H.R., (2009); *Mitchell v. Superior Court*, 37 Cal 3d 268 (1984); *Secy. of State for Defence v. Guardian Newspapers* 1985 AC 339;

[4] Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161 : AIR 1995 SC 1236; Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294 : AIR 2002 SC 2112.

[5] Universal Declaration of Human Rights, art. 19, GA Res 217A (III), UN Doc A/810; International Covenant on Civil and Political Rights, art 19, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; European Convention on Human Rights. art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

[6] Cervantes v. Time, Inc., 464 F.2d 986, at 993 n.10 (8th Cir. 1972); Riley v. Chester, 612 F.2d 708, 714 (3d Cir. 1979); Baker v. F & F Inv., 470 F.2d 778, 782 (2d Cir. 1972), cert. denied, 411U.S. 966 (1973)

Third, a lack of protection can lead to a 'chilling effect' on the speech and expression. A chilling effect takes place when a positive or overt act results in curbing of the freedom of speech and expression and thus the individual is not able to utilise his right to the fullest extent.[7] It has been documented that the journalist are deterred from disclosing a news of national importance at a mere threat of being subpoenaed.[8] Further, another effect called 'drying up' can take place wherein even after the information is disclosed by the source, the journalist does not use it fully which leads to drying up of the relationship between the journalist and his source. This results in the diminished willingness to disclose information and therefore it directly impacts the free flow of information to the public.[9]

SOURCE PROTECTION IN THE INTERNATIONAL ARENA

1) United States of America:

The landmark case in the US with respect to shield laws is *Branzburg v. Hayes.*[10] which held in negation of sources privilege. Despite the ruling, it gave the spark to the fire that resulted in the adoption of many state shield laws. Before the institution of the case only seventeen states in the US had some form of protection for the sources. However, after the case left open the options to the states to enact shield laws, thirty-one states obliged.[11]

The Constitutional Court in the case had held by a slim majority of five-four that there is no constitutional protection that can be accorded for the confidentiality to the source of the journalists. They judges had opined that there was a responsibility casted upon every citizen to disclose information relevant for a particular case and that no special status can be provided to the news reporters against the same.[12] However, a balancing test was proposed by the Court which balanced the freedom of the press

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7 Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring);THE CHILLING EFFECT IN CONSTITUTIONAL LAW, Columbia Law Review, Vol. 69, No. 5 (May, 1969), pp. 808-842.

8 Blasi, The Newsman's Privilege: An Empirical Study, 70 MICH. L. REv. 229, 276 (1971).

9 Dworkin, The Press on Trial, New York Review of Books, Feb. 26, 1987, at 29, col. 1

10 33 L Ed 2d 626 : 408 US 665 (1972).

11 Murasky, The Journalist's Privilege: Branzburg and Its Aftermath, 52 TEx. L. REV. 829, 853-56 (1974).

12 Michael D. Saperstein Jr, Federal Shield Law: Protecting Free Speech Or Endangering The Nation? 14 Comm Law Conspectus 543 (2006).

to the duty to testify to be decided on a case to case basis, which led to the furtherance of the journalistic privilege in future adjudications.[13]

The majority opinion had declined the grant of confidentiality on the count that it was very specula-tive and impossible to prove and therefore did not have any form of chilling effect on reporting. However, the minority opinion was founded on self censorship and chilling effect itself. The judges also proposed a balancing test to provide for confidentiality in which if there exists an information that is relevant to governmental inquiry together with a reasonable belief that the witness has the information as well as the existence of exhaustion of alternate remedies to gather the information, then source protection was to be allowed.[14]

After the adjudication of the case, there were several attempts made to enact a federal shield protection in the USA by Society of Professional Journalists and others but all the attempts failed.[15] Only state level protection has been given which varies from state to state in terms of the scope of the protection. There are also protections that can be claimed based on the State's constitution or on the State's common law. The New York Court of Appeal in ***O'Neill v. Oakgrove Construction, Inc.***[16] had held that their State constitution provides for confidential and non-confidential privilege for a journalist while the Supreme Court of Washington in ***Senear v. Daily Journal-American***,[17] had held that common law allows the journalist to exercise confidentiality in case of civil suits.

2) European Union

The European Union is guided by Article 10 of the European Convention of Human Rights (ECHR) which guarantees the right to freedom of expression. The European Court of Human Rights ('the Court') has time and again recognised the freedom of press under Article 10 of ECHR. The landmark case that granted journalistic privilege protection under Article 10 of ECHR was ***Goodwin vs United Kingdom***.[18] The

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[13] Robert D. Lystad, Anatomy of a Federal Shield Law: The Legislative and Lobbying Process, 23 A.B.A. Comm. L. 14 (2005); Id.

[14] Nathan Fennessy, Bringing Bloggers Into The Journalistic Privilege Fold 55 Cath. U.L. Rev. 1059 (2005-2006); Developments in the Law - The Law of Media 120(4) Harv. L. Rev. 991 (2007)

[15] Freedom of Information; https://www.spj.org/foi.asp

[16] 71 N.Y.2d 521 (N.Y. 1988)

[17] 97 Wn.2d 148 (1982)

[18] App. No. 17488/90, 22 Eur. H.R. Rep. 123 (1996).

case was initiated in the United Kingdom where the court had ordered disclosure order at national level under Section 10 of the Contempt of Courts Act, 1981. It was appealed in the the Court wherein it was observed that, *"the protection of journalistic sources was one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms."*[19]

The Court pointed out at the chilling effect of disclosure and stated that a lack of protection would compromise the role of the press as a watchdog which would inevitably impact their capacity to disseminate information. Furthermore, an important test was formulated by the Court to enable national Courts to develop a law around this point. The Courts had to consider whether the interference was prescribed by the law, whether it pursued a legitimate aim and whether it was necessary in a democratic society. This last requirement of necessity is entered around the test of proportionality which encapsulates the requirement of public interest to disclose the identity of the source. As the last requirement was not satisfied in the Goodwin case, the court held against the disclosure.

The Court has thereafter in many cases held good this test of prescription, legitimacy and necessity. The restriction was held to be good by the Court in an appeal to it, in the case of ***Nordisk Film and TV v. Denmark***,[20] wherein an undercover journalist was making a documentary on paedophilia in Denmark. The Court held the domestic courts interference to be proportionate as there was an overriding public need for the disclosure of the identity of the source. Thereafter, the Court in many cases has upheld the confidentiality of the source including. Subsequently, many different countries have adopted the right to confidentiality of the source, with some countries, including Australia and France, adopting an almost absolute source protection law.[21] Therefore, worldwide the necessity of journalistic privilege has been recognised as a cogent right.[22]

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[19] Id, para 39.

[20] 2005-XIII Eur. Ct. H.R. 951.

[21] An International Assessment of Journalist Privileges and Source Confidentiality, 14(1) New Eng. Int'l & Comp. L. Ann. 103 (2007).

