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EDITORIAL

I am very thankful to my institution, Rajiv Gandhi National University of Law, Punjab, Patiala for creating a positive environment for research and for initiating research ventures in forms of Journals and Research Centers which are doing their best towards the attached moral and professional obligations. The RGNUL Social Sciences Review (RSSR) is one of these features of the institution and is an exclusive collection of research works done by academicians and professionals from different social sciences and realms of profession. The contributions made till date have reflected crucial social, legal, financial, cultural issues with recognizable levels of sensitivity and intellect. The journal aims at encouraging researchers to undertake authentic and useful topics to write papers and contribute thereon.

Society is growing in many ways. There is a continuous increase in stratification, and other social processes. Social issues are also increasing. Crime is taking multiple forms to occur and the regional essence is even more interfering in the entire above mentioned scenario. For democracies as big as India's, it becomes a big challenge to control the situation; since the people are different and the minds are even more diverse and unique. The thinking of people; the law behind the scenes; economic and religious factors, gender guiding most of the social trends and behavior and the like are all such factors which space out ample of topics to be pondered over and researched upon. Hate crimes in name of religion; gender; culture; cyber crime; brutal rapes and murder culture; regionalism and the related crimes and violence, and the like are a new range of discourse influencing the research paradigm of the nation and rather the whole world. There is a need that academicians and researchers and other professionals join hand through research and workably address and redress the social issues. There is a need to reach to common masses through such research ventures so that they are made aware about the root causes behind their sufferings. Environmental degradation has affected many aspects of human life including physical as well as mental health, agricultural productivity, rural stability, urban life, and the like. But many of the commoners cannot understand the inter-linkage between these changes and the environmental alterations. Today, Youth Unrest features on Indian face very ardently and it will not be wrong if said that the nation's future and nation's overall health is on stake. The youth who should ideally be busy in studying, earning livelihood, doing research work, striving for excellence, is on roads vending for multiple rights and demands undone or dejected. There is a need that this issue is taken as a priority by researchers and academicians. There is a need to understand the reasons behind frustration in youth and to make situation at ease by contributing empathetic interpretation of the same so that the nation's overall growth does not suffer more. Social Sciences can do this task very efficaciously; and thinking on same lines the present journal is being nurtured as a dream.

Genuine research works and good journals can be a source of amelioration at the grass root level; which RSSR also aims at. We at RGNUL, apply all academic skills to promote research and encourage researchers to address the cardinal fronts of discourses surfacing national as well as international communities and societies. The Call for Papers is published periodically and we receive ample number of research papers and articles, which are put in process of doubly blind peer review and are published only after they cross that level successfully.

I congratulate all the contributors whose works have been published and welcome them and all others to contribute more for the coming issues of RSSR.

Blessings for all & Warm Regards

Dr. Jasleen Kewlani

Chief Editor

RGNUL Social Sciences Review

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SURROGACY IN REFERENCE TO THE SURROGACY BILL: A LEGAL DISCOURSE

*Alifah Ahmad

1. Surrogacy

India's draft Surrogacy (Regulation) Bill has sparked back one of the most heated debate in the country, regarding commercial surrogacy. The new bill extends a blanket ban over commercial surrogacy in India which Hon'ble External Affairs Minister Sushma Swaraj justified by saying "It goes against Indian ethos.[1]" This paper aims to descriptively analyze the position of surrogacy in India after the current bill and the pros and cons of the same.

1.1 Introduction:

Lord Patrick Devlin in his article "Morals and the Criminal Law" wrote that:

No act of immorality should be made a criminal offence unless it is accompanied by some other feature such as indecency, corruption or exploitation ... It is not the duty of law to concern itself with immorality as such ... it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive and injurious[2].

For a pronatalist country that India is, childlessness is almost socially unacceptable and that is one primary reason why Assisted Reproductive Technology is in full bloom. As an outcome, with developing medical facilities and easy availability of "borrowed womb" India gradually became the surrogacy hub for the world. According to an official estimate, it has grown to be an industry worth $2.3 Billion with 5,000 children being born every year.[3] Medical tourism became a crucial form of tourism in India, generating hefty revenue until the new bill was passed by Union Cabinet on 24th of August, 2016 and with it came a blanket ban over the concept that Commercial Surrogacy is. The word 'surrogate' has its origin in Latin 'surrogatus', past participle of 'surrogare', meaning a substitute, that is, a person appointed to act in the place of another. Surrogacy is an arrangement by which a woman, called as surrogate, carries and delivers the offspring of the commissioning parents and it has been recognized in India under the ART treatment.[4]

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1 'The surrogacy bill is dangerous overreach' (2016) Livemint, available at http://www.livemint.com/Opinion/8LQjqMqXaRVDTPLCEUv31L/The-surrogacy-bill-is-dangerous-overreach.html(accessed on 13 September 2016).

2 R.M Dworkin (Ed.), *The Philosophy of Law,* Oxford University Press, United Kingdom, 1977, pp. 68.

3 'Despair over ban in India's surrogacy hub' (2015) BBC, available at http://www.bbc.com/news/world-asia-india-34876458 (last accessed on 13 September 2016).

4 Jim Buchanan, *"Baby M" & Surrogate Motherhood: A Resource Guide*, Vance Bibliographies, USA, 1987; K. I. Winston, & M.J. Bane, *Gender and Public Policy: Cases and comments*, West View Press, Inc., Boulder (Colorado), 1993.

Thus a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg or from the implantation in her womb of a fertilized egg from other woman.[5] According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person.

Surrogacy is commercial or altruistic depending on whether the surrogate receives financial reward for her pregnancy or the relinquishment of the child, or not.[6]

1.2 Surrogacy in India

In the light of various instances found in Indian mythology, it is evident that the concept of surrogacy has been the part of our culture since the very beginning. The world's second and India's first IVF (in vitro fertilization) baby, Kanupriya alias Durga was born in Kolkata on October 3, 1978 about two 8 months after the world's first IVF boy, Louise Joy Brown born in Great Britain on July 25, 1978.

India legalized commercial surrogacy in 2002 and is the first country to have a thriving national and transnational commercial surrogacy industry[7]. India, slyly, has become a flourishing centre of a fertility market with its "reproductive tourism" industry reportedly estimated at Rupees 25,000 crores today[8]. Clinically called "Assisted Reproductive Technology" (ART), it has been in vogue in India since 1978 and today an estimated 200, 000 clinics across the country offer artificial insemination, IVF and surrogacy.[9] Several reasons can be cited for the booming surrogacy tourism in the country. To begin with, commercial surrogacy is significantly cheaper here. While the cost of commercial surrogacy may exceed US$100,000 in other parts of the world, the cost in India is a third of that amount.[10] Additionally, India is more desirable than other destinations because of minimal language barriers, easy availability of surrogate wombs, abundant choice of donors, use of advanced medical technologies and most

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5 Law Commission of India, Two Hundred and Twenty Eight Report on 'Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy (2009)'.

6 Ibid.

7 M. Chang, 'Womb for rent: India's commercial surrogacy' (2009) Harvard International Review, available at https://hir.harvard.edu/womb-for-rent-indias-commerci al-surrogacy/ (last accessed 13 September 2016).

8 Law Commission's 228 th Report, supra footnote 5.

9 A. Malhotra, 'TALKING POINTS – Surrogacy Paper:Cape Town Conference' & lt; http: // www.millerdutoitcloeteinc.co.za/family-law-cape-town-img/Conf2013/Conf2013/Paper %20-%20Malhotra%20R%20-%202.pdf (last accessed on 13 September 2016).

10 A. Pande, 'Transnational commercial surrogacy in India: Gifts for global sisters?' (2011) *Reproductive BioMedicine Online*, available at https://www.rbmojournal.comarticle/S1472-6483(11)0411-1/fulltext (last accessed 14 September 2016).

importantly lack of law to regulate surrogacy in clinics.[11] Moreover, the lack of regulation, Indian women being less prone to having smoking and drinking habits, the provision of enjoying the biological parent's name in the birth certificate of the baby born, and the younger age of the surrogate mother holding a better chance of getting a successful pregnancy further act as catalysts.

1.3 Need for the bill and expectations

There are no clear legal provisions in effect yet to monitor the malpractices of Assisted Reproductive Technology (ART). In the absence of the same, the Indian Council of Medical Research in 2005 issued guidelines for the authorization, supervision and regulation of surrogacy clinics, but those remain on paper. The guidelines failed to address many existent problems at hand and therefore, "exploitation, extortion and ethical abuses in surrogacy trafficking were rampant, went undeterred and surrogate mothers were misused with impunity.[12]"Since they were non-statutory, the guidelines had no legal sanctity and were thus non-binding. Silent on major issues, they lacked teeth and were frequently violated.[13]

The surrogacy debate started in India in 2008, when two-week-old Baby Manji Yamada faced statelessness after the commissioning parents in Japan separated during the pregnancy and the commissioning mother refused to accept the baby. Following a long legal battle the custody of the child was granted to the baby's grandmother while the Gujarat HC emphasised on the extreme urgency to enact laws which address such issues.

In 2010, the *Assisted Reproductive Technologies (Regulation) Bill, 2010*and the *Assisted Reproductive Technologies (Regulation) Rules, 2010* were brought in to fill the loopholes lying in the area of surrogacy but these too failed to answer few major questions.

The bill had stricter norms for foreign couples opting for surrogacy in India. On one hand, where the maximum revenue in this field was generated via foreign nationals, imposing stricter norms would pose them to other available options.

These women are usually from rural backgrounds and are attracted to the monetary compensation resulting from the surrogacy, without understanding the consequences of the procedure on their health. Even though the bill did mandate the

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[11] A Malhotra, *supra* footnote 9.

[12] Babu Sarkar,"Commercial Surrogacy: Is it morally and ethically acceptable in India?",Practical Lawyer, S-11,December2011.

[13] *Ibid.*

number of times a woman may undergo live births and embryo transfers, it did not mention any other provisions for her welfare or safeguarding her from any health hazards.[14]

The bill also did not talk about the amount of compensation to be given to the surrogate's family in case of death during or resulting from the pregnancy[15] neither did it attempt to channelize the middle-man concept prevalent in this field which would prevent the surrogate mother from obtaining a fair share of fee.

At a time when 'rent-a-womb' is thriving in India, it is needless to say the poor and rural women are subjected to exploitation. When legalization of Commercial Surrogacy resulted in a booming market, what was required was a legislation that would regulate this industry and prevent the surrogate mothers from being deprived of their rights, ensuring them with safer prospects.

1.4. Surrogacy Bill: Salient Features

The Union Cabinet has cleared the draft Surrogacy Regulation Bill 2016, passed by the Health Ministry, on the 24th of August 2016; and is set to be introduced in the Parliament soon.

The new Surrogacy (Regulation) Bill can be said to do more harm than good. According to the draft bill surrogacy will be an option only to the parents who have been married for five years and can't naturally have children. They must lack access to other reproductive technologies, should want biological children and can find a willing participant who necessarily has to be their relative. The bill also clarifies the legal position of such a child and would ensure that a child born of surrogacy will have all legal rights as a citizen. It prohibits surrogacy for overseas Indians, foreigners, unmarried couples, homosexuals, and live-in couples. The surrogate mother has to be a married woman who has herself borne a child and is Indian citizen (neither a non-resident Indian (NRI) nor a foreigner). Couples with biological or adopted children cannot opt for surrogacy.[16]

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[14] Priyattama Bhanj, 'The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?' (2014) The Journal of Indian Law and Society Blog, available athttps://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/(last accessed on 13 September 2016).

[15] Rayw at Deonandan & Andreea Bente, "India's Assisted Reproduction Bill and the Maternal Surrogacy Industry", *International Review of Social Sciences and Humanities*, Vol. 4, No. 1,2012, pp.16 9-173.

[16] Ibu Sanjeeb Garg, 'Understanding India's Complex Surrogacy Debate' (2016) The Diplomat, available athttp://thediplomat.com/ 2016/08/understanding-indias-complex-commercial-surrogacy-debate/(last accessed on 13 September 2016).

The Supreme Court has deemed live-in relationships on par with marriage and the Juvenile Justice (Care and Protection of Children) Act, 2015, allows for adoption by single parents and inter-country adoption. While on one hand, we are propagating contemporary beliefs, the fact that only married couples are allowed to opt for surrogacy is a setback in this direction. Surrogacy permits otherwise childless men and women to have children.

Surrogacy is considered to be a fundamental human right by many, consistent with the freedom of personal choice and the right to bear children. Surrogacy empowers women to choose whether to participate and gain financial compensation for their valued service. The Commercial Surrogacy enabled an informed decision, with consent of all the parties, now that the bill promotes altruistic surrogacy, it may lead to forced decisions. There are many women, for whom surrogacy acts as a means of livelihood. It funds their needs and demands, pay off debts and meet their expenses.[17] No doubt, there was exploitation prevalent in the arena too, due to middle men, brokers etc., but what was required was regulation. Despite providing them social security and safe future, totally shutting down their income source is a preposterous step.

1.5 Enabling Informed Decision v. Promoting Forced Decision, what is preferable? :

1.5.1 Economic impact on poor women

Surrogacy is the only option for the needy women who want money for their houses, or for their children's education, to overcome their problems. Prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational.

These women from poor background get healthy treatment for 9 months and a handsome payment after that which government cannot provide. Instead of imposing a blanket ban, a regulatory mechanism, like any other industry with the right mixture of ethics and business was the need of the hour.

[17] , 'The surrogacy bill is dangerous overreach' (2016) livemint.com, *supra* footnote 1.

1.5.2 Difficult to regulate altruistic surrogacy:

A complete blanket ban on Commercial Surrogacy would lead to a blooming black market, opening up illegal channels. Similar scenario can be traced from the ban on organ donation business, which put the whole business behind the doors, ultimately leading to more illegitimate and dubious dealings.

The bill also doesn't ensure welfare of the surrogate mother; neither does it provide health benefits and insurance to her. In the light of newly enacted Maternity Leave Benefit Act, a surrogate mother is not even entitled to maternity leave, which is an option only available for the adoptive mother..

1.5.3 Impact of modern lifestyle:

Globalization and urbanization has lead to the prevalent concept of nuclear families, bygones are the tales of extended relatives at avail. In such scenario, finding someone to come forward for altruistic surrogacy is a tough task in itself.

The question that arises is, how many women would agree to bear someone's child for 9 months solely for altruistic reasons without any advantage.

1.5.4 Establishment of Surrogacy Centers, a futile exercise:

While the new bill encourages the concept of Surrogacy Centers wherein women are given vocational training, well fed and taken care of; the government's decision to promote solely altruistic surrogacy defeats the sole purpose of these centers.

1.5.5 Is adoption really a good option?

Reforms initiated by the central Ministry of Women and Child Development in 2015 sought to boost the number of adoptions in the country by addressing the above problems in the system. A new online registration system is now in place called the Child Adoption Resource Information and Guidance System (CARINGS), which is managed by the nodal body dealing with adoption, the Central Adoption Resources Agency (CARA). As per the new guidelines framed by the CARA, parents desiring to adopt must register with the online system by uploading a list of documents. Next, a home study report is prepared within a month by a social worker based in the state where the prospective parents reside. The report is vetted by one of the *specialised* adoption agencies — either declaring the parents eligible to adopt or rejecting their application with reasons.

If declared eligible, the prospective parents are placed on a waiting list (called seniority list) and when their turn comes, they are shown the photographs of six children, along with background information and medical history. The parents are then supposed to reserve their preference within 48 hrs.

1.6 Problem

How many people in the country have access to computers to get onto the online registration system? Though the minimum financial means required to be eligible for adoption set by the Cara is pretty low, the new system effectively excludes those without access to computers or cyber cafes from the adoption process. Additionally, how are the visually impaired prospective parents expected to *see* the photographs of children generated by the system in the first round of the matching process?

It has also been argued that allowing prospective parents to select one child out of six options based on photographs and other basic information, turns the child into a commodity in the marketplace. The format does conjure up the image of online shopping that helps customers decide whether to buy or not by providing striking images and a range of information about the product. While this might be a disturbing thought in the context of children, it needs to be scrutinised in the light of what we know and see about family formation in contemporary India. And not to forget, adoption procedure in India is long and cumbersome in nature.

(I) Not in consonance with the contemporary laws supporting live-ins:

While the Indian Juidiciary is advertising live-in relationships[18], keeping it at par with marriage and the Juvenile Act promotes even single parents opting for adoption,[19] the fact that surrogacy has been limited to married and heterosexual couples is preposterous.

This would lead to a setback to the commendable judicial decision, propagating time-worn and obsolete idiologies.

(II) Right to choose/ parenthood:

The right to life includes the right to reproductive autonomy — that includes the right to procreation and parenthood. It is not for the state to decide the modes of parenthood. Constitutionally, the state cannot interfere in the prerogative of a person(s) to have children, naturally or through surrogacy. Infertility cannot be a condition to undertake surrogacy. The proposed law ought to be put in the public domain before the country's parliamentarians debate it.[20]

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18 "Live-in Relationship not a crime", *The New Indian Express*, 24 July 2015, available at http://www.newindianexpress.com/nation/Live-in-Relationships-Not-a-Crime-Supreme-Court/2015/07/24/article2938099.ece(last accessed on 13 September 2016).

19 The *Juvenile Justice (Care and Protection of Children) Act*, 2000.

20 Anil Malhotara, 'Draft Surrogacy Bill violates fundamental rights of people to choose modes of parenthood', *The Indian Express*, 6 March 2017, available at http://indianexpress.com/article/opinion/columns/surrogacy-bill-ban-commercial-2998128/(last accessed on 13 September 2018).

(III) Altruistic surrogacy, the real picture:

When the government is propagating the idea that only family members can volunteer for surrogacy and must do so for free, the possibility of coercion of daughter in laws in families cannot be ignored. Instead, it would give rise to a strong potential black market in this area. Simultaneously, it also opens the door wide to some *khap panchayat* somewhere decreeing that the wife of the second son must bear the child of the first son and his wife, or else off with her head.

1.7 Conclusion

Need of the hour was a law that would address the several problems prevalent with respect to the sensitive concept that surrogacy is in India. Although a timely initiative has been put forth by the legislature in the form of this bill, it is facing more criticism than appraisal. What has been put on plate seems to be a hasty preparation that fails to serve all the stakeholders.

The bill should have been all encompassing; addressing the issues and ensuring the involvement of all stakeholders instead of being focused on upholding the age old traditions and moral values. At the least the drafting panel should have involved or base its recommendations upon suggestions from fertility experts, lawyers, media, health minister, social workers, NGO heads, rural tribal representatives etc. The idea is to engage a mix of neutral and interested parties. Further, to understand the ground reality and ensure proper enforcement of legal mechanism, a full detailed study should be done as surprise audit of several surrogacy centres and status of the women post surrogacy.

In a pronatalist nation like ours, the urge to pass on one's own genes is predominant which cannot be attained through adoption. The era is of 21st century wherein medical science has advanced far enough to provide people with a safe and consensual procedure, the least we expect from the government is to facilitate the same and ensure legal protection rather than making the process strenuous and deterrent. The concept of commercial surrogacy can be equated with Commercial sex work or organ donation, in these case too, sale of a human body part is involved. The harsh, prevailing truth is, that exploitation in both the areas cannot be curbed. What is required, is a clear demarcation between voluntary and non voluntary actions, ensuring legal remedies to the exploited person so as to ensure proper regulation. Legislation in our country, tries to deal with these topics by imposing a blanket ban which is an escapist as well as anarchist approach. Therefore, in light of the discussion carried on in this paper, and the conclusions reached, it can be safely held that blanket ban of commercial surrogacy is an idea that cannot be advocated. What's expected of the government, is to ensure legal as well as medical protection to both the parties, take steps for the betterment of ART procedures in India, ensuring health insurances and post maternity benefits to the surrogate mother, instead of campaigning archaic ethos play.

ON CRIMINALISING MARITAL RAPE IN INDIA

***Anuleena Bhattacharjee and **Anvesha Panda**

Abstract

The unprecedented silence that shrouds the issue of marital rape is a reflection of India being out and out a typically gender-biased patriarchal society, where male chauvinism still reigns supreme. In India, where thousands of women remain afflicted with unbearable atrocities within the four walls of their house, marital rape is another shameful chapter in the saga of suffering of women, an issue which has remained grossly neglected owing to the utter patriarchal mindset of the society, which fails to recognise rape within the bonds of marriage. As a result, married women in India, excepting in certain rigid conditions, are deprived of protecting their body and soul from being abused and exploited from men only for the sheer fact that they happen to be their husbands, or their 'masters' who have an exclusive right over their 'property'. The following paper thus hereby attempts to explore into this crucial socio-legal issue with special reference to the need of criminalisation of marital rape in India, as early as possible, for the sake of human dignity and in the interest of justice.

Keywords: Marital rape, Violence, Criminalisation, Legal scenario.

1.1 Introduction

Women in India, since time immemorial, have been virtually perceived as becoming the 'exclusive property' of their husbands on entering the sacrosanct institution of marriage. Unfortunately, for many women, marriage becomes an institution which literally binds them with an irretrievable duty to satiate the unquenchable lust of their husbands, and grants the latter with a licence to rape their wives, without their consent, at any point of time. Although time has changed and radical changes have been brought especially in the wake of feminist movement across the globe, however little changes have been brought to the fate of married women in India who are left to languish helplessly if raped by their husbands, excepting the circumstances when a wife is below fifteen years of age or if she is living in judicial separation from her husband- the only cases where a wife can criminally prosecute her husband for rape. It implies that in absence of these exceptional circumstances, a woman has no right to punish a man who injures her body or soul only for the fact that he is her husband which debars him from being a rapist. This hence amounts to a blatant violation of all known canons of human rights when marriage, which is supposed to confer equal rights on both the parties to it, becomes a shield in the hands of men to subjugate women and women lose all rights to protect their self-dignity owing to the absolute immunity enjoyed by their husbands for raping them.

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1.2 Understanding Marital Rape and its Devastating Consequences

Rape is the violation with violence of the private person of a woman, an outrage by all means[1]. However, when rape is committed by a husband upon his own wife, it is seldom treated as a offence for a wife is more or less treated as the husband's property, and the decision making as to what to do with his 'property' is the husband's sole prerogative. This unfortunately has been the prevailing social norm in most of the societies throughout history and therefore even in contemporary times, marital rape despite being a grossly pervasive phenomenon remains one of the least reported crimes. This is due to the fact that sexual transgression within the bonds of marriage is perceived to be socially sanctioned and hence it is more often treated as less severe crime than when a woman is raped by a stranger. However on pondering seriously and sensibly over the issue, marital rape is found to be as invasive and disastrous like other forms of rape and if considered from a psychological standpoint, it appears to be much more dangerous than the former having potentially devastating long term effects. The logic behind this argument lies in the fact that in cases of stranger rape, the woman is outraged of her dignity only once, while in cases of marital rape, a woman is subjected to sexual torment more frequently, often everyday when a woman is compelled to submit her person forcibly without her consent or will, and often meted out with ruthless physical violence that accompanies the sexual act. A majority of married women are subjected to *'battering rape'* in which women are physically battered and violently tortured by their husbands during the sexual act which they employ to coerce their wives. If not battered, substantial degree of force is used to coerce wives for sexual gratification which is often termed as *'force-only rape'* – another category of marital rape where women are frequently assaulted by their spouses in cases of refusal to submit themselves. Women are also believed to undergo traumatic experiences of *'obsessive rape'*, where rape is a sadistic obsession of men where they find pleasure to sexually dominate their wives and their aggression is often complemented by perverse sexual acts which are both violent as well as demeaning in nature. The violence associated with marital rape often leads women to suffer from severe physical injuries as well as gynaecological complications such as miscarriage and stillbirths. Unwanted pregnancies and contraction of diseases including STDs and AIDS are also a part of the atrocities that afflict them. Besides, the psychological trauma and emotional disorder that results from episodes of marital rape, often shatters the self-confidence of victims who find it unacceptable to be treated inhumanely by persons from whom women seek love, care and support. The instances of marital rape often leaves an unhealed scar in their memories of women owing to which women suffer from stress, depression, anxiety, post traumatic

[1] *Phul Singh* v.*State of Haryana*, AIR (1980) SC 249.

behavioural orders and sexual dysfunction. Victims lose all hope, faith and. confidence being caught in a relationship which imposes an obligation upon her to endure all agonies with unquestioned obedience. The plight of victims is further enhanced when the law, like in India, maintains an unprecedented silence over the issue and does not empower women with effective remedy or relief to rebuke the man who pathetically tortures and dominates her without showing any mercy.

1.3 Status of Criminalisation of Marital Rape across the Globe with special reference to India

1.3.1 Initial Tolerance to the Phenomenon

Recognition of marital rape is a recent development in law which gathered momentum only in late 70's. Prior to that, spousal exemption in rape was the prevalent assumption which was based on the *'implied consent theory'* propounded by English Judge, *Sir Matthew Hale*[2] during the 1600s, who pronounced:

"A husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

This theory of Common Law which lied on the principle of irrevocable consent of a wife to submit to the sexual demands of her husband when once entered into the contract of marriage justified the marital rape exemption and this infact became an accepted notion in law for decades owing to which husbands could not be accused in courts of law of raping their wives and robbing of their self-dignity.

In the case of R v. Kowalski[3], the Court of Appeal in the United Kingdom held that a man can be found guilty of indecent assault but in no way shall be guilty of raping his own wife because of the implied consent to sexual intercourse given by the wife which she cannot revoke during the subsistence of marriage. Again in *R v. Miller*,[4] *Justice Lynskey* ruled that a petition for divorce did not revoke the implied consent to sexual intercourse and during the continuance of proceedings too, a man cannot be held guilty of his own wife. The deep rooted biasness operating in favour of the superiority of a man over his wife found expression in Scottish Criminal Law too which strictly maintained that rape within marriage is no rape as marriage. Similar contention was reiterated by the Courts of law in the United States as well which highly drew inspiration from the Common Law doctrine of implied consent.[5]

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2 Matthew Hale, "History of the Pleas of the Crown", Vol. 1. 1680.

3 [1988] 86 Cri.App. 339.

4 [1954] 2QB 282.

5 *Commonwealth* v. *Patrick Fogarty & others*, 74 Mass. 489 (Massachusetts 1857) (In Fogarty, the counsel cited 1 Hale P.C. 629. Archb. Crim. Pl. (Waterman's ed.) 306, note. 1 Russell on Crimes, 676, that a man cannot commit a rape on his own wife.).

1.3.2 Radical Changes in Attitude and Paradigm Shift in Law

The legality and rationale for marital rape exemptions became a subject of vehement criticism with the change in societal and legal attitudes in the late 19th and early 20th centuries realising the fact that married women are effectively denied protection of law from marital violence due to the fallacious and age old doctrine of Common Law which enabled men to oppress women in the private sphere and hence unduly sheltered male chauvinism in the society.[6] The simple fact was significantly realised that a married should not be left without the full protection that the law affords otherwise to unmarried women who are raped.[7]

More particularly, it was realised by the Judiciary that it was high time to liberalise women from the shackles of bondage and therefore the House of Lords in England, the country being the one which laid the foundations of marital rape exemptions, denounced the implied consent theory and criminalised marital rape in the historic case of *R v. R.*[8] in 1991 where the five Law Lords unanimously held that *'a husband's immunity from the charge of raping his wife no longer formed part of the English law'.*[9] It was noted that in the light of changing social, economic and cultural developments, a husband and wife were now regarded as equal partners in marriage and therefore it could not be any longer maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances.

In the words of *Lord Keith, "Marriage was in modern times regarded as a partnership of equals and no longer one in which the wife was to be the subservient chattel of the husband".*[10]

This judgement was subsequently affirmed by the European Court of Human Rights in the decision of *SW v. United Kingdom*[11] and served as precedentin courts of law in Scotland, Southern Ireland, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, The Soviet Union, Poland, Czechoslovakia, United States and Australia.

The U.S Court supported this revolutionary development in the case of *People v. Liberta,*[12] where it was held that *'the bodily integrity of the wife must outweigh the husband's right of marital privacy'.* Similarly, the U.S Supreme Court in *Trammel v.* ***U.S.A***[13] reinforced the necessity of abolishing the marital rape exemption with changing times stating that, *"nowhere in modern society is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being".*

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6 Jill Elaine Has day, "Contest and Consent: A Legal History of Marital Rape",*California Law Review*, Vol. 88, 2000, p. 1373.

7 Kelly C.Connerton, "The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists",*Albany Law Review*, Vol. 6, 1997, p. 237.

8 [1991] 3 W.L.R. 767.

9 *Ibid.*

10 *R* v. *P*, [1994] 1 SCR 555.

11 [1995] 1 F.L.R.434(ECHR)

12 474 N.E.2d 567,573 (N.Y.1984).

13 445U.S. 40(1980)

Besides the paradigm changes in judicial response to marital rape, statutory recognition to marital rape as a criminal offence was offered in various countries. The first State to abolish the marital rape exemption has been Nebraska in 1976, and North Carolina being the last in 1993. Subsequent to the judgement of *R v. R.*[14] in 1991, the *Criminal Justice and Public Order Act, 1994* has been enacted in England which abolished the marital rape exemption altogether.[15] Another example can be cited of Maine, which completely excluded the spousal exemption in rape.[16] The law in Pennsylvania, which formerly regarded marital rape as a lesser grave crime than stranger rape, has been repealed to equate marital rape on the same footing with stranger rape so as to establish that rape by one's spouse is as heinous a crime as when committed by a stranger.[17] The law in North Carolina also has made it clear that sexual offences by spouses should be treated the same as sexual offences by strangers, and it explicitly states, *"A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offence."*[18] Again, the law in the District of Columbia also reaffirms the similar proposition when it states that, *"No actor is immune from prosecution under any section of this subchapter because of marriage or cohabitation with the victims."*[19]

1.3.3 Unsatisfactory Legal Provisions

However, apart from these positive developments, it is unfortunate to note that there are many States in which either spousal exemption from the offence of rape is totally retained by law or the law is coupled with certain conditions for accusing husbands as rapists due to which the offenders are seldom prosecuted.

For example, in Washington, a spouse cannot be charged with third degree rape[20]. In the State of Tennessee in U.S, the law imposes a condition precedent that a person can be accused of rape or sexual battery of a spouse (i.e. sexual penetration without consent) only when the person is armed with a weapon or credible decoy, and causes serious bodily injury to the victim, or when the spouses live apart and one of them has filed for a divorce or separation.[21] Similarly, the law in the State of Maryland in U.S mandates that a spouse may only be prosecuted for rape if force or threat of force is used, or if at the time of the alleged crime they lived apart (under a written separation agreement or for at least three months before the offence) or under the decree of limited divorce.[22]

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14 *Commonwealth* v. *Patrick Fogarty & others*, *supra* footnote 7.

15 The *Criminal Justice and Public Order Act*, 1994, s. 147.

16 *Maine Criminal Code*, 1976, *Title 17-A*, s. 251.

17 *Pennsylvania Statutes*, *Title 18 Pa.C.S.* s. 3121.

18 *North Carolina General Statutes*, 14-27.8.

19 *Code of the District of Columbia*, s. 22-3018.

20 *Revised Code of Washington*, 2005, s. 9A.44.060.

21 *Tennessee Code*, 2004, s . 39-13-507.

22 *Maryland Code, Criminal Law*, 2004, s. 3-318.

In Mississippi too, the perpetrator is not guilty of sexual battery under the law of the State if 'the alleged victim is that person's legal spouse and at the time of the alleged offence such person and the alleged victim are not separated and living apart, except in certain circumstances'.[23] Again in the State of Ohio, the offence of rape by the use of a drug or intoxicant that impairs the victim's ability to resist only applies to a spouse who is living apart from the victim.[24]

Criminalisation of marital rape hence remains an unaccomplished task under many statutes and therefore has a long way to go. It is however much more distressing to note that even in those countries where the issue has been addressed by law, marital rape still remains one of the most under-reported crimes and continues to be socially perceived as a tolerable form of violence which women are expected to endure or ignore.