[22] Financial Times v United Kingdom [2009] ECHR 2065, Sanoma Uitgevers B.V. v. the Netherlands (2010) (Application no. 38224/03),

SHIELD LAWS STATUS IN INDIA:

The Indian Constitution provides for the freedom to speech and expression to every citizen under Article 19 qualified only by the restrictions imposed by Article 19(2). The Supreme Court of India has read the freedom of the press as being an integral part of freedom to speech and expression.[23] However, journalistic privilege has not received a vehement support either from the legislature or from the courts.[24]

In India, there is no form of journalistic privilege available to the sources. Strong proponents of the idea suggest its inclusion in the lines of the other privilege communications that exists. Despite there being a duty of every person to disclose information to the court there are a few exceptions that have been carved out for the same. The foremost is found in the Constitution itself, wherein under Article 20(3) there is a right against self incrimination. Second, in the Indian Evidence Act from Section 121-132, there is a list of privilege conversations that cannot compel disclosure even from the court including client- attorney privilege, spousal communication, state secret, etc. The rationale behind such privilege was provided in the 69th Report of the Law Commission which summarily stated that the relationships that are mentioned require this privilege for their proper functioning. It is for that reason that the law assumes such a privilege to be necessary.[25]

The only form of indirect legislation that ostensibly safeguards the interests of the source is Section 15(2) of the Press Council of India Act, 1978. While Section 15(1) provides for the powers of PCI to conduct inquiry, Section 15(2) provides protection to the sources as the PCI cannot compel the journalists to compel to their discloser. Moreover, another form of journalistic protection is provided by 2010, PCI- norms for journalistic conduct wherein Point 27 provides for a situation in which if any information is received from a confidential source, then its confidence should be respected. However, all these guidelines lack enforceability and are indicative of the PCI as being a toothless institution.[26]

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[23] Brij Bhushan and Anr. vs The State of Delhi (1950 Supp SCR 245); Sakal Papers (P) Ltd., and others vs The Union of India (1962 AIR 305)

[24] Noorani, A G (1982): "A Journalist and His Sources", *Economic & Political Weekly*, Vol 17, No 22, pp 898-99.

[25] Law Commission of India, 69th Report (Indian Evidence Act, 1872), page 628, para 62.5.

[26] Akoijam, Indira (2012): "How Effective Is the Press Council?" Hoot, 17 September, http://www.thehoot.org/web/home/story.php?storyid=6292&mod=1&pg=1§ionId=9&valid=true

Interestingly, the case laws on journalistic privilege have also been shadowed by the duty of a citizen to testify. With the exception of just one Patna High Court judgment, all the other judgments have not provided any emphasis on the delicate nature of the relationship between the journalist and his source and didn't provide any detailed explanation as to why such privilege should not be provided.

The earliest case on this point was adjudicated by the Bombay High Court in ***Javed Akhtar vs Lana Publishing Company***,[27] where the famous script-writer and his wife were allegedly defamed and he prayed for the disclosure of the identity of the source of the magazine. In this case, the disclosure was mandated as the article did not serve the public interest but related to the private life of the individual. The next case on this matter was ***Jai Prakash Agarwal v Bishambar Dutt Sharma***,[28] related to a contempt petition filed against reporters of two newspapers who had criticised a judicial verdict. The Court held in the case that there is no absolute journalistic privilege and therefore dis-closure of the identity was ordered. Further, in the matter of ***Court on its Own Motion v The Pio-neer***,[29] the Delhi High Court had held that the Court can direct the disclosure of sources for the interests of justice. However, before doing so, it has to analyse as to whether there is an overriding public interest for arriving at the same.

In cases of matters that touch the question of national security, the Court has always been reluctant in granting any kind of rights to individuals who oppose it. In the matter of ***People's Union for Civil Liberties v Union of India,***[30] the Court held that, "*a journalist or lawyer "does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics.*"[31] However, they made a mention of the PCI Act, stating that the journalists can withhold information as provided under the Act.

The only case that serves as a silver lining to the issue of journalistic privilege was In ***Re: Resident Editor and others of the Hindustan Times***,[32] where the Patna High Court after a comprehensive re-view of the case laws in India as well as the law governing source protection

[27] AIR 1987 Bom 339
[28] 30(1986)DLT21
[29] 68(1997)DLT259
[30] (2004) 9 SCC 580
[31] Id
[32] 1989PLJR821

throughout the world had made meaningful observations. They had most importantly provided for qualified privilege for a journalistic source. While observing that the freedom of press is indistinguishable from the freedom enjoyed by any citizen and that a journalist if asked in the normal circumstances should disclose the source, the Court held that ordinarily it cannot ask a journalist to reveal its source. This was held so because of the free flow of information was said to be a public cause. Therefore, in case of an existence of a public interest, the journalist cannot be asked to disclose a source.

But, what is the way forward for India then as their exists no concrete legislative or judicial frame-work for a source protection? The answer can be found out in the 93rd and 185th recommendation made by the Law Commission.The more important of the two is the 93rd report titled "Disclosure of Sources of Information by Mass Media". Therein, many questions were discussed forming the core of journalistic privilege including the class of people, publication, matter to be protected and the type of proceeding as well as the type of protection was under consideration by the Law Commission.

Finally, they recommended the inclusion of a suitable provision in the Indian Evidence Act, which was stated as follows:

Disclosure of source of information contained in publication

132A. (1) No Court shall require a person to disclose the source of information contained in a publication for which he is responsible, unless it is established to the satisfaction of the Court that such disclosure is necessary in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court or incitement to any offence.

Explanation. For the purposes of this sub-section,

(a) "publication" means any speech, writing, symbols or other representation disseminated through any medium of communication including through electronic media in whatever form, which is addressed to the public at large or to any section of the public.

(b) "source" means the person from whom, or the means through which, the information was obtained.

(2) The Court while requiring any person to disclose the source of information under subsection (1), shall assess the necessity for such disclosure of the source as against the right of the journalist not to disclose the source.

The recommendation firstly laid down that all kinds of journalists should be granted protection including casual journalist or even the lonely pamphleteer as mentioned in Branzburg v. Hayes. Secondly, it clarified that every form of publication should be protected as envisaged under Section 15(2) of the PCI Act. Further, they recommended that the the protection should extend to all types of proceedings and should be decided by the Courts upon considerations relating to the interest of justice or any demand of national security as against the need to protect the confidentiality.

However, this was never acted upon and thus never enacted.

CONCLUSION:

Upon stressing on the need for protection of the sources of the journalists, it is pertinent to mention that during these times of attacks on prominent journalists like Gauri Lankesh, it is indeed the need of the hour. India, today, can provide such a protection through three routes. The first would be the enactment of a statute by the legislature like the ones in the US. Second, would be the acceptance of the recommendation of the Law Commission and the inclusion of the lucid Section 132A. If none of these works, then the Supreme Court, being the custodian of justice of the country, can provide for the same by reading source protection into Article 19(1) through the means of Freedom to press and the importance of free flow of information. The only restriction on it thus would be under Article 19(2) which would be guided by the principle of Constitutional morality due to the recent judgment of ***Navtej Singh Johar vs Union of India***[33]. Further, with the recognition of right to privacy as a fundamental right by the Supreme Court,[34] it becomes all the more important for source protection as informational privacy forms a formidable part of the right and if the sources are deterred from disclosing the news, then it would interfere directly with their Right to life and personal liberty and thus the act would be unconstitutional.

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[33] WRIT PETITION (CRIMINAL) NO. 76 OF 2016

[34] K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors, WRIT PETITION (CIVIL) NO 494 OF 2012

DECRIMINALIZATION OF ATTEMPT TO SUICIDE: A NEW APPROACH

[*]**Abhishek**

Introduction

After long debates in courts and public outrage elsewhere and repeated recommendations from the Law Commission spanning over a period of three decades, Government of India has ultimately made a sensitive and humane step and struck off "attempt to commit suicide" as under Section 309 from the Indian Penal Code. The British who actually drafted this legislation during the 19th century updated the suicidal laws several decades ago in the parent country, Britain but India continued to be in the chains of this obsolete piece of law.

Nevertheless, with affirmative action by the Indian government to decriminalize attempt to suicide, it finally did justice to people who are in an urgent need of counseling and care rather than rigorous punishment. An attempt to suicide is more of a manifestation of a diseased condition of mind which nowhere deserves to be dealt with harsh punishment[1]. The current judicial scenario punishes the unfortunate victim twice over; he is agonized first by the circumstances that led him into taking the step and then hounded by the law. Thus, a person attempting to end his/her life should be considered as a victim rather an offender in the eyes of law.

Life is very complex. It is full of goods and evils, pleasures and pains; and perhaps all these mixed together make the life livable, or it would become unenthusiastic. Difficulties, hurdles and miseries are part of life and reality and for many they instill freshness and provide zeal and motivation for achieving the goal of life, but for some they become the cause of self- destruction. These people who cannot face the realities and decide to end the precious gift of life have been a cause of concern for the civilizations.[2]

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[*] LLB (Hons), Dr. RMLNLU, Lucknow

[1] LAW COMMISSION REP. NO. 210 (2008) p.11, available athttp://lawcommissionofindia.nic.in/reports/report210.pdf [Hereinafter "LAW COMMISSION REPORT"].