1.3.4 Position in India- Legislative Apathy to Marital Rape:

So far as Indian law on marital rape is concerned, it can be said that the criminal law takes a very narrow approach in addressing the issue, and marital rape is more often viewed as a form of non-criminal domestic violence in India, and not generally as a distinct sexual offence in all cases. The Indian Penal Code (IPC), 1860 recognises marital rape to a limited extent in Section 375, the exception to which states that sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape. This age has been now proposed to be raised to 16 years which ironically still remains below the legal age for marriage in India. Whatsoever, it is to be noted that the Penal Code in India makes a man guilty of raping his minor wife and not otherwise. The only situation other than this where a man can be held guilty of raping his wife is contemplated in Section 376-Awhich makes any form of sexual intercourse between a judicially separated couple without the consent of the wife punishable with imprisonment for a term which may extend to two years as well as with fine. It therefore follows that any married women in India not below the above specified age and not living apart from her husband has no power to punish her husband for the degrading and inhumane sexual torture meted towards her; she can at best seek divorce from him on the ground of cruelty or have recourse to Section 498-A of IPC dealing with cruelty, provided she can prove the fact of 'perverse sexual conduct by the husband', which often appears to be something too difficult to establish or correctly interpret.

Surprisingly, like the legislature, the Judiciary in India which has otherwise been playing a pro-active role in securing social justice in India has not been that sensitive enough in cases of marital rape as it should have been and has not been very effective in alleviating the miseries of married victims. For example, in *Queen Empress v. H.M Mythee*[25], the court defended the marital rape exemption on the ground that it

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23 *Mississippi Code*, 2013, s. 97- 3-99.

24 *Ohio Code*, 2005, Ch. 2907.02 and 2907.03.

25 (1890) 18 Cal.49.

aims at the preservation of family. This proposition is grossly illogical and fallacious and reflects the orthodox patriarchal mindset prevalent in India. Further in recent cases of *Bodhisattva Gautam v. Shubra Chakraborty*[26] and *Sakshi v. Union of India*[27], the Supreme Court failed to recognise marital rape as a separate criminal offence and refused to criminalise the same.It is hence pathetic to note that in a country which casts a fundamental duty upon citizens to denounce derogatory practices against women and where every person is assured of protection of his life and personal liberty[28], wherein right to life is interpreted to denote right to live with human dignity, women are left in a deplorable condition to without the right of representation or the right to redress grievances against their wrongdoer just because they happen to be their husbands.

1.4 Need of Reforming the Stagnant Laws in India- High Time to Change

In a country like India, where women have remained a subject of discrimination and persecution for ages and the low socio-economic status accorded to them through structural factors makes them remain a ever vulnerable class, a refreshing change in the attitude of lawmakers is a dire necessity to assure a woman of her right to dignity, her right to a self identity within the bonds of marriage, for marriage is not the tool of depriving a woman of her basic human rights and fundamental freedoms.

The recent deliberation made by the law makers of our country that marital rape ought not to be criminalised for it is capable of destroying the sanctity of marriage is entirely erroneous. This is because marriage is a bond of love and trust which forms the basis of its purity and in a marriage where dominance, violence and sadism reigns supreme, the sanctity of marriage is already lost. It is therefore not the sanctity of marriage which is sought to be protected but the perverted offenders who are sheltered under the veil of marital relationship. Also there is need to correctly interpret the implied consent theory which does not preclude a woman to resist at reasonable times from having unwanted sexual intercourse. Sex is a part of marriage no doubt but forced cohabitation is definitely not the sole obligation of a wife to perform as per the whims and fancies of her husband who tends to dominate her physically, emotionally or sexually.

The legislators have further opined that criminalisation of marital rape might increase instances of false and fabricated claims against innocent husbands in India. This approach is however untenable, both logically and legally. It is illogical to say that laws should not be made because someone might be at risk of a fabricated claim. If this was so, no law pertaining to the protection of any specific class would have ever been enacted in the country. And legally speaking, when it is already difficult to prove a claim of rape, it would be much tougher to prove a fabricated claim of rape against someone beyond reasonable doubt. Besides, taking into consideration the societal norms of our aims at the preservation of family.

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[26] (1996) 1SCC 490.

[27] AIR 2004 SC 3566.

[28] The *Constitution of India*, 1950, Article 21.

This proposition is grossly illogical and country, it can be further inferred that accusing one's husband of rape and dragging him into court is one of the least possibilities for an Indian woman to do, who values her family reputation more than her life and worships her husband like deity, and unless she is compelled by unbearable circumstances, no woman would take such stringent action. Weird though it may sound, but this is the stark reality of Indian women who are genuinely an embodiment of tolerance which often leads them to compromise with their liberty and dignity throughout their lives. The absence of legal provision to this effect would hence add to the misery of women, who would find no assistance or remedy of law even if they dare to stand up against all atrocities, defying the societal and cultural norms. Hence not enacting a law in fear of possibility of fabricated and malicious claims is definitely not the solution.

Further, it is high time that the Indian Judiciary should take positive concrete steps in regard for unless women are protected within the bonds of marriage, right to equality enshrined in Article 14[29] of the Indian Constitution would have no meaning. Article 21[30] of the Constitution which guarantees every woman a fundamental right to life and personal liberty, would become a sheer mockery, unless interpreted as to include her right to bodily integrity at all times, irrespective of marital status. The Judiciary being the custodian of fundamental rights of all citizens has an inherent duty to secure justice to the fairer sex ensuring that no man has a licence to rape his wife, just because she might be fed and clothed by him through his earnings. The task is not difficult for it is the same institution which has once mandated that even a woman of easy virtue has a right of privacy and no person has a right to violate her person[31]. The only essential requirement is that the Judiciary is to rise above any sort of prejudice which may cripple it and shed off any patriarchal biasness for the greater cause of justice to thousands of married women in India, whose miseries often go unheard, unwept and unsung.

1.5 Conclusion

It can be hence be concluded that marital rape is definitely one of the burning social issues that needs to be criminalised for securing the interests of married women who do not deserve to be left alone in their crusade against injustice. It is insufficient for law to think about affording security to women only against outsiders when they are at risk at the hands of persons who are most close to them. Marital privacy definitely deserves to be secured but that should not outweigh the interest of women. Removing the spousal exemption from rape, irrespective of any age-factor for consent, is a positive step that is looked forward to. Also criminalising marital rape would become a deterrent to prospective husbands who would think twice before

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29 The *Constitution of India*, 1950, Article 14. ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.")

30 The *Constitution of India*, 1950, Article 21. ("No person shall be deprived of his life and personal liberty except according to the procedure established by law".)

31 *State of Maharashtra* v. *Madhukar N. Mardikar,* (1991) 1 SCC 57.

subjecting their wives to sexual slavery and exploiting her sexuality. A change in the attitude of the civil society is equally pertinent to shed off all stereotype notions that a woman becomes a husband's private property on marriage and that she is bound to tolerate all physical or emotional abuses. It is time to end the preconceived notion of the Indian society, that marriage is a licence to rape. Rape is rape, a violent and distorted expression of male aggression which deserves to be punished when committed by any person whosoever; for a woman has a identity of her own, she has a primary right over her body or soul which never loses its individuality. Marital status in this context is completely immaterial.

THE PRINCIPLE OF COMPLEMENTARITY IN THE INTERNATIONAL CRIMINAL COURT

***Arijeet Nandi**

ABSTRACT

The establishment of the International Criminal Court in 2002 was a major step taken by the legal luminaries across the globe in curbing the menace of international crime. Ratified by 160 states, the Rome Statute of the International Criminal Court is the guiding law of this court. This international court aims to prosecute and try individuals involved in heinous crimes like that of genocide, crimes against humanity and war crimes. The court seated in Hague, has jurisdiction on crimes committed after the incorporation of the Rome Statute, by individuals in member states. Besides this the Security Council of the United Nations Organisation may refer to any matter to the Prosecutor of the International Criminal Court whether the act or the accused is a citizen of a state party to the statute or not. This court is primarily founded of the principle of complementarity which gives an upper hand to the national judicial systems of the country involved to try the purported accused for the acts of international crime. It is only if such judicial mechanism is incapable of or unable to try a case of such a high stature or lacks the basic means to investigate and adjudge cases, will the issue move on to the International Criminal Court. In other words the first onus to punish individuals involved in such atrocious acts is upon the state itself. Though this principle of complementarity had been vividly outlined in the Rome Statute, yet in a majority of cases we find that the principle of primacy had been followed or the international court taking up matters declining the very basic principle of complementarity. A further detailed study shows that very often few states act as a shield in obstructing the accused from receiving their due and to prevent such an act the principle of primacy is to be abide by. The court has successfully prosecuted a few individuals and a number of cases are still pending before the court. However, time will say whether the International Criminal Court would be successful in meeting up to the expectations with which it had been established.

1.1 Introduction

The twentieth century witnessed two World Wars, innumerable number of civil wars, acts of mass destruction and heinous crimes against human race. Numerous international organizations, bodies, tribunals have been established from time to time to curb the growing menace. However most of them have failed to comply with the basic objective for which they had been formed. It was only towards the later part of the twentieth century that the world realized the need for an autonomous, international organization to stop criminal activities across the globe and prevent further massacre. This led to the establishment of the International Criminal Court[1].

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1 Henceforth referred to as ICC.

The ICC is a self-directed international organization and international tribunal that sits in Hague, Netherlands. The ICC has the jurisdiction to investigate, prosecute and try individuals for grave crimes such as that of genocide, crimes against humanity and war crimes. The main intention behind developing the ICC was to complement the established national judicial systems of all the countries. The first onus to try individuals for heinous acts is on the state. If not duly prosecuted by the courts of a state, those accused of violating fundamental international norms would be subject to prosecution by the ICC regardless of their nationality or support within U.N. political bodies.[2] The Security Council of the United Nations Organization can also refer a matter to the Prosecutor of the ICC and thereby a case can be instituted in this Court.

1.2 Establishment of the ICC

The International Law Commission (ILC) was delegated the work of the preparation of a new draft statute by the United Nations General Assembly to answer to the continually increasing criminal activities across the globe. The ILC in 1994 placed before the General Assembly a draft statute of the ICC based on the established international precedents, such as Nuremberg and Tokyo tribunals, the draft statutes of 1951 and 1953, the statutes for the Tribunals of Rwanda and Former Yugoslavia and many others.Following this there were serious discussions and deliberations on the draft presented by the ILC and it was rejected by a major number of recognized states as they thought that the establishment of an autonomous international body for the prosecution of individuals would harm the sovereignty of the states involved. Thus a Preparatory Committee was established in 1996 to examine ILC's draft statute for the ICC and this committee was successful it submitting the final report in 1998.

On 17th July 1998, a conference of 160 States established the first treaty-based permanent ICC by a vote of 120 to 7, while 1 countries of the UNO abstained from voting. The treaty subsequently was ratified by 60 States in 2002 and came into force under the name of Rome Statute and with this the ICC came into existence. There are several countries (the number being 124 as of March 2016) which have accepted the Rome statute and acceded to its rules. These countries are called State Parties and are represented in the Assembly of State Parties which meets atleast once in a year.The creation of the Court was widely viewed as a significant contribution toward ending impunity and promoting the global rule of law.[3]

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2 Bartram S. Brown, //"Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals," *The Yale Journal of International Law*,Vol 23: No. 383, [1998] PP. 386.

3 William W. Burke White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome Statute of International Justice," *Harvard International LawJournal*, Volume 49, Number 1, [2008], Pg. 59.

1.3 Referral of matters of the ICC by Security Council

The Security Council of the United Nations Organisation has the power under the Rome Statute to refer to the Prosecutor a situation in which serious crimes which are of international concern have been committed and which would otherwise not fall within its jurisdiction as per provisions of Chapter VII of the Charter of United Nations. The Security Council of the United Nations Organization can "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security."[4] The Security Council can impose prosecution without any precondition, i.e., without requiring the consent of any state, be this party or not to the ICC.[5]

In a situation in Libya, the Libyan government had approached the ICC for proper consideration though a Security Council Resolution 1970 as they were not a party to the Rome Statute. Within a week of referral, the Prosecutor of the Court opened investigation in Libya and issued an arrest warrant against the prospective suspect namely Saif-al-Islam Gaddafi.[6]The UNSC had referred the matter in Sudan's Darfur region to the ICC through resolution 1593, whereby an arrest warrant had been issued against the two prime accused namely Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb").[7]

1.4 Prosecution of National of Non-Party States by ICC

The ICC as per the governing statute has the license to prosecute nationals of non-parties states, i.e., citizens of states that have not ratified the Rome Statute under three circumstances. Firstly, as per Article 13(b) of the Statute, when the Security Council of the United Nations Organisation refers to the Prosecutor of ICC, about a situation in which one or more crimes over which this court has jurisdiction has been committed, as per provisions under Chapter VII of the Charter of the United Nations. Secondly, when non-party nationals have committed an offence within the territory of the state over which the ICC has jurisdiction as per Article 12 (2) (a) of the Statute. Thirdly, in cases where a non-party state has acceded to the jurisdiction of this court with regard to a particular crime.[8]The Pre-Trial Chamber had taken cognizance of matters against Omar

4 Article 39 of Charter of the United Nations and Statute of the International Court of Justice.
5 Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism Pg. 64 (2004).*
6 *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11.
7 *The Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07.
8 Article 12(3) of Rome Statute to the International Criminal Court.

Hassan Al Bashir[9] and Saif Al-Islam Gaddafi[10], though both of them are nationals of non-signatory states, and have issued an arrest warrant against them. These matters had been referred to the Prosecutor the Security Council and so the court could excise its jurisdiction over these two individuals.

However a wide range of controversy exists over this principle of prosecuting nationals of non-party states and most of the countries that have not ratified the Statute had vehemently protested against this provision. As a result of its opposition to the ICC, the US has sought to use a variety of legal and political tools to ensure that the ICC does not exercise jurisdiction over its nationals.[11] According to Article 34 of the 1969 Vienna Convention on the Law of Treaties[12] international agreements are capable of binding only contracting parties. They do not bind third States without their consent. Hence the provision under the Rome Statute to prosecute nationals of non-party states under Article 13 is against the principles of international law.

1.5 Complementarity

The primary lookout for the ICC before adjudicating core international criminal aspects is to check whether or not they have jurisdiction over the particular criminal act. The jurisdiction of the ICC is governed by the principle of complementarily which has been enshrined in the Preamble as well as Article 1 of the Rome Statute of the International Criminal Court. Unlike most other courts and tribunals, the key role of ICC is not to replace the national criminal jurisdictions of the member states, but to further and complement them. This essentially means that ICC does not enjoy primacy over the criminal courts of the respective countries and the Statute recognizes that States have the first responsibility and right to prosecute accused involved in heinous international crimes.

The ICC may merely exercise jurisdiction where national legal systems are unsuccessful in doing so, as well as where they purport to act but in reality are unwilling or inept to genuinely carry out proceedings against the alleged accused. The main aim of complementarily is that if the national courts fail, then the ICC should take up so that perpetrators do not go unpunished. ICC judges have explained that complementary addresses the rules by which a conflict of jurisdiction should be resolved. The Court seeks global cooperation to protect all people from the crimes

9 *Prosecutor v Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09.

10 *The Prosecutor v Saif Al-Islam Gaddafi,* ICC-01/11-01/11

11 Dapo Akande, 'The Jurisdiction of International Criminal Court over Nationals of Non-Party: Legal Basis and Limits', *Journal of International Criminal Justice,* Vol. 1,[2003], Oxford University Press. 1155 UNTS 331.

12 International Criminal Court, *at* https://www.icc-cpi.int/about (last accessed 18September 2016).

codified in the Rome Statute.[13]

The concept of complementarity is predominately an old one which was first used in the Treaty of Versailles after the World War I. Here, the Allied Powers had acceded to the offer of Germany to try and prosecute a limited number of perpetrators in the Reichsgericht, the Supreme Court of Germany sitting in Leipzig. Though the term complementary has not been explicitly used in the said Statute, yet over the time, both the negotiators of the court and the authors of the commentaries to the Statute have hinted and used this term over and again. The notion of complementarity stems from the increasingly important relationship between States and international organizations,for the role played by international entities other than States has forged a new conception of the international system and of the distribution of rights, responsibilities and tasks.[14]

1.5.1 Statutory Provisions of the Rome Statute Relating to Complementarity

The Rome Statute nowhere defines the term "complementarity," but the plain text of Article 1 compels the conclusion that the International Criminal Court is intended to supplement the foundation of domestic punishment of international violations, rather than supplant domestic enforcement of international norms.[15] The most important provisions of the Rome Statute dealing with admissibility are found in Articles 17-20. Article 17 reiterates the founding norm of complementarity and lays down substantive provisions as to what constitutes "unwillingness" or "inability" on the part of the state criminal judicial mechanism. A state is unwilling when it is trying to shield an individual from his responsibility in an international crime and incapable when its judicial mechanism has failed.

Article 18 is about "preliminary rulings regarding admissibility", whereby a state can request the Prosecutor of the ICC to defer the investigation into a case if a similar one is already being investigated by themselves. Since the inception of the court the Article 18 has yet not been invoked by any State and hence there are no rulings by the ICC. Article 19 sets out the rules for a state or individual person to challenge the admissibility of a case before the ICC. Article 20 of the Statute is of the opinion that no person should be punished for the same offence twice or in other words if an individual

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13 Available at <https://www.icc-cpi.int/about> accessed September 18, 2016.

14 Oscar Solera, "Complementary Jurisdiction and International Criminal Justice", *RICR Mars, IRRC, Vol. 84, No. 845, [2002].*

15 Lieutenant Colonel Michael A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with The Rome Statute Of The International Criminal Court", *Military Law Review, Vol. 167, Pg. 26, [2001].*

has been convicted or acquitted for a particular offence then he should not be tried by the ICC for the same offence. Having satisfied the requirements laid down in the foregoing articles of the Rome Statute the Prosecutor of the ICC can initiate an investigation against the purported accused as per Article 53.

1.5.2 Complementarity over Primacy

States have traditionally, on account of their sovereignty, exercised a primary right of criminal jurisdiction over offences perpetrated upon their territory.[16] This is mainly because the rights of the accused are best safe-guarded there and that is one of the primary look out of each and every nation. A number of limitations are present on the ICC when it comes to the question of jurisdiction. The Court, having a limited number of judges and limited financial resources and infrastructure, would be unable to cope with a broad range of cases.[17] Most importantly only a few cases can be tried in the ICC in a particular year. Furthermore the court being a prospective institution does not have jurisdiction over matters which had taken place before the establishment of this autonomous body, thereby making complementary jurisdiction a compulsion for this court.

The principle of *lex loci delicti commissi* which means the law of the place where the delict or tort has been committed has been established by several notable precedents in private international law and this principle gives the national courts of the states an upper hand in trying a matter involving their citizens. This principle is mostly followed because it is easier to collect evidence as well as examine witnesses in such cases. It is hence seen that the national courts are the *forum conveniens* or the ideal place to meet the ends of justice.

1.5.3 Cases and Situations on Complementarity

The first challenge which the ICC faced with regard to complementarity principle was in the case of Germain Katanga, the commander of the Front de Resistance Patriotique en Ituri, who was tried in the ICC for a span of 5 years from 2009-2014. Katanga along with Ngujolo Chui had allegedly committed crimes against humanity and war crimes in eastern part of Democratic Republic of Congo. Katanga, arrested by the authorities of Congo, was produced before ICC where he challenged the admissibility of his case on the basis of the principle of complementarity. Katanga defended that he should be tried in DRC as they were willing to try him and a proceeding is going on against him there. However the Trial Chamber II of the ICC on June 12, 2009 had declined the admissibility plea on the basis that the case in Congo was on a different issue. Further

16 Ilias Bantekas and Susan Nash, International Criminal Law, Pg. 73, (Third Edition).

17 Antonio Cassese, International Criminal Law Pg. 343, (2nd Edition).

on appeal Germain Katanga failed to satisfy the Appeals Chamber and they adjudged that the case was admissible in the ICC.[18]

In 2010, an ongoing battle ensued between ICC and Kenya relating to four Kenyan individuals who have been recognized by the ICC to be responsible to spread violence during 2007 Presidential election. Kenya had repeatedly challenged the jurisdiction of ICC on the principle of complementarity. However, on August 30, 2011, in *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*[19], the Appeals Chamber had rejected Kenya's plea and upheld the jurisdiction of ICC over the national courts of Kenya placing strong reliance on the fact that Kenya was trying to shield the accused and hinder the normal judicial process.

In the case of Mr. Jean-Pierre Bemba Gombo, the government of Central African Republic had referred the matter to ICC in 2004. Nevertheless, a similar matter against the accused was going on in Cour de Cassation, CAR and so going by the strict principles enshrined in the Rome Statute the ICC refused to take cognizance of the matter. It was only in April 2006 that this highest court of CAR, Cour de Cassation gave a final judgement that ICC should look into the situation as the judicial mechanism of the country was unable to investigate properly into the matter. Thereafter ICC took up the matter and the accused was held guilty of several counts of war crimes and crimes against humanity in March 2016.[20] With regard to Simone Gbabo, Cote d' Ivoire had lost the admissibility challenge as they failed to show that "concrete, tangible and progressive steps" were being taken at the national investigation on May 27, 2015.[21]

The ICC for the first time had accepted the admissibility challenge of a state in the matter of Abdullah Al Senussi, the intelligence chief of Libya and also the brother-in-law of Muammar Gaddafi. The Court held that a similar case on a similar matter is being looked into by the competent national courts of the Libya and that Libya is both willing and capable to adjudge a case of such a high stature. Placing reliance on this the Appeals Chamber of ICC directed that the current case placed before them is inadmissible owing to Article 17(1)(a) of the Rome Statute.[22] However in the similar case the Court had adjudged that the case against Saif Al-Islam Gaddafi, the son of Muammar Gaddafi is admissible before this court of law as no action against him had been taken by the competent authorities of Libya.

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18 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8.

19 ICC-01/09-02/11-274.

20 *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

21 *The Prosecutor v Simone Gbabo*, ICC-02/11-01/12-25-Red.

22 *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11.

Thus we see that this international institution have been dealing with the matters placed before them as and how they are to be treated. Proper survey is being conducted by the Prosecutor of the ICC in adjudging as to whether the complementarity plea should be allowed or not. Strong reliance has been placed on the state activities as well as the past records of the states involved in dealing with the prospective suspects in allowing or rejecting the plea of the involved nations.

1.6 Conclusion

The International Criminal Court is one of the biggest steps taken in the twenty first century by the legal luminaries across the globe. The adoption of theRome Statute is undisputedly a significant accomplishment of the humankind taking into consideration the previous failures of establishment of an international tribunal capable of exercising jurisdiction over important international crimes.Complementarity is one of the foundational principles of the Rome Statute system. What was envisioned by the drafters of the Rome Statute was not simply a self-standing Court, but rather a comprehensive system of international justice, where the duty on the State Parties to investigate and prosecute international crimes is clearly reinforced.[23]In the global fight to end impunity, the first line of defense continues to be national justice systems. The ICC has an important role to play, but, again, it is a court of "last resort" that must work with domestic systems. Thus we see that though the ICC has complementary jurisdiction, yet in certain cases the court has to take up matters dismissing this principle on account of unwillingness and incapability on the part of the national judicial mechanism of the state involved.

A major responsibility lies on the national courts of the states involved and their genuine efforts in curbing international crimes. The leading norm of complementarity can actually be put into practice if the states vouch to perform their endeavors. The primary onus being on the state, it becomes very important for the state to have a sound criminal judicial mechanism as well as the true intent to punish the guilty. During the International Criminal Court Review Conference in Kampala, Uganda, in 2010, the established principle of complementarity as had been put forth in the 2002 statute was upheld and no amendments were proposed to this principle. Till date this international court has adjudged numerous cases concerning issues in various parts of the world. This institution have been successful in identifying major issues across the globe. Only time will tell as to whether the court would be triumphant in fulfilling the objective with which it had been established.

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[23] Coalition of International Criminal Court, Delivering on the promise of a fair, effective and independent Court<http://www.iccnow.org/?mod=complementarity> accessed September 15, 2016.

MAGGI CONTROVERSY AND HEALTH ISSUES: ROLE OF FOOD SAFETY AND STANDARDS LAWS[1]

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ABSTRACT

The recent Maggi noodles controversy has not only made the instant noodles go off the shelf in most homes, but the majority of people are beginning to get cautious. A report published by the World Instant Noodles Association, India stands fourth in the global instant noodles consumption listing at 5.5 billion servings per year. In most cases monosodium glutamate (MSG) as well as tertiary-butyl hydroquinone (TBHQ) a chemical preservative derived from the petroleum industry may be present in instant noodles for their taste enhancing and preserving properties. Though dietary intake of these elements is allowed within a limit, regular intake of these can cause severe health issues. As the Indian food safety regulator has just announced that it would finally draft new norms for maximum lead and other heavy-metal content in foods. The whole controversy surrounding Maggi has caught everyone's attention on two issues. First, Nestle and second the Food Safety and Standards Authority of India (FSSAI). People now realise that a government organisation is supposed to ensure the safety of the food we consume. The duty of FSSAI is to regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food for public consumption. Under Sec. 4 of The Food Safety and Standards Act, 2006 (FSS), FSSAI is, inter alia, empowered to make regulations prescribing standards for food items including limits on food additives, crop contaminants and pesticide residue. The mandate of the FSS Act is enforced by both FSSAI and State Food Safety Authorities. Most of the legal issues and disputes have arisen due to the term "Proprietary Food". Only 377 food items are standardised, with all remaining food items falling under the term "Proprietary Food". FSSAI has been lethargic and inefficient in the past and it can be for many reasons including financial constraints and untrained manpower. In their over enthusiasm, they might harm the industry and may jeopardise the jobs of many. In the last few months, one can definitely see a change in the workings of FSSAI. Despite this, there is lot more to improve.

1.1 Introduction

Consumers have a right to expect that the foods they purchase and consume will be

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safe and of high quality. They have a right to voice their opinions about the food control procedures, standards and activities that governments and industry use to ascertain that the food supply has these characteristics. Consumers and governments play an important part in ensuring food safety and quality. The food industry that continuously oversees the manufacture and processing of foods, from raw ingredients to finished product, day in and day out.[2] The private enterprise recognizes that its success and measured in terms of profitability is completely dependent on consumer satisfaction. A reflection of consumers' satisfaction is their continuing purchase of the same products. Food manufacturers and marketers thus have an investment in their product identities (brand names) that they naturally wish to protect. It is in their interest, therefore, to establish and administer the controls that ensure that their products do indeed meet consumer expectations of safety and quality[3].

Food safety is everybody's concern, and it is difficult to find anyone who has not encountered an unpleasant moment of food borne illness at least once in the past year. Food borne illnesses may result from the consumption of food contaminated by microbial pathogens, toxic chemicals or radioactive materials. Food allergy is another emerging problem. While many food borne diseases may be self-limiting, some can be very serious and even result in death. Ensuring food safety is becoming increasingly important in the context of changing food habits, popularization of mass catering establishments and the globalization of our food supply. As our food supply becomes increasingly globalized, the need to strengthen food safety systems in and between all countries is becoming more and more evident. That is why WHO is promoting efforts to improve food safety, from farm to plate on World Health Day, 7 April 2015. The World Health Day 2015 slogan is: "From farm to plate, make food safe"[4].

1.2 Food Safety and Health Issues: International Scenario[5]

The recurrence of serious events of food contamination across the globe, food safety has become a matter of ever increasing international concern and the World Health Organization has defined food borne diseases as a global public health challenge. Protecting global health from food borne hazards is a compelling duty and a primary

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2 Gardner Sherwin, Consumers and food Safety: A food Industry Perspective (http:/www.fao.org/dorcrep/42890//)

3 Report of the FAO/WTO conference on Food Standard, Chemicals in Food and Food Trade, Rome (1991)

4 Food Safety: What you should know by World Health Organisation on World Health Day, 7 April,2015

5 Negri Stefania," Food safety and global health", *Global Health Governance,* Vol.III, No. 1 (2009) (http://www.ghgj.org)

interest of both States and non-State actors; it calls for enhanced proactive cooperation between National and International institutions. Unfortunately, the present state of International law on food safety regulation and governance is still unsatisfactory and reforms are desirable in many respects. The improvements and progresses could be achieved in three major areas of intervention: a) the human rights framework, where the profile of the emerged right to safe food should be raised by way of express recognition in international human rights law, backed up by authoritative interpretation by the UN Committee on Economic, Social and Cultural Rights and strengthening of accountability and remedial measures; b) the regulatory framework, where trade and health issues related to food safety should be addressed in a way that contributes to easing tensions between trading parties while prioritizing consumer protection over freedom of trade; c) the sanitary framework, where International preparedness and response to public health hazards posed by food borne diseases should benefit, where appropriate, from the extended application of the International Health Regulations and the possible devise of enforcement measures aimed at ensuring International health security.

Awareness of the significance of food safety has been greatly enhanced in the last two decades, and its impact on health, marketing, and foreign trade are now recognized at different levels. Food safety issues have thus been at the core of extensive scientific and legal literature, with a focus on the most critical aspects of the subject and its intersection with other key legal issues (*e.g.* consumer protection, biotechnology and safety of genetically modified organisms, application of the precautionary principle, traceability of products, quality standards setting, responses to bioterrorist threats, freedom of trade and legitimacy of restrictions, international cooperation and governance of public health risks). Scientists and legal scholars have paid special attention to the management of food borne diseases, which are indeed a source of major concern for the whole International community.[6] These diseases encompass a broad spectrum of illnesses[7] causing morbidity and mortality worldwide

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6 For full coverage of food safety issues see the relevant web pages at http://www.who.int/topics/food_safety/en/.

7 According to the WHO, "foodborne illnesses are defined as diseases, usually either infectious or toxic in nature, caused by agents that enter the body through the ingestion of food" (see WHO Fact Sheet No. 237, Reviewed March 2007). Major foodborne diseases of bacterial origin are brucellosis, salmonellosis, listeriosis, escherichiosis, campylobacteriosis, cholera, botulism; other agents causing serious health problems are naturally occurring toxins (such as mycotoxins and marine biotoxins), and agents which may contaminate food through pollution of air, water and soil, like the so-called Persistant Organic Pollutants (e.g., dioxins) and metals (especially lead, mercury and cadmium). Other unconventional agents embrace anthrax and the agent causing Bovine Spongiform Encephalopathy, which is associated with the variant Creutzfeldt-Jakob disease.

and their real overall health impact on the world population is yet unknown. Moreover, globalization of trade has led to the rapid and widespread international marketing of food products, demanding that the most careful controls be carried out along the entire food-chain from "farm to fork".[8] Whenever such controls fail and food production and distribution fall short of complying with regulations and standards set either at National or International level the potential likelihood of transboundary incidents involving tainted food increases, and global health is hence seriously put at risk.

For the reasons stated above, international food safety is perceived as a global challenge. In the wake of a trend towards more efficient food safety policies, the 2007 Beijing Declaration on Food Safety[9] gives voice to the global community's concern that a comprehensive and integrated approach be adopted, prompting all stakeholders to take cooperative and concerted actions and strengthening links between the different sectors involved. The Declaration, in fact, recognizes that "integrated food safety systems are best suited to address potential risks across the entire food-chain from production to consumption" and that "oversight of food safety is an essential public health function that protects consumers from health risks". In this perspective, it mainly urges States to develop transparent regulation to guarantee safety standards; to ensure adequate and effective enforcement of food safety legislation using risk-based methods; to establish procedures, including tracing and recall systems in conjunction with industry; to rapidly identify, investigate and

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8 The "farm to fork" approach implies that food hygiene legislation issued both at the national and at the international level apply at every stage of the food chain, including primary production (e.g., farming, fishing and aquaculture), and that official and effective controls under the responsibility of national authorities be carried out from the input level to the front end retail. The "farm to fork" approach to food safety was the subject of extensive debate at the Pan-European Conference on Food Safety and Quality, held in Budapest on February 25-28, 2002 (see especially the FAO conference document on FAO Veterinary Public Health and Food and Feed Safety Programme: the Safety of Animal Products from Farm to Fork, available at http://www.fao.org/docrep/MEETING/004/AB500E.HTM), and at the Second FAO/WHO Global Forum of Food Safety Regulators, held in Bangkok on October 12-14, 2004 (see http://www.foodsafetyforum.org/global2/index_en.asp). For further information on this approach as adopted in the context of the activities of the European Commission's Directorate-General for Health and Consumers, see http://ec.europa.eu/food/index_en.htm; see also the Commission's explanatory booklet From farm to fork – Safe food for Europe's consumers (2005), available at http://ec.europa.eu/food/resources/publications_en.htm.

9 The Declaration was adopted by consensus by the High-level International Food Safety Forum, "Enhancing Food Safety in a Global Community," held in Beijing on November 26 and 27, 2007, with the participation of senior officials and well-known experts from relevant international organizations and various government authorities as well as representatives of food industry and consumers. Available at: http://www.who.int/foodsafety/fs_management/meetings/forum07/en/index.html.

control food safety incidents and to alert the World Health Organization (WHO) of those events falling under the revised International Health Regulations. In short, the Declaration expresses the need to understand food safety as both a National and an International responsibility.

1.3 Food Quality and Food Safety[10]

Quality includes positive and negative attributes that influence a product's value to the consumer. Positive attributes that demonstrate good quality may be the origin, colour, flavour, texture and processing method of the food, while negative attributes may be visible spoilage, contamination with filth, discolouration, or bad odours or tastes. However not all unsafe foods may demonstrate bad quality, that is, unsafe food may appear to be of good quality, such as tainted meat disguised using bleach or strong spices. This distinction between safety and quality has implications for public policy and influences the nature and content of the food control system most suited to meet predetermined National objectives. Traditionally, qualities of foods are evaluated by our sensory organs – our eyes, nose or mouth or, more recently, by the use of instruments. Sensory evaluation is commonly practiced by food regulatory authorities who consist of judging the quality of food by a panel of judges. The evaluation deals with measuring, evaluating, analyzing and interpreting the qualities of food as they are perceived by the senses of sight, taste, touch and hearing.

Food safety refers to limiting the presence of those hazards whether chronic or acute, that may make food injurious to the health of the consumer. Food safety is about producing, handling, storing and preparing food in such a way as to prevent infection and contamination in the food production chain, and to help ensure that food quality and wholesomeness are maintained to promote good health.

1.4 Maggi Controversy in India

Maggi is an International brand of seasonings, instant soups and noodles owned by Nestlé Company since 1947. The brand is popular in Australia, India, South Africa, Brazil, New Zealand, Brunei, Malaysia, Singapore, Sri Lanka, Bangladesh, Fiji and the Philippines. In several countries, it is also known as "maggi mee" (mee is Indonesian/Malay/Hokkien for noodles). Maggi noodles are part of the Maggi family, a Nestlé brand of instant soups, stocks, and noodles.

Nestlé have faced criticism over their advertising of the Maggi brand, adhering to marketing regulations in developed countries, but making misleading claims in developing countries where regulation permits it.Three major violations have been

[10] Supra Note 3

noted in Maggi product, viz. (a)presence of Lead detected in the product in excess of the maximum permissible levels of 2.5 ppm, (b) misleading labelling information on the package reading "No added MSG", and (c) release of a non---standardised food product in the market, viz."Maggi Oats Masala Noodles with Tastemaker" without risk assessment and grant of product approval[11].

On 5 June, 2015, Food Safety and Standards Authority of India (FSSAI) ordered a recall of all nine approved variants of Maggi instant noodles and oats masala noodles from India, suggesting them unsafe and hazardous for human consumption. On the same day, Food Safety Agency of United Kingdom launched an investigation to find levels of lead in Maggi noodles. On 6 June 2015 the Central Government of India banned nationwide sale of Maggi noodles for an indefinite period. Nepal indefinitely banned Maggi over concerns about lead levels in the product. Maggi noodles has been withdrawn in five African nations- Kenya, Uganda, Tanzania, Rwanda and South Sudan by a super-market chain after a complaint by the Consumer Federation of Kenya.Testing found some MSG in Maggi noodles. The packet stated "No added MSG". However MSG naturally occurs in hydrolyzed groundnut protein, onion powder and wheat flour. Maggi offered to remove the words "No added MSG" from the package to overcome the objection[12].

Maggi packets includes packets of flavoring termed Tastemaker which is intended to dissolve in water during cooking. Maggi insisted that testing should be done on the product as it is eaten. However Food Safety and Standards Authority of India insisted that they should be tested as a powder itself. On June 5, the FSSAI said that the prescribed standards of 2.5 parts per million would have to apply to all components of the product. Out of the 13 samples tested by Delhi authorities, 10 of them had lead content exceeding this limit. The original sample from Uttar Pradesh, which raised the alarm in the first place, had 17.2 ppm of lead. Nestlé also questioned reliability of the labs used. Testing outside of India (Singapore, USA) resulted in reports that Maggi noodles are safe[13]. In the later Bombay High Court judgment, the court agreed that the test results by the earlier labs were unreliable.

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11 Order No.10/Q.A./Enforcement Issues/FSSAI---2015 by Food Safety and Standards Authority of India,Para2, dated June 5,2015

12 Maggi Noodles safety Scare in India, Maggi from Wikipedia, the encyclopedia

13 Ibid

1.5 Maggi Noodles and Health Issues

Instant noodle is a food item that has always been under a lot of speculation. When I was a little girl, I was allowed to have it only on Sundays. Most instant noodles are made of *maida* (refined flour) which could cause indigestion. A common belief was that instant noodles could lead to bowel troubles and obesity. I therefore decided to put to rest these speculations and seek expert advice on the same. With the world gobbling down 102.7 billion instant noodle servings in a year, it's finally time to analyze how much is too much and whether we require to draw a line on processed food consumption. According to a report published by the World Instant Noodles Association, India stands fourth in the global instant noodles consumption listing at 5.5 billion servings per year. China tops the list at a staggering 44.4 billion servings consumed annually. Keeping the statistics in mind as well as the recent hullabaloo around one of the Nation's most loved instant noodles brand, it is compulsory to simplifying and bringing to light the implications of excessive instant noodles consumption on human body.

Food Safety and Drug Administration (FSDA), Lucknow collected a few samples and sent them to Kolkata for testing. The report found the samples to contain Monosodium glutamate (MSG) beyond permissible limit. Monosodium glutamate, also known as sodium glutamate or MSG, is the sodium salt of glutamic acid, one of the most abundant naturally occurring non-essential amino acids Monosodium Glutamate, better known as MSG, is a form of concentrated salt added to foods to enhance the flavor. This salt version of glutamic acid is an amino acid the body can produce on its own, but the MSG we find on store shelves is processed and comes from fermented sugar beets. Because this kind of MSG is processed, it can cause many adverse reactions, including skin rashes, itching, hives, nausea, vomiting, migraine headaches, asthma, heart irregularities, depression and even seizures. Glutamate is found in tomatoes, Parmesan cheese, potatoes, mushrooms, and other vegetables and fruits.MSG is used in the food industry as a flavor enhancer with an umami taste that intensifies the meaty, savory flavor of food, as naturally occurring glutamate does in foods such as stews and meat soups.[14]

Since MSG acquired its infamous reputation for causing migraines, the food industry has given it new names and new forms, including autolyzed yeast, yeast extract, maltodextrin, hydrolyzed protein, sodium caseinate, mono-potassium glutamate, and textured protein.

14 Permar Manisha, 'The truth behind 2 mintue Maggi Noodles, Active8 Health Fitness Magazine, Feb 14,2013. Available at (http://www.active8health.net)

According to Mayo Clinic, "Monosodium glutamate (MSG) is a kind of flavour enhancer that's usually added to Chinese food, canned vegetables, soups and meat." MSG has been a popular food additive for years and is usually regarded as safe, when used in limited quantity only. But too much MSG in your food can lead to headache, sweating, burning on the face, neck and other areas. It can also cause to nausea and weakness. When MSG is consumed over a longer period of time, it can also damage the nervous system[15].

According to Dr. Simran Saini, Nutritionist at Fortis Hospital, New Delhi "High amounts of Monosodium glutamate (MSG) can cause a gradual increase in blood pressure. And for people who are already hypertensive, it creates further problems." She added, "MSG doesn't suit everyone and reacts differently in different people. It could cause bloating, water retention and ultimately weight-gain. Lastly, we have seen that MSG affects the nerves, destabilizes your nervous system and can cause long-term problems[16]."

Detection of Lead in a food product as a Heavy Metal contaminant beyond permissible levels renders the food product unsafe and hazardous. Reference is made to a document published by the Food Safety Authority of Ireland on "Mercury, Lead, Cadmium, Tin and Arsenic in Food", which succinctly brings out the adverse toxic effects of lead as under: "Short-term exposure to high levels of lead can cause brain damage, paralysis, (lead palsy), anaemia and gastrointestinal symptoms. Long-term exposure can cause damage to the kidneys, reproductive and immune systems in addition to effects on the nervous system. The most critical effect of low-level lead exposure is on intellectual development in young children and like mercury, lead crosses the placental barrier and accumulates in the foetus. Infants and young children are more vulnerable than adults to the toxic effects of Lead, and they also absorb lead more easily. Even short-term low-level exposure of young children to lead is considered to have an effect on neuro behavioural development. Consumption of food containing lead is the major source of exposure for the general population[17]."

It is established from numerous scientific studies that presence of heavy metal (Lead in this case) as a contaminant beyond the permissible limits is a serious health hazard and cannot be allowed in any product in the market.

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15 No MSG in Maggi Noodles, says Nestle, as States reportedly ask for tests,NDTV Food, May 21,2015. (http://food.ndtv.com/)

16 Ibid

17 Order No.10/Q.A./Enforcement Issues/FSSAI---2015 by Food Safety and Standards Authority of India, A3 dated June 5,2015

1.6 Food Safety and Standards Laws

The Indian food processing industry is regulated by several laws which govern the aspects of sanitation, licensing and other necessary permits that are required to start up and run a food business. The legislation that dealt with food safety in India was the Prevention of Food Adulteration Act, 1954 (PFA). The PFA had been in place for over five decades and there was a need for change due to varied reasons which include the changing requirements of our food industry[18].

The Act brought into force in place of the PFA is the Food Safety and Standards Act, 2006 (FSSA) that overrides all other food related laws. It specifically repealed eight laws which were in operation prior to the enforcement of FSSA:

- The Prevention of Food Adulteration Act, 1954
- The Fruit Products Order, 1955
- The Meat Food Products Order, 1973
- The Vegetable Oil Products (Control) Order, 1947
- The Edible Oils Packaging (Regulation) Order, 1998
- The Solvent Extracted Oil, De oiled Meal, and Edible Flour (Control) Order, 1967
- The Milk and Milk Products Order, 1992
- Essential Commodities Act, 1955 (in relation to food)

The PFA dealt with countless Government ministries handling different food sectors as per separate orders, like the fruit products order, and other orders related to vegetable oil products, edible oils packaging, milk and milk products and meat food products, which were issued at different points of time and were sometimes overlapping and inconsistent. On the other hand, a unified Act like FSSA enables unidirectional compliance. The administrative control of the FSSA has been assigned to the Ministry of Health and Family Welfare thereby establishing a single reference point for all matters and eradicating any possibility of multiplicity of orders or the chance that any coordination problems are caused.

FSSA initiates harmonization of India's food regulations as per International standards. It establishes a new National regulatory body, the Food Safety and Standards Authority of India (FSSAI), to develop science based standards for food and to regulate and monitor the manufacture, processing, storage, distribution, sale and import of food so as to ensure the availability of safe and wholesome food for human consumption. All food imports will therefore be subject to the provisions of

[18] Vaish Vinay, 'India: Law governing the Food Industry in India-Revisited, Vaish Associates Advocates 13 June,2013

the FSSA and rules and regulations which as notified by the Government on 5th of August 2011 will be applicable.

1.6.1 Food Safety and Standards Authority of India (FSSAI)

The Food Safety and Standards Authority of India (FSSAI) have been established under Food Safety and Standards Act, 2006 which consolidates various Acts & Orders that have hitherto handled food related issues in various Ministries and Departments. The Act also aims to establish a single reference point for all matters relating to food safety and standards, by moving from multi- level, multi-departmental control to a single line of command. To this effect, the Act establishes an independent statutory Authority – The Food Safety and Standards Authority of India with head office at Delhi. Food Safety and Standards Authority of India (FSSAI) and the State Food Safety Authorities shall enforce various provisions of the Act. Ministry of Health & Family Welfare, Government of India is the Administrative Ministry for the implementation of FSSAI. The Chairperson and Chief Executive Officer of Food Safety and Standards Authority of India (FSSAI) are appointed by Government of India. The Chairperson is in the rank of Secretary to Government of India.

1.6.1.1 FSSAI has been mandated by the FSS Act, 2006 for performing the following functions[19]:

• Framing of Regulations to lay down the Standards and guidelines in relation to articles of food and specifying appropriate system of enforcing various standards thus notified.

• Laying down mechanisms and guidelines for accreditation of certification bodies engaged in certification of food safety management system for food businesses.

• Laying down procedure and guidelines for accreditation of laboratories and notification of the accredited laboratories.

• To provide scientific advice and technical support to Central Government and State Governments in the matters of framing the policy and rules in areas which have a direct or indirect bearing of food safety and nutrition.

• Collect and collate data regarding food consumption, incidence and prevalence of biological risk, contaminants in food, residues of various, contaminants in foods products, identification of emerging risks and introduction of rapid alert system.

• Creating an information network across the country so that the public, consumers,

[19] For Detail See; Official website of Food Safety and Standards Authority of India (http://www.fssai.govt.in)

Panchayats etc receive rapid, reliable and objective information about food safety and issues of concern.

• Provide training programmes for persons who are involved or intend to get involved in food businesses.

• Contribute to the development of international technical standards for food, sanitary and phyto-sanitary standards.

• Promote general awareness about food safety and food standards.

1.7 Maggi Noodle Controversy and Legal Issues

There are basically three legal issues surrounding the maggi controversy[20]:

1. The presence of lead in excess of the permissible safety limits of 2.5 ppm as provided under the Regulation 2.1.1:1 of the Food Safety and Standards (Contaminants, toxins and residues) Regulation, 2011 (the "Contaminants Regulation")[21];

2. A violation of Regulation 2.4.5:18 of the Food Safety and Standards (Packaging and Labelling) Regulation, 2011 (the "Labelling Regulation") with regard to the following label „No added Mono Sodium Glutamate ("MSG") added" whereas Maggi was found to contain MSG; and

3. The release of „Maggi Oats Masala Noodles with Tastemaker" (hereinafter referred to as "Maggi Oats") in the market without completing the process of risk/safety assessment and approval by the FSSAI.

In brief the order dated 5th June, 2015 issued by Food Safety and Standard Authority of India, Delhi has held M/s. Nestle India Ltd liable inter alia under Section 20, 22, 23 and 24 r/w Section 53, Section 26, 27,48, 50, 52 and 58 and 59[22]amongst others of the FSS Act, 2006[23]. The FSSI order also directed M/s. Nestle India Ltd to withdraw and recall the 9 approved variants of Maggie instant Noodles from the market since these products having been found unsafe and hazardous for human consumption. The Authority also directed the company to further stop the production, processing, import, distribution and sale of the instant products from immediate effect, and also to immediately withdraw and recall "*Maggie Oats Masala Noodles with Tastemaker*"

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20 Sarshar Mubashshir, Controversy Surrounding Maggi Noodles: Legal Issues, National Law University, Delhi (2015) (http://works bepress.com/mubashshir/31)

21 See Regulation2.1.1:1 of FOOD SAFETY AND STANDARDS (CONTAMINANTS, TOXINS AND RESIDUES) REGULATIONS, 2011 (Chemicals described in monographs of the Indian Pharmacopoeia when used in foods, shall not contain metal contaminants beyond the limits specified in the appropriate monographs of the Indian Pharmacopoeia for the time being in force).

22 For Detail See: Food Safety and Standards Act,2006

23 Ibid

since the product has still not been approved by the Competent Authority[24].

Section 20 deals with Contaminants, naturally occurring toxic substances, heaving metals etc which states that food products will only contain the quantities as specified by the regulations. Section 22 deals with genetically modified foods, organic foods, functional foods, proprietary foods[25]. It is this "proprietary food" provision that has been used against Maggie Oats Masala Noodles with Tastemaker whereby M/s. Nestle India Ltd was asked to recall and withdraw the product with immediate effect. Section 23 of the FSSI Act deals with packaging and labelling of foods, M/s. Nestle India Ltd has been prima facie being liable under this section since the label of Maggie specifies that the product does not contain any MSG whereas lab testing of the product confirmed that the MSG presence was much higher than the prescribed limit.

Section 27 deals with liability of the manufacturers, packers and wholesalers, distributors and sellers and amongst various other liability Section 27 (3) (c) deals with liability of wholesalers and distributors for unsafe and misbranded. Section 48[9] in detail covers provisions relating to offences.

The company has challenged the order dated 5th June, 2015 issued by FSSAI and order dated June 6th, 2015 issued by Maharashtra FDA whereby direction was issued to recall Maggie products from the market before the Hon'ble Bombay High Court.

Bombay High Court in its Judgement in WPL/1688/2015 para 122 of the opinion that,

"We clarify that though in the judgment we have mentioned that the samples of 9 Variants of Maggi Noodles should be tested, we make it clear that the Variants which are available with the Petitioner may be tested. Those Variants which are not available with the Petitioner, they may be manufactured after positive report is given in respect of the Variants which are available. So far as "Maggi Oats Masala Noddles with Tastemaker" is concerned, the Petitioner will have to undergo the procedure of obtaining product approval and the Respondents(FSSAI) may consider the application of the Petitioner again, after such an application is made within a period of 8 weeks from the date of making of such application".

The Supreme Court on 12 Jan,2016 sought a response from Maggi noodles

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24 Kumar Abhishek, 'India: Maggie: 2 mintues noodles controversy and the Legal issue involved, Singh and Associates, 16 July,2015

25 'Proprietary and Novel Food, means an article of food, for which standards have not been specified but is not unsafe; See, Sec,22(4) of the FSSI Act,2006

manufacturer Nestle India Ltd and Maharashtra on a plea filed by the Food Safety Standards Authority of India (FSSAI) against the Bombay High Court verdict lifting ban on nine variants of the fast food and asking the company to go for fresh tests and said the testing of Maggi noodles samples as directed by National Consumer Disputes Redressal Commission (NCDRC) will now be undertaken by the Mysore-based Central Food Technological Research Institute lab.

1.8 Conclusion and Findings

The right to food was first recognized in the Universal Declaration of Human Rights in 1948, and further codified by the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976. In the ICESCR the right is recognized as part of an adequate standard of living, which also includes housing and clothing (Art. 11-1), and it enjoys separate recognition (Art. 11-2). The right to food is also closely related to the right to life, which is protected under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The 1992 Rio Declaration on Environment and Development proclaimed that human beings are entitled to a healthy and productive life in harmony with nature (principle 1), and Agenda 21 contains numerous references to food security and food safety[26].

The whole controversy surrounding Maggi has caught everyone's attention on two issues. First, Nestle and second the Food Safety and Standards Authority of India (FSSAI). People now realise that a government organisation exists that is supposed to ensure the safety of the food we consume. FSSAI has been in the news for quite some time now in relation to imported food items, but its name has now reached the common man with the Maggi controversy[27].The FSSAI has certain regulations providing the standards for different kinds of food articles and additives that may be permitted to be used in food products called the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011.However, it has failed to develop a standardized revised format and criteria to define the adequate requirements for standardization of food and food products. Proprietary Food is a category under the FSS Act, which is not standardized under the regulations and these regulations provide for an additional labeling requirement major issues that have caused a legal dilemma and discussion have been on the basis of the definition provided to proprietary foods which did not conclude that the non-standardized foods

[26] Borghi, M. & Postiglione Blommestein, L. (eds.). 2002.For an Effective Right to Adequate Food. In Proceedings of the International Seminar on The Right to Food: A Challenge for Peace and Development in the 21st Century, Rome, 17-19 September 2001. Presses Universitaires de Fribourg, Fribourg.(http://www.fao.org/docrep/005)

[27] Kishore Kunal, 'Legal Opinion: the sleeping FSSAI gaint awakes from its slumber as magi tumbles', Legally India,25 June,2015

are not allowed to be manufactured, imported or sold, but also doesn't mean exclusively that all other non-standardized products, not mentioned in the list of 377 food items, may be manufactured. Given the back drop, The biggest lacuna of FSSAI has been the non-inclusion of thousands of food products that need minimum standards to be prescribed and the ratification of International standards for the same. The "Product Approval Scheme" by the FSSAI has been held unconstitutional by the Bombay High Court under Section 93 of FSS Act[28].

The Maggi Controversy erupted when an officer of the UP Food Safety and Drug Administration Ordered laboratory tests of some samples of Nestle's Maggi instant noodles. The Gorakhpur lab tested positive for MSG whereas the labeling on the product claimed that it contained no added MSG i.e. monosodium glutamate. According to the FSS Rules 2011, MSG, a flavor enhancer, is not permitted in over 50 items but is allowed to be used as a seasoning for noodles and pastas. According to the FSS (Contaminants, Toxins and Residues) Regulations 2011, the permissible limit of lead for instant noodles ranges to a maximum of 2.5 ppm. The tests revealed that the product contained 17 parts per million lead as opposed to the permissible limit of 0.01ppm.

Nestle India said on May 21,2015 "We do not add MSG to our Maggi noodles sold in India and this is stated on the concerned product. However, we use hydrolysed groundnut protein, onion powder and wheat flour to make Maggi noodles sold in India, which all contain glutamate. We believe that the authorities' tests may have detected glutamate, which occurs naturally in many foods." FSSAI-approved testing methods for MSG only test for glutamic acid, which is a component of several foods, including hydrolised vegetable proteins. "Tests in India are not as sensitive as those in developed countries, where individual sources of every component can be identified"[29] "Actually there are always two lines of manufacturing in India. One is for poor people like we Indians and the other is for Singapore and Europe. Nestlé has faced criticism of its advertising not adhering to marketing regulations in developed countries, and making misleading claims in developing countries. Also, in October 2008 Nestlé mistakenly aired a commercial meant for Bangladeshi television on British TV. The advert made false claims that the noodles would "help to build strong muscles, bone and hair". The British Advertising Standards Authority said that the advert did not abide by the new European Union consumer protection legislation, by

[28] Chhabra Vanya, Ban on Maggi and the Legal Issue Involved, Legal News, Nov 16, 2015 (http:/www.lets comply.com/knowedge_hub/2015/11)

[29] Chatterjee Pritha, 'Explained: The Controversy surrounding magi noodles', The Indian Express, June 5,2015. (See more at: http://indianexpress.com/article/explained/explained-noodles-in-the-soup/#sthash.nxS3Zo2I.dpuf)

which advertisers have to provide proof of health claims.

Food controversies are not new to India. Like iconic brands such as Cadbury, Pepsi and Coke that had once been considered unsafe, For one, FSSAI, the food regulator of India, is waking up to the magnitude of the job at hand-of regulating India's organised and unorganised food sector. Second, a more evolved consumer. The National Consumer Disputes Redressal Commission has got the maximum number of calls in its history enquiring about food safety in the week after the Maggi controversy erupted.

Most state labs also lack the capability to test most products. In Delhi, one of the first to ban the sale of Maggi for 15 days, the sample was sent to a referral lab. "I picked 13 samples of which 12 failed. Five samples were mislabelled," says K.K. Jindal, food safety commissioner, Delhi. He complains of shortage of staff: there is need for 10 food chemists in the lab, but there are only three. "If I have to do a microbiological analysis, I don't have the expertise," he adds. Apart from the controversy over the head of the FSSAI, there is an issue of shortage of staff. It is the most neglected department as posts are lying vacant in the capital Delhi itself. In Delhi, two-thirds of the posts are vacant and out of 32 food safety officers only 12 officers are available to check adulteration of food products. Even the testing laboratories of the FSSAI are in pathetic condition. Delhi labs face almost 75 percent of staff shortage. Because of such shortage, test reports take more than 20 days of preparation while it should be over in three to four days.

The other big issue is the lack of a foolproof mechanism to enforce the laws. While the central regulator's job is to frame rules, enforcement, including grant of licences and sales, rests with the states. A few years ago, the central government had thought of strengthening food and drug administration in India along the lines of the US Food and Drug Administration (FDA). But currently, only seven states - Uttar Pradesh, Maharashtra, Madhya Pradesh, Jammu and Kashmir, Haryana, Gujarat and Goa - have proper food and drug administrations. Orissa, Delhi, Kerala and Tamil Nadu have a food safety department, headed by a food safety commissioner. In the remaining states and union territories, the job of ensuring food safety is entrusted with health and family welfare departments. Regulatory sources say manpower to monitor the over $25 billion food industry is the biggest issue in most states. As of February 2015, the FSSAI has granted 18,736 central licences, while states and UTs granted another 5,50,808 licences. There is also a registered base of 23,73,484 food business operators in the food sector. Sources say at least an equal number of unregistered FBOs operate in India. It is practically impossible to collect samples and

monitor all the units on a regular basis[30].

Statistics also reveal the pitiable enforcement scene in the country. In 2013/14, only 72,200 food samples were examined across the country. Of this, 13,571, or nearly 19 per cent, were either found to be misbranded or adulterated. The agency initiated action against 10,235 defaulters, but only 3,845 were convicted or penalised. Similarly, in 2012/13, 69,949 samples were examined, and 10,380 were found to be nonconforming. Only 5,840 of the culprits were prosecuted, while 3,175 were awarded penalties or convicted. There is a large number of states whose record is poor in terms of food adulteration investigations. For 2012-13, Jharkhand, Lakshadweep, Tripura and West Bengal show no record as per the FSSAI website[31]. In West Bengal only 91 samples were checked and 41 of them were declared misbranded but no penalties and conviction could be slapped. In Bihar too, in 2012-13, the samples in the range of 371 were declared misbranded but not a single rupee was collected as penalty. Similarly in Haryana out of 1,500 samples 235 were misbranded and 131 cases were lodged but neither a single conviction could happen nor penalties were recovered[32].

Data also reveal that several states are either not equipped or bother to monitor the industry regularly and test samples. Figures for 2013/14 show only one sample was taken and tested in Andaman and Nicobar, six in Dadra & Nagar Haveli, 40 in Daman and Diu, 704 in Goa, 213 in Arunachal Pradesh, 236 in Himachal, 17 in Meghalaya and 66 in Nagaland. Even in states where a large number of samples were analysed, the violators got away. For example, Andhra Pradesh found 716 adulterated or misbranded food samples, but nobody was convicted.

The infrastructure for continuous monitoring requires both public and private sactors laboratories and exclusive central referral laboratories to validate the testing procedures. In India, there are sufficient Nation Accreditation Board for Testing and Calibration Laboratories-accredited laboratories to undertake the food quality analysis at a cost ranging between Rs. 10,000 and Rs. 20,000 per sample. However, estimating heavy metals in food samples need sophisticated equipment costing about Rs. 1 Crore, and State such as Tamil Nadu are among the few that have such

30 Jay Kumar P.B and Shashidhar Ajita, 'How safe is our food anyway? The magi controversy brings to fore the need to have a strong food regulatory system, Business Today, July 5,2015.

31 Kumar Pankaj, 'Time to overhaul FSSAI and Protect the future generation, Governance now, June 22,2015

32 Ibid

facilities[33].

The country does not have the necessary infrastructure for test facilities and even existing testing units do not often meet global standards. There are only 166 approved laboratories that are capable of testing samples collected from the near 24 lakh FBOs. Of this, there are 90 NABL (National Accreditation Board for Testing and Calibration Laboratories) units, apart from around 12 referral labs of repute. But their workload is huge.

The India Today Television team conducted a sting operation in which they approached FSSAI officials pretending to have a food product with high lead levels in October 2015. One of them agreed to pass the samples without conducting any tests. told the team that "When you make money by selling your product, just pay me Rs 20,000 on a yearly basis" He revealed that milk samples from one of India's best known companies had been dismissed by deliberately adulterating it, because company did not agree to bribe the inspectors. Food and Consumer Affairs Minister Ram Vilas Paswan reacting to the operation said that "Standard products are being labelled as sub-standard and faulty products are being passed by such corrupt officials. This is a big crime and I demand strongest possible action against all those found guilty," and promised to take serious action, although FSSAI is not administer by his ministry. Commenting on the reports, Union Health Ministry stated that FSSAI has clarified that the officials who have figured in the sting operation are not working in FSSAI but are employees of the UP state government[34].

1.9 Grey Areas: Need for immediate Improvements

Consumer policy experts and activists have identified several grey areas that help food operators to supply sub-standard products to consumers and yet remain 'untouched'. It's ultimately the consumer, who gets the wrong end of the stick[35].

- Central regulator doesn't conduct regular inspections and testing of products, to ensure that only the right quality product is sold in the market.
- There is laxity on part of state governments' food safety departments as well.
- There is lack of proper coordination between the Centre and states, as the latter

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33 Punj Shweta, 'Under scanner: In God we trust. Lack of standard testing protocols. Compromised enforcement in the states, on which the onus of food safety lies. India eats, drinks at its own peril'; India Today News Live TV Magazine, June11, 2015

34 Supra Note 11

35 Not Just Maggi:Here's the shameful truth about food safety inspection in India, Firstpost, Jun 5,2015

don't report to the Centre in this regard.

- Barring a few laboratories accredited by the National Accreditation Board for Testing & Calibration Laboratories (NABL), several testing laboratories in states fail to conform to standards. The equipment used by these labs is often not upgraded and not properly calibrated. It leads to variation in results.

- Despite having immense power, the food safety commissioners and officers in states don't exercise it on a regular basis to keep a check on all ready-to-eat products on shelves.

- Often the field inspectors fail to get permission from higher authorities to conduct a raid and check products.

- Lack of proper training facilities of inspection staff, and modernization.

- Unlike abroad, the implementation of law and regulations is weak in India. So, is the penalty.

- Both the regulator at the Centre and food safety departments in the states suffer from staff crunch. The state units lack funds.

- Corruption is another area of concern.

- A Five-year action plan chalked out jointly by the Centre and states in 2009-10 is yet to be implemented

ROLE OF GOVERNOR IN CENTER-STATE RELATIONS: CHANGE IN TREND

*Rattan Singh
**Ravideep Badyal

1.1 Introduction

Federalism means distribution or division of power between the Centre and States. This distribution of powers makes the federal government more transparent, accountable and close to the individual or public at large. Many countries have federal form of government and have a good track record in such efficacious form of governance. Federal form of government also leads to the good governance because of the proper division of powers between the Union and State governments. According to the K.C. Wheare, "there are some federal principles that make a country federalist and establish a federal form of government." He stated that (a) both the governments i.e. Union and State government should have their own independence so that they can take decisions without any dependence on each other and coercion or force, (b) both the countries should act in their own limited sphere and they must not transgress the field of one another and (c) both the governments should be co-ordinate to each other. If a country has all these three principles then we can say that a country is federal in structure. In the federal form of government two authorities has to play the important role as head of the Union and State i.e. President and Governor.

Out of these two Governors of the States have significant role to play in federal form of government. In India, as K.C. Wheare stated that we have Quasi-Federal government because the State governments are subordinate to Centre Government and in the case of Emergency the whole powers rest with the Union. For that reason, Governor has very limited role to play in the emergency situation. Governor is an important authority in federal form of government and he is an intermediary between the Centre and State. Centre- State relations are very much depending upon the role of Governor. Governor has to play a very positive and vibrant role in federalism. Governor has dual responsibility in federal form of government and he has to fulfil its duty with high scrupulous attitude and he should be very rectitude towards its obligations. Firstly, Governor is a "Constitutional Head" and "Manager" of the affairs of the State and he has to maintain the proper peace and security in the state.

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The state government does its functions on the behalf of the Governor and in that case Chief Minister and its cabinet do everything under the authority of the Governor because they represent the Governor in their each and every action. Secondly, Governor is also an agent of the Union Government and an intermediary between the Centre-State relations and he has to operate as a connection between the Union and State during the crisis in administration or affairs of the State. He has to play a pivotal role while performing in these conditions.