[2] B.P. Singh, Suicide: Caused and Legal Control, 30 BANARAS L.J. (2002) 184, available at www.bhu.ac.in/lawfaculty/vol31/B_P_Singh_final.doc.

Suicide deaths have puzzled the minds of social scientists, philosophers and jurists since the dawn of civilization. Since the Middle Ages, society has used first the canonic and later the criminal law to battle suicide. Following the French Revolution of 1789, criminal adjudications for attempting to commit suicide were abolished in European countries, England being the last to follow series in 1961[3] by the Suicide Act, 1961.

There can be various causes which can be attributed to Suicides such as depressive illness, schizophrenic attitude, intolerable physical illness and even poverty, unemployment, disappointment, dowry problems etc. but it is difficult to generalize any and conceptualize particular theory.[4] Other risk factors are childhood adversities such as sexual/physical abuse, abuse of alcohol or drugs, stressful life events such as death of a loved one, loss of a job or relationship, financial bankruptcy, imminent criminal prosecution and suffering from, or having recently been diagnosed with, a terminal illness etc.

Suicide law in India

Section 309 is based on the principle that lives of men are not only valuable to them but also to the State, which protects them. The State is under obligation to prevent persons from taking their lives[5]. Section 309 reads:

> ***Attempt to commit suicide.*** *"Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both."*

Suicide attempt must be a non-fatal self-directed potentially injurious behavior with an intent to die. Thus, if a person takes an overdose of poison by mistake or in a state of intoxication, he is not guilty under this section. ***[Dwarka Poonja Vs. Emperor]***[6]

Thus, technically speaking, suicide as such is not a crime under the IPC; it is only an attempt to commit suicide that is punishable under

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[3] The New Encyclopaedia Britannica, Vol. 11, Micropaedia, 15th ed. (1987), p. 359

[4] Preeti Singh, Should attempt to suicide be decriminalized?, 1.2 INT'L J. OF RES. & ANALYSIS 374, 375 (2013).

[5] P.S.A.Pillai, Criminal Law, 9th Edition, Lexis Nexis, Butterworths

[6] 1884 ILR 8Mad 5

this section. In other words, it is only when a person fails in his mission to commit suicide that the Penal Law comes into picture. The offence to commit Suicide is cognizable. A policeman is empowered to go to the hospital where the individual who attempted suicide is recovering, arrest him and put him through the torture of criminal proceedings at a time when he is already emotionally fragile.

Suicide is one of the important factors contributing to premature or unnatural end of precious human lives. In 1968, the World Health Organization (WHO) defined suicidal act as "the injury with varying degree of lethal intent" and that suicide may be defined as "a suicidal act with fatal outcome". According to one of their report, India has the highest suicide rate in the world after China and world leader in suicides among 15 to 29 years old. The highest suicide rate is not amongst the disadvantaged groups, which means that young, educated adults are facing problems.[7] Moreover, the International Association for Suicide Prevention, which every year sponsors 'World Suicide Prevention Day'[8], has also expressed the view that attempted suicide should be decriminalized[9]. The World Health Organization too, has stated that having suicidal behaviors specified by law as a punishable offence has many negative effects at a public health level and thus, attempt to suicide should be decriminalized[10].

Judiciary on Attempt to Commit Suicide

The constitutionality of section 309 of the Indian Penal Code, 1860 has been the subject matter of controversy several times before the Hon'ble Supreme Court and Hon'ble High Courts. The philosophical dilemmas surrounding the individual's right to life and death have been debated, across several disciplines with differing outlook and perspectives. India's Courts have however, over the last two decades, slowly woken up to the reality that in a misguided effort at preserving life, they have been doing everything to facilitate just the opposite. It will be appropriate to first note the following observation of the Hon'ble Delhi High Court in ***State Vs. Sanjay Kumar Bhatia***[11], a case under section 309, IPC:

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[7] Report of the Lancet Commission, 2013 on Adolescent Health and Well-being that was launched in London. Lancet is a renowned, Medical Journal.

[8] On September 10 as a part of its efforts to achieve effective suicide prevention.

[9] LAW COMMISSION REPORT

[10] LAW COMMISSION REPORT

[11] AIR1988CrLJ5499.

> *"A young man has allegedly tried to commit suicide presumably because of over emotionalism. The result is that a young boy driven to such frustration so as to seek one's own life would have escaped human punishment if he had succeeded but is to be hounded by the police, because attempt has failed Instead of sending the young boy to psychiatric clinic it gleefully sends him to mingle with criminals. The continuance of Section 309 I.P.C. is an anachronism unworthy of a human society like ours. Need is for humane, civilized and socially oriented outlook."*

Suicide is nowhere defined in the Indian Penal Code. While some suicides are glorified (for example, Jain practice *Santhara*), others are condemned. The need of a realistic definition of Suicide makes the provisions of section 309 IPC arbitrary and violation of Article 14 of the Constitution as it was held in ***Maruti Sripati Dubal Vs. State of Maharashtra***[12] Justice P B Sawant pointed out that *the discriminatory nature of section 309 IPC becomes particularly prominent when its provisions are compared with section 300 IPC. While defining murder, the legislature has taken pains to make a distinction between culpable homicide amounting to murder and one not amounting to murder and has prescribed different punishments for the two*. However, section 309 IPC prescribes the same punishment to all individuals irrespective of the different sets of circumstances under which the suicide attempt is made.Further, the Hon'ble Court observed that if the purpose of the punishment for attempted suicide is to prevent the prospective suicides by deterrence, the same is not achieved by punishing those who have made the attempts, as no deterrence is going to hold back those who want to leave the world either because of the loss of interest in life or for self-deliverance. The Court observed that those who make the suicide attempt on account of the mental disorders require psychiatric treatment and not confinement in the prison cells where their condition is bound to worsen leading to further mental derangement.

As stated above, if a person because of family disharmony, distraction, loss of near and dear relation or other cause of a like nature overcomes the instinct of self-preservation and decides to take his life, he should not be held guilty for attempt to commit suicide ***[Queen Emperor***

[12] 1985 CrLJ 931.

Vs. Ramakka][13] In such a case, the unfortunate man deserves indulgence, sympathy and consolation instead of punishment.

The matter reached the Hon'ble Supreme Court in ***P. Rathinam Vs. Union of India***[14] held that section 309, IPC violates Article 21, as the right to live of which the said Article speaks of can be said to bring in its realm the right not to live a forced life. Hon'ble Supreme Court disagreed with the view of the Hon'ble Bombay High Court that section 309 is also violation of Article 14. The Hon'ble Supreme Court was of the opinion that section 309 IPC was a "cruel and irrational provision and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide" and recommended that the section be deleted in view of the global trend in criminal laws. The need to decriminalise attempts to suicide has been considered by the Courts only from the perspective of the right to life under Article 21 of the Constitution not from a mental health perspective.

Dealing with the argument relating to the want of a plausible definition of suicide, the Hon'ble Supreme Court observed that irrespective of the differences as to what constitutes suicide, suicide is capable of a broad definition and that there is no doubt that it is intentional taking of one's life[15]. As for the reason that section 309 treats all attempts to commit suicide by the same measure without regard to the circumstances in which attempts are made, the Hon'ble Supreme Court held that this also cannot make the said section as violation of Article 14.