There are some differences between the position and role of the President and Governor described as following:

i. President is indirectly elected by the people through their representatives and Governor is appointed by the President with the aid and advice of the Union Government.

ii. The removal of the President is happened through the impeachment procedure by passing a non-confidence motion in any house of the Parliament but the removal of the Governor depends upon the pleasure of the President.

iii. President appoints many state officers under his authority but Governor has no authority to remove any official from the office.

iv. President also has diplomatic powers but there are no such powers are given to the Governors of the States under the Constitution of India.

The role of Governor is still silent in Indian federalism because states are depended upon the Union government. If there is breakdown of Constitutional machinery then Governor has an obligation to submit the report to the Executive and to give the proper report about the conditions of the State from time to time to the President of India. After that Governor has no other role to play but only to provide the continuous information regarding the position of the social order of the state.

> If we compare the role and position of the Governor with the United States of America then the Governors in the American States are directly elected by the people by the voting system and federal government cannot intervene in the election process because it is totally out of the purview of the Executive. [1]

Governors are more powerful in United States as compare to India. In India political parties are trying to control the authority of the Governor and Governors in many

[1] William Bennet Munro, *The Government of The United States* 674-75 (The Macmillan Company, Osmania University, New York, 1946).

states are also mingled with the politics. For example, the Governor of Assam recently made a statement that Hindustan is for the Hindus only. It clearly described the intentions of the Governor. When a Governor is appointed by the President then he becomes an independent body or authority and has nothing to do with the state politics. Governor has to be more loyal towards the Union Government as compare to State governments. But in the filth of dirty politics nothing is out of reach in state politics. Similarly, in recent days the new BJP government forced many state Governors to resign from the office without any reasonable cause because of the precedent. Precedent is already well settled that every new government appoints the state Governors according to their whims and fences under the authority of the President.

The role of Governor has been changed in India. Like before 1967, there was only single ruling party in the country and every office of the country was under the control of the Union and Congress dictated his own terms and conditions and wanted every public official to run his office according to the desires of the government. Governor was very powerless and at that time the Sarojini Naidu who was then Governor stated that she considered herself as a bird in a golden cage.

Similarly, Dr. Pattabhai Sitaramaya Governor during the regime of Jawaharlal Nehru stated that she has no power and function except making the late night reports of the Nehru and Nehru stated that the role of the Governor is to make people happy, satisfied and joyful and nothing else. Sri Prakasa and Vijaylaxmi Pandit were the former Governors of Madras and Maharshtra respectively under the Nehru regime observed that the office of the governor is not so important and it is totally redundant and they demanded to abolish the office of governor. Professor K.V. Rao stated that the powers of Governors were undermined by the Nehru because of the single party existence in India at that time. The congress party

> The office of the Governor suddenly became an important figure and the office of the Governor was very disputable one and lot of controversies were started taking place after the period of 1972. Role of this significant authority came into questions for the first time in the history of India. After that plethora of political dialogues were held by the various political parties to reconstruct the constitutional framework regarding the office, position and role of the Governor in Indian federalism.[2]

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2 Indrajeet Singh, "Role of Governor and Multiparty System" 46 *Mainstream* 11 (2008) as cited in *available at*: http://interstatecouncil.nic.in/downloads/volume2.pdf/ (last visited November 28, 2015).

The political parties were trying to capture the spirit of the office of the Governor and dictate their own terms without any compliance with the provisions of the Indian Constitution. Political parties did not want any kind of authority upon them and they had tendency to undermine the role of Governor and they were always misused their powers during the appointment of the Governors. The complete vindictive approach was there between the Governors and Chief Ministers of the States.

> When the Chief Minister was from the opposition party the Governor considered himself as the agent of the Centre and when there was government by alliances then the position of Chief Minister was rendered incompetent. This was resulted the fastidious and adamant behaviour of the Governor which became disputable and debates were taking place on the constitutional powers and role of the Governor in federalism of India.[3]

All these powers are derived from the Government of India, 1935 in which Governor was having the supreme position and authority and he had to discharge his powers under the name of the Monarch but there was one condition also that he has to take the assistance of the Ministers in Council before using his authority except in the case of discretionary powers. So, it was really problematic and same kind of practices was followed by the Governors of the States in India post-independence. It has been stated that 'Governor shall hold office during the pleasure of the President'[4] but such provision is not followed by the new government and practice has been followed since 1977 during the regime of Janata party. Janata party dismissed the Governors appointed by the previous Congress regime and till now this precedent is there and following by the every newly elected Union government.

Recently after the establishment of BJP government in 2014, the Governor of five states i.e. West Bengal, Uttar Pradesh, Chattisgarh, Nagaland and Goa have already resigned from the office due to the regular pressure of the Union Government because they wanted to appoint all the Governors according to their own agenda and President is bound to appoint the Governor as proposed by the Union Government.

A controversy was also there in New Delhi where a continuous deadlock between the powers of the state government and Lieutenant Governor were going on. Both the authorities were transgressing the powers of each other but we must follow an opinion that politics are involved in this controversy because of the lesser grant of powers to the government of Delhi. So, the position of Governor is in danger and role of the Governor is not up to the mark because of the limited powers prescribed

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3 *Supra.*

4 The Constitution of India, Art. 156(1)

him under the Constitution of India. The main problem with the role of Governor that on one side, he has to work independently without the interference of the state government but on the other side the appointment of the Governor is not secured because it totally depends upon the satisfaction of the Union government and removal upon pleasure of the President. This problem has to be cured immediately so that the office of the Governor should be secured and becomes more independent. Role of the Governor should be more effective and vibrant under the federal structure of India. Otherwise, state governments will start dictating their own terms to the Governor.

How we can maintain the independency of the office of the Governor? How the role of the Governor should become more effective and powerful? The researcher is this paper will try to resolve these problems or suggest some reforms for the betterment of the federalism of India.

Governor is an employee of the Union government and he has only neutral role to play in Indian political structure and he should be kept himself away from the state politics and any pecuniary or other benefits.

Does the election process enhance the independency of the office of the Governor? Does the removal of the Governor on the basis of doctrine of pleasure is effective one? These are certain questions those have to be answered to maintain the standard of Governor's office.

1.2 Intentions of the Framers of the Indian Constitution

'During the Constituent Assemble debates earlier it was held that Governor should be directly elected through the lection procedure but later on the idea of elections was dropped.'[5] 'Assembly stated that there would also be friction between the Governors and popular ministries. The decision to not elect the Governors and appointed by the nominations would maintain the efficiency of the office of the Executive.'[6]

> It was held by the assembly that it might have some detrimental effects on the federal structure of the India by centralising it further. Nehru was partly favoured the concept of nominated Governors because he was of the opinion that it would help the Union to be in touch with the States and would eliminated the possibility if separatist tendencies.[7]

5 D.D. Basu, *Commentary on the Constitution of India Vol.6* 6078 (LexisNexis, Buttersworth, Wadhwa, Nagpur, 8th edn., 2009).

6 *Ibid.*

7 Grandville Austin, *The Indian Constitution – Cornerstone of a Nation* 117 (Oxford University Press, New Delhi, 9th Impression, 2005) as cited in *Supra.*

During the assemble debate, Alladi Krishnaswami Ayyar stated that if we consider election process for the appointment of the Governor then political parties will start to rally for the elections of the Governors and this would give rise to the elections of the Governor would become politicised which is no good for the harmony between the legislature and executive. He further observed that the President and his cabinet should have the option to select the right person for the post of Governor and they might pick up the person with full of ability and that person will increase the smooth working of the government as a mediator. He also stated that convention can be developed where Government of India would consult the State government for the appointment of the Governor but Jawaharlal Nehru was of the opinion that it is better to not involve the Governor in local politics.

Dr. B.R. Ambedkar made an amendment and on the behalf of the drafting committee stressed upon the appointment of the Governor by the Executive and not by the election process because it is not necessary for the appointment of Governor and elections will lead to the more investment. He also expressed that it will enhance the troubles for the country also to proceed with the lection process which is purely ornamental. So, he supported the process of nomination. 'Everybody supported the amendment made by the Ambedkar.'[8]

1.3 Recommendations of Sarkaria Commission's Report, 1988 on Center - State Relations

Sarkaria Commission was constituted in June, 1983 by the Union government at that time to check the connection or relationship and proper balance of powers between the Union and State government in the federal structure of India and to give the proper suggestions or recommendations for the necessary changes within the structure of Indian Constitution.

The head of this Commission was Justice Rajinder Singh Sarkaria and because of this the name of the Commission was named as Sarkaria Commission. The other two eminent members of the Commission were Shri. B. Sivaraman and Dr. S.R. Sen. Lot of studies, research and discussions were held to examine the relationship between both the governments and finally a report of 1600 pages was submitted to the Central government at that time. In this report of Sarkaria Commission total 247 recommendations in specific areas were passed by the said Commission and during the whole examination or research, Commission also discussed the role of Governor

8 Subhash C. Kashyap, *The Framing of Indian Constitution – A Study* 395-396 (Universal, New Delhi, 2nd edn., 2004).

in Center-State relations. The main emphasis was on the role of Governor and provision of 'proclamation of emergency in the case of breakdown of functionality of Suprema Lex '.[9]

The Commission stated three vital roles of the Governor in Indian Federalism developing out of the provisions of the Indian Constitution under Chapter IV of the report are as following:

a. To operate normally under the parliamentary system of Indian democracy as the Head of The Constitution in India.
b. To make an important linkage between the Federal and State Government.
c. To work as a representative of the Union Government in peculiar areas 'during the ordinary circumstances'[10] and 'during the abnormal conditions or circumstances also'.[11]

Commission stated that minute controversy is related to the role of the Governor during the situation of emergency but the main controversy exists where Governor has to perform its duty or obligations because of the ample complaints against the behaviour of the Governor. Sometimes, Governor promotes the interests of the Union Government and on the contrary to that he also involved in the state politics which is detrimental to the office of the Governor. Governor has to play a neutral role in the federal form of government because every act of the state is under his authority and he has a prime responsibility to act unbiased.

'The power should be exercised in the general interest of the society or community and for the purpose of welfare of the public at large and it is not meant for any personal benefits'.[12] Former President Dr. APJ Abdul Kalam also expressed that the office of the Governor has been bestowed with the high degree of independence and he has to maintain this independence by not put himself into the day to day politics of the country. The Sarkaria Commission laid down the following recommendations:

a) During the time of the selection of the Chief Minister of a State when proper majority doesn't exist then Governor should appoint a leader, who, in his sound judgement is most likely to command a majority in the assembly.
b) The dismissal of the Chief Minister should be held on the grounds of

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9 The Constitution of India, art. 356
10 The Constitution of India, art. 239(2)
11 The Constitution of India, art. 356(1)
12 *Rameshwar Prasad* v. *Union of India* , AIR 2006 SC 980. Five Judge Bench Decision by Y.K. Sabharwal, C.J., B.N. Agrawal, Ashok Bhan, Dr. Arijit Pasayat and K.G. Balakrishnan, JJ.

"subjective satisfaction" but on the test of majority.

c) If the case is related to the dissolution of the legislative assembly then in this particular case, the power should reside with the people of the state to settle the matters themselves and before dissolving the assembly; he should consult the leaders of the political parties and Chief Election Commissioner if he wants fresh elections.

The whole recommendations of the Sarkaria Commission were based on the specific situation when the single party in a particular State fails to obtain the proper or absolute majority to form a government and 'order of preference directly comes under the authority of the Governor and this order of preference should follow in selecting a Chief Minister.'[13] So, the Commission suggested the reforms in the role of Governor and made it clear that in Center-State relations, the Governor has to play an important role without any prejudicial approach and he must follow the principle of fairness and independency. He must act as the intermediary between the Union and State Government and not to show its unnecessary authority over the States by misusing his constitutional powers.

1.4 Punchhi Commission on Center-State Relations, 2007

After the first Commission on the Center-State constituted under the headship of Justice Rajinder Singh Sarkaria, the second Commission on the Center-State relations was appointed on 27th April, 2007 composed of four members headed by Justice Madan Mohan Punchhi. The other three members of the Commission were Dhirendra Singh and VK Duggal (Former Home Secretaries) and eminent Professor N.R. Madhava Menon (Former Director of National Law School, Bangalore). In addition to these names, one more name was included later on and Dr. Amaresh Bagchi (Professor Emeritus and Former Director of National Institute of Public Finance and Policy, New Delhi) became the member of the Commission. The Commission submitted its report on the Center-State relations on 30th March, 2010.

After the Sarkaria Commission lot of new developments were taken place due to the open market and globalisation and new challenges were developed in the country. The political and economic structure of the country has undergone many changes and new challenges have come out before the Government of India at various levels. So, Government wanted to make a fresh look regarding the role and responsibility of the Union and State Governments. Commission was appointed to examine the Center-State relations and provide contemporary suggestions or recommendations for the better smoothening of Indian federalism.

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[13] *Supra* note 4 at 6102.

In the report of this Commission under Volume II (Chapter IV) , role of Governor has been discussed by the Commission in which they articulated the expressions of Dr. B.R. Ambedkar that Governor has no functions to perform which he can discharge by himself under the Indian Constitution but he has to execute his duties or responsibilities.

> Governor has no power to overrule the particular decisions of the ministry and undermine the role of the government but he is bound to take the aid and advice of the council of ministers and has to fulfil his duties in accordance with the aid and advice of the ministers.[14]

The key recommendations of the Commission are as following:

a) The commission recommended the "localising emergency provisions" during the situation of emergency due to the 'failure of constitutional machinery'[15] in which a district or districts be brought under the rule of the Governor instead of the whole state and time period for such emergency should not be more than three months.

b) Another proposed recommendation was to give right to sanction to the Governor against the opinion of the Ministry of appropriate government in case of the prosecution of a minister.

c) The nominee for the appointment of Governor has moral and social obligation to not participate in the active politics at any level including the local level for atleast couple of years before the appointment.

d) The commission criticised the arbitrary dismissal of the Governor without any reasonable cause and stated that this practice should be stopped because Governor is not a political football to play with.

e) Commission recommended that the tenure of the Governor should be five years and removed through the impeachment procedure in the State Assembly. They also recommended that before the appointment of the Governor, the Chief Minister of that particular state should be consulted by the authorities.

f) The recommendations of the Commission were also there regarding the 'appointment of Chief Minister'[16] and laid down certain guidelines for the appointment. Order of precedence should be followed during the problem where the single party unable to obtain the proper majority:

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14 The Constitution of India, art. 167

15 *Supra* note 9.

16 The Constitution of India, art. 164(1)

a. To invite the political party having largest pre-poll alliance commanding the largest number of votes.
b. The party having the leading majority as an individual capacity should be given preference as compare to others with the support of the other political parties.
c. 'Post-electoral coalition can be taken into consideration in which all the parties joined together to form a government.'[17] This is one of the main precedent that Governor ha to follow in the case the formation of the Government having no proper majority in the Legislative Assembly.
d. 'Any alliance after the elections with few political parties those are willing to join the government and the parties those are left behind as well as independents supporting outside.'[18]

So, Punchhi Commission has given very important and new suggestions including the qualification for the post of Governor and the removal of the Governor on the basis of impeachment procedure and not base upon the doctrine of pleasure in which Governor shall hold the office during the pleasure of the President but this doctrine of pleasure is very vague and ambiguous in itself and the term is very broader. It is very difficult to establish the doctrine of pleasure that what things has to be calculated under the doctrine of pleasure but in India "doctrine of pressure"[19] is being followed by the President with the aid and advice of the council of minister instead of the doctrine of pleasure.

The recommendations are still not implemented by the Indian government in any manner. Commission has given very new changes regarding the role of Governor but hearing of the government is still pending upon these relevant suggestions.

1.5 Functions of Governor as Constitutional Head

The Governor has the same status as to the President in State government and he is also a Constitutional Head of the State in same manner as President of the Union. But the Council of Ministers has to perform the primary role in the State government and all the powers of the Governor shall be exercised by the Council of Ministers under his authority.[20]

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17 Dnyanesh Kumar, "What are the main recommendations of Punchhi Commission" *available at*: http://www.preservearticles.com/2011092814259/what-were-the-main-recommendations-of-punchhi-commission.html (last visited, November 29, 2015).

18 *Ibid.*

19 The Constitution of India, art. 156(1)

20 *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab* AIR 1955 SC 549.

The office of Governor is permanent as long as the parliamentary form of government or system exists and question regarding the abolition of this office will never arise in this particular system. We cannot drive out the Governor because there are responsibilities and obligations that have to be fulfilled by the executive during the critical conditions in State either by the President or Governor.

> In the Parliamentary form of government, Council of Ministers, changes from time to time because of the loss of the confidence in the legislature and dissolution happens. In this situation, the role of Governor comes into picture and he has to play an important as Constitutional Head for the better administration of the State and to execute formal acts in relation with the outside world and this has to be maintained as well as continued by the Executive i.e. President for the Union and Governor for the State.[21,22]

The word 'Constitutional Head' has its own meaning and it states that Governor of the State won't participate in the administration of the state. He has prime responsibility to keep check on the administration of the state and on the state government for every action of the state politics. Governor cannot interfere in the active politics of the state government. Once, he has been appointed by the President then he shall be under the duty to render his service for the Union Government and to fulfil its obligations without any personal interest and biasness. He has to be more loyal towards the Union as compare to State.

> Governor also cannot intervene in the formulation of policy, making of laws and for the implementation of the policies and laws which comes under the purview of administration of the State because it is the sole concern of the Council of Ministers or Cabinet to decide upon these matters. Council of Ministers is there to aid and advice the Governor and not vice-versa.[23]

So, basically the role of Governor as Constitutional head is to maintain administration of the state in case of critical conditions and to send the report of the state functionality to the Union if something is out of the control of state government. Governor has two major functions with regard to his position as Constitutional Head:

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21 The Constitution of India, arts. 53(1), 154(1). This is the reason that Constitution vests the executive powers of the Union to President and of a State to Governor in Indian parliamentary system or federal structure.

22 *Samsher* v. *State of Punjab* AIR 1974 SC 2192. Seven Judge Bench decision by A.N. Ray, C.J., A. Alagiriswami, D.G. Palekar, K.K. Mathew, P.N. Bhagwati, V.R. Krishna Iyer and Y.V. Chandrachud, JJ.

23 *Ibid.*

I. *To support, encourage and caution*: Governor of the State has primary function to support the Council of Ministers in every legitimate action taken by them for the betterment of the state administration. For the better services of the State government, Governor must encourage the Council of Ministers. Further, in the case of any detrimental conditions which can affect the Constitution or in the case of social disorder in the State, Governor also has prime responsibility to warn the Council of Ministers for the same to maintain the peace, order and stability in the administration of the State.

II. *Right of Apprisal*: 'Chief Minister as head of the Council of Ministers has an obligation to communicate all the decisions regarding the management or supervision of the state affairs, legislative or executive.'[24] 'If some information is required by the Governor on any decision taken by the Council of Ministers then Chief Minister has to submit the report for the same on as head of the state government to the Governor of the State.'[25] So, here Governor has power to ask the government regarding the affairs of the State.

Above mentioned are the major two functions of the Governor as the Constitutional head and he has to maintain all the records of the State affairs because Union government can ask anything the regarding the State affairs if requires.

But under Article-167 of the Indian Constitution, we can clearly imagine the position of the Governor in reality that he has no authority or power to take any action against the Chief Minister or the Council of Ministers if the provisions of this particular Article-167 have not been followed by the Council of Ministers.

So, if the Chief Minister denies furnishing the required information that has been asked by the Governor to furnish and Council of Ministers has taken the decision themselves without informing it to the Governor with respect to the administration of State affairs then Governor cannot impose any obligations on the Council of Minister. Neither can he compel the Chief Minister on the behalf of the Council of Ministers to furnish the information nor to make this provision mandatory by using its own power as Governor of the State. Chief Minister is a powerful authority and Governor cannot do anything to him because he is backed by the strong majority in legislative assembly. This makes the Governor helpless and powerless. The word 'duty' is used in this Article-167 of the Indian Constitution which puts an obligation on the Council of Ministers to furnish but as we all know that duties are not enforceable by any Court of Law in India.

[24] The Constitution of India, art. 167(1)
[25] The Constitution of India, art. 167(3)

Here, the question arises regarding the position of the Governor. The answer is very simple with due respect to the Indian democracy that everything depends upon the personal relations between the Chief Minister and the Governor. Recently, Sacrilege of Guru Granth Sahib has been done by some fundamentalists in State of Punjab but Governor did not ask Chief Minister to furnish any information regarding the social disorder created by the radicals. Governor has powers in theory but not in practice. But a genuine and sensible Chief Minister always upholds the supremacy of the Constitution on the moral grounds and never transgresses or disrespects the provisions of the Constitution.

1.6 Governor's Role in Law Making Process

Governor has a very limited role in the law making process in state administration. 'Governor has to take a decision to assent the bill or to withhold the bill for his own consideration or keep the bill with himself for the consideration of President.'[26] If the Governor took decision to assent the bill then he has to do it as soon as possible but he may also return the bill to the legislative assembly or to the legislative council for the reconsideration. No time limit has been defined for the Governor to assent a bill but for the betterment of the state administration, Governor should not reserve the bill for long time. 'Time limit is not necessary in granting the assent to the bill by the Governor.'[27] Similarly, 'Governor is not answerable to any Court of Law in case of reserving the bill for the consideration of the President.'[28] We cannot term it as veto power and atlast the will of the legislature shall prevail. 'Governor can request the legislature to reconsider if there is any defect or unsoundness of measures or policy involved in the bill by sending a message to the legislature.'[29] ' Further if the legislature clears the error after complying with the message of the Governor in the second reading of the bill then Governor is bound to give his assent to the bill within the reasonable time period or as soon as possible.'[30]

'He also has power to reserve the bill for the assent of the President'[31] in following cases:

a. 'Where Governor thinks that if bill becomes law them it would prejudicially affect the powers of the High Court.'[32]
b. 'Where the bill is related to the imposition of taxes on the water or electricity

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26 The Constitution of India, art. 200
27 *Purshothaman* v. *State of Kerala* AIR 1962 SC 694.
28 *Hoechst Pharmaceuticals* v. *State of Bihar* AIR 1983 SC 1019.
29 The Constitution of India, art. 200 (Proviso 1)
30 *Supra* note 25.
31 The Constitution of India, art. 200 (Proviso 2)
32 *Ibid.*

is less number of cases.'[33]

c. 'Where the bill is a money bill during the case of financial emergency.'[34]

In the above mentioned situations, the Governor has imperative obligation to withhold the bill for the consideration of the President and it is must. 'When the bill is withheld by the Governor then President has to declare either that he assent the bill or that he withholds.'[35]

But no time period is specified under this power of the President and sometimes it leads to the harmful conditions. President sometimes doesn't give the assent immediately and withhold the bill for long time and this particular thing affects the operation of the state administration because sometimes the law is required to be passed for the smooth running of the administration of the state.

Punchhi Commission also criticised this power to withhold the bill by President and the Commission observed that six months period should be applied in the case of assenting or reserving the bill because no time period has been prescribed in this Article-201 regarding the assent or withhold of the bill. So, that state legislature can again consider the bill for the necessary changes and after that passed to fulfil the requirements of the administration.

1.7 Ordinance Making Power of the Governor

Ordinance making power is a unique and important feature of Indian federal structure. 'President and Governor both have ordinance making power when both the houses of Parliament and State Legislative Assembly or Legislative Council as the case may be are not in session.'[36] 'Further, if President or Governor, as the case may be, is satisfied that there are necessary circumstances to take an immediate action and in that case President or Governor, as the case may be, may promulgate ordinances for the social order or administration of state.'[37] 'During the exercise of this power appropriate authority is bound by the aid and advice of the Council of Minister and satisfaction doesn't mean personal satisfaction of authority.'[38] 'It can also serve the purpose to unlock the deadlock between the political disorders.'[39] 'It has validity for the period of six weeks from the date of reassembly of the legislature and he can

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33 The Constitution of India, art. 288(2)
34 The Constitution of India, art. 360 (4)(a)(ii)
35 The Constitution of India, art. 201
36 The Constitution of India, arts. 123, 213
37 *Ibid.*
38 *Supra* note 22.
39 *State of Punjab* v. *Satya Pal Dang* AIR 1969 SC 903.

withdraw the ordinance by himself before the expiration period.'[40]

1.8 Judicial Functions of Governor *vis-a-vis* Power to Grant Pardon

'Governor of a state can exercise its power to grant pardon, to halt the conviction during the period starts from the conviction till the disposal of the mercy petititon or provide remission of the punishment or can suspend or commute the punishment of any person convicted under any law of the state.'[41] 'Governor of the States has power to grand pardon to the prisoners within the state jails and extra territorial operation is not valid in this case.'[42] Governor of a particular state has to exercise this power of clemency within the concerned state and outside the sphere or jurisdiction of that state. He cannot interfere in the matters of other state with regard to the pardoning power. 'The clemency power of the Governor is subjected to judicial review on reasonable grounds.'[43] 'Governor is bound and not sovereign with respect to its clemency power and he himself cannot exercise such power without any concern with the Council of Ministers.'[44]

'Governor also appoints the Advocate General of the State which can hold his office till the pleasure of the Governor and Advocate General is under the obligation to perform all the functions that Governor may ask from time to time.'[45]

1.9 Discretionary Role of the Governor

a) *Administrator of Union Territories*: In this particular case, Governor has no concern with the State Government and he has power to perform its functions without any pressure and interference of the State Government. 'In this case, Governor has discretionary powers to his functions against the ministerial advice.'[46] 'Agent of the Union is necessary to promote the national integration and strength and to maintain the national measures in the administration of state.'[47]

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40 The Constitution of India, art. 213(2)(a)

41 The Constitution of India, art. 161

42 *Government of Andhra Pradesh* v. *M.T.Khan* AIR 2004 SC 428.

43 *Satpal* v. *State of Haryana* AIR 2000 SC 1702.

44 *Maru Ram* v. *Union of India* AIR 1980 SC 2147. Five Judge Bench Decision by Y.V. Chandrachud, C.J., P.N. Bhagwati, S. Murtaza Fazal Ali, V.R. Krishna Iyer and A.D. Koshal, JJ. Order of commutation can be issued without the consent of the Governor because it is a governmental function. But to facilitate the Governor, we can take the signature of the Governor. President and Governor both cannot take decision independently and they have prime duty to consult the Government i.e. Union and State Government as the case may be.

45 The Constitution of India, art. 165

46 D.D. Basu, *Comparative Federalism* 408 (LexisNexis, Wadhwa, Nagpur, 2nd edn., 2008).

47 *Ibid.*

'Governor shall be appointed by the President of India in the Union Territories of the country and Governor has to perform its mandatory functions under the Union authority. He is not responsible for any act to the State Government.'[48] 'He is independent and shall take decisions by this own discretion without consulting the Council of Ministers of the State because he is the administrator of the State.'[49] Sometimes, these powers lead to the deadlock between the decision taken by the State Government and the Governor as an administrator.

Recently, we can see that during the appointments of the higher officials in Delhi public departments, there was continuous conflict between the Chief Minister Arvind Kejriwal and Lieutenant Governor Najeeb Jung. Everything happened because Delhi government has no full fledge powers and government is subordinate to the Lt. Governor in which total administration is under the control of the Lt. Governor and government has to maintain the limitations between the powers of each other. So, discretion is a finest principle of administrative law and functionality of the administration but sometimes it can also be detrimental if we use this discretion in excess without reasonability and justification.

b) *Special Provisions with regard to Certain States*: 'Governor has an important role to play in the State of Maharshtra and Gujarat.'[50] He has sole responsibility to act upon the directions of the President in the following cases:

i. 'To constitute separate development boards for Vidarbha, Marathwada anf for the rest of the Maharashtra and similar boards in Saurashtra, Kutch and rest of the Gujarat.'[51]

ii. 'To make equilibrium while allocating the funds to these special areas for the development purpose.'[52]

iii. 'To provide equal standards to both the States in case of technical education, vocational training and opportunities of employment in State services under the control of State government.'[53]

Similarly, special powers are given to the Governor in the State of Nagaland

48 The Constitution of India, art. 239(1)
49 The Constitution of India, art. 239(2)
50 The Constitution of India, art. 371
51 The Constitution of India, art. 371(2)(a)
52 The Constitution of India, art. 371(2)(b)
53 The Constitution of India, art. 371(2)(c)

in which powers are conferred on the Governor by the Constitution to maintain the proper law and order in the State and to prevent or protect the people from the internal disturbance.

Further, discretionary powers are given to the Governor in the State of Manipur in which, 'he has to fulfil the responsibility given by the President of India to secure the smooth functioning of the members of a committee of the legislative assembly in which members are representing the Hill areas of the Manipur.'[54] 'Governor has to furnish the annual report of the administration of the Hill areas to the President of India.'[55]

In the State of Sikkim, Governor has the special obligations 'to maintain the peace in the State and to make arrangements that ensures the social and economic advancement in the basis of equitable distribution for various sections of the people and to act upon the directions of the President from time to time.'[56]

Governor in State of Arunachal Pradesh have got the authority from the Constitution that he has 'crucial liability to maintain the law and order in the State and can exercise his individual capacity in case of any judgement after consulting the Council of Ministers.'[57] 'The decision of the Governor while delivering the judgements on the individual capacity shall be final and cannot be challenged in any Court.'[58] Sarkaria Commission recommended that Governor must take the consent of the Ministers before exercising the final authority in the matters directly related to the administration of the State.

c) *Appointment of Chief Minister*: 'Governor appoints the Chief Minister of the State.'[59] But if the case is related to the "Hung Parliament" where no political party enjoys the proper majority then the Governor may appoint such person as the Chief Minister whom he thinks fit to form and run a government. Subsequently, in the case of death or resignation of a Chief Minister on moral or political grounds, Governor may appoint the person as a chief Minister whom he thinks fit for the administration of the State. But the decision of the Governor should be just and fair and without any pecuniary or personal interests then the administration of State can run properly with any obstruction.

54 The Constitution of India, art. 371C(1)
55 The Constitution of India, art. 371C(2)
56 The Constitution of India, art. 371F(g)
57 The Constitution of India, art. 371H(a)
58 The Constitution of India, art. 371H(Proviso to clause a)
59 The Constitution of India, art. 164(1)

'Governor also has discretionary power to remove the Chief Minister or any other Minister because of they can hold their offices till the pleasure of the Governor and if there is gross violation of the Constitution provisions or where the Chief Minister is able to make his majority under vote of confidence.'[60]

d) *Power to Dissolve State Assembly*: Governor has a power to dissolve the state Assembly if the Constitutional Machinery fails in that particular State or where State government is not able to perform its functions or resigns from the legislative assembly. There is no such provision provided under the Indian constitution but judicial interpretations are there that justifies the dissolution of State Assembly. 'State Assembly cannot be dissolved without giving any justified reasons'[61] or on the prejudicial grounds or any deadlock between the office of Governor and Council of Ministers.

1.10 Governor and Failure of Constitutional Machinery

The expression "failure of Constitutional machinery" is nowhere defined under the any Article of India Constitution. This expression is very absurd or ambiguous. What are the limitations of this expression and in which situations, this emergency can be imposed by the President on the report furnished by the Governor? The expression has no definition or scope. Even Dr. B.R. Ambedkar was also expressed his opinion on this emergency provision and stated that we hope that this provision would not be put into operation by the any government and may remain as a dead letter and nothing more than that. In federal structure of any country both the government should have their own autonomy for the relevant purposes and to achieve those purposes the independency should be given to the States instead of suppression by the Union at every front. Prof. Shibban Saxena also observed that imposition of Article-356 of the Indian Constitution degrades the State autonomy which is not good for the federal structure of India democracy. Similarly, Pandit H.N. Kunzru (Member of Constituent Assembly) also expressed that during the petty instabilities in the State legislature cannot attract this provision and if President of Union imposes this provision on these irrelevant matter then it won't be justifiable.

This provision of Article-356 of Indian Constitution has been derived from the Section-93 of the Government of India Act, 1935 in which Governor had the power to impose the emergency and take the whole mandate under his authority if the provincial government doesn't act according to the said provision and after the satisfaction of the Governor, the emergency had been imposed. Under this provision

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60 *Supra* note 46 at 418.

61 *S.R. Bommai* v. *Union of India* AIR 1994 SC 1918.

it is stated that:

> 'on the receipt of a report made by the Governor of the State if President becomes satisfied or "otherwise" which means other than the submission of the report of the Governor if President thinks fit that State government is not able perform his functions according the provisions of the Constitution then State emergency can be imposed by the President with the consultation of the Council of Ministers.'[62]

'The proclamation of emergency has effect for two months unless approved by the both the house of the parliament.'[63] 'If Parliament approved the resolution then the time period for the proclamation of the emergency would be one year and can be beyond the one year if needed.'[64] 'But proclamation shall not continue after three years because maximum period id of three years if the conditions are more critical.'[65]

Earlier the time period was two months but after 42nd Constitutional amendment, it has been increased for six months and subsequently the time period has been increased further beyond one year after the 44th Constitutional amendment.

'Because, the satisfaction of the President doesn't mean his personal satisfaction but the satisfaction of the Council of Ministers as well and he is bound to consult the Council of Minister before taking any necessary action in any part of the Country.'[66]

The proclamation shall be made by the President and after that President has taken the mandate:

a. 'To exercise its power on the State and can perform the functions of the government or any power of the Governor by himself.'[67]
b. 'To declare that Parliament of India can make laws on the State subjects for the people of the State or he can also make laws under his own authority.'[68]
c. 'To make any other necessary law which he thinks fit to achieve the purpose of the proclamation. He has power to suspend wholly or partially any provision of the Constitution for the time being.'[69]

In this proclamation Governor act as an "agent" to the Center Government. Governor

62 The Constitution of India, art. 356(1)
63 The Constitution of India, art. 356(3)
64 The Constitution of India, art. 356(4)
65 The Constitution of India, art. 356(4)(Proviso 1)
66 *Supra* note 22.
67 The Constitution of India, art. 356(1)(a)
68 The Constitution of India, art. 356(1)(b)
69 The Constitution of India, art. 356(1)(c)

has to submit the reports on the peace, law and order or administrative affairs to the Union or the President for the further action and Governor has to be very neutral while making the report and should not act against the welfare of the democracy and people of the State. Governor is like father to the society and everything depends upon him because he has capacity either to do reforms or to deteriorate the administration of State. So, role of the Governor is more important than the role of any other authority in State administration because States make the nation and not vice-versa. Administrative Reforms Commission, 1966 laid down certain requisites for the proclamation of emergency in States:

Where the case is related to the "political breakdown" in the State which means that State government has resigned from his office and no fresh government or coalition government has been formed in the States after the new elections.

i. Where the State government doesn't perform its functions in compliance with the provisions of the Constitution and there is violation of the Constitutional provisions continuously by the State government.

ii. Where State government doesn't act in accordance with the directions issued by the Union government from time to time.

iii. Where there are serious charges of malpractice, maladministration against the State government or in case of any disruptive activities by the separatists or terrorists.

iv. 'Where the problem of law and order arises within the state and it is difficult for the State government to act upon.'[70]

v. 'Where there are continuous defects and change in allegiances of legislature.'[71]

'The union government cannot transgress his limits merely on the grounds of political instability but only in respect of the violation of the Constitution only.'[72]

> 'In Indian federal structure or democracy there are chance that different political parties are working under the Center and State and it can be possible that both the governments lack in tuning. So, for that reason the powers under Article-356 should be confined for the bonafide acts of the Governor and powers must not be used with malafide intentions just to the Union. Governor's report under this Article can be malafide sometime and not neutral.'[73]

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70 For instance, it was invoked in Punjab in 1959 and 1987; in 1990 in Jammu and Kashmir and in 1991 in Tamil Nadu.

71 For instance, in case of Sikkim in 1984; in Tamil Nadu and Gujarat in 1988 and 1996 respectively.

72 *State of Rajasthan* v. *Union of India* AIR 1977 SC 1361.

73 *Supra* note 61.

Similarly, the emergency cannot be invoked under Article-356 of the Indian Constitution 'on the grounds of corruption, maladministration of the State government.'[74]

The role of the Governor during the state emergency should be very neutral and not arbitrary. He must follow the moral grounds while making any report on the matters of the failure of state administration and he must consider all the relevant issues before recommending it to the President of India because sometimes it happens that out of the personal grudges, power has been misused by the authorities which is not good for the stable and efficacious democracy in any country.

Some scholars said that the Article-356 should be removed from the Indian Constitution because we have stable political system and democracy and we don't need this now. But still there are certain states where law and order is not proper and what about these states? State government sometimes fails to maintain the law and order in the state and then refers the matter to the Union for the further action. Like in case of Punjab during the "Bluestar Operation" the law and order of the state was not under the control of the state government and President Rule had been imposed in the State of Punjab.

Sarkaria Commission supports this provision and stated that it should not be deleted or suspended from the Indian constitution because it has its own value and worth. If we delete this provision then may be state governments would start acting like a dictator also and it should be imposed during the relevant breakdown of Constitutional machinery but deletion in toto is not good for the Indian federal structure.

> 'This power also leads to the judicial review if the emergency has been imposed on the failure on the part of the state government and "floor test" has been laid by the Supreme Court of India in which the majority has to be proved by the state government as single or by coalition. If the test has been passed then judiciary can review the decision of the Governor.'[75]

So, many times this provision has been misused by the Union government and State becomes helpless in this situation and it is also detrimental for the political and socio-economic growth of the State. Governor cannot use this power on the account of pleasure but to use it by applying the futuristic approach and inner-conscience so that

74 *Supra* note 12.
75 *Supra* note 61.

nothing will happen wrong to the State administration. Governor must perform this obligation by considering the affects of this provision on the society at large with deeper understanding and introspection. Every office has reputation and the authority itself build the prestige of that particular office. By imposing this provision on personal footing will degrades the level of democracy and the hard reality of Indian democracy is that every political party or government wants to develop by compromising with the development of the society.

1.11 Change in Trends in the Role of Governor

The role of Governor before the Independence was same as now in Indian federal structure. Under the British rule, Governors are under the control of the British Parliament and they were just to facilitate the British Parliament and had no power to act independently or to act in his personal capacity. The same status of Governor is going till now after the independence also and more or less the role of Governor is very much silent till now. They are the real agents of the Union because they have only work by acting on the behalf of the Union government. They are appointed by the President by making consensus with the ruling party and ruling party always want a name as the Governor in the state that can fulfil their political agenda and nothing else. A convention is still working in the Indian democracy to appoint the Governors as per the convenience of the Union government and not on the basis of merit and this practice has been followed by the ruling party post independence.

As H.M. Seervai explained that the judiciary during the Congress regime since 1967 was committed judiciary and inclined towards the ruling government but not acted as independent body. A similar condition was with the Governors also because they were more or less committed with the ruling party and ruling party appointed them according to their own whims and fences.

> 'From the very beginning of 1966 to 1977, the ruling party imposed the emergency provision in the Indian federalism approximately for 39 times in the States where Congress didn't have any majority and the tuning was not frequently good between the Center and State government and Janta Party has the same track record in imposition of emergency from 1977 to 1979.' [76]

'Janta party imposed the emergency provision in the States probably 19 times where the ruling party was of the Congress. This shows the dictatorship of the ruling party

[76] Minhaz Merchant, "Governing Our Governors" *The Times of India* Jan. 21, 2012.

during these years.'[77] During the regime of Congress, Supreme Court of India held that 'Governors are subordinate to State government and they have to perform every function after discussion with the Ministers of state government and he shall be bound by the result.'[78] In 1979, a landmark decision has been given by the Apex Court and stated that Governors are more powerful in States and 'State government and Governor has to show the co-ordination in the administration of the State and Governor shall not be inferior or subordinate to the government.'[79] 'All the powers of the State reside with the Governor and he should act as a sovereign authority.'[80]

After that the report of Sarkaria Commission gave some recommendation with regard to some changes in the role of Governor and few of them have been accepted by the Government. Commission suggested the reforms in appointment and removal of the Governor from his office and said that Governor should hold the office for five years so that his tenure can be secured by this.

In the year 1989, lot of political parties have emerged at the Center and State level which was good for the office of Governor. Regional parties were emerged strongly and they had no concern with the Governor appointed by the opposition party in the Center and later on, no serious incident was happened with regard to the dispute between the Union and States on the issues of Governor. In 1998, the BJP government came into the rule with its regional alliances and during that time the federal system was emerged strongly and similar case was happened in 2004 and after that the concept of 'Co-operative Federalism' came into existence.

'There shall be no judicial inquiry on the Governor if he reserves the bill for the consideration of the President and this gave some more power to the office of Governor.'[81] The trends were changing and varying from case to case and as per the circumstances. Similarly, Supreme Court stated that the 'appointment and dismissal of the Chief Minister can be only done by the Governor and it is his sole authority and not subjected to any judicial inquiry if he used the malafide intentions while using the discretion under Article-163(2) .'[82] Role of Governor has changed from time to time and in another case Apex Court restricted the power of Governor with respect to the dissolution of the State Assembly and stated 'that majority test has to

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77 *Ibid.*

78 *Supra* note 22.

79 *Hargovind Pant* v. *Raghukul Tilak* AIR 1979 SC 1109. Five Bench decision given by Y.V.Chandrachud, C.J., P.N. Bhagwati, N.L. Untwalia, Syed Murtaza Fazal Ali, R.S. Pathak, JJ.

80 *Ibid.*

81 *Supra* note 28.

82 *R.L.K. Jain* v. *Union of India* AIR 1993 SC 1769.

be passed before the dissolution.'[83]

Restrictions were also put on the Governor regarding the "clemency power" in which Apex Court stated that 'Governor cannot use this power without the prior consent of the State government'[84] and 'if he uses power with malafide intentions then it will come under the judicial review and overruled the decision of *R.K.L. Jain* v. *Union of India*.'[85] Governor has been put under the obligation that 'while appointing the Chief Minister if he has any doubt then he has to consider with care and cautious manner and here, the mandate of the people shall not prevail because of the supremacy of the Constitution.'[86] In between these judicial interpretations, Sarkaria Commission Report and Puncchi Commission Report in the year 1988 and 2010 respectively and suggested the reforms for the role of Governor and many of them were adopted which made the office of Governor more efficacious and meticulous.

In 2010, another landmark decision has been given by the Supreme Court held that 'reshuffling of the Governor is not possible on the grounds that Union government and State government is has no synchronisation and removal before the expiration on time should be on reasonable grounds.'[87]

But still the practices of removal of Governor after the formation of new government is happening in Indian democracy and after the establishment of NDA regime in 2014, approximately seven Governors of different States have resigned and everybody knows that it was politicises because no government wants Governors in the States appointed by the previous ruling party.

So, this is how the role of Governor has been changed from time to time. At various stages, role of Governor in federal structure has emerged like a sovereign entity and in some cases the role is undermined by the politics of the Union and States. The role of Governor is still silent in Indian democracy because he has powers to exercise but there are two reasons for non-exercising of powers i.e. either Governors only want to continue their terms without any stigma or they are performing their duty just for the sake of formality and on the moral grounds.

1.12 Deficiencies in the Office of Governor

Still, there are certain shortcomings in the office of Governor. Two Commissions on Center-State relations have been established by the Union government to give reports

83 *Supra* note 61.
84 *Supra* note 44.
85 *Supra* note 43.
86 *B.R. Kapur* v. *State of Tamil Nadu* AIR 2001 SC 3435.
87 *B.P. Singhal* v. *Union of India* (2010) 6 SCC 331.

including the recommendations for the effective federal structure and to make the Indian federal structure more powerful and strong. Some suggestions have been incorporated by the government from time to time but there are certain shortcomings with respect to the office of the Governor.

I. *Appointment Procedure*: The appointment procedure of the Governor is always under the question. Sarkaria Commission gave suggestions for the qualifications of the Governor like (a) he should be a person of some ability and has done something for the nation; (b) he must be a person outside the local state; (c) he should not have any relation with the political parties or at the local level politics; (d) there should be no defect regarding his character. But still there are no proper qualifications for the appointment of Governor under Article- 157 of the Indian Constitution. Recommendations made by the Sarkaria Commission have not been followed by the government. Punchhi Commission also supported the recommendations of the Sarkaria Commission and again mentioned the same qualifications with reference to the previous Commission. Constituent Assembly earlier referred the appointment of Governor by the way of elections but later on the idea was dropped and power has been given to the President to appoint the Governor as nominated by the Ministers in Union Parliament.

II. *Procedure of Removal*: Governor can be removed from the office by the President having consultation with the Council of Ministers is illegitimate. The basic reason for the removal is doctrine of pleasure but what is the scope of doctrine of pleasure. Whether it includes the charges of corruption, maladministration or any personal equation with the Union government? It is an important question to think upon. The hard reality is that doctrine of pleasure has been changed into doctrine of pressure in which if the Governor goes against the will of the Parliament then he would be fired and that is the sadden reality of the Indian politics. The Governor should be removed by the impeachment procedure as recommended by both the Commissions in their reports and it would be more just and fair instead of the rule of pleasure, Governor has prime responsibilities to perform and he is not sitting in his office to please or entertain the President or the Union.

This is the main reason that Governor of a state doesn't want to go against any wrongful action of the State government. Because of that reason, Governor has threat in his mind that he might be involved by the Union or State under any illegal charges. So, the impeachment procedure should be there and he must be impeached by the State Assembly as President is impeached by the Union Parliament. It will make the Governor more independent in the service of the State and make him free mind to

deal with the matters of the State in normal as well as in critical circumstances.

Another matter of concern is that the term of the office of the Governor should be secured for five years and no doctrine of pleasure should be applied on this matter because this doctrine is misused by the ruling party every time. This degrades the values and standards of the politics in Indian democracy.

1.13 Conclusion

Governor is an authority in the Indian federal system which has so much relevance but the political parties in regime has propensity to not give so much importance to the Governor in State politics. Governor is always suppressed in the case where the Union and State governments have no synchronisation in working with co-operation. Governor should also make efforts to remove a stigma of puppet from his character. If he acts freely and uses his powers on moral grounds then the office of Governor would get more security and worth.

The role of the Governor is to keep check on the functions of the government and to take care of the law and order of the state but reality is something else. He is more interested to establish himself as an emerging contender for the State politics. In India, every public office is attached with some kind of personal benefits and everybody wants to achieve new heights of success by compromised with their internal values. Governor also sometime plays very negative role in state politics just to put pressure in the State government because he is an agent of the union government also.

The problem of attitude and ego always arises in the minds of the Governor. The role of Governor can be turned from negative to positive one if he starts working in diligent manner and by contributing something worthy in the administration of the State for the development of the federal system of the India instead of having lust for the personal benefits. Public offices are for the service of the people but instead of service, the politicians and government serve their own pockets.

The election should be adopted in the appointment of Governor as elections held in United States and Governor should be elected directly by the people. Investment is there but atleast we can spend money on good cause. Secondly, Governor should not be from the same political party ruling in the Union because it also lowers the powers of the Governor. On the contrary, we can also say that then Governor can misuse his powers against the State government but the Governor should be appointed from the bureaucrats, persons those have rendered their services in the field of arts, science, sports etc. He must not have any political record or association with any political

party throughout the life.

Finally, the role of Governor can be turned into positive by serving as guardian of the Constitution rather than as an agent of the Union and one if he follows the rule of honesty, non partisan and self-introspection during making report before or after the proclamation of the emergency. So, first of all Governor himself has to break the precedent to work under the coercion of Union then he can serve the country well and after that Union government must use him to build a nation but not to demolish the nation on the note of retaliation with the State government and has to work as a co-operation instead of competition of powers.

Co-operation is more important in federal structure because for the upbringing and to build an institution the only that requires is co-operation.

In the developed nations, there is full co-operation between the political parties, Union government and State governments and this is the predominant reason of their development. Executive in Union and State should do everything with the co-operation and not by competing on the personal notes. Ultimately, society has to suffer from this trajectory.

India is an emerging economy in global market and to make it stronger now it is time to give up the vindictive agenda for the political, economic and social development of the country.

United States of America has strong federalism because of the sync between the Union and States. Powers are divided between both the government and this is the basic principle of federalism i.e. distribution of powers between the Center and State.

In India, political parties or governments are busier in leg pulling instead of putting legs in same direction. The Union Executive and State Executive must have proper manifesto for the welfare of the nation. Governor can play more important role as compare to President because development is not done by single hands and in a country having so much of political, social, cultural and economic diversities, States are more responsible as compare to Union. States can implement the Union policies well in the State and to Governor can participate in that by checking the implementation of the policies in the State government.

Governor cannot force the State government or State legislature but he can direct the government in framing of policies and this should be included as an obligation of the Governor.

Convention regarding the change of Governors after the newly elected government

should be stopped and it has to be broken for the betterment of the Indian democracy because it leads to the typical politics. The office of the Governor must be secured form the cheap politics and must not be removed before the expiration of the time period i.e. five years and it can only be done if Union government would change its attitude. For the stable government and for the proper overall development of the nation, States have to play a neutral role because India is a Union of different diversities and it is a unique feature of Indian culture.

The role of Governor has changed with the changing requirements of the federalism but we have to build this institution with co-operation. Governor's role is still silent but for a strong federal structure in democracy needs the voice of every public authority then the nation transforms from one phase to another.

RESURGENCE OF PIRACY AND LEGAL PROTECTION

Sinjini Majumdar*

1.1 Introduction

Pirates have existed as long as ships have sailed the high seas, and despite the international community's endeavours to end it, continue to persist as a menace to men and cargo. It is of pertinence to note that the concept of piracy has evolved over the ages, with changing perspectives of maritime law and ocean governance.

The word "piracy" comes from the Latin word *pirata*, meaning "sea robber", which again is derived from the Greek *peirates*, which mean "brigand" or "one who attacks"[1].This concept has considerably evolved over the ages and modern piracy has become increasingly sophisticated, and often linked with terrorist groups.[2] Despite the existence of a large number of national, regional and international frameworks, there still exists a gap in the effect of law, to curb the international crime of piracy.

Through this paper, the author seeks to analyse the reasons behind this problem of piracy. The author will first discuss the historical factors as to how and why piracy came into existence, after which she will examine the two main international legal frameworks which deal with piracy, namely the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA). Furthermore, the author analyses the various reasons for the resurgence of piracy in the recent past, and tries to put forth a few possible ways in which piracy can be curbed.

1.2 Historical Evolution of the Concept of Piracy in Maritime Law

Jurisdiction over the high seas has been a grey area for most of human history. Various scholars have propounded their own theories regarding the same, but the general view remained that the seas cannot be owned, occupied or governed. In the early 1600s, the Dutch jurist, Hugo Grotius, in his treatise *Mare Liberium*, has

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1 Bruse A Ellemean, Andrew Forbes and David Rosenberg (Ed.), *Piracy and Maritime Crime: Historical and Modern Case Studies*, New Port, Rhode Island: Naval War College Press, 2010

2 Natalie Klien, Maritime Security and the Law of the Sea, Oxford University Press, 2011, Michael A. Becker, *The Shifting Public Order of The Oceans: Freedom Of Navigation And The Interdiction Of Ships At Sea*, 46, Harvard J.Int'l L. pp 131, 2005

opined, "The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.[3]

With the expansion of trade and colonialism, the incidences of piracy became more lucrative and hence rampant. To combat this States started building navies. In instances where states did not have naval power, they resorted to three inter-related legal remedies, namely, letters of marque, commissions as privateers, and prize law.[4] When a ship was attacked by the citizens of another State, the ship would first seek direct restitution from the offending State. If this was refused, the ship would petition to its sovereign State, and if the sovereign State and offending State could not reach solutions through negotiations, the sovereign would issue a letter of marque to the ship. This letter accorded the ship the right to attack any merchant ship of the offending State as a means of compensating his original losses.

However, with time, the practice of issuing letters of marque was viewed as a belligerent act. This led to the concept of privateering. Accordingly, ships of offending States were only attacked at times of war. The sovereign State commissioned the privateers who had to adhere to a number of instructions as laid down by the sovereign.[5]

Under Admiralty Law, the captured enemy ships along with cargo, were referred to as 'prize'. Prize law regulated the valuations and recipients of these prizes. This was done through regulations issued by the sovereign, which were followed by the prize courts, who were the forum for determining issues. The general order was to auction off the ship and its cargo to compensate for losses. However, there were also complications in this regard, in instances when a neutral ship carried enemy cargo, or when enemy ships carried neutral cargo, as countries differed in their views of dealing with these situations. Often this was used as a false plea of defence by the enemy State, and it was up to the Admiralty Courts to interpret the laws.[6]

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3 Hugo Grotius, Mare Liberium: *The Freedom of the Seas, or the Right which belongs to the Dutch to take part in the East Indian Trade*, Trans. Ralph Van DemanMagoffin 8, Published In The Original Latin In 1608: Oxford Univ. Press, New York, 1916, P. 2

4 *Supra*, n. 1.

5 Michael P. Scahrf, Michael A. Newton & Milena Sterio, *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes*, Cambridge University Press, New York, 2015

6 Donald A. Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail*, Naval Institute Press, 1999

As time passed, States increased their limits of territorial sovereignty to the seas, beginning with the US extending sovereign jurisdiction to three miles offshore in the late 1700s. Any act of robbery and looting within this area was regarded not as piracy, but maritime crime, and the State had as much jurisdiction and control as it did on land. Most countries started following the US, especially after rich mineral and fishing resources were discovered offshore. However, nations started following their own standards of jurisdictions, with varying territorial outreach. Finally, in 1958, the United Nations made the first attempt to create a single international standard, at the First Conference on the Law of the Seasin Geneva[7], where the 1958 Convention on the High Seas [8] was framed. After a few more such conference, the UN came up with the United Nations Convention on the Law of the Sea, 1982 (UNCLOS),[9] which, among other things lays down a framework for the repression of piracy, especially in Articles 100 to 107, and 110 of the Convention.[10]

1.3 International Legal Frameworks and Their Limitations

There are various national, regional and international legal frameworks which pertain to the problem of piracy, in the domain of both international law and maritime law. There are 2 international legal instruments which regulate piracy: the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA). Both Conventions define piracy differently, and both have a number of loopholes which act as detriments for counter piracy measures.

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7 *See*, United Nations Conference on the Law of the Sea, 1958, available at http://legal.un.org/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html

8 *See*, Convention on the High Seas, 1958, available at http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf

9 *See*, United Nations Convention on the Law of the Sea, 1982, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

10 *Piracy under International Law*, Division of Ocean Affairs and the Law of the Sea (April 4, 2012), available at http://www.un.org/depts/los/piracy/piracy.htm

1.3.1 United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS is binding on all States, irrespective of whether they are signatories to the Convention, as it is accorded as customary international law.[11] Article 101 defines piracy as "any illegal acts of violence or detention, or any act of depredation, committedfor private ends by the crew or the passengers of a private ship or a private aircraft". However, this definition narrows down the scope of piracy as it requires the fulfilment of 3 conditions, and most often it is difficult to prove all the conditions.

The first condition is that an offence would amount to piracy only if it is committed on the high seas, thus automatically excluding any offence committed in the territorial waters of a State. Secondly, the act of piracy has to be between two vessels. However, contemporary piracy often involves members of the crew hijacking their ship, and the present definition precludes this situation, and courts have often upheld the same.[12] Lastly, the act has to be carried out by a private ship for private purposes, thus excluding politically motivated activities, such as those carried out by secessionist or terrorist outfits.[13]

1.3.2 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA)

The SUA Convention of 1988 was enacted to combat acts of maritime terrorism and to fix the loopholes in the UNCLOS, after the failure to implement the UNCLOS in the *AchilloLauro*case. Article 3 of SUA has a broader outreach of the definition of piracy and covers all the 3 limitations of UNCLOS. Article 6 deals with jurisdictional issues and enhances the definitional aspect laid down in Article 3. It covers offences in territorial or archipelagic waters and ports as long as it involves a ship scheduled to embark international navigation, as well as provisions for extradition of offender, none of which were present in UNCLOS.[14]

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11 Ved P. Nanda, "Maritime Piracy: How Can International Law And Policy Address This Growing Global Menace?",*39 Denv J. International Law and Policy*, 2011, pp 177

12 In 1962, the hijacking of a cruise-liner Santa Maria by a Portuguese man, was not considered piracy as there was no second ship. Similar is the case of Achillo Lauro in 1985, where members of the Palestine Liberation Front hijacked the ship, and the Court dismissed the case simply because it did not fulfil the two ships criteria.

13 Zouk Keyuan, "New Development in the International Law of Piracy", *8 Chinese Journal of International Law*, 2009, pp 323

14 Article 6, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988

Furthermore, the 2005 Protocol to the Convention added a new article on the procedures for a state party requesting the flag state of a suspected vessel for its authorization to board and search that vessel, its cargo, and persons on board, thus providing the necessary legal foreground to states for intercepting acts of piracy.[15]

The only problem with SUA is that it has still not attained recognition as customary international law, which makes it non-binding to non-signatories to the Convention. This creates a huge lacuna especially in countries like Somalia, which is notorious for its pirates and is a non-signatory to the Convention. This situation essentially undermines the Convention's efforts of bridging the gaps in the UNCLOS.

1.4 Resurgence of Piracy

In the past decade, there has been a substantial rise in maritime piracy.[16] A total of 245 incidents of Armed Robbery and Piracy have been reported to the IMB Piracy Reporting Centre in 2014.[17] Even though pirate attacks occur all around the globe, theseare largely confined to four major areas: the Gulf of Aden, near Somalia and the southern entrance to the Red Sea; the Gulf of Guinea, near Nigeria and the Niger River delta; the Malacca Strait between Indonesia and Malaysia; and off the Indian subcontinent, particularly between India and Sri Lanka.[18] This is due to a large number of factors, which are purely based on economics.

First of all, the start-up costs of becoming a pirate is low, with ready availability of cheap artillery, over-supply of labour and mechanisms of community financing, such as "pirate stock exchange."[19] Secondly, the rates of returns are very high, as over 90% of global trade takes place by the maritime route.[20]

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15 Article 8*bis*, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, (entered into force July 28, 2010), available at http://www.state.gov/ documents/organization/87452.pdf.

16 Christopher Alessi & Stephanie Hanson, *Combating Maritime Piracy*, Council of Foreign Relations, 23 March 2012, available at http://www.cfr.org/piracy/combating-maritime-piracy/p18376

17 ICC IMB Piracy and Armed Robbery Against Ships – 2014 Annual Report, 1 January – 31 December 2014

18 *Supra*, n. 16.

19 Pirate Stock Exchanges Function InHaradhere, Somalia, Where Stocks Are Bought And Sold For Upcoming Attacks. Investors Are Given Profits From The Ransom Collected From Successful Attacks. *See*, James Kraska, "Freakonomics Of Maritime Piracy", *16 Brown Journal Of World Affairs*, 2010, pp 109-115; See AviJorisch, "Today's Pirates have their own Stock Exchange", *The Wall Street Journal*, June 16, 2011

20 *UNODC Maritime Crime Programme*, United Nations Office on Drugs and Crime: East Africa, available at https://www.unodc.org/easternafrica/en/piracy/index.html

Piracy off the Gulf of Guinea, for instance, is especially lucrative as oil tankers are prevalent there, and oil prices on the black market are high. [21] Moreover, laundering the money into the global banking network is easy.[22] Lastly, poor coastal security[23] and governance gaps act as a catalyst to piracy and sea robberies. Moreover, due to improved networking and technology, mobility of the pirates to other waters is fairly easy. Thus, counter-piracy measures don't have much effect as they merely shift their location of operations.[24]

Moreover, pirates these days have come up with innovative methods to surpass the law. One such instance is the use of "phantom ships". The pirates steal or hijack a legally registered vessel, repaint it and change its name and then get it registered again to make it appear legitimate. The new certificate of registration is used to acquire business from traders or shipping agents, and once the cargo is loaded, the pirates sail to a different port and sell it there.[25] Often pirates use these phantom ships for drug trafficking or carting illegal immigrants.[26]

There is also the problem of mistaking vessels for pirate ships, when they are not. This can be seen in the case of *Enrica Lexie*. In 2012, two Italian marines on board the *MV Enrica Lexie*, an Italian flagged ship, shot at an Indian fishing boat and killed two fishermen. The marines had mistaken them for pirates. This incident happened in the contiguous zone thus leading to a jurisdictional issue. This case makes us realize that innocents are getting harmed due to anti-piracy measures, and the fact that the law is ambiguous on this regard, does not help the case. Presently, the case is being heard by the International Tribunal for the Law of the Sea, who has instructed both Italy and India to suspend all proceedings in their respective jurisdictions till

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21 *See, Maritime Piracy in the Gulf of Guinea*, Transnational Organized Crime in West Africa, UNODC, available at https:/www.unodc.org/documents/oc/Reports/TOCTA West Africa/ West_ Africa_TOC_PIRACY.pdf

22 Mark T. Nance & Anja P. Jakobi, "Laundering Pirates? The Potential Role of Anti-Money Laundering in Countering Maritime Piracy",*Journal of International Criminal Justice*.Vol 10, 2012, pp 857, 860, 874.

23 Paul R. Williams & Lowry Pressly, "Maritime Piracy: A Sustainable Global Solution", Case *Western Reserve Journal of International Law*, Vol 46, No. 1, 2013, pp 177- 179

24 UN Office on Drugs and Crime (UNODC), Transnational Organized Crime in West Africa: A Threat Assessment, No. 51, 2013

25 Scott Davidson, 'International Law And Suppression Of Maritime Violence' in Richard Burchill, Nigel D. White and Justin Morris (Ed.) *International Conflict and Security Law: Essays in Memory of HilaireMccoubrey* CUP, Cambridge, 2005

26 John S Burnett, *Dangerous Waters: Modern Piracy and Terror on the High Seas*, Penguin Books, 2003

the case is heard.[27] This case is expected to be a landmark judgment as it would provide solutions and establish a precedent to a vast number of issues in international maritime law.

1.5 Proposed Solutions

The approach towards combating piracy needs to be changed from a localized problem to a global one. Due to changed times and technology, fighting pirates like it was done in the past will not suffice, and the need of the hour is for the global community to work towards a global solution. To this effect there can be a number of viable solutions, as discussed below.

(I) Better Implementation of International Legal Frameworks

It is the need of the hour to amend the definition of piracy in the UNCLOS and provide a broader scope to it so that captured pirates cannot take pleas based on loopholes in the law. Alternatively, the SUA Convention could be accorded recognition as customary international law, thus making it binding on non-signatory States. Authorities should conduct thorough background search before granting registration to ships so as to avoid the problem of phantom ships.

(II) Better Implementation of Best Management Practices

The International Maritime Organization has come up with "Best Management Practices"[28] for the protection against Somali pirates, which continues to be the largest prevailing piracy network. This provides a framework for dealing with pirate attacks. Measures include, watch keeping and enhanced vigilance facilities,[29] razor wires and electric fences,[30] water cannons and ballast pumps,[31] CCTV cameras for recording footage of attacks,[32] among other things. Ships should take due diligence of these norms and equip themselves for safety.