Since the 1970's, most criminal statutes the world over have been decriminalising attempts to suicide. However, in ***Gian Kaur Vs. State of Punjab***[16] the Hon'ble Supreme Court viewed this differently and held that the "right to life" is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and therefore, incompatible and inconsistent with the concept of "right to life". The Court made it clear that the "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. This may include the right of a

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[13] 1884 ILR 8 Mad 5

[14] A.I.R. 1994 S.C. 1844

[15] *Encyclopedia of Crime and Justice*, Volume IV, 1983 Edn page 1521

[16] A.I.R. 1996 S.C. 1257

dying man to also die with dignity when his life is ebbing out. But the "right to die" is an unnatural death curtailing the natural span of life. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The Hon'ble Court reiterated that the argument to support the views of permitting termination of life in such cases (dying man who is terminally ill or in a vegetative state) by accelerating the process of natural death when it was certain and imminent was not available to interpret Article 21 include therein the right to curtail the natural span of life.The 'right to die', if any, is inherently inconsistent with the 'right to life', as is death with life. It is significant to note that the Supreme Court in *Gian Kaur* focused on constitutionality of section 309, IPC. The Court did not go into the wisdom of retaining or continuing the said provision in the statute[17].

The Hon'ble court set aside the judgment of the Hon'ble Bombay High Court in *Maruti Sripati Dubal* case and the decision of the Hon'ble Supreme Court in *P. Rathinam* case wherein section 309 IPC was held to be unconstitutional and upheld the judgment of the Hon'ble Andhra Pradesh High Court in ***Chenna Jagdeeswar Vs. State of A. P.***[18] holding that section 309 of the IPC does not violate Articles 14, 19 and 21 of the Constitution.

Reports of the Law Commission of India:

The Law Commission of India exercised its function of reviewing the penal statutes and Central Acts of general application and importance.In accordance with the opinions expressed by the World Health Organization, the International Association for Suicide Prevention, France, decriminalization of attempted suicide by all countries in Europe and North America, the opinion of the Indian Psychiatric Society, and the representations received by the Commission from eminent personalities, the Commission concluded to recommend to the Government to initiate steps for repeal of law contained in section 309, IPC. The Law Commission has already recommended the removal of section 309 IPC, irrespective of its constitutionality or unconstitutionality, and doing so would be a bit of progressive step in India becoming a country governed by modern aspects of the law. The Law Commission had noted that someone trying to take their own life should be treated more as a cause of deep unhappiness and

[17] 210th Law commission Report.

[18] (1988) Cr LJ 549 (AP)

not a penal offence. Since then, several states and union territories concurred with this view and sought a repeal of the section.

In 1970, the Law Commission's 42nd report recommended repeal of section 309 IPC and found it "monstrous" to inflict further suffering on even a single individual who has already found life unbearable and happiness so slander[19]. The Indian Penal Code (Amendment) Bill, 1978, as passed by the Rajya Sabha, accordingly provided for omission of section 309. Unfortunately, before it could be passed by the Lok Sabha, the Lok Sabha was dissolved and the Bill lapsed in 1979.

The Commission submitted its 156th Report in 1997 under its then Chairman, Justice K. Jayachandra Reddy after the pronouncement of the judgment in *Gian Kaur* recommending retention of the section asserting that owing to rise in rise in terrorism in form of Suicidal attacks and drug trafficking in different parts of the country led re-thinking on the need to keep attempt to commit suicide an offence. However, the suggestion to repeal section 309 IPC came up again in the 210th report of the Law Commission in 2008, on Humanization and Decriminalization of Attempt to Suicide, submitted by its then Chairman, Justice A R Lakshmanan. Law Commission again has recommended repeal of Section 309 stating the penal provision to be harsh and unjustifiable. It stated that sympathy, counseling and appropriate treatment and not punishment will prevent a person from committing suicide. It called Section 309 a "stumbling block in prevention of suicides and improving the access of medical care to those who have attempted suicide."

A reason for the late implementation of the recommendations could be the conflict of opinions between the authorities. While the Law Commission held that attempt to suicide was a "manifestation of diseased condition of mind deserving treatment and care rather than an offence to be visited with punishment[20]", the Constitution Bench of the Supreme Court had in *Gian Kaur* upheld the validity of section 309 IPC on the ground that the Constitution, which gives the right to life, cannot also give the right to take one's life[21]. It did not go into the wisdom of retaining or continuing the same in the statute book.

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[19] It relied, among other sources, on the commentators on Manu in the *Dharmashastra* to state that a person who is driven to death is either "incurably diseased or meets with a grave misfortune".

[20] LAW COMMISSION REP. NO. 210 (2008)

[21] GianKaur v. State of Punjab, 1996 INDLAW SC 662.

In a recent development Minister of Home Affairs has decided to accept the recommendations of the Law Commission of India[22]. A draft note, containing the proposal to delete Section 309 from IPC has been sent to the Legislative Department of the Law Ministry for drawing up a draft amendment bill. Since law and order is a State subject, a mere repeal at the national level was insufficient, and States and Union Territories has to agree if the recommendations of the 210th report of the Law Commission had to be implemented. 18 States and 4 UTs supported the deletion of Section 309. Apart from the fact that it has been welcomed by majority of the states in the country and also by many social groups as stated above, there are five States in the Country viz., Bihar, Madhya Pradesh, Punjab, Sikkim and Delhi who have opposed this move on several grounds. The State of Bihar does not want the entire section to be repealed rather they want certain modifications in this Section in regard to the suicide attacks, whereas, Madhya Pradesh opposed it on the ground that hardly any arrests are made in such cases, and that this will encourage people to sit on fast unto death. Delhi also suggested that the police should be able to book people who try to kill themselves in public by ways such as self-immolation under other sections.[23]

The significant fact to be considered that criminalization has the opposite effect of deterring people from attempting suicide as it discourages them from reaching out for medical help and treatment. Recognizing it as an illness would also help us to cautiously address cases relating to abatement to suicide and it would definitely not aggravate the mental trauma and sufferings of a person who failed at ending one's life. Thus, decriminalization of attempt to suicide is a fair and reasonable step that the Centre has ultimately taken.

Need of Decriminalization of Attempt to Suicide:

The criminal prosecutions and the imposition of custodial and financial penalties on those convicted of suicidal behaviors constitute an insult to human dignity. In a large majority, the suicidal behavior is typically a symptom of psychiatric illness or is an act of psychological distress, indicating that the person requires assistance in his personal and psychological life, not punishment by fine and/or imprisonment.

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23 Vijaita Singh ,New Delhi, Posted: http://indianexpress.com/article/india/india-others/five-states-oppose-bid-to-decriminalise-suicide-attempt/

The stigma attached to attempt to commit suicide as a 'crime', discourages survivors to go ahead and seek medical help. Fear of penal action and having to deal with police and Courts further adds to the trauma. For Instance in an attempt to Suicide case, due to the legal hassle involved, hospitals in India often prefer to call in law enforcement agencies rather than treating the person involved. This has two main negative consequences. Firstly, hospitals often lose out on that 'golden hour' where medical intervention could have helped save/improve the person's life. Secondly, the subsequent police interrogation in the wake of such an attempt might lead a person to attempt suicide again and succeed. Decriminalizing suicides could allow for doctors and counsellors to reach out and provide people prone to suicide with the necessary coping mechanisms they need.

Punishing the person who attempted suicide does not dissuades the person to do so. Suicide may be regarded more as a manifestation of a diseased condition of mind deserving treatment and care rather than an offence to be visited with punishment[24]. It has also to be realised that a determined suicide can never be prevented by the fear of only one year's imprisonment or fine or both which section 309 IPC seeks to achieve. On the other hand, criminalization has the opposite effect of deterring people from attempting suicide as it discourages them from reaching out for medical help and treatment. Even the Hon'ble Bombay High Court had observed that those who make the suicide attempt on account of the mental disorders require psychiatric treatment and not confinement in the prison cells where their condition is bound to worsen leading to further mental derangement.[25]

Even the International Association for Suicide Prevention has pointed out that decriminalization of attempt to suicide would lead to recession in suicide rates as the same can be related to the medical and psychological assistance. There are no indications whatsoever that there was an increase in suicides in European and North American countries following decriminalization, in fact, it is believed that suicide rate has decreased as more suicidal individuals received the help they need.[26]

Attempt to commit Suicide only remains as a crime on the statute books in a few countries and are mainly from two regions viz. North African region and South Asian region. In the African region, Kenya,

[24] LAW COMMISSION REPORT,

[25] Maruti Dubal case, supra note 26.