(III) The Use of Armed Personnel on Ships

Ships which use high risk routes should be allowed to have private security[33] or military personnel on board. This is a more practically effective solution than having patrolling navy ships, simply because the ship will be able to defend itself from attack. Furthermore, this is economically more beneficial, as insurance costs of ship and cargo are much higher than

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27 The "Enrica Lexie" Incident (Italy v. India), International Tribunal for the Law of the Sea, 24 August, 2015, available at https:// www.itlos.org/fileadmin/ itlos/documents/cases/case_no.24_ prov_meas/ C24_Order_24.08.2015_orig_Eng.pdf

28 BMP4: Best Management Practices for Protection against Somalia Based Piracy, International Maritime Organization (2011), available at http ://www. imo.org/en/Media Centre /Hot Topics /piracy/Documents/1339.pdf

29 Section 8.2, BMP4.

30 Section 8.5, BMP4.

31 Section 8.6, BMP4.

32 Section 8.9, BMP4.

33 Section 8.15, BMP4.

hiring armed personnel. However, this has to be carefully carried out so as to avoid legal complications, such as the Italian marines case.[34] The International Maritime Organization could act as the regulatory body for this procedure, thus according legitimacy and uniform standardization to the system.[35]

(IV) Establishing an International Piracy Court

As most States lack domestic laws on piracy, they often do not know how to deal with the issue. Instances have been seen when European countries have released captured pirates routinely.[36] In 2010, the UN Secretary General opined that a regional or international tribunal for crimes of piracy, should be created. [37] Till date no such tribunal has been established. Due to the international nature of piracy, and jurisdictional conflicts of national courts, it is pertinent to establish an international court or tribunal which would only pertain to matters of piracy. This should not only include attacks at sea, but also the complex funding and finance chains and all persons involved at every level of piracy, be it directly or indirectly. Establishing a court would not only bring enhanced efficiency and clarity, but would also reduce costs of maintaining regional law enforcement mechanisms.[38]

1.6 Conclusion

Piracy incidents have decreased from 445 in 2010 to 246 in 2015,[39] thus indicating that intervention by the international community is bearing fruit. However, matters are still grave and it is the need of the hour to implement viable solutions. Special focus needs to be given to new problems related to modern piracy instead of maintaining an archaic mindset. Better implementation and interpretation and widening the scope of the UNCLOS and the SUA Convention is necessary for the same, apart from the formation of regional anti-piracy bodies and special tribunals and courts.

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34 *Enrica Lexie* case.*See*, Annie Banerji & D. Jose, "Insight: Murder Trial of Italian Marines in India Navigates Murky Waters", *Reuters*, June 9,2013, available at http:// in.reuters. com/article/ 2013/06/09/ us-india-italy-marines-insightidINBRE9580GB20130609

35 *Supra*, n. 23.

36 Craig Whitlock, "Lack Of Prosecution Poses Challenge For Foreign Navies That Capture Pirates", Wash. Post (May 24, 2010): Anne Applebaum, "Somali Pirate's Clash With Russian Navy Reveals A Gap In Rule Of Law", Wash. Post, May 18, 2010; Ellen Barry, "Russia Frees Somali Pirates It Had Seized In Shootout", New York Times (May 8, 2010)"Piracy: Wrong Signals, Pirates And Legal Knots", The Economist, May 9,2009

37 Report of the Secretary General, U.N. Doc. S/2010/394 (July 26, 2010).

38 *Supra*, n. 23.

39 ICC IMB Piracy and Armed Robbery Against Ships – 2015 Annual Report, 1 January – 31 December 2015

SOCIO-ECONOMIC STATUS, ALCOHOLISM AND FAMILY CRISES: A CASE STUDY OF PUNJAB

Dr. Honey Kumar*

1.1 Introduction

Alcoholism[1] has become a serious social problem in contemporary society. It is continuously affecting millions of families across the world[2]. The alcoholic members of family are not only problematic to themselves but as well as to other family members because of his drinking habits. Data reveals that harmful use of alcohol results in approximately 2.5 million deaths; 4 percent of total deaths, each year in the world and causes illness and injury to many more. Globally, 320000 young people aged 15-29 years die annually from alcohol related consequences resulting in 9 percent of all deaths in that age group.[3] In addition to this, the harmful use of alcohol is also associated with multiple supplementary crises to alcoholic such as unemployment, neglect, non-support and imprisonment [4] as well as to his family such as domestic violence, divorce, child neglect[5], breakup in social relationships, financial problems[6] and many more. Thus alcohol abuse results in enormous cost not only to the abuser but also to his family.

Further, socio-economic status of individual and family is strongly associated with alcohol consumption patterns, factors and implications. The use and implications of alcohol vary among individuals depending upon their biological status such as age, body type, gender etc. as well the socio-economic conditions such Income, marital status, size of family, occupation and educational level etc. Therefore, socio-economic status of alcoholic and his family has a significant role to access the level of complications that the family faces. Thus, the present research paper is an attempt to obtain insight into the relationship between the socio-economic

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1 Alcoholism is a social ill or disorder of behavior which is a result of repeated drinking of alcoholic beverages to an extent that exceeds customary dietary use or the socially approved drinking customs of the community or suggested limits which has capacity to damage the health of individual and impair the social functioning of all the family members. Sociologically alcoholism have been defined in terms of individuals' social role performance and others' definition of the extent to which this performance, due to repeated episodes of drinking, fails to meet social expectations (cited in Honey Kumar, 2018, *Alcoholism and Family Crisis in Punjab: A Sociological Study*, Punjabi University, Patiala (Ph.D. Thesis).

2 World Health Organization, *Global Status report on alcohol and health*, Geneva: WHO, (2014).

3 World Health Organization, *Global status report on alcohol and health*. Geneva: WHO, (2011).

4 J. K. Jackson, "The adjustment of the family to alcoholism", *Marriage and Family Living*, Vol. 18, p361-369 (1956).

5 Minakshi and P.C. Joshi, "Disaster and Domestic Violence: The Alcohol Connection", *Man in India*, Vol. 92, No. 3-4, p551-559, (2012).

6 John Mullahy and Jody L. Sindelar, "Alcoholism, Work and Income", *Journal of Labour Economics*, Vol.11, No. 3, p494-520(1993).

status, problem drinking and its implications on family life in Punjab. Mainly, the article discusses that how age, occupation, gender, marital status or in other words the socio-economic status affects consumption patterns of an alcoholic and further to his family. Moreover, it also highlights in which age group, gender, occupation, type of family, income group etc. the problem is more complicated so that the necessary precautions can be taken accordingly.

1.2 Methodology

The present paper is based on field work. Qualitative methods such as case study, participant and non-participant observation and focused group discussion were used along with quantitative techniques like interview schedule and attitudinal scales etc. to collect primary data. By keeping in focus the definition of an alcoholic[7] used in the present study, 100 families were selected from two districts of Punjab, namely Ludhiana and Tarn Taran, on the basis of highest and lowest consumption of alcohol. According to excise reports, the highest consumption was observed in district Ludhiana and lowest in district Tarn Taran of Punjab (Punjab Excise Policy 2015). Further, data was assembled from respondents i.e., alcoholic, spouse of alcoholic, one of the parents and one of the children of the alcoholic by using interview schedule method. Thus, the total number of interviewed families were 100 and the total number of respondents from the families were 100 (alcoholics) + 73(spouse) + 62(parents) +68 (children) = 303, depending upon the size of family. Collected data were arranged into sequence and entered in SPSS (Statistical Package for Social Sciences) software for statistical analysis. By using this software, data were converted in the form of tabulation and results were drawn after due analysis. During analysis of data, a significant relationship was found between socio-economic status of families, alcoholism and family crises. Therefore, in the present article, larger emphasis is given that how the socio-economic status of families is one of the major causes behind alcoholism and further family crises.

1.3 Socio-Economic Statue Alcoholism and Family

The socio-economic status of family, including alcoholic has a significant contribution for understanding the factors and implications of alcohol abuse.

[7] In sociological terms if one's drinking is deviant in the eyes of another then it may be said that the person is an alcoholic. In addition to this, other symptoms which define person's deviant drinking are, slurred speech, inability to walk strait, continuous laughing, hooting, aggression, fighting and impaired judgment after the use of alcohol. In short, Alcoholic, also known as critical drinker, is one who cannot stop himself from using alcohol and carry out binge type of drinking i.e. drinking large quantity of alcoholics beverages at a single time or whole the day and whose behavior largely affects others (cited in Honey Kumar, 2018, *Alcoholism and Family Crisis in Punjab: A Sociological Study,* Punjabi University, Patiala (Ph.D. Thesis).

Therefore, a detailed account of socio-economic variables such as the respondents' age, gender, caste, religion, marital status, size of family, type of household, possession of basic assets, educational level, occupation and family income etc. are discussed as following.

1.3.1 Age Alcoholism and family Crises

Age of the respondents is one of the most important variables to analyze demographic background of alcoholics and their family members. Though it is a biological component, it is a crucial factor in influencing social and psychological behavior of an individual. Age always becomes major concern for sociological analysis, as a person's age is directly associated with fulfilling many family and societal obligations. Each society creates its own age structure with certain types of corresponding statuses, roles and responsibilities. Thus, if a person gets addicted to alcohol at younger age, it can cause harm to the family for a longer period of time. Data collected from the study shows similar trend. Thus, it is significant to identify age wise distribution of respondents, namely, alcoholic, spouse, parent and children of the alcoholic. In order to get clear picture the entire sample was divided into various age categories. The distributions of respondents according to age categories are presented in table 1.

Table: 1

Age Wise Distribution of the Respondents

S.No.	Age Categories (In Years)	No. of Respondents and Their Percentage			
		Alcoholics	Spouses	Parents	Children
1	Below 25	15 (15%)	4 (5.48%)	0 (0%)	48 (70.59%)
2	25-34	34 (34%)	20 (27.40%)	0 (0%)	16 (23.53%)
3	35-44	24 (26%)	25 (34.25%)	11 (17.74%)	04 (5.88%)
4	45-54	19 (19%)	18 (24.65%)	20 (32.26%)	0 (0%)
5	55-64	05 (5%)	04 (5.48%)	21 (33.87%)	0 (0%)

6	65 and above	03 (3%)	02 (2.74%)	10 (16.13%)	0 (0%)
7	Total	100 (100%)	73 (100%)	62 (100%)	68 (100%)

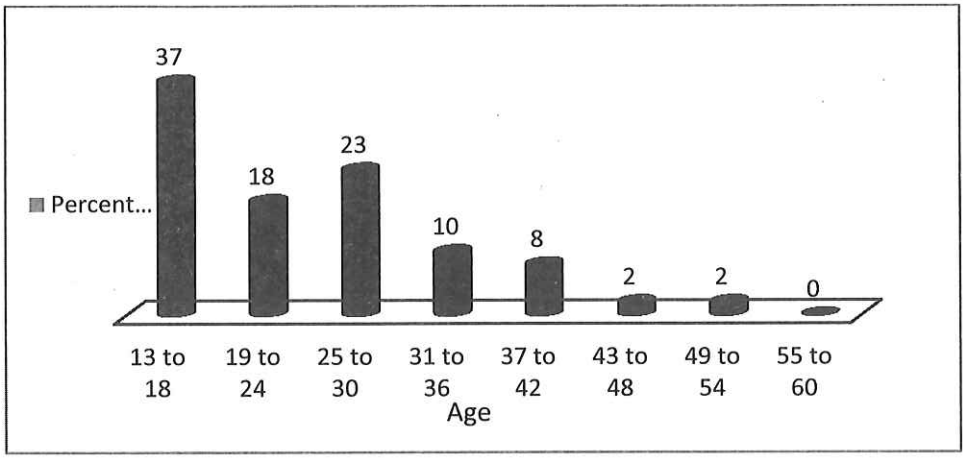
Source: Primary data

The above table 1 depicts that a significant proportion of alcoholic respondents 34% belonged to age group 25-34 years followed by 24 % between 35 to 44 years, 19% between 45 to 54 years, 15% under the age of 25 years and remaining 8% above age 55 years. Thus it can be concluded that maximum alcoholics 49% were less than 35 years of age which shows the heavy involvement of young age people in this menace. This is a period when people are bound to fulfill many family and societal obligations. If they are married, they are supposed to perform functions like socialization of children, protection of elders, fulfilling economic ends and many more. In the present study it was found that majority alcoholics belonged to young age group and their families were suffering heavily because of the addiction of alcoholic. Another appalling finding was that 15% alcoholics were under 25 years of age. This is a very crucial and valuable period in human life when a person completes his major trainings such as education, preparation for marriage, search for good job etc. for securing future. But it was found that due to early age addiction most of them were unable to fulfill these basic goals.

Table 1 also shows age wise proportions of spouses, parents and children respondents. It depicts that most of spouse respondents 34.25% belonged to age group 35-44, followed by 27.40% between 25 to 34 years, 24.65% between 45 to 54 years, 5.48% between 55-64 years, 5.48% under 25 years and only 2.74% above 65 years. Therefore it can be concluded that majority of spouses belonged to young age group and they were spending their prime period of youth in problematic situations caused by alcoholics. Majority of parents 82.26% were above 45 years of age and in old age they were suffering by their child's addiction. Table 1 also shows the age wise proportions of child respondents. It shows that majority children 70.58% were less than 25 years of age. For children it is a crucial period where they receive primary socialization and build foundation for their life. During this period children need more support by their parents so that they can secure their future life. During field work it was observed that most of the children had left their studies and were doing part time or full time jobs for contributing in family income.

Graph

Distribution of Alcoholics According to their Age of Initiation for Alcohol



Source: Primary data

In context of alcoholics, another important finding of present study is, 37% alcoholics had started drinking alcohol between 13 to 18 years of age. This is an age when a person is not cognitively mature with hardly any capacity of self-evaluation and thus is more prone to be addicted with severe problems caused by drinking. It also shows that 23% of respondent had started drinking alcohol at age of 25 to 30 years, a period when person has to initiate new life in the form of marriage. Thus, it can be concluded that majority of alcoholics 78% had initiated alcohol consumption before 30 years of age. The factors behind initiation of drinking alcohol varied person to person. Majority of them mentioned that friends', relatives' and employers' influence were the major causes for initiating alcohol consumption. Some of them mentioned family complications i.e., financial situation, death of family member etc. as the major cause behind initiation of alcohol consumption and some of them said that they had started just for the sake of enjoyment in life (see the following tables).

1.3.2 Gender, Alcoholism and Family Crises

Gender is another important variable to study the phenomenon of alcoholism in modern times. Gender of alcoholic and other family members is an important aspect in determining family situations. In Indian patriarchal family structure, male is always supposed to be primary bread winner and head of household. But in the present study it was viewed that majority of the work was done by female member of family, such as earning livelihood, socialization of children, care of elders etc, due to

addiction of their male partners. Further in the present study an attempt has been made to identify male female ratio of alcoholics and views of spouse, parents and children (both male and female gender) about their family situations. The gender wise distribution of respondents is presented in table 2

Table: 2
Gender Wise Distribution of the Respondents

Gender	No. of Respondents and their Percentage			
	Alcoholics	Spouses	Parents	Children
Male	95 (95%)	1 (1.37%)	25 (40.32%)	32 (47.06)
Female	5 (5%)	72 (98.63%)	37 (59.68%)	36 (52.94)
Total	100 (100%)	73 (100%)	62 (100%)	68 (100%)

Source: Primary data

The above table 2 clearly shows that majority alcoholics 95% were male. The remaining 5% were female. Table 2 also indicates that the majority spouse 98.63% were female and only 1.37% were male. Thus the higher proportion of male alcoholics and female spouse indicates that most of the responsibilities i.e. socialization of children, family rituals, protection of children and earning livelihood for family members etc were performed by female and any other mature member of the family. Data also depicts that whether the ratio of female alcoholic was very less, but it shows a shocking new trend in Punjab. Earlier the consumption of alcohol among women was tabooed. Now, due to the effect of western and modern cultural values, the impact of media and some other factors, the consumption of alcohol among female youth is increasing day by day, therefore alcohol related complications are also increasing. Thus it can be concluded that the addiction to alcohol among females has become a new phenomenon in present society.

1.3.3 Marital Status, Alcoholism and Family Crises

Marriage is one of the important social institutions in every society. It is another most important variable in social science research. According to Lundberg (1958) marriage consists of "the rules and regulations which define the duties and privileges of husband and wife with respect to each other."[8] Another sociologist Mazumdar (1966) defined marriage as a socially sanctioned union of male and female, for purpose of establishing a household, procreating, providing care for the offspring and other family members. If a person fails to perform these functions, this can affect the

[8] George A.Lundberg, *Sociology*. New Delhi: Harper and Bros, (1958).

life of other family members.[9] Thus, it was observed during data collection process that majority of the married alcoholics were failed to fulfill their primary responsibilities such as providing care to children, spouse and parents, achieving economic ends, performing family rituals and other responsibilities associated with married persons. According to the marital status alcoholic respondents were classified into four categories namely, single, married, divorcee, widow or widower. The table 3 shows the distribution of alcoholic respondents according to their marital status.

Table :3
Marital Status of Alcoholic Respondents

S.No.	Marital Status	No. of Alcoholic Respondents	Percentage
1	Single	19	19
2	Married	73	73
3	Divorcee	5	5
4	Widow/Widower	3	3
5	Total	100	100

Source: Primary data

The above table 3 clearly shows that most of the alcoholics 73% were married whereas 19% were single followed by 5% divorcee and 3% widow or widower. Therefore, it can be said that married life and obligations attached with married life becomes the reason for addiction among people. Further data also indicates that due to addiction of married alcoholics, their family members such as spouse, children and parents were suffering. It was observed during interviews that most of the important responsibilities, which are otherwise part of male persons, were performed by female and any other mature member of the family.

1.3.4 Family Income, Alcoholism and Family Crises

Family income is another important indicator to identify the socio-economic status of alcoholic and his family. Studies show that person's economic class largely affects the social life of the individual, which leaves the possibility of alcoholism. Further, alcoholism can also affect the financial situation of the family. Therefore, in the present study, an attempt has been made to find out the income of a family of an

[9] H.T. Mazumdar, *Grammar of Sociology: Man in Society*. New Delhi: Asia Publishing House, (1966).

alcoholic so that the relationship between income, alcoholism and family crises can be analyzed. The income of the family of alcoholics is presented in table 4

Table:4
Distribution of Family of Alcoholics According to Family Income

S.No.	Family Income (In Rupees)	No. of Families	Percentage
1	Up to 5000	20	20
2	5001 to 10000	34	34
3	10001 to 20000	19	19
4	20001 to 30000	15	15
5	30001 to 40000	9	9
6	Above 40000	3	3
7	Total	100	100

Source: Primary data

Table 4 depicts that maximum families 34% had their family monthly income between Rs. 5001 to 10000 followed by 20% up to Rs. 5000, 19% between Rs. 10001 to 20000, 15% between Rs. 20001 to 30000, 9% between Rs. 30001 to 40000 and only 3% above Rs. 40000. The data also indicates that more than 50% families had their monthly family income up to Rs. 10000 only. Thus it can be concluded that majority alcoholic belongs to low income families. While interaction with respondents, it was found that most of the alcoholic started consuming alcohol due to poor economic status. They said that their major reason for taking alcohol was insufficient economic resources and more dependent family members. Some other respondents also narrated that their addiction turned their economic status into poor economic status. Thus it can be concluded that poor economic status is one of the major reasons behind alcoholism (Also see Case 1). The other interpretation can be made here that due to addiction of alcoholic the economic status of families turned into poor economic status. Therefore, alcoholism is also one of the major reasons behind poor economic status of families. Largely, it was found that due to problem of alcoholism the family members of alcoholics were facing many troubles such as problem in the educational life of children due to lack of money, care of parents, health issues due to violence in the family, duel jobs performed by spouses such as house work, care of children and parents as well as work outside for earning livelihood for family members and so on.

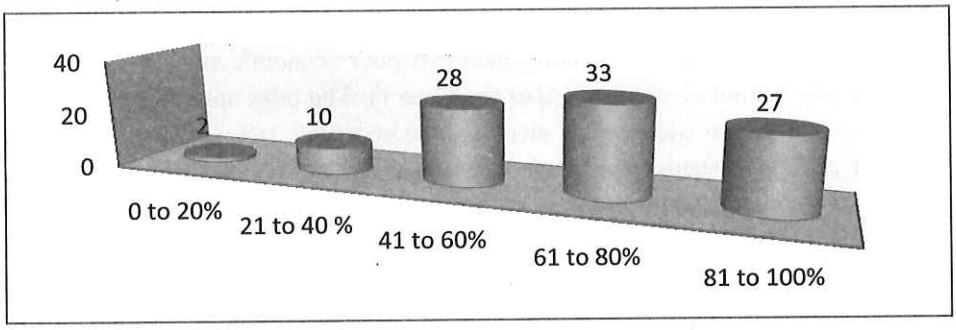
1.3.4.1 Case study 1

An alcoholic respondent of village Bhalaipur Dogra (Tarn Taran) belonging to a poor family informed that he lost his father in earlier age and to earn livelihood for family he started working as waiter at a *dhaba*. He reported, "I usually worked there till late night, just for the sake of more money. I was forced by many truck drivers and other customers to take alcohol and other substances. But I always refused. One day I was very much tired and asked the owner for going home early. But he refused my request and offered me one small peg of alcohol. Owner was addicted to alcohol. I refused many times but he forced me again and again by saying;

> *'Tu Mere Bache Warga Hai....Eh Sarab Nahi Hai....Eh Dawai(Medicine) hai...Iss Naal Teri Sari Thakawat Duur Ho Jayegi Putar.....'. (You are like my son....It is not an alcohol....It is a medicine....By consuming it you will release your all bodily discomfort, My son)*

Respondent continued by saying, I was confused at that time and had my first drink at the age of 15 years. After taking one peg, he offered me one more. When I went home, I felt very bad. But I got little relief and after that day I started taking alcohol weekly, usually at the end of week, than twice in a week and than all the days at the age of 17 years. As I was working at *dhaba*, I also started using some other drugs like bhukki, opium, tobacco and some time synthetic drugs. Since last 32 years, I am consuming alcohol regularly along with other drugs." Therefore, it can be concluded that under pressure of poor economic condition and workplace pressures the person started consumption of alcohol and other substance, become addicted of it shortly.

Graph: 2
Distribution of Alcoholic Respondents According to Income Spent on Alcohol Consumption



The above graph 4 shows that the most of the alcoholics 33% spend 61 to 80% share of their monthly income on alcohol. Similarly 28 % alcoholic spend 41 to 60% , 27%

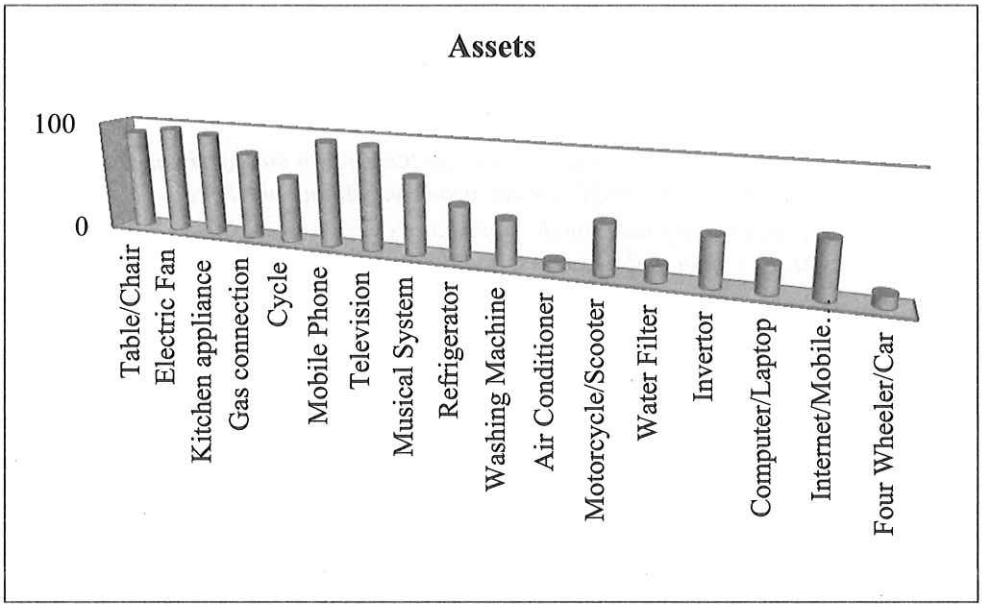
spend 81 to 100% and 10% alcoholic spend 21 to 40% share of their monthly income and Only 2 % spend 0 to 20% share of their monthly income for alcohol consumption. Thus it can be concluded that majority alcoholics 60% spend more than 60% share of their monthly income for purchasing alcohol. Moreover, it was also found during interaction with alcoholics that they can spend a day without meal but not without alcohol. In case of lack of money they choose other means too. Some alcoholics narrated their stories as follows;

> *Roti bina reh sakda han, par sharab bina ni reh hunda. (I can live without food but it is impossible for me to survive without alcohol.)*
>
> *Kyi waar paise nahi hunde ta dostan rishtedara to paise mang ke pi layi di hai. Kyi waar paise chori ve kar laina han. (Sometimes when there is no money then I borrow it from my friends, relatives and then drink it.Sometimes I also steel money to arrange alcohol)*
>
> *Daru da jugaad karn aste kayi war dudh wich pani mila ke vech dinda han. (In order to arrange money for alcohol I add water to milk and earn extra money on it)*
>
> *Daru na peen te hath kamban lag jande han.Te kayi vaari shareer kam karna band kar dinda hai (My hands start to shake when a day passes without alcohol and sometimes my body stops functioning)*
>
> *Sharab peete bina neend kithe andi a ke (I cannot sleep without consuming alcohol)*

Thus, from above narrated stories by alcoholic respondents it can be concluded that most of the alcoholics were addicted to such an extent that they found themselves unable to live without drinking alcohol at least once a day. Even their day was incomplete without alcohol. We may say that they cannot spend even a single day without alcohol, they cannot sleep without alcohol, and they cannot work without alcohol or, in short, they cannot survive without alcohol. Further, they try for any method to buy alcohol, legal such as doing extra work or illegal such as by stealing, adulteration, begging, fighting or by doing illegal transactions like selling drugs or doing any other illegal work etc.

On the other side some parents and spouses said that due to critical financial condition they are unable to meet their day to day routine household expenditure. Most of them said they could not provide education to their children due financial crisis. Most of the children had started work in their childhood age due critical addiction of father and financial crisis in the family. Thus it can be concluded that most of the families of alcoholic were facing economic crisis due to alcoholism which has given birth to many other social problems. Moreover, it was also found that most of the families were lacking modern basic amenities due to this problem (see graph 3)

Graph: 3
Distribution of Families According to Possession of Basis Amenities



Source: Primary data

Graph 3 Shows that majority of the families had only basic amenities such as table/chair, electric fan, kitchen appliances, television, mobile phone, gas connection, cycle, musical system, where as majority families were lacking modern necessary amenities such as refrigerator, washing machine, air conditioner, water filter, invertors and most importantly computer/laptop and internet connection. Therefore it can be said that majority of the families were unable to buy the modern amenities due to addiction of their main family member.

1.4 Size of Family, Alcoholism and Family Crises

The size of family has a remarkable impact on its members. It is considered that in joint family structure, division of labor can be done easily as compared to the quasi-joint and the nuclear family. In these types of families, if any family member stops working, other members fulfill most of his obligations whereas it becomes problematic for the nuclear and quasi-joint families. For the purpose of the current study, the households are divided into three main categories namely, nuclear, quasi-joint and joint family. The distribution of families according to their size is presented in the table 5

Table 5
Families According to Size

Size of Family	Percentage
Nuclear	38
Quasi-Joint	37
Joint	25
Total	100

Source: Primary Data

Table 5 reflects that out of 100 families, 38% belonged to nuclear family followed by 37% to quasi-joint and remaining 25% belonged to the joint family. The nuclear family consists of husband, wife and their unmarried children. The joint family consists of parents and more than one married couples and their children Quasi-joint family consists of husband-wife, unmarried children and parents. Data presented in table 5 clearly unveils that the problem of alcohol addiction is more prevalent in nuclear and quasi-joint families. During field survey, it was observed that the problem among joint families was relatively less due to the existence of many family members. In any case, such type of problems occur, the joint families face comparatively less troubles than nuclear families. Therefore, it can also be concluded that due to decreasing size of families the problem of alcoholism has become more acute.

1.5 Educational Level, Alcoholism and Family Crises

Education is a crucial tool which strengthens the conscience of an individual for understanding his responsibilities and social world. There are two kinds of education that the society imparts, one which we get through educational institutions and the other we generally acquire while interacting with various agencies of the society. Both are important, however, the former helps us increase knowledge regarding the technicalities of life, helps in tackling different issues and provides opportunities for better survival in the modern age. Several studies have identified the problem of alcoholism among illiterate and less educated families, therefore, to verify this fact, in the present study an attempt has also been made to identify the educational status of family and its relationship with alcoholism. The detailed discussion over the educational status of family is presented in table 6

Table: 6
Distribution of Respondents According to Educational Qualification

S.No.	Educational Qualification	No. of Respondents and Their Percentage			
		Alcoholics	Spouses	Parents	Children
1	Illiterate	25 (25%)	17 (23.29%)	24 (38.71%)	11 (16.17%)
2	Primary	19 (19%)	21 (28.77%)	15 (24.19%)	13 (19.12%)
3	Middle	22 (22%)	17 (23.29%)	09 (14.52%)	14 (20.59%)
4	Matriculation	13 (13%)	11 (15.06%)	10 (16.12%)	10 (14.70%)
5	Higher Secondary	11 (11%)	4 (5.48%)	03 (4.84%)	12 (17.65%)
6	Graduation	07 (7%)	2 (2.74%)	01 (1.61%)	5 (7.35%)
7	Post Graduation	03 (3%)	1 (1.37%)	0 (0%)	3 (4.41%)
8	Total	100 (100%)	73 (100%)	62 (100%)	68 (100%)

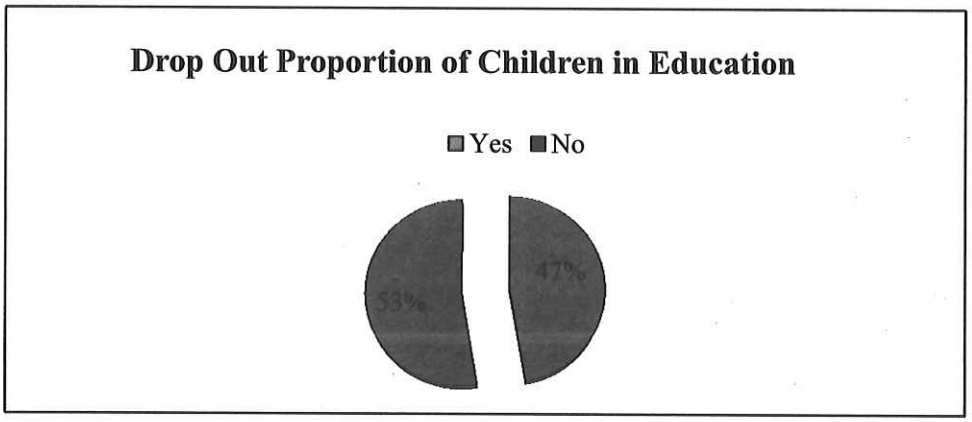
Source: Primary data

Table 6 depicts that large number of alcoholics (25%) were found to be illiterate and 54% had merely studied up to 10th grade. Therefore, the majority of the alcoholics were less educated or illiterate. Poor educational status was one of the major reasons behind their addiction. During the interaction, few alcoholic respondents mentioned that they indulged in adverse usage and bad company because of which they left their studies and became a victim of alcoholism. Further, few alcoholics also stated that due to poor education, they could not learn the proper use of alcohol and they consumed it without knowing the degree, content, quality, and quantity of liquor.

Data also indicates that majority of spouse i.e. 90.41%, parents of 93.54% had completed studies up to 10th grade only. Therefore, overall educational level of the family was poor due to which majority of the families were unable to tackle the problem of alcoholism. The critical addiction of alcoholics also affected the education of children. Data shows that 16.17% children of alcoholic could not go to school due to the poor economic status which was largely consequence of the problem of alcoholism

in the family. Other than this, many children had quitted school many times due to the addiction of the parent and those who were studying (54.41%) were also facing many troubles in their academic life. Thus, it can be concluded that the overall educational status of all families was very low and one of the major reason the families reported was the problem of alcoholism. Further, it was also found that due to problem of alcoholism the children were not able to get education. They have left their studies and were forced to do job at early age. Graph 4 shows the drop out ratio of children of alcoholics in education.

GRAPH 4



Source: ***Primary data***

Graph 4 shows the drop out proportion of children in education. It reflects that out of 83.82% literate children 47% had faced dropout in education. Majority of them said that the major reason behind educational dropout was their parent's addiction. Some of them clearly disclosed that due to earning livelihood for family they had left their studies. Similarly kind of response was given by most of the illiterate children.

1.6 Occupation, Alcoholism and Family Crises

Occupation of a person is an important aspect of individual life which is attached to his identity and reveals about his socio-economic conditions. Different types of tasks and reputation are attached with various occupations which further decide a person's status in a non-identical manner in sundry societies. Therefore, through this present study, an attempt has been made to identify the occupational status of an alcoholic to know about his socio-economic status and to understand its relationship with alcoholism, further with family crises. The occupational status of the alcoholic respondents found in the present study falls under the seven categories. These are presented in table 7.

Table: 7
Alcoholics According to their Main Occupation

S. No.	Occupation	Percentage
1	Agricultural Laborer	21
2	Non-agricultural Laborer	17
3	Cultivator	16
4	Private Employee	15
5	Business	13
6	Government Employee	12
7	Unemployed	6
	Total	100

Source: Primary Data

Table 7 depicts that most of the alcoholic respondents 21% were agricultural wage labourers followed by 17% Non-agricultural wage Laborer, 16% cultivators, 15% private employee, 13% businessman, 13% government employee and remaining 6% were unemployed. Those who were unemployed, all of them reported alcohol addiction as a reason behind their unemployment and they continued to consume alcohol by selling land, household amenities and by taking loans etc. While interacting with alcoholics and other family members, it was also found that those who were employed, majority of them were working partially, just to fulfill their quota of alcohol in a day. Many of them also switched from regular profession to daily wage labour due to their critical addiction. Data also indicates that majority of the respondent belonged to low-class professions thus, it can be concluded that the problem of alcoholism is more prevalent in low paid professions. It was also observed during fieldwork that majority of alcoholics after finishing their job directly go to a liquor shop instead of going home. Another fact that surfaced was that most of the respondent consumed alcohol throughout the day. More than 50% of the respondents consumed alcohol at their workplaces and they began ingesting alcohol as soon as they woke up in the morning.

1.7 Findings and Conclution

In this paper an attempt has been made to seek the relationship between socio-economic conditions, alcoholism and family crises. To reach at conclusion, the analysis of various socio-economic variables has made to examine the conditions of alcoholic

families. The variables such as the respondents' age, gender, marital status, family income, size of family, educational level, occupation etc. were studied extensively to arrive at the following major findings.

(1) It was found that young people were more addicted to alcohol and majority of them were unable to fulfill their family obligations. Further, majority of the alcoholics started drinking in their early age.

(2) Further, married people were found to be more addicted to alcohol as compared to unmarried ones. Due to addiction of the male head of the family, the majority of the females were forced to perform duties of head of the household such as taking care of children and parents, earning livelihood for family members, performing different rituals, which were directly associated with male members.

(3) Problem is more prevalent among males than females. However, a new trend also surfaced in the study that the addiction of alcohol among young females, particularly in urban areas, is becoming a new phenomenon.

(4) Similarly, agricultural and non-agricultural wage labourers, cultivators were more addicted to alcohol. Most of the alcoholics reasoned that they consumed alcohol in order to escape the problems in their lives.

(5) Further, an inverse relation was found between alcoholism and family income i.e. lower the income; greater was the extent of alcoholism. Moreover, most of the alcoholic spend most of their earning on alcohol consumption which further contribute for lower economic status of family.

(6) The nuclear and quasi-joint families, on the other hand, had a greater prevalence of alcoholism than the joint families due to greater stress and weak family control, especially in the absence of elders.

(7) With regards to educational qualifications, less educated people were found to be more addicted to alcohol. And the overall educational status of these families were found low due to problem of alcoholism which further expand the problem to more critical stage.

In a brief, a majority of respondents, mainly alcoholics, were married males with low educational status, less family income, belonged to nuclear or quasi-joint households and had a low standard of living. After looking into socio-economic co-ordinates of respondents, it can be concluded that there is direct relationship between socio-economic status, alcoholism and family crises. In other words, the socio-economic conditions of persons force them for consumption of alcohol which slowly and gradually turns into addiction and then alcoholism. Further, the problem of alcoholism disorganizes the family system and creates many troubles for all members of the

family. Once a problem start in a family, it increases day by day. Within a short period of time it turns into a vicious cycle. For instance, poor socio-economic conditions such as less education, poor financial condition, over responsibilities or extra burden, bad company etc. put a person into stress because of which the person starts critical drinking. This leads to alcoholism and further creates multiple family crises such as violence, problem in education of children or less education in the family, financial burden due to over consumption of alcohol, health issues and many more. Furthermore, these complications become the reason for more critical consumption among alcoholic. In most of the cases this vicious cycle goes till the death of alcoholic. In some cases this goes further, as the children of alcoholics also start consuming alcohol due to the influence of their parent's addiction. Therefore, it can be said that alcoholism has become a very critical problem in contemporary society, which requires immediate attention.

RIGHT TO INFORMATION ACT 2005: A KEY DRIVER OF PARTICIPATORY DEMOCRACY

*Jyoti Arora

Abstract

Knowledge is power and freedom of information is essential for the advancement of society. Right to Information Act (RTI) is the backbone of a democracy. In India, RTI Act was introduced in 2005 and since then this act has proved to be a strong weapon in the hands of citizens, for ensuring transparency in government departments and act as a crusade against corruption. The enactment of the Right to Information Act is an epoch-making event in the history of Indian politico-administrative system for the simple reason that for the first time citizens have legal right to access information from the government and its agencies. The magnificent aspect of RTI is to empowers common citizens with requisition of information. It is a path breaking legislation which signals the march from darkness of secrecy, to dawn of transparency. It enhances the quality of citizen-participation in governance. It lightens up the mindset of public authorities which is clouded by suspicion and secrecy. It has the widest possible reach covering central government, state government, Panchayati Raj institutions, local bodies. Citizens, especially the poor should have the right to know and are provided with access to relevant information so that they can take their own informed decisions, which ensures sustainable human development. The application of RTI at the lowest rung of the administrative structure at the local level, i.e. at the village, block and district levels has shown enormous possibilities in making democracy energetic, dynamic and vital one for the public. The beauty of the implementation of RTI Act is, therefore, an important milestone for building an enlightened and a prosperous society. This paper attempts to analyze the status of RTI and role of RTI as tool to ensure good governance and inclusive development which is the life line of democracy in India.

Key Words: RTI 2005, citizen-government partnership, Inclusive Development and Good Governance

1.1 Introduction and Concept

"Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed" **RTI Act 2005**

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Democracy is all about people's participation and empowerment. RTI act has played a significant role in strengthening democracy by promoting decentralization of power and good governance. RTI made it promised possible, to a great extent, for the people to decide and determine the way they want to be governed. RTI Act gave the common people a defining power to shape the government schemes and policies. Governance was no more privilege of select few rather it lent voice to the aspirations of ordinary common citizens in the issues of governance. **Sweden was the first country in the world to introduce the right to information. The "The Right to Information Act" became fully operational from 12th October, 2005 in India.** The law applies to all States and Union Territories of India, except the State of Jammu and Kashmir - which is covered under a State-level law. Right to information (RTI) is harnessed as a tool for promoting participatory development, strengthening democratic governance and facilitating effective delivery of socio-economic services. Right to Information as defined under the Right to Information Act (Act No. 22 of 2005) means:

"the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-

(i) Inspection of work, documents, record;
(ii) Taking notes, extracts or certified copies of documents or records;
(iii) Taking certified samples of materials;
(iv) Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through print outs where such information is stored in a computer or any other device.

1.2 Objective of The Study

(i) To underline the significance of RTI in India.
(ii) To study the role of RTI to ensure good governance in India.
(iii) To examine the importance of RTI in augumenting inclusive development.
(iv) To suggest positive recommendations for strengthening of RTI Act in India.

1.3 Research Methodology

This research paper is generally confined to study of RTI as a key driver of Participatory democracy in India. The study is based on qualitative (secondary) data collected through various books, internet web sites, magazines, journals, newspapers, and research studies etc. Analysis of data and information collected

from published sources were made keeping the objectives of the study in mind.

1.4 Review of Literature

Prakash Kumar and K.B. Rai (2006) studied that in a democracy, access to information and government records is indispensable. The book throws light on the significance of information. Information is termed as "oxygen of democracy". The experience of the Delhi Right to Information Act has also been discussed. The book deals in detail with RTI, its scope and provides a comprehensive view about each section of the RTI Act 2005.

G, Palanithurai (2009) research study is based on primary sources collected from focus group discussions with panchayat leaders, farmers, artisans, students and women. In this study, the experience of RTI in the state of Tamil Nadu has been discussed. To ensure downward accountability, people need information. The study analyses the awareness among local body leaders and other stakeholders pertaining to RTI and how it is being used by Panchayati Raj Institutions (PRI), leaders and others. The main findings revealed lack of awareness as to usage of RTI. No knowledge among people regarding which office deals with which scheme, Tamil Nadu is known for pro-poor and pro-development policies and initiatives. The new expectation demands that state should give space to the people as far as the process of development and governance is concerned.

Ahmad Shamshad (2009) examined that Right to Information is a basic requisite of good governance and the key to strengthening participatory democracy. It increases level of accountability and transparency in administrative machinery. The poor flow of information is the result of low level of literacy and absence of effective communication tools and processes. In many regions, the standard record-keeping system is very poor. For the effective implementation of the Act culture of openness coupled with accountability and participative governance is the need of the hour.

S.L. Goel (2007) has pointed out in his studies that Second Administrative Reforms Commission, set up by Manmohan Singh government, under the chairmanship of Veerappa Moilly regards to "Right to Information". He further opines that RTI and administrative reforms are two sides of the same coin and RTI can go a long way in providing a new look to Administrative system and awakened humanity. All challenges hindering the way to improve administrative system can be easily done away with if Right to Information is used as a tool of Administrative reforms.

C.P. Srivastava and K.B Rai (2008) reported that in an era of information age, web based Right to Information system will help both the citizen and administration to solve the queries in a stipulated time. The authors have analyzed while studying the online system for applications and first appeal cases under RTI in Government of Delhi. The system provides number of benefits e.g. citizens can file applications, can check the status of their applications; can view application filed by others, can check the details of information sought and information provided. It also provides data about applications and appeals submitted, disposed and pending and support the idea that the system works effectively in a decentralized manner.

Studies highlighted the importance of RTI Act in India as it is a potent tool to ensure transparent, accountable and efficient administration system for the empowerment of people. The study also finds there are lacunae on the side of RTI such as lack of awareness, corruption among the public functionaries. Study tries to fill the gap in literature.

1.5 Chronology of different states and year of enactment of RTI Act in India

In Rajasthan, the Right to Information movement was initiated by Aruna Roy in the early 1990s. The Mazdoor Kisan Shakti Sangathan (MKSS) succeeded through struggle and agitation, in accessing and using information to put an end to local corruption and exploitation. Even before the Central legislation was passed, some of the states have introduced their own right to information legislation.RTI legislation has a potential for ensuring a real democratic and efficient governance system. The following table illustrates the respective years of enactment of legislations in various states.

Table: I
Year of enactment of RTI Act in Different States in India

S.No.	States	Year of Enactment
1.	Tamil Nadu	1997
2.	Goa	1997
3.	Rajasthan	2000
4.	Karnataka	2000
5.	Delhi	2001
6.	Maharashtra	2002
7.	Assam	2002
8.	Madhya Pradesh	2003
9.	Jammu & Kashmir	2004

1.6 Significance of RTI in Indian Administration

Right to Information Act 2005 is necessary due to its significance.

Following are the major underlying important points of Right to Information Act in India:

(i.) The Supreme Court has observed that RTI is a part of Right to Speech and Expression, which is a fundamental right under Article 19(1) of the Constitution. According to the Supreme Court, Right to Speech & Expression cannot be exercised without Right to Information.

(ii.) RTI makes the administration more responsive to the requirements of the masses.

(iii.) It reduces the gulf between administration and people.

(iv.) It makes the administration more accountable to the masses.

(v.) It increases people's participation in administration.

(vi.) It facilitates intelligent and constructive criticism of administration.

(vii.) It checked the scope for corruption in public administration.

(viii.) It promotes the idea of popular sovereignty.

(ix.) It made an attempt to lessen poverty.

(x.) It reduces the chance of abuse of authority by the public authority.

1.7 Provisions of Right to Information Act

The new legislation confers on all citizens the right of access to the information and correspondingly, makes the dissemination of such information an obligation on all public authorities. Its various provisions are mentioned below:

(i.) It provides for the appointment of an information officer in each department to provide information to the public on request.

(ii.) It fixes a 30 day deadline for providing information; deadline is 48 hours if information concerns life or liberity of a person.

(iii.) Information will be free for people below poverty line. For others, fee will be reasonable.

(iv.) The act imposes obligation on public agencies to disclose the information suo-motu to reduce requests for an information.

(v.) It provides for the establishment of a Central Information Commission and State Information Commissions to implement the provisions of the Act.

They will be independent high-level bodies to act as appellate authorities and vested with the powers of a civil court.

(vi.) Government bodies have to publish details of staff payments and budgets.

(vii.) The President will appoint a Chief Information Commissioner and governors of state will appoint state information commissioners. Their term will be five years.

(viii.) The Chief Information Commissioner (on par with the status currently accorded to the chief election commissioner) will be selected by a panel comprising the Prime Minister, leader of opposition in the Lok Sabha and a minister nominated by the prime minister.

(ix.) The Chief Information Commissioner and State Information Commissioner will publish an annual report on the implementation of the act. These reports will be presented before Parliament and State legislature.

(x.) The act overrides the official secrets act, 1923. The information commissions can allow access to the information if public interest outweighs harm to protected persons.

(xi.) It carries strict penalities for failing to provide information or affecting its flow. The erring officials will be subject to departmental proceedings.

(xii.) The information commission shall fine an official Rs 250 per day (subject to a maximum of Rs 25,000) if information is delayed without reasonable cause beyond the stipulated 30 days.

(xiii.) The procedure of appeal in case the information is denied is like this – first appeal to superior of public information officer, second appeal to information commission, and third appeal to a high court.

(xiv.) All categories of exempted information to be disclosed after 20 years except cabinet deliberations and information that affects security, strategic, scientific or economic interests, relations with foreign states or leads to incitement of offence.

(xv.) Its purview does not extend to intelligence and security organization like Intelligence Bureau, RAW, BSF, CSIF, NSG and so on. However, information pertaining to allegation of corruption or violation of human rights by these organizations will not be excluded.

1.8 How Right to Information ensures Good Governance

RTI Act has empowered the common people, promoted good governance and strengthened participatory democracy.

S.No	Indicators of Good Governance	How RTI ensures Good Governance
I.	**Empowerment**	Power no more remains confined to select few, rather it was made available equally to all the citizens. So, in the modern era of Information age, RTI services as a great tool of 'empowerment for the common people.
II.	**Transparency**	Transparency is the cornerstone of any good government. It is the most powerful weapon in hands of common people to challenge the impenetrable fortress of officialdom. According to latest 2012 ranking of Transparency International, India stands at 94, out of 176 nations. The survey also revealed that 54% Indians paid bribe, at least once, to get things done. RTI act has the potential to tackle with this rampant corruption in both at grass root level and at power corridors of high and mighty. After enactment of this, many a cases of corruption came to light. From the Commonwealth Games to the 2G scam, RTI queries have been the starting point of exposure in a score of recent cases of corruption.
III.	**Accessibility**	RTI has given the status of fundamental right in the Indian Constitution. RTI act gave much-needed significant right to seek information about functioning of their government.
IV.	**Participation**	RTI act facilitated and encouraged the participation of common people in the process of governance and sought information regarding various issues affecting their lives and well-being. So, the government policies and schemes must be formulated keeping in mind the interest of all the sections of the society, especially the downtrodden and marginalized
V.	**Accountability**	The RTI provides people with the mechanism to access information, which they can use to hold the government to account or to seek explanation as to

		why decisions have been taken, by whom and with what consequences or outcomes. In addition, every public authority is required 'to provide reasons for its administrative or quasi-judicial decisions to the affected persons' u/s 4(1) (d) of the Act. So, accountability invariably led to efficiency and sense of responsibility among government official.

1.8.1 Noteworthy Cases of RTI depicting the real picture of Inclusive Development

The challenge of development is to improve the quality of life, which calls for increasing people's options for higher earnings, better education and health care, a cleaner environment and a richer cultural life.

(i) ▪ **Assam adopted Train the Trainer concept on Right to Information Act** Assam has adopted a "Train the Trainers" concept, where the Government trains the Community Based Organizations (CBOs) and Non-Governmental Organizations (NGOs) to impart training to citizens on RTI in order to maximize the reach of RTI and ensure that there is local ownership and sustainability. In this decentralized approach, active NGOs in each district are identified and training is imparted to them on "How to train citizens for RTI".

(ii) ▪ **Endeavours of Parivarthan a NGO in Delhi for Right to Information Act awareness**

Parivarthan a NGO working in the urban slums of Delhi on awareness building on Right to Information Act and using RTI as the potential instrument for transparent delivery of services like Public Distribution System, infrastructure such as public roads, electoral reforms and buildings. The Parivarthan also used the right to information in conducting the social audit in the urban areas on spending of the public investment.

(iii) ▪ **Right to Information Act Portal**

The RTI portal should contain links to a Ministry/Department websites of the appropriate Government. Orissa has developed a portal -RTI Central Monitoring Mechanism (CMM) (www.rtiorissa.gov.in) which was launched in 2009 and provides a single point access to information in conformity with the RTI Act, 2005 in a uniform manner at all the offices of

Government of Orissa(figure). Till May 2011, about 4500 RTI applications were received online from a total of 25,000 applications file during the same period. All the departments and subordinate offices are given with a user ID and password to manage their proactive disclosure information, RTI applications and appeals.

(iv) ▪ Integrated Child Development Scheme (ICDS) and Right to Information Act

One of the components of this scheme is to provide nutritional support to children from poor families. The use of RTI by the target group, including the NGOs, has ensured effective implementation of the scheme to the advantage of the poor children.

(v) ▪ Mahatama Gandhi National Rural Employment Gurantee Act (MNREGA) and Right to Information Act

Taking advantage of the transparency norms, which are duly built in both the NREGA, and the right to information, people have sought to know the details of programme and its relevance to the rural community, utilization of funds, payment of wages to the target beneficiaries, etc. The disclosure of relevant details, such as muster rolls, has helped in containing corruption, ensuring the reach of benefits to the target groups and identification of officials responsible for creating obstruction in effective implementation of programmes. Through RTI, citizens ensure effective delivery of services in a time bound manner which makes an effort to reduce poverty and improve the quality of life in rural areas.

(vi) ▪ Provision of Pension Scheme and Food Security for the Poor Senior Citizens and RTI

With a view to providing income and human security to the poor and destitute, financial assistance to families with low means of subsistence is provided to all poor persons, above 60 years of age. The grant of pension of Rs.500/- per month has been universalized. Moreover, the destitute are entitled for 10 Kgs of food grains per month free of cost. The RTI encourages everyone to ask the Government to explain as to why assured benefits are not reaching them and by this process their grievances are redressed under the auspices of the Information Commission.

- **National Rural Health Mission and Right to Information Act**

Healthcare services have largely remained on paper due to lack of accountability of staff. Using the tool of RTI, the citizens have sought for details of primary health services. RTI has thus created effective demand for improvement in quality of services provided by the hospitals.

1.9 Conclusions and Policy Recommendations

Right to Information has significant bearing on good governance, development and the implementation of flagship programmes for alleviation of poverty. RTI protects and promotes the socio-economic interests of every citizen especially the poor, who are receiving the benefits of development as per their entitlements.

With a view to realizing the development goals, the followings are suggested to strengthen the RTI regime:

(i) All the development projects, particularly poverty alleviation programmes should incorporate transparency and accountability norms to allow for objective scrutiny of the process.

(ii) Appointment of Central Information Commissioners and State Information Commissioners should be done in a bipartisan manner involving leader of opposition, Chief justices of SC and HC may also be included.

(iii) Records at district court and subordinate courts should be stored in a scientific manner and uniform way. Administrative processes in district and subordinate courts should be computerized in a time bound manner. Working of legislative committees should be thrown open to public.

(iv) Promote timely dissemination of accurate information to the public.

(v) Awareness level among the poor is less than 10 per cent, which is a major obstacle in reaping the benefits of RTI for securing entitlements to the poor. The capacities of both the public authorities (i.e. the duty – bearers) and the citizens (i.e. the claim holders) access to information may have to be enhanced, for which a two-pronged strategy would be needed.

(vi) National Coordination Committee (NCC) should be created and be headed by Central Information Commissioner. This committee will monitor successful implementation of RTI.

(vii) The role of NGOs is vital one for creating effective demand for maximum disclosure of information relating to public activities so that

an informed citizenry can participate in designing and implementation of socio-economic programmes.

(viii) A comprehensive Information Management System should be developed by each public authority for storage, and retrieval of data and information in a less cost that may be shared with anyone who seeks to inspect the records and use the information for development purposes.

(ix) Civil Service Rules of all states to be reworded- Civil Servant shall communicate all information applicable under RTI to public **(ARC-II Recommendation)**

(x) Ministers on assumption of office to take an oath of transparency instead of secrecy. Article 75, 164 and third schedule should be suitably amended. **(ARC-II Recommendation)**

Thus, in a democracy, people are the masters. Government exists to serve them. People have a right to know how they are being governed. According to French philosopher Michel Foucault, power is derived from knowledge and information is the basic concept of knowledge. RTI Act, which if used efficiently and sensibly in letter and spirit can take the country in the direction of panacea of development and good governance.

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RIGHT TO LIFE *vis a vis* THE RIGHT TO DIE WITH DIGNITY

*Dr. Sharanjit

Marte hain aarzoo mein marne ki, maut aati hai par nahin aati.
(one dies longing for death but death, despite being around, is elusive.)
Mirza Ghalib

1.1 Introduction

Right to life has been protected and promoted throughout the world. Every human being irrespective of his caste, class, race, nationality, religious effinity has a right to life and personal liberty. History is a reminder of this fact as to how at different points of time in the evolution of mankind and development of civilization, a quest for making the right to life more meaningful has been witnessed. Now the pertinent question which has often been asked is – Does the right to life also takes within its ambit the right to die ? Throughout the world this aspect relating to the right to die has attracted the attention of jurists, law makers and people in general. What if a person looses all hope in life or he/she is rendered in a permanent vegetative state or is suffering from constant and unbearable pain due to a deadly and uncurable disease ? Can he or she in the above mentioned circumstances enjoy their right to life to the extent of right to die with dignity and respect ?

Another well recognized fact of the present times is that right to life does not mean mere animal existence, hence every thing that makes life more meaningful is taken within the ambit of the right to life. However, there is no denying the fact that the right to live with dignity is denied to countless number of men, women and children due to poverty, lack of development, ignorance etc.

Right to live would, however, mean right to live with human dignity up to the end of natural life. Hence, a dying man who is terminally ill or in a persistent vegetative state can be permitted to terminate it by premature extinction of his life. In fact, these are not cases of extinguishing life but only of accelerating process of natural death which has already commenced. In such cases, causing of death would result in end of his suffering. The other side of the coin deals with the moral, ethical and religious aspects of the right to die. Morally and ethically it is passionately believed that God is the ultimate creator and as the creator of all the living beings on earth, it is only God that can terminate the life of a living creature. Thus it is considered to be a moral wrong to bring an end to one's life. On the contrary there are religious

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practices like the one prevalent in Jain religion, i.e. the practice of 'Santhara' or fast unto death.

1.2 Genesis and Origin of Euthanasia

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

Suicide (*felo de se*) means deliberate termination of one's own physical existence or self murder, where a man of age of discretion and *compos mentis* voluntarily kills himself. It is an act of voluntarily or intentionally taking one's own life. Suicide needs to be distinguished from euthanasia or mercy killing. Suicide by its very nature is an act of self killing or self destruction, an act of terminating one's own life sans the aid or assistance of any other human agency. Euthanasia, on the other hand, involves the intervention of other human agency to end the life. Euthanasia is nothing but homicide, and unless specifically accepted it is an offence. A priori, an attempt at mercy killing is not an attempt to suicide. Throughout history, suicide has been both condemned and commended by various societies. Since the Middle Ages society has used first the canonic and later the criminal law to combat suicide. Following the French Revolution of 1789 criminal penalties for attempting to commit suicide were abolished in European countries, England being the last to follow suit in 1961.[2]

Euthanasia may be either voluntary active euthanasia where a physician administers a medication, such as a sedative and neruromuscular relaxant, to intentionally end a patient's life with the mentally competent patient's explicit request(India's case). Involuntary or non-voluntary active euthanasia, when a physician administers a

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1 241st Report of Law Commission of India, *"Passive Euthanasia – A Relook,"* August 2012.

2 *Ibid*

medication to intentionally end a patient's life but without the patient's request. Or it can be a physician assisted suicide when the physician provides medication at his or her explicit request with the understanding that the patient intends to use the medication to end his or her life.

Two commentators on Manu, Goverdhana and Kulluka, say that a man may undertake 'the mahaprasthana' the great departure) on a journey which ends in death, when he is incurably diseased or meets with a great misfortune, and that, because it is taught in the Sastras. It is not opposed to the Vedic rules which forbid suicide. To this Max Muller adds a note as follows:-

"From the parallel passage of Apasthambha II, 23, 2, it is, however evident that a voluntary death by starvation was considered the befitting conclusion of a hermit's life. The antiquity and general prevalence of the practice may be inferred from the fact that the Jaina ascetics, too, consider it particularly meritorious".[3]

The issue of euthanasia or mercy Killing is a sensitive issue having socio-legal, medical, ethical, religious, economic and scientific aspects to it. In the present scenario, medical science has progressed to the extent that a person may continue to live even beyond the stage of physical fitness and productivity. There are divergent views all across the world as to whether the right to life includes the right to die or not. In the historical context as well the holy text of Mahabharata also talks about *echa mritu.* In the Jain religion the santhara tradition of fast unto death was prevalent.

1.3 International Perspective on Euthanasia

As discussed previously, euthanasia or mercy killing is a highly sensitive and debatable issue which has attracted the attention of medico-legal professional all across the world. It is often discussed- whether right to life also includes within its ambit the right to die with dignity.

The case in favour of legalization rests on two civic virtues: compassion for the suffering of dying patients and respect for their autonomy over their own dying process. These virtues then shape the terms of an ideal Model Policy for the common law jurisdiction, one that defines a regulatory regime for assisted suicide, voluntary euthanasia, and non-voluntary euthanasia. The significant objections to such a policy are not ethical but practical. The most influential of these objections point to two alleged problems with the regulatory conditions and safeguards built into the policy:

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[3] *Ibid*

while they might initially permit only ethically justifiable practices they will inevitably be expanded to permit unjustifiable ones (the slippery slope argument) and, regardless of where the lines are drawn, they will inevitably be violated in ways that will put vulnerable populations at risk (the argument from mistake and abuse). However, the Model Policy is not vulnerable to a slippery slope argument, since it already includes most of the practices (including nonvoluntary euthanasia) that are usually thought to lie at the bottom of the slope. Nor is it more prone to problems of medical mistake (misdiagnosis or misprognosis) than the conventional end-of-life measures measures. As for abuse, there is no convincing evidence from the legal regimes in the Netherlands or Oregon that legalization will put vulnerable sections of the population at risk. Furthermore, while it is reasonable to expect some degree of non-compliance with the terms of the policy, this is likely to be less of a problem for assisted death than for these other measures, which are currently entirely unregulated.[4]

Euthanasia in Netherlands is regulated by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 2002. Belgium legalized euthanasia in September 2002. the Belgian law sets out conditions under which suicide can be practiced without giving doctors a licence to kill. Patients wishing to end their lives must be conscious when they make their demand and repeat their request for euthanasia they have to be under "constant and unbearable physical or psychological pain" resulting from an accident or an uncurable disease. Italian law makers passed a law in 2017 allowing adults to decide, in consultation with their doctors, their end of life medical care, including the terms under which they can refuse treatment. Active euthanasia is illegal in all US states, but physician assisted dying is legal in Oregon, Washington and Montana. The difference between the two lies in who administers the lethal medication. Switzerland allows assisted suicides as long as the motive isn't profit.[5]

(R on the applications of Pretty) v. *DPP,*[6] per Lord Bingham, para 2.- In April 2002, Dianne Pretty's final appeal for a 'right to die' foundered before the judges of the European Court of Human Rights in Strashbourg. Mrs. Pretty had motor neurone disease, a neuro-degenerative condition that progressively attaches the sufferer's muscles, for which there is no cure. According to Mrs. Pretty, she had 'fought this disease each step of the way'. She nevertheless knew that the disease would overpower her and she particularly feared the prospect of suffocating in the final stages of her lie. Mrs. Pretty's husband, Brian confirmed that he would be willing to

4 Richard Huxtable, *Euthanasia, Ethics and the Law*, Routlegde-Cavendish, 2007.
5 Hindustan Times, Chandigarh, 10th March 2018, p. 10.
6 *(2002)* 1 FLR 268

help his wife commit suicide, but only if the legal officials would in turn confirm that he would not be prosecuted. "If I am allowed to choose when and how I die I will feel that I have wrested some autonomy back and kept hold of my dignity', said Ms. Pretty. 'That is how I want my family to remember me – as someone who respected the law and asked that in turn the law respect my rights.'

Death tourism is nevertheless on the rise. To date, at least 54 British citizens have travelled to Switzerland to receive help from the organisation Dignitas (Minelli 2006). The Swiss policy appears to be unique. In jurisdiction like the Netherlands, Belgium, Oregon and previously, Australia's Northern Territories, assisted suicide can only be sought by a resident and performed by a doctor (see e.g. Nys 1999, Jackson 2006: 960-972). These restrictions are absent in Switzerland: Article 115 of the Penal Code only condemns assistance in suicide where this is motivated by selfish reasons. In the circumstances of a mercy killing, where the patient autonomously wishes to die, there will be no prosecution, even if the patient is a foreign national and the assistant has no medical qualification (Hurst and Mauron2003). Although some organisations like *Exist Deutsche Schweiz* have distanced themselves from the practice of helping suicide tourists (Bosshard, Ulrich and Bar 2003: 316), *Dignitas* has seen its membership rise to 2,500 (Avery 2003) and has helped at least 619 members to die (Minelli 2006). Founded on 17 May 1998 by retired jolurnalist and lawyer Ludwig Minelli, the non-profit organisation requires confirmation from a doctor of the patients condition before it will facilitate the suicide. *Dignitas* currently books an apartment in which the assistant, often a nurse, will provide a fatal dose of harbiturates, which have been prescribed by a Swiss doctor.[7]

The data from the Netherland and Oregon give us some basis for estimating the costs on one side of the balance sheet. In 2005 there were 2,410 deaths from euthanasia and assisted suicide in the Netherlands, which constituted 1.9 per cent of all deaths during the year. If we extrapolate those figures to the three common law countries then expected number of deaths in Canada under a similar policy would have been approximately 4,770, in the United Kingdom 12,000, and in the United States 47,000. This gives us a rough idea of the number of patients who would elect assisted death every year in these countries if it was legally available under the terms of the Dutch policy, thus the number whose suffering would remain unrelieved if assisted death were not available. It is entirely reasonable to erect safeguards that make it more difficult for patients to obtain an assisted death, in order to protect vulnerable third parties. But making those safeguards too strict would come at an unacceptable cost

7 Richard Huxtable, *Euthanasia, Ethics and the Law*, Routlegde-Cavendish, 2007.

to a significant minority of the population in particularly dire circumstances.[8]

Despite a judgment of the Europeon Court of Human Rights in 2011 acknowldging the right of an individual to decide on the time and manner of ending his or her life, the Switzerland based non profit Dignitas says the actual number of assisted suicides at its clinic remain low. The number of members of Dignitas has grown steadily in recent years. As of the end of 2017, Dignitas had over 8,400 members. People who become members do not usually do so because they want to die, but because they went to support the broad activities of the association and to have the safety of choice. Since 2012, the number of assisted suicides at Dignitas has been stable at around 200 persons per year. The organisation charges 80 Swiss Francs as Membership fee, which is waived or "reasonable request". The main objective of the organisation is to work towards suicide attempt prevention, palliative care, advanced directives and assisted dying. In at least three Europeon countries euthanasia is legal while assisted suicide is allowed in Switzerland, Germany and Japan. In nearly a dozen States of the United States, assisted suicide is allowed.[9]

In 2011, three year after he was diagnosed with Alzheimer's disease, Sir Terry Pratchett, a famous British author then, 62, made a documentary called *'Choosing to Die'*. In it he argued that the decision of when to die should be an inalienable right of the individual. In England, euthanasia and assisted death is deemed manslaghter or murder, with the maximum penalty being life imprisonment.[10]

1.4 Legal Position of Suicide in India

The Constitution of India under article 21 provides the right to life and personal liberty. However, time and again the judiciary has been vexed with the issue whether right to life takes within its ambit the right to die also. Can the right to life be given such a broad interpretation so as to take within its protective umbrella the right to die also.