[26] LAW COMMISSION REPORT,

Malawi, Nigeria, Rwanda, Tanzania, Ghana and Uganda are among the countries that currently criminalize nonfatal suicidal behavior. In the South Asian region, India, Pakistan, Malaysia, Singapore, Bangladesh, North Korea are among the countries that continue to criminalize the suicidal attempt. As seen from above, the attempted suicide has been decriminalized in whole of Europe, North America, much of South America and few parts of Asia.

United Kingdom, which is the last European country to decriminalize the attempt to suicide, enacted the Suicide Act of 1961 which states that, "The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated."[27], the reason for abrogation being the ineffectiveness of legal sanction as a deterrent. Additionally Suicide was decriminalized in Canada in 1972 and in Ireland[28]. Only a few countries from South Asia, which include Sri Lanka, Indonesia, Maldives and Thailand do not treat attempted suicide as a crime.

From a societal perspective, decriminalization is a much sensitive and humane way of dealing with the problem compared to prosecution. It would be a step further in evolving humane laws according to a modern medical approach. Additionally, it will also help in improving the reporting and generation of better data on suicides. The criminalization of suicidal acts makes it difficult for suicidal persons to receive necessary assistance. Improved and accurate statistics can help in better planning and resource allocation for efforts towards suicide prevention.

Crime is an unlawful act or default which is an offence against the public[29]. One of the most important features of crime is that there shall be some 'harm' to social interests. But, as has been correctly asserted by the Law Commission of India[30] as well as the by Hon'ble Supreme Court[31], an act of attempted suicide has no baneful effect on society. Technically, it should not be considered as an offence against the state. On the contrary, the state itself may be indirectly responsible for the plight of the victim who is left with no other alternative, except but to end his

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[27] Suicide Act, 1961,

[28] Section 2(1) of the Criminal Law Suicide Act of 1993 now reads, "Suicide shall cease to be a crime"

[29] K.D. GAUR, CRIMINAL LAW AND CRIMINOLOGY 7 (2002).

[30] LAW COMMISSION REPORT.

[31] P. Rathinam case, supra note 16.

life[32]. Hence, it is submitted that attempt to suicide should cease to be a crime because it is in no way a threat to the public at large.

On the other hand, measures must be brought into force to penalize offenders such as terrorists, and other offenders who seek to achieve their ends by the method of attempting self-immolation to draw attention to their demands. Police used to book them under Section 309 to prevent them from committing suicide. Hitherto, the police are going to be deprived of their power to stop such protests. For instance, a terrorist or drug trafficker who fails in his or her attempt to consume the cyanide pill and the human bomb who fails in the attempt to kill himself or herself along with the targets of attack, have to be charged under Section 309 and investigations be carried out to prove the offence. Thus, while the government decision to decriminalize 'attempt to suicide' is rightly being studied from a moral and philosophical perspective, it would also be wise to analyze its implications from a practical standpoint of powers of police in relation to protests and agitations. Government should find a way around this problem if it completely takes away the powers of the police to prevent unnecessary deaths. There is a need to carve a silver lining between the two so as to ensure national sovereignty and societal welfare. There are many preventive laws as well within the Criminal Law which may be used to counter such issues.

Also, now-a-days there is an ever-growing trend witnessed amongst certain individuals to enact a suicide drama at public places on trivial matters so as to gain cheap publicity in print and digital media. Many-a-times some jilted lovers also climb high rise buildings or towers threatening to end their life. The cases of such nuisance elements need to be dealt severely as they tend to disturb public peace and tranquility. Decriminalizing attempt to suicide should not come as a bonanza for such persons.

As far as Hunger Strikes including Fast-unto-Death are concerned, such tactics are resorted to as a means to pressurize some authority to concede demand(s) of such agitators. So generally speaking, intention of such person(s) is not to kill himself/herself. Only if such person(s) sitting on fast unto death proceeds to refuse all nourishment and the stage is reached where there is imminent danger of death ensuing, he/she could be held guilty of the offence of attempted suicide.

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[32] Government of India. Humanization and decriminalization of attempt to suicide (Report No. 210) 2008.

MENTAL HEALTH ACT, 2017 ON SUICIDE

In the past three years, the Central Government has taken a number of steps to improve the mental well-being of the people. On 28 March 2017, the Parliament passed the Mental Healthcare Bill, 2016 which will be repealing the existing Mental Health Act, 1987. The bill was already passed by the Rajya Sabha in August, 2016. After receiving the assent of the President on the 7th April, 2017, the Mental Healthcare Act, 2017 has come into existence.

The law was described in its opening paragraph as, "An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto."

"Mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterized by sub-normality of intelligence.[33]

Some features of the Act include:

1. The Mental Healthcare Act ensures every person has the right to access mental healthcare and treatment from health services run or funded by government. The Act assures free treatment for mentally-ill persons if they are homeless or poor, even if they do not possess a Below Poverty Line card.[34]
2. "This Act compels the state to have a mental health programme and it empowers the individual", Union Health Minister said in Lok Sabha, that Act (then bill) has a "patient-centric" approach with the aim of increasing participation of service users.
3. The Act also provides that a person with mental illness will have the right to make an advance directive in writing specifying the way the person wishes to be cared for and treated for a mental illness.[35]

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[33] Section 2(s) of the Mental Health care Act, 2017

[34] Section 18 of the Mental Health care Act, 2017

[35] Section 5 of the Mental Health care Act, 2017

4. The Mental Healthcare Act recognizes the role of care-giver as those who can be appointed as a nominated representative of a mentally ill person, members of the Central Mental Health Authority and State Mental Health Authorities, or members of Mental Health Review Boards.

5. On the clauses decriminalizing suicide, the Act states that a person who attempts suicide should be presumed to have severe stress, and shall not be punished. While supporting the bill Union Minister of Health and Family Welfare stated that the "Suicide is a mental disease. It will not be a criminal act, it will decriminalize. It recognizes that it is done under severe mental stress".

6. "Notwithstanding anything contained in section 309 of the Indian Penal Code, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code[36]", the Mental Healthcare Act states.

7. The Mental Healthcare Act also provides mentally ill people a right to confidentiality in respect of mental health, mental healthcare, treatment and physical healthcare. Photographs or any other information pertaining to the person cannot be released to the media without the consent of the person with mental illness[37].

8. The government will set up a Central Mental Health Authority at the national level and a State Mental Health Authority in every state. Every mental health institute and mental health practitioners including clinical psychologists, mental health nurses and psychiatric social workers will have to be registered with this Authority[38].

9. A Mental Health Review Board will be constituted to protect the rights of persons with mental illness and manage advance directives.

10. Under the Mental Healthcare Act, the punishment for flouting of provisions will attract up to six months in prison or Rs 10,000 fine or both. Repeat offenders can face up to two years in jail or a fine of Rs 50,000 to Rs 5 lakh or both.[39]

The most notable of all is that this Act effectively decriminalizes suicide attempt under the Indian Penal Code by mentally ill persons by

[36] Section 115 of The Mental Health care Act 2017

[37] Section 23 of The Mental Health care Act 2017

[38] Section 33 & 45 of The Mental Health care Act 2017

[39] Section 108 of The Mental Health care Act 2017

making it non-punishable. Electro-convulsive therapy,[40] which is allowed only with the use of anesthesia, is however out of bounds for minors.

Conclusion

In order to declare the Indian Penal Code, a modern Code in every possible sense (or for that matter any legislation) amendments and repeals are necessary to bring the provisions in tune with the needs of the present day.