1.4.1 The Indian Penal Code, 1860

The Indian Penal Code, 1860 under section 309 criminalizes the attempt to commit suicide. It provides that "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". While section

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8 L.W. Sumner, *Assisted Death : A Study in Ethics and Law*,Oxford University Press, 2011,

9 The Hindu, 12 March 2018, p. 11

10 Sunday Hindustran Times, 11 March 2018, p. 10, Chd.

306 IPC deals with the abetment of suicide.

It provides that "if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

In Maruti Shripati Dubal v. State of Maharashtra [11] the Bombay High Court held that section 309, IPC is *ultra vires* the Constitution being violative of Articles 14 and 21 thereof and must be struck down. It was pointed out that the fundamental rights have their positive as well as negative aspects. For example, the freedom of speech and express includes freedom not to speak and to remain silent. The freedom of association and movement likewise includes the freedom not to join any association or to move anywhere. If this is so, logically it must follow that right to live as recognized by Article 21 of the Constitution will include also a right not to live or not to be forced to live. To put it positively, Article 21 would include a right to die, or to terminate one's life. The Court further pointed out that the language of section 309, IPC is sweeping in its nature. It does not define suicide. In fact, philosophers, moralists and sociologists are not agreed upon what constitutes suicide. What may be considered suicide in one community may not be considered so in another community and the different acts, though suicidal, may be described differently in different circumstances and at different times in the same community. While some suicides are eulogized, others are condemned. The High Court also observed that there is nothing unnatural about the desire to die and hence the right to die.

The High Court further observed that the right to die or to end one's life is not something new or unknown to civilization. Some religions like Hindu and Jain have approved of the practice of ending one's life by one's own act in certain circumstances while condemning it in other circumstances.

In P. Rathinam v. Union of India [12] a Division Bench of the Supreme Court also 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 to its trail the right not to live a forced life.

The Supreme Court observed that suicide, the intentional taking of one's life has probably been a part of human behavior since prehistory. Various social forces, like the economy, religion and socio-economic status are responsible for suicides. There are various theories of suicide like sociological, psychological biochemical and environmental. Suicide knows no barrier of race religion, caste, age or sex.

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[11] 1987 (1) Bom CR 499; (1986) 88 BOMLR 589.
[12] JT 1994 (3) SC 394

The Supreme Court expressed the view that section 309 of the Penal Code deserves to be effaced from the statute book to humanize our penal laws. It is a cruel and irrational –provision, as 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.

In Gian Kaur v. State of Punjab [13] however, a Constitution Bench of the Supreme Court overruled the decisions in Maruti Shripati Dubai and P. Rathinam, holding that Article 21 cannot be construed to include within it the 'right to die' as a part of the fundamental right guaranteed therein, and therefore, it cannot be said that section 309, IPC is violative of Article 21. It was observed that when a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the 'right to life' under Article 21. '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 comparison with other rights, such as the right to 'freedom of speech', etc. is inapposite.

C.A. Thomas Master v. Union of India,[14] wherein the accused, a retired teacher of 80 years, wanted to voluntarily put an end to his life after having had a successful, contended and happy life. He stated that his mission in life had ended and argued that voluntary termination of one's life was not equivalent to committing suicide. The Kerala High Court held that no distinction can be made between suicide as ordinarily understood and the right to voluntarily put an end to one's life. Voluntary termination of one's life for whatever reason would amount to suicide within the meaning of sections 306 and 309 IPC. No distinction can be made between suicide committed by a person who is either frustrated or defeated in life and that by a person like the petitioner. The question as to whether suicide was committed impulsively or whether it was committed after prolonged deliberation is wholly irrelevant.

In Naresh Marot Rao Sahtre v. Union of India, [15] it was observed that suicide by its very nature is an act of self killing or self destruction, an act of terminating one's own life and without the aid or assistance of any other human agency euthanasia or mercy killing on the other hand means and implies the intervention of other human agency to end the life. Mercy killing thus is not suicide and an attempt at mercy killing is not covered by the provision of section 309. The two concepts are both factually and legally distinct. Euthanasia or mercy killing is nothing but homicide whether the

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13 JT 1996 (3) SC 339

14 1994 Cr. LJ 1605 (4)

15 1996 (1) Bom (R 92, 1995 Crl LJ 96

circumstance in which it is affected.

A living will is a document to decide on ending life in case the person becomes terminally ill, gets into vegetative state and has no hope of recovery. Active euthanasia is administration of medication to end life. Living will pertains to passive euthanasia, which is a withdrawal of life support or withholding of medical treatment.

The need to change euthanasia laws was triggered by the case of Aruna Shanbaugh, a 25 year old nurse who was raped and choked by a ward boy in 1973 and lay in a vegetative state for over 40 years. In 2009, a plea was filed in the SC seeking mercy killing for her, but it was rejected in 2011. The SC, however, permitted passive euthanasia. The government had proposed a Bill to legalize passive euthanasia, after two Law Commission Reports of 2006 and 2012.

Aruna Shanbaugh v. Union of India [16] the SC in 2011 in a 110 page judgment ruled that in cases of irrereversable illness, and after a thorough medical evaluation, passive euthanasia should be permitted. Aruna, however, could not herself choose to undergo passive euthanasia and eventually died of a cardiac arrest in May 2015.

The Supreme Court on 9th March 2018 has ruled that the individuals have the right to die with dignity, allowing passive euthanasia with guidelines.

1.4.2 The Mental Health Care Act, 2017

The Mental Health Care Act, 2017 which received the assent of the President on 7th April 2017, is an Act to provide for mental health care and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during the delivery of mental health care and services and for matters connected therewith or incidental thereto.

It is important to note that the Convention on the Rights of Persons with Disabilities was adopted by the United Nations on 13th December 2006 and India signed and ratified the said convention on 1st October 2007.

Under the Mental Health Care Act, 2017, "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,

[16] 2011 (4) SCC 454

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.

Section 115 of this Act raises a presumption of severe stress in case of attempt to commit suicide. It provides that notwithstanding anything contained in section 309 of the IPC, 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. The Act further provides that the appropriate government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce risk of recurrence of attempt to commit suicide.

1.5 Santhara Tradition Under Jainism

The Santhara which means a fast unto death, is a practice prevalent in Shvetambara group of the Jain community. It is a religious fast unto death on the pretext that when all purposes of life are served, or when the body is unable to serve any purpose of life, the santhara will attain moksha (salvation). A person, after taking vow of santhara stops eating and even drinking water and waits for death to arrive. It was submitted that santhara is a religious thought which has no place under the law of the land.

Nikhil Soni v. Union of India,[17]

This writ petition was filed under Article 226 of the Constitution of India of India in public interest wherein the petitioner had prayed for a direction to the Union of India and the State of Rajasthan, to treat 'Santhara' or 'Sallekhana' as illegal and punishable under the law of the land and that the instances given in the pleadings, be investigated and subjected to suitable prosecution of which the abetment be also treated as a criminal act.

It was submitted that a voluntary fast unto death is an act of self destruction which amounts to suicide, which is a criminal offence and is punishable under section 309 IPC. A person adopting santhara is helped by the entire community in designing it ceremoniously. People visit the person for his/her darshan and to witness the occasion with reverence. The entire act is considered to be an act of courage and rational thinking on the pretext that the soul never dies. They glorify the act and its

[17] (2015) Cri LJ 4951

eventuality.

In this case the learned counsel appearing for the respondents had passionately defended the santhara as an inseparable tenets of Jain religion. They tried to connect it with the way of life and source to attain moksha, which is the ultimate purpose of Jain religion.

In this case it was emphatically denied that santhara is a voluntary suicide. And it was said that it was arbitrarily equated with Sati or Euthanasia in the Public Interest Litigation. It was further said that the main psychological and physical features of suicide are : (1) the victim is under an emotional stress; (2) he or she is overpowered with a feeling of disgrace, fear, disgust or hatred at the time when suicide is resorted to ;(3) the main intention of committing suicide is to escape from the consequences of certain acts or events, disgrace, agony, pain, social stigma or tyranny of treatment etc.; (4) the kind is far away from religious or spiritual considerations; (5) the means employed to bring about death are weapons of offence or death; (6) the death is sudden in most cases unless the victim is rescued earlier; (7) the act is committed in secrecy and (8) it causes misery or bereavement to the kith and kin.

It was further alleged that every man as per Hindu religion lives to accomplish four objectives of life- (1) Dharma (2) Artha (3) Karma and (4) Moksha. When the earthly objectives are complete, religion would require a person not to clinch to the body. Thus a man has a moral right to terminate his life, because death is simply changing old body into a new one.

It was further said that in the observance of the vow of Sallkhana, there is a complete absence of passion and the conduct is directed to liberate the soul from the bondage of Karma. The quiet and joyful death makes us conscious of what is good for the individual and the community at large. Such death is not suicide and cannot be categorized as such either according to law or morals. In the Brahmic it is called living samadhi. To treat santhara as a suicide amounts to ignorance of the Indian culture.

This writ petition was allowed with a direction to the State authorities to stop the practice of Santhara or Sallkhana and to treat it as suicide punishable under section 309 IPC and its abetment by persons under section 306 IPC. The state shall stop and abolish the practice of Santhara or Sallkhana in the Jain religion in any form. Any complaint made in this regard shall be registered as a criminal case and investigated by the police in the light of the recognition of the law in the Constitution of India and in accordance with sections 306 and 309 of the IPC.

However, this decision of the Rajasthan High Court is now under challenge before the Supreme Court of India.

1.6 The Law Commission of India

1.6.1 The 196th Report of Law Commisson of India

The report entitled "the Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)" is of March 2006. In this report it was felt that euthanasia and 'Assisted Suicide' must continue to be offences under our law. The scope of the inquiry is, therefore, confined to examining the various legal concepts applicable to 'withdrawl of life support measures' and to suggest the manner and circumstances in which the medical profession could take decision for withdrawl of life support if it was in the best interest of the patient. In that context, it was also felt necessary to propose sufficient safeguards to the 'patient' so that the procedure proposed for doctors arriving at a decision for withdrawl of life support measures were not misused or abused by any body, including the patient the relatives of the patient or the doctors or the hospitals where the patient was under treatment.

1.6.2 The 210nd Report of Law Commission of India

The Law Commission of India in its 210th report entitled "humanization and decriminalization of attempt to suicide," had felt that attempt to 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. In view of the views expressed by the World Health Organization, the International Association for Suicide Prevention, France, decriminalization of attempt to suicide by all countries in Europe and North America, the opinion of the Indian Psychiatric Society and the representations received by the Law Commission from various parts of the country, the commission had resolved to recommend to the government to initiate steps to repeal the anachronistic law in section 309 of the IPC.

1.6.3 The 241st Report of Law Commission of India

The 241st Report of Law Commission of India entitled "Passive Euthanasia- A Relook" recommended that passive euthanasia, which is allowed in many countries, shall have legal recognition in our country to subject to certain safeguards, as suggested by the 17th Law Commission of India and as held by the Supreme Court in Aruna Shaunbaugh's case ((2011) 4 SCC 454). A competent adult patient has the right to inhibit that there should be no invasive medical treatment by way of artifical

life sustaining measures/ treatment and such decision is binding on the doctors/hospital attending on such patient provided that the patient has taken an 'informed decision' base on free exercise of his or her will. The same rule will apply to a minor above 16 years of age who has expressed his or her wish not to have such treatmentprovided the consent has been given by the major spouse and one of the parents of such minor patient.

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

The High Court shall take a decision after obtaining the opinion of a panel of three medical experts and after ascertaining the wishes of the relatives of the patient. The High Court as *parens patriae* will take an appropriate decision having regard to the best interests of the patient. The Medical Council of India is required to issue guidelines in the matter of withholding or withdrawing of medical treatment to competent or incompetent patients suffering from terminal illness.

1.7 Practical Implications of Legalizing Passive Euthanasia in India

Where do we draw the line between murder and an act of charity? Does the mental state of the person who is asking for death count? How do we account for depression, or losing the will to live when there are treatments available by mental specialists which can effectively turn a person's life around? Where does the concept of e stand in our law and how do we distinguish between a person who has lost the will to live and one who cannot live? What is "mercy, killing and how to do differentiate it from "killing"?[18]

The court does, however, permit physician to withhold or withdraw lie sustaining treatment, both from patients who have consented to this and from those who are incompetent to do so. This what court calls "passive euthanasia ". The use of the term, "active" and "passive" has been criticized by the Indian Council of Medical Research defining terms used in end of lie care. Using passive euthanasia to describe the withholds or withdrawl of treatment wrongly suggest that there is something

[18] Sushila Rao "Is Active Euthnasia the next step? 16 March 2018, The Hindu, Mohali 9

unnatural about the process. Instead such withholding ought to be seen as allowing death to take its nature course. Section 115 of the Mental Health Care Act, creates a prescription that any person attempting to commit suicide is under severe stress and is not to be tried or punished. This is a positive step towards decriminalisation sujcide which is a precondition to permitting rights to autonomy, dignity, liberty and privacy while recognizing the right to a dignified death. If these rights are to be given the full effect, it would be hard to justify why "passive euthanasia" is permitted, while "active euthanasia" is not.[19]

Last year (2017), in its privacy judgment[20], the Supreme Court affirmed that the ideas of self determination and the right of the individual to make fundamental choices about how to use her body are at the heart of the constitution. Common cause represents the first important application of the general principle to a concrete situation. In framing the issues in terms of the individual choice to reject medical intervention, the court articlated an important insight: we live in a world where we are constantly subjected to all kinds of invasive processes, procedures and systems. In common cause, the context was that of medical intervention. Common cause, therefore, is an emphatic recognition of the basic principle that in today's world, individuals must be empowered to engage with technological systgem on their own term. Common cause marks the first important judicial endorsement of those principles in the privacy era. And if the court continues to apply it in the cases that will inevitably come before it, in the coming month and years, common cause might be remembered as the first formulation of a case constitutional principle of the 21st century: the principles of technological self determination.[21]

In December 2017, an elderly couple from Mumbai wrote to the President seeking permission for active euthanasia. Naryan Lavate 88 and his wife, Iravati, 78, stated that they have led fulfilling lives and did not want to suffer if their health failed. The Lavates said the Supreme Court's judgment was irrelevant to them. "our idea is not to wait till the suffering starts. Lurs is also a plea for the right to die with dignity but this order will still not help us," said M. Lavate, a retired Maharashtra State Transport employee. Passive euthanasia involves withholding or discontinuing treatment for a terminally ill person where as active euthanasia involves injecting a lethal dose to a terminally ill person. Active euthanasia is banned in India. Wish to be independent. The couple does not have children. "We don't want to be in a situation where one of us is left alone or taking care of the other. We also don't want anyone else to have to take care of us", said Ms. Lavate, a retired school principal. "The court should have

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19 Dhwani Mehta, 16th March 2018, The Hindu, Mohali.

20 (2017) 10 SCC 1

21 Gautam Bhatia, Under a humane constitution The Hindu, 12March, 2018, p. 8 Mohali.

allowed active euthanasia as well for peole like us who have lived lives to their fullest and are seeking to go in peace', he said.[22]

1.7.1 SC legalises passive euthanasia and living will, says right to lie includes right to die.[23]

(i) Matter of Life and Privacy: The judgment paves the way for decriminalising suicide by suggesting that the right to die should now be considered a part of right to life and right to privacy. Cites Mental Healthcare Act, 2017 as the first step.

(ii) State's Failure: "When the State is not being able to guarantee the right to healthcare for all, can the citizens be denied the right to die with dignity.? asks SC

(iii) Stressed Finances and Facilities: Poor are forced to sell properties and endanger family's future to treat terminal cases. SC also questions the fairness of limited life-saving facilities being blocked by patients who won't recover.

(iv)Euthanasia Was In Practice : Buddhism and Jainism allow euthanasia, while Hinduism, Islam and Christianity are against it, SC found that limited euthanasia was allowed through medical council regulations, 2002.

(v) The Safeguards: Mandatory provision for a double medical board involving judicial magistrate or collector or high court, to impement euthanasia and living will.

1.7.2 What About Active Euthanasia?

Allowed in several western countries, active euthanasia, or assisted suicide, will continue to be a crime and can be made legal only through legislative action.

1.7.3 In country of poor, why force costly life support, asks SC[24]

First because of rampant poverty where majority of the persons are not able to afford health services, should they be forced to spend on medical treatment beyond their means and in the process compelling them to sell their house property, household things and other assets which may be means of (their) livelihood. Second when there are limited medical facilities available, should a major part thereof be consumed on those patients who have no chances of recovery.

Explaining the importance of applying cost benefit test even to constitutional principles, Justice Sikri said, "At times, for deciding legal issues, economic analysis

22 The Hindu Saturday March 10, 2018.
23 The Times of India dated March 10, 2018
24 Times Nation dated March 10, 2018.

of law assumes importance. It is advocated that one of the main reasons which should prompt philosophers of law to undertake economic analysis seriously is that the most basic notion in the analysis – efficiency or Pareto optimality – was originally introduced to help solve a serious objection to the widely held moral theory utilitarian.

"Utilitarians hold that the principle of utility is the criterion of the right conduct. If one has to evaluate policies in virtue of their effect on individual welfare or utility, one norm of utility has to be compared with that of another. We may clarify that this economic principle has been applied in a limited sense only as a supporting consideration with the aim to promote efficiency."

1.8 Conclusion

The major issue is to who is to decide in the most deserving cases, the SC has given the judgment only for passive euthanasia. Law has not fully developed, the penal provisions in India by way of section 306 and 309 of the IPC. It is otherwise the desirability of the law that is in question. Need for other alternatives to deal with the problem. Why only passive euthanasia is permitted in most of the countries including India and not active euthanasia.

In these very cases dealing with mercy killing, there are different circumstances and situations dealing with the individual cases. There are cases where a person may be in a position to take such decisions in contrast to cases where a person being in a permanent vegetative state or on a life support system and thus unable to decide.

Drawing a link between right to die and right to health, Justice Sikri said, "Right to health is a part of Article 21 of the Constitution. At the same time, it is also a harsh reality that everybody is not able to enjoy that right because of poverty etc. The state is not in a position to translate into reality this right to health for all citizens. Thus, when citizens are not guaranteed the right to health, can they be denied right to die in dignity.

AFRICAN CULTURAL HERITAGE AND PEACEFUL DISPUTE RESOLUTION IN AFRICA

*Tobiloba Awotoye

1.1 Introduction

Africa, as a continent comprise of different peoples, ethos, cultures, religions and traditions. It is a distinct continent with its own distinct way(s) of life. The African way of life and manner of doing things is separate and different to that of Europe, America, or Asia. According to Olaoba (2008), in explaining the distinctiveness of the Yoruba culture, he said:

> "The concept of Iwa (character) and Omoluabi (well-cultured person) are enshrined in Yoruba philosophy. Reasonability of intention and action do not go unrecognized in Yoruba legal culture..."[1]

Just as we have in other continents and among all other peoples in the world, Africa is not without her own share of indigenous or traditional laws that bind or regulate their ways of life. Some scholars[2] have, however, found the above so hard to believe- mainly because of its lack of codification. Nonetheless, scholars and jurists alike have established that, in fact, prior to the advent of colonialism, there were laws in Africa[3]. In this paper, an attempt is made at establishing the sources of these indigenous African laws and how they touch on the core of African culture.

1.2 Conceptual Framework: What is Law?

According to HLA Hart[4], Law refers to the social rule that a social group or society consider as acceptable and usable. There are two words in this definition that must be given further clarification- acceptable and usable. 'Acceptable' means something that is agreeable, a consensus; while 'usable' means something capable of being used. From this, it can be inferred that Hart meant that the social rule must be agreed upon by the social group or society for it to have the weight of law. It also goes from this that law differs from one social group to another. Salmond sees law as 'the body of principles recognised and applied by the state in the administration of justice'.

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1 Olaoba O., *Yoruba Legal Culture,* New Age Publishers Ltd, p 4 . 2008

2 Gluckman M., *Ideas and Procedures in African Customary Law*, Oxford University Press, p 69.1969,

3 Elias T., *The Nature of African Customary Law,* Manchester University Press, p 29.1956

4 Hart H.L.A., *The Concept of Law*, 2nd Ed, Clarendon Law Series, p 44.1994

Nyasani (1995) defines law as 'a paradigm according to which actions, be they rational beings or inanimate beings, ought to conform to'.[5]

Law is essential to the survival of any society. As the saying goes, absence of law breeds anarchy. Law guarantees orderliness and peacefulness among individuals and, in fact, authorities in a society. One of the ways by which this happens is through the peaceful settlement or resolution of disputes, provision and guarantee of certain individual rights and establishment of legal instruments to enforce those rights.

Nonetheless, as shall be seen subsequently, law is a product of morals, cultures, religions and customs of the people in the society. For these customs and cultures to have the force of law, however, they must be accepted as such by the people. As Hart observed:

> "The law of every modern state shows at a thousand point, the influence of both the accepted social morality and wider moral ideals. These influences enter the law either abruptly and avowedly through legislation or silently and piecemeal through the judicial process... The further ways in which law mirrors morality are myriad, and still insufficiently studied, statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles".[6]

A certain degree of caution must, however, be exercised here on the influence of morality on the law of a society. As was emphasised by Elias (1956)[7]:

> "Mere ceremonial practices with the essential requirements of the law, for instance: dances and drumming at native weddings, are customs but they are not like payment of dowry that is entrenched in native law that gives validity to marriage".

Same can also be said of religion and how it influences law in a society. Divine law, for instance, is a product of Christian Biblical commandments and principles. It should be noted that the Ten Commandments given by God through Moses to the Israelites is foundational to virtually all the laws In the West and Europe today. For

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5 Nyasani M., *'Legal Philosophy: Jurisprudence,'* Consolata Institute of Philosophy Press, p 11.1995

6 Kanyeihamba G., *'Kanyeihamba's Commentaries on Law, Politics and Governance,' Law* Africa Publishing Ltd p 11.2006; See also Lloyd D., *'The Idea of Law,'* Penguin Books, p 3.1979

7 Elias T., *'The Nature of African Customary Law,'* op cit,. p.29.1956; See also Holmes O., "The Common Law" in Fisher III W., Horwitz M., and Reed T. (Eds), American Legal Realism, Oxford University Press, p 9.1993

instance, one of the Ten Commandments which says 'Thou shall not kill' can be found in Section 33 of the 1999 Constitution of the Federal Republic of Nigeria. The Holy Qur'an of the Muslim also influences the laws of certain societies such as Saudi Arabia, United Arab Emirate, and Turkey.

1.3 African Law

As have earlier been defined, law is a body of principles recognised, accepted and enforced by a given society or social group through its instrument of justice. Law is peculiar, normative and differs from one society to another. Law in Africa is different from law in Asia. African law, as we have today, has elements of European, Arab and North American laws as a result of conquest, colonialism and globalization. This has threatened the survival of our indigenous laws. This was graphically painted by Okoth-Ogendo[8]:

> "That I believe customary law qua positive law is dying; it is in fact dead in a lot of substantive areas... I believe customary law now belongs to social and cultural history, and that those principles of it as reflect the way of life of contemporary Kenyans belong to Sociology and Anthropology!"

African law can be divided into two- Modern African law and traditional African law. Modern African law refers to African law as we have in operation today. As earlier stated, conquest, civilization and colonialism have brought different 'alien' laws into the African continent. These laws have been practiced over a long period of time and accepted as part of our laws. In the words of Allot (1965):

> "In more recent times, the existence of indigenous legal systems in Africa, suitable for collective study on a comparative basis, has been recognised...what in earlier period were thought of merely as 'native law and custom' and hence assimilable to native law and custom in Asia or the Pacific, or else as a number of separate tribal laws, were now treated as constituting a family of legal systems which could be studied as a whole" [9].

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8 Okoth-Ogendo H., 1989, "Customary Law in the Kenyan Legal System: An Old Debate Revisited", in Ojwang J. and Mugambi J. (Eds), The S.M. Otieno Case, Nairobi University Press, p 136

9 Allot A., 1965, 'The Future of African Law" in Kuper H. and Kuper L. (Eds), African Law: Adaptation and Development, p 220

Traditional African law, on the other hand, has often been referred to as 'customary law'. This can be described as the indigenous personal laws of the African people[10]. African law has also been described as 'one of the most fundamental values found in organized African societies'[11]. One of the factors that differentiate modern African law from traditional African law is its codification. Traditional African law is not codified- that is, it is unwritten. This peculiar factor-at times regarded as an anomaly of the law- has made many scholars to deny and even criticize the existence of African law[12]. Some have said that Africa has no history and incapable of invention and philosophy[13]. Others also argued that African law have no means of coercion or enforcement which is fundamental. This, according to Elias, is pure ethnocentrism. He said:

> "Scholars, with more advanced social science techniques and more conversant than their predecessors with underdeveloped societies, came to a totally different conclusion. They were generally agreed that 'underdeveloped peoples' possessed legal systems in the proper sense of the term, that the system varied greatly among different peoples depending on their stage of development and that it was not only flexible but capable of development. They also contended that breaches of law did occur frequently and there existed established sanctions which could be applied. Religion was one of the sources and legal rules might in some cases derive most of their authority from religious beliefs. Nevertheless, it was quite possible to differentiate between the religious and secular rules of a primitive society"[14].

Therefore, it is fallacious and highly mischievous to say that law was 'brought into' Africa through colonialism. Although, it should be said that both modern African law and traditional African law exist and operate in complement of each other.

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10 Please note that Traditional African Law and African Law shall be used interchangeably for the purpose of this paper.

11 Masolo D., 1994, *African Philosophy in Search of Identity*, Bloomington: Indiana University Press, p 46

12 Contran E., The *Restatement of African Law,* Vol. 1, p V

13 Trevor-Roper H., The Listener, 28 November, 1963

14 Elias T., The nature of African Customary Law, op cit, p 264

1.4 Sources of African Law

Traditional African law differs from society to society. Nonetheless, Oyewo et. al (1999)[15] have identified five major sources of African law. They are command, legislations, taboo, maxims and customs. These sources shall be discussed below:

1.4.1 Command:

the Black's Law Dictionary defines command as 'an order, imperative direction, or behest'. A command can also be described as an orger given by a superior to a surbordinate that must be obeyed. Command, as a source of African law, is common among kingly and chiefly societies. Here, the king's dictates, orders and directives are regarded as law. This can, I fact, be found in the preceptivesaying of the Yoruba culture which states:

> *"Oba n pe o, o n difa; Bi ifa ba fore; Bi Oba ko fore nko?*
> (Interpretation: The king summons you to his court, But you bluffed at the command; pretending that you are consulting Ifa oracle; Do you not know what will happen to you if the oracle favours you but the king descends brutally on you?"[16]

The king in a kingly society is regarded as the supreme authority- *igbakeji oosa*. Therefore, every order or directive he gives must be obeyed as law. This source of law is no longer common quotidian in modern Africa

1.4.2 Legislation:

this source of African law can take any of the following forms- Legislation by chief's decree, legislation by chief in executive council, legislation by public assembly, institutional legislation and judicial precedence. *Legislation by chief's decree* is the same as command where a king or chief issues a diktat to his subordinates or people as law. This cannot happen in acephalous societies. *Legislation by chief in executive council* can be likened to the legislature of a modern state or the Supreme Military Council in a military administration. The chief in executive council comprise of elders and/or representatives of the people. They are empowered to make legislations on behalf of the king or chief. Another form of legislation in traditional Africa is the *institutional legislation* which is made by members of a profession, religious group or association to govern their members- for instance, Market women association of a community.

Legislations can also take the form of a meeting of the members of a community to debate on current happenings and how to better the lots of the community. This is

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[15] Oyewo A. and Olaoba O., A Survey of African Law and Custom with Particular Reference to the Yoruba-Speaking Peoples of South Western Nigeria, Ibadan:Jator, p 28.1999

[16] Olaoba O., Yoruba Legal Culture, op cit, p 17

predominantly invoked in acephalous societies. Finally, legislation as a source of traditional African law can also take the form of judicial precedence- that is, the previous decision of a superior court on a similar issue becomes binding on a lower court. However, since those decisions are unwritten, some cultures make us of remembrancers who remind the court of previous decisions.

1.4.3 Taboo:

this is basically a moral and/or religious source of traditional African law. Taboo means something forbidden, illicit, or impermissible. Taboos, it is believed, are put in place to stave off evil, and also maintain relationship with the divine.

1.4.4 Maxims:

this is a very important source of traditional African law. Maxims depict and represent the oral tradition, beliefs and religion of the community. They differ from culture to culture. In Yoruba culture, there is a maxim that says '*agba kii wa loja ki ori omo titun wo* (An elder should not be in the market-place and allow a child's head to hang)'. This saying emphasise the important roles that elders play in dispute resolution in a Yoruba community. Also in the Yoruba legal culture, there is a maxim which says 'omo *ale ni nrinu ti kii bi; omo ale ni a mbe, ti kii gba* (this means: only a bastard will not be vexed; only a bastard will not yield to a plea for peace)'. This maxim is used to appeal to litigants who do not want to toll the path of peace.[17]

1.5 African Law and the African Culture

African culture emphasise on the maintenance of social equilibrium by promoting peaceful coexistence in the society. African law is shaped around this truth-reconciliation and peaceful coexistence. Reconciliation is however not a strange concept to law as a whole. According to Driberg (1970),

> "Law does not create offences, it does not make criminals; it directs how individuals and communities should behave toward each other. Its whole object is to maintain equilibrium, and the penalties of African law are directed, not against specific infractions, but to the restoration of this equilibrium. There is no written code, but the law is an organic growth, inherent in the body politic and accepted just because it is organic, coherent and traditional".[18]

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17 Olaoba O., *Yoruba Legal Culture*, op cit, p 16

18 Driberg J., 1970, *'The African Conception of Law'* in Contran E. and Rubin N. (Eds), Readings in African Law, p 163

Of particular impc tance to this discourse on the cultural heritage of African law is the anthropological work of Gibbs (1963) on the Kpelle of Liberia[19]. In this work, Gibbs gave a graphic and precise description of traditional African law and its culture of reconciliation. He described this culture as therapeutic. Olaoba also echoed this about the Yoruba cultu re. In his words:

> "Legal culture undoubtedly gives sense of direction to pace of development in Yoruba society. Thus peace-making and peace-keeping are two functional processes of Yoruba legal culture. The processes are operational in Yoruba courts by the legal officials. Peace-making and peace-ke ing are correspondingly identical within the framework of adjudicati n and arbitration"[20].

This culture of reconciliation maintains espirit de corps among the people, engenders development and also maintains relationship with the divine in the society.

1.6 Conclusion

Africa is a distinct entity with thousands of cultures. Theses cultures form the source of our legal system. It has been established in this paper that Africa has her indigenous laws which predates civilization. Nonetheless, unlike Western and European Laws, African indigenous law exist mainly for the maintenance of social equilibrium. All the sources of traditional African law as identified above all touch on this.

It should be noted, however, that traditional African law cannot operate in isolation in modern Africa. In fact, African laws, as we have today, consist of traditional and modern sources. In the words of Allot, "all laws in independent Africa are now 'African', and African law no longer means simply the indigenous customary laws deriving from antiquity, but the modern statutory laws as well'[21]. It remains to be seen how good or bad this influence of colonialism is on indigenous African law. But it should be said that the principles of the new African laws (Modern African law) negates the core of traditional African law- reconciliation.

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19 Gibbs J., 1963, "The Kpelle Moot", *Africa*, Vol 33 No. 1

20 Olaoba ., Yoruba Legal Culture, op cit, p 5

21 Allot A., *'The Future of African Law'*, in Kuper H. and Kuper L. (eds) op cit, p 219

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