When a distressed and troubled individual tries to end his life, it would be cruel and illogical to visit him with punishment on his failure to die. Section 309, which deals with criminalization of attempt to suicide should be immediately erased from the statute book, as it is superfluous and its inability to serve the purpose of reducing the suicide rates. As it is rightly observed in ***Maruti Shripati Dubal's*** case that, no deterrence is going to hold back those who want to die for a special or political cause or to leave the world either because of the loss of interest in life or for self-deliverance. Thus, in no case does the punishment serve the purpose and in some cases it is bound to prove self-defeating and counterproductive.

The decision to repeal Section 309 should not be treated as a license to die, but as an opportunity for the Government, society and everyone around to assist, support and care for those in agony. Now that section 309 is done away with, the state must see to it that there is ample legislation and procedures to report all sorts of suicide attempts. The Government ought to discover ways and methods by which people can be prevented from being driven to commit suicide. The society should come together and take it upon itself as a societal responsibility to protect our folks in distress and in need of support and care.

Government will have to actively undertake various steps such as educating people about the repeal of the disputed provision, importance of life etc. In addition, the government would also have to take into consideration the extra costs which might be involved in implementation of new measures.

The purpose of the law should be to serve the people at large and not to scare them.

"Do not punish the helpless, help the helpless." - Justice Shri Jahagirdar

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[40] Section 94(3) of The Mental Health Care Act, 2017.

RIGHT TO INFORMATION ON THE INTERNET

[1]Pooja Tiwari & [2]Devika Tiwari

ABSTRACT

The World Wide Web transformed the Internet from a technological infrastructure into a popular network linking people throughout the world and becoming the harbinger of 'information age'. However the corresponding copyright laws have failed to keep its pace with the developments of digital technology. Digital Copyright laws seem to take authors' economic incentives very seriously over its other object of free flow of the information. In the present paper an attempt is made to elucidate the right to information of the users on the internet. The research paper contains a detailed analysis of the evolution of copyright laws, object of digital copyright laws, right to information of the users, the comparison of the rights in various jurisdictions and its benefits. In the end a conclusion is reached that there is exists a right to free information of users on the Internet. Right to free information in present time has become a myth in the hands of the copyright authors, publishers and distributors who with their vast resources and army of lawyers undermine this right of the users over their right to economic exploitation of their work. There is a dire need of devising a middle path, where owners relax some of their rights for public use and in turn certain restrictions be imposed on free flow of information so as to balance both these rights if a permanent solution is sought to be achieved for the problem.

Keywords: Digital Copyright infringement, Right to information, Berne Convention, fair use, fair dealing, World Intellectual Property Organization, the WIPO Copyright Treaty

INTRODUCTION

The electronic age has kick started the information boom and with an ever increasing pace, it has begun to spread its canvas to engulf mankind as its greatest beneficiary. From the times of Gutenburg's printing press to the Modern day internet technologies, a lot has flown beneath the bridge. The world has witnessed a progressive transition from the physical

[1 & 2] Law Graduates from Amity Law School, Delhi

tangible to the ephemeral. We are leaving the industrial world of the past 250 years and entering a new networked world of cyberspace- the global interactive multimedia society and enjoy easy and cheap access to varied genres of entertainment media such as MP3, music, full length DVD movies, software, games etc. at the click of a mouse button. This pervasive information gateway has revolutionized the economics of accessing information and bears an influence on every facet of human specie.

Copyright How Started

Lowell once described copyright as, "You can't see it, but it is fifteen pounds to the square inch all at once[1]." Before the invention of printing press the authors attached a sense of honor in the wide circulation of copies of their work. This was evident as Homer and the Rhapsodists published their work by words of mouth. The Greek dramatists relied on public performances of their plays for pecuniary rewards. It was only after the invention of Gutenburg's printing press in 1436 that an author saw a possibility of definite profit from the sale of his work and an injury resulting from denial of the same by sale of unauthorized copies.[2]

In 1483, King Richard III allowed foreigners to import manuscript and books in England and print them there. This lead to creation of a class of intermediaries who functioned as both printers and booksellers called 'Stationers' in England[3]. In 1529, Henry VIII made Stationer's Guild into a company comprising of 97 London publishers and in 1556 the Stationers Company through a Royal Charter was granted to right to administer system of private registration of all published works[4]. The Licensing Act of 1662 in England prohibited printing of any book not licensed or registered with Stationer's Company[5]. Thereafter with the evolution of the society a need of adequately rewarding the authors and publishers was felt and in 1709 world's first copyright Act of Queen Anne was passed in United Kingdom[6]. Later in 1911, the Copyright Act was adopted

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[1] "Brander Matthews", *Political Science Quaterly*, Volume 5, No 4 ,(December 1890), pg 583-602.

[2] Ibid.

[3] Stephen M. Stewart, *International Copyright and Neighboring Rights*, Butterworth's London, 1983, p.20.

[4] Ibid

[5] E.P. Skone James, et al, *Copinger and Skone James on Copyright*, 13th Edn., Sweet & Maxwell London, 1991, para 1-24.

[6] VK Ahuja, *Law Relating to Intellectual Property Rights*, 2nd Edn., Lexis Nexis, , Noida, 2013, pg 17-20.

which repealed some twenty legislations on the subject and abolished common law copyright.

In India the earliest statutory law on copyright was enacted by East India Company in 1847 known as the Indian Copyright Act which affirmed the applicability of English copyright law. Thereafter the 1911 Act was made applicable in India which was later modified to suit Indian conditions and Indian Copyright Act of 1914 was passed. This Act was applicable in India till it was replaced by Copyright Act of 1957.[7]

Object

The copyright law has a two fold objective:

First it assures creative people and people who risk their capital in putting their works before public, the right to their original expression[8] which includes giving to the author or in some cases the employer rights to enjoy certain exclusive rights over the work for a limited period of time.

Second, the copyright law encourages others to build freely upon the ideas and information conveyed by a work and allows them to make some use of the copyright material. The reason for having provisions[9] relating to free uses is to strike a balance between the interests of copyright owners and society at large.

Contemporary Copyright

Till the middle of the nineteenth century a number of bilateral treaties were concluded between various States for copyright. Due to lack of uniformity a need arose for a global copyright protection system which led to formulation of the Berne Convention for the Protection of Literary and Artistic Works on September 9, 1886.[10] Article 2 of Berne Convention gives an illustrative list of copyrights which extend to all literary,

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[7] Kala Thairani, *How Copyright Works in Practice: The Copyright Act, 1957 and Judicial Interpretation- A Case Law Study Perspective*,1st Edn., Popular Prakashan Pvt. Ltd, Bombay, 1996, p.2.

[8] *In Holy Faith International and Others v. Dr. Shiv K. Kumar*, 2006(33) PTC 456, 463(AP), the court observed that the primary function of a copyright law is to protect the fruits of a man's work, labor, skill or test from being taken away by other people.

[9] Section 52, of Copyright Act 1957.

[10] "International Treaties and Conventions on Intellectual Property", available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf (viewed on 04-01-2018).

scientific and artistic works, whatever be the mode or form of its expression, and their derivatives. This was revised quite regularly, approximately every 20 years, in order to find responses to new technological developments. By the 1908 Berlin Revision this was expanded to include photos, choreography, architecture, recording right of music and cinematographic right. The 1928 Rome Revision expanded this to include lectures, moral, broadcasting and adaptation rights. In the 1948 Brussels Revision, this was expanded to include television and public performance rights. The 1971 Paris revision expanded this to include folklore, legitimate system for films and reproduction right.[11]

In the 1970s and 1980s, a number of important new technological developments took place - reprography, video technology, compact cassette systems facilitating "home taping", satellite broadcasting, cable television, the increase of the importance of computer programs, computer storage of works and electronic databases, etc. For a while, the international copyright community followed the strategy of "guided development" by study and discussion, rather than trying to establish new international norms. At the end of the 1980s, however, it was recognized that guidance would not suffice any longer. After the adoption of the TRIPS Agreement under the auspices of GATT, the preparatory work of new copyright and related rights norms in the World Intellectual Property Organization (WIPO) committees was intensified to deal with problems not addressed by the TRIPS Agreement. To this end, in 1996 the WIPO Diplomatic Conference on Certain Copyright and Related Rights Questions adopted two treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).[12]

Digital Copyright

From one perspective, the Internet has been described as the Worlds Biggest Copy Machine. Whereas the earlier technologies such as taping allow mechanical copying by individual consumers, the do so in limited quantities requiring considerable time and resulting in copies of inferior quality. Today, information and communication technologies have radically changed the way works and services circulate, and have also

[11] "Berne Convention-Chronology", available at https://cyber.harvard.edu/people/tfisher/IP/Berne%20History.pdf (viewed on 04-01-2018).

[12] "International Treaties and Conventions on Intellectual Property", available at http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf (viewed on 04-01-2018).

changed the way protected works are accessed and used. They have made it possible for information to be communicated at high speed over wired or wireless networks practically everywhere and have allowed for the opportunity of simultaneous access by an unlimited number of individuals. Digitization and circulation of works over networks such as the Internet means that low-cost, high-quality copies can be made quickly, and these copies can also be sent to many people around the world, irrespective of borders. This could result in disruption of traditional markets for the sale of copies of programmes etc.[13]

RIGHT TO FREE INFORMATION ON THE INTERNET

Object and Benefits

Rights in intellectual property should strike a balance between ensuring sufficient private returns on investment in innovations in exchange for disclosure and diffusion of those new inventions.[14] Through this exchange, human endeavor flourishes. Innovators are inspired by new ideas or artistic visions, and those inspirations lead to the creation of new works, such as books and music or inventions for the nations benefit.[15] Yet if there is unequal access to new technology, this exchange is no longer what the society has bargained for. Such inequality has become major policy concern because a knowledge and technology divide could lead to a whole segment of population becoming less and less capable of participating in the economy.[16]

Additionally, disparities in national legislation could hamper the flow of personal data across the borders. Restriction on these information flows could cause serious disruption in important sectors of the economy, such as banking and insurance[17]. When societies and cultures are subject to the free flow of data, the markets available to innovator and consumers increase, as does diffusion of knowledge, technologies, and new business practices. This is especially true in the advent of Internet. Globally the

[13] Rajnish Kumar Singh, *Neighbouring Rights under Copyright Law*, 1st Edn., Satyam Law International, New Delhi, 2015, p. 216.

[14] Dennis Campbell and Chrysta Ban, *Legal Issues in the Global Information Society*, Oceana Publications Inc., New York, 2005, p. 43.

[15] Report on Department of Justice's Task Force on Intellectual Property, United States Department of Justice, Office of Attorney General, at p.1(October 2004).

[16] Dennis Campbell, op. cit., p.44.

[17] Ibid.

Internet supports critical infrastructures such as energy, transportation, and finance interconnects the world by allowing easy flow of information across national borders. Harmonization[18] of the opposing interests of intellectual property rights and the public domain is essential.[19]

Scope of the Right

International Conventions

The WIPO predicted that since most literary and artistic works can be digitized, therefore the most logical way to access them is by the internet.[20] It also predicted that Internet would become an immensurable library of all existing work which would be available worldwide. This is the big bang theory of cyberspace, where masses of digital works whirling over electronic networks become the breeding ground for explosions in global intellect.[21]

Berne Convention does not expressly contain limitations on the author's exclusive rights except Article 2(8) which denies copyright to "news of the day or miscellaneous facts having the character of mere items of press information".[22]

WIPO Copyright Treaty aims to:

"..maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information as reflected under Berne Convention".[23]

Despite enhanced provisions, it remains true to *quid pro quo* concept and reaffirms the limits of copyright to expressions and not to ideas, procedures, methods of operation, or mathematical concepts, or raw data.[24] Furthermore the WCT places limitation on the contracting

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[18] "Organization for Economic Cooperation and Development, Guidelines For The Security Of Information Systems And Networks", 2002 Sci.& Info. Tech.9 at p.7(2002).

[19] Dennis Campbell, op. cit., p.44

[20] Electronic Commerce and Copyright: A key Role for WIPO, World Intellectual Property Organization, Advisory Committee on Management of Copyright and Related Rights in Global Information Networks, at section II(1)(1999).

[21] Dennis Campbell, op. cit., p.51.

[22] Article 2(8) of Berne Convention.

[23] Preamble, World Intellectual Property Organization Copyright Treaty.

[24] Article 2, World Intellectual Property Organization Copyright Treaty.

parties to allow for exceptions such as fair use by not allowing the author to exercise rights beyond Berne Convention.[25]

In Europe, the Electronic Commerce Directive contains certain exclusions to protect information service providers from liability when they act as intermediaries in transmitting or storing information when they:-

i) Transmit information at the request of another (Article 12)

ii) There is automatic, intermediate and temporary storage of information to allow for more efficient transmission of information.

iii) They store information provided by and at the request of recipient provided the service provider does not have knowledge of illegal activity and on being aware of it they act expeditiously to remove or disable access to the information (Article 14).[26]

The Database Directive protects unoriginal databases in which there has been substantial investment and is distinguished from copyright protection, which grant protection in database based on authors' own intellectual creation[27]. The directive defines database "as a collection of independent works, data, or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means".[28] The European Parliament and the European Union recognize that database is a "vital tool of development of an information market".[29]

United States of America

The limiting doctrine on authors' rights grants the author substantial but not complete rights over the work, and the public some.[30] Two systems of limitations have evolved. The United States Practices practices the open system of fair use doctrine, which leaves the determination of

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[25] World Intellectual Property Organization Intellectual Property Handbook: Policy, Law, and Use, http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf (viewed on 04-01-2018)

[26] Simon Stokes, Art and Copyright, 2nd Edn., Oxford and Portland Oregon, London, 2012, p. 154.

[27] Stephens, "Database Rights: A Surprise Judgment by the European Court of Justice", 18 World Intell. Prop. Rep.12(1 December 2004).

[28] Directive96/9 EC, Article 1(2).

[29] Directive96/9 EC, Recital 9.

[30] Lessig, Code and Other Laws of Cyberspace, Basic Books, New York, 1999, p.135.

permissibility to courts based on number of criteria, initially set forth by statute[31], but evolving with case law.[32] Other system is the closed catalogue of exceptions, prevalent mostly in Civil Law countries, under which each of individual exception is given in detail by statute. Some of these rights available in United States are:

1. Necessary copies that are required for operation of a program or a back up copy;[33]
2. The 'first sale doctrine'[34];
3. The 'fair use' doctrine[35].

The first sale doctrine recognizes that the buyer of a copyrighted work only acquires a limited right to alienate, so long as the alienation does not result in the production of a new copy in contravention of the right to produce. The problem becomes more complicated in the digital world where questions like what amounts to first sale, who can legally sell and distribute copyrighted work and how is rental right to be allocated arise. The ephemeral and ethereal character of this technology raises problems of its own kind.[36]

The fair use doctrine recognizes the author's individual and public right of fair use so long as the use does not disturb the economic and in some countries the moral right of the author. It was recognized that it is necessary to maintain a balance between copyright and "larger public interest" particularly education, research and access to information and the various treaties had provision to address these concerns. Fair use as under US Law should satisfy the following 'four factor test'[37]:

i) Purpose and character of your use

ii) Nature of the copyrighted work

iii) Amount and substantiality of the portion taken and

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[31] 17 United States Code, section 107.

[32] *Harper & Row Publishers Inc. v. National Enterprises*, 471 U.S. 539(1985); Campbell v. Acuff-Rose Music Inc., 510 U.S. 569(1994).

[33] 17 United States Code, section 117(a).

[34] 17 United States Code, section 109.

[35] 17 United States Code, section 107.

[36] AK Koul et al.(Ed.), *Law of Copyright: From Gutenberg's Invention To Internet*, 1st Edn., Faculty of Law, University of Delhi, Delhi, 2001, p. 252.

[37] 17 United States Code, section 107; Campbell v. Acuff Rose Music, Inc., 510 U.S. 569(1994).

iv) Effect of the use upon potential market.

The right of fair use has to continue in the digital world so as to contribute to the human development. However differential treatment is required in digital environment because of its distinguishing character.[38]

Under the Digital Millennium Copyright Act, two exceptions are provided for circumventing technological measure of a copyrighted work:

a) Reverse engineering for the sole purpose of achieving interoperability of an independently created program.

b) Prevent collection of personally identifiable material.[39]

Right to Information also covers data and facts as they are the basic building blocks for subsequent inventions and hence should be available free to all.[40] As summarized by the United States Supreme Court:

"…the economic policy behind clause empowering Congress to grant patent and copyright is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in science and useful art."[41]

United Kingdom

The UK laws, which proceeds more circumspectly by means of its categories of "fair dealing" and other nominate defenses, allow protection for a range of cases.[42] UK however fails to take initial step of creating a general exception of copyright liability of private use.[43] But limited provisions exist in terms that private researchers and students may engage in fair dealing. People are free to record broadcasts privately for time shifting. A new proposed limited private copying exception is also around the horizon.[44]

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[38] AK Koul, op. cit., p 251.

[39] 17 United States Code, section 1201(f) and (i).

[40] Green, "Copyrighting Facts", 78 Ind. L.J., 2003, p.922.

[41] *Mazer v. Stein*, 347 U.S. 201, at p.219 (1954).

[42] In Europe Countries which have such a defense have nonetheless introduced levies on equipment and recording media, such as tapes, by which to some degree to compensate right-owners for private copying. The UK has long resisted such a private interest tax.

[43] William Cornish et al, *Intellectual Property Patents, Copyright, Trademark and Allied Rights*, 8th Edn.,Thompson Reuters, London, 2013, p. 878.

[44] Modernizing Copyright: A modern robust and flexible network, available at http://www.allpartywritersgroup.co.uk/Documents/PDF/Modernising-copyright.aspx (viewed on 04-01-2018).

India

In India, the provisions of Section 52 of the Copyright Act, 1957 provide for certain acts, which would not constitute an infringement of copyright namely fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of-

- private use, including research;
- criticism or review;
- reporting current events in any print media;
- by broadcast or in a cinematographic film or by means of photographs;
- reproduction for the purpose of a judicial proceeding or of a report of a judicial proceeding;
- reproduction or publication of a literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature;
- the reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force;
- the reading or recitation in public of any reasonable extract from a published literary or dramatic work;
- the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions,
- the making of sound if made by or with the license or consent of the owner of the right in the work[45]

As per Section 52 (1)(ad) making of copies or adaptation of computer programme from a legal copy for non commercial personal use is also fair use. Explanation to Section 52 (a) provides that storing of any

[45] "Exceptions to Copyright infringement-Fair Dealing", available at http://www.lexology.com/library/detail.aspx?g=4c426ccb-a002-4256-9a0a-36039b2856a3 (viewed on 04-01-2018).

[28] Section 2(1) of the Criminal Law Suicide Act of 1993 now reads, "Suicide shall cease to be a crime"

[29] K.D. GAUR, CRIMINAL LAW AND CRIMINOLOGY 7 (2002).

[30] LAW COMMISSION REPORT.

[31] P. Rathinam case, supra note 16.

work in electronic medium for purposes mentioned in the said clause including incidental storage which is not itself an infringing copy will not constitute infringement. This justifies as to why cache would be put under fair use.

The term "fair dealing" has not been defined in the Act and depends entirely upon the facts and circumstances of a given case. The line between "fair dealing" and infringement is a thin one. In India, there are no set guidelines that define the number of words or passages that can be used without permission from the author. Only the Court applying basic common sense can determine this. It may however be said that the extracted portion should be such that it does not affect the substantial economic interest of the Authors to constitute fair dealing.

Certain changes were incorporated by way of the Copyright (Amendment) Act, 2012. The existing clause (1)(a) has been amended to provide fair dealing with any work for the purposes of private and personal use with an exception that of a computer programme. With this amendment in force, cinematograph and musical works also came under the ambit of the works to which the fair use provision has been extended to. This amendment further provides for fair use of the work aimed at the benefiting the disabled. It facilitates reproducing, issuing of copies, adapting or communicating to the public any work in any accessible format, for disabled persons to access works including sharing with any person with disability for private or personal use, research or for any other educational purposes.

In a case[46], the High Court examined the applicability of defence of "fair dealing" and held that doctrine of fair use legitimizes the reproduction of a copyrightable work provided the purpose served by the subsequent or infringing work is substantially different from the purpose served by the prior work. Interestingly, the Court used the balancing test in "fair use" doctrine in United States copyright law for resolving whether Section 52 which encapsulates "fair dealing" doctrine applies.

It is further interesting to note that the High Court used "fair dealing" doctrine and "fair use" doctrine synonymously. This approach of the Court should be seen in the light of the fact that both the doctrines are

[46] T*he Chancellor Masters and Scholars of The University of Oxford v. Narendra Publishing House and Ors.*, IA 9823/2005, 51/2006 and 647/2006 in CS(OS) 1656/2005], *Delhi HC; Syndicate of The Press of University Of Cambridge V. B.D. Bhandari & Ors*, Rfa (os) no. 21 of 2009 and fao (os) no. 458 of 2008.

conceptually similar and the only difference being with regard to the flexibility of the later doctrine. Hence the adoption of the latter shall help the judiciary to give a liberal interpretation to Section 52 of the Copyright Act. The four-factor test of US for "fair use" was also adopted in this case It is well settled that all the above said factors are to be treated together and no undue preference can be given to any one of them.

As far as the first factor is concerned, the Court must look into the nature of the use i.e. whether it was for educational purposes or for review or criticism. The test is whether the work merely supersedes and supplants the original work or it adds something new, with a further purpose or different character. In other words, the test is how transformative the new work is. This determination is closely knit with the other three factors, and therefore, central to the determination of "fair use". For example, if the work is transformative, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work[47].

Conclusion

Thus it can be seen that there is a wide gap between the right of authors to copyright of their work in one end and the right of public to get access to such information with the scales titling in favor of authors. A balanced approach is needed wherein both the interests are balanced. An imbalance titling towards authors creates an environment where the masses are deprived of access to new works and hence resulting in limiting resources to public for innovation in the long run. An imbalance towards free flow of information creates an environment devoid of any economic incentive for the author which in turn would create loss of motivation to create new work. The present scenario is a tussle between copyright authors who are demanding full rights to their work as under the traditional system and the infringers demanding free access to such information available on the internet up till now. Policy makers giving in to either of the extremes would be completely absurd, and a middle path should be devised wherein the copyright owners give up some of their copyrights and the infringers paying some remuneration to the authors.

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[47] Mihir Nainiwadekar, “Decoding Indian Intellectual Property Law”, available at http://spicyip.com/2008/11/guest-post-delhi-high-court-on.html (viewed on 04-01-2018).

As Justice ***Blackmun noted in Sony Corp. v. Universal City Studios***, "When the ordinary user decides that the owner's price is too high and forgoes use of the work, only the author is the loser."[48] It is pretty clear that even if protected material will not be offered free to the public it is pretty certain that:

i) technology will continue to evolve, producing smaller and smaller files with little quality degradation; and

ii) digital sharing would grow regardless of what happens in the courtroom and in Legislature.[49]

Court make decisions on direct infringement on a case to case basis, law suit based on indirect liability and sweep together socially harmful uses of a program or service either permitting both uses or condemning both. A middle ground has largely been lacking and needs to be taken.

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[48] *Sony Corp. v. Univeral City Studios*, 467 US at 477(Blackbmun dissenting).

[49] Liz Robinson, "Music on the Internet: An International Copyright Dilemma" (2000) 23 U.Haw. L. Rev. at 183.