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EDITORIAL

It gives me immense pleasure to bring forth the January-June 2019 issue, Vol. IX, Number-I which contains articles on various contemporary issues ranging across National and International scenario's. It is an eclectic mixture of opinions offering the readers an insight into both social and legal issues. The editorial team sincerely hopes that the papers benefit the readers by providing a fresh perspective and is a starting point for further Research. I wish to thank all the contributors to the Journal and wish that they continue their support in future as well. I also thank all the members of the Editorial Board of the Journal for all their sincere efforts. We look forward to constructive criticism on the articles published in this issue, hoping that the suggestions would help and encourage scholarly dialogue in our forthcoming issues.

Dr. Kamaljit Kaur

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CONTENTS

THE RIGHT TO PROPERTY AND RIGHT TO COMPENSATION: AN UNEASY RELATIONSHIP

Gaurika Chugh*

1 Introduction

The dissent between Legislature and the Judiciary on the issue of "Right to Property" finally reduced it to a legal right by the "Forty-Fourth Amendment" Act and it now reads in Article 300-A, as *"No person shall be deprived of his property save by authority of law."* Though the Judiciary stressed on the payment of just compensation to the dispossessed but in the process, it thwarted the objective of state in bringing out land reforms in the country. The aim of the state was to usher a series of land reforms in the country that in turn would lead to the social and political transformation of the society and promote the well-being of the individuals.

The deletion of the "Right to Property" as a Fundamental Right prompted the state to shift its focus from ushering in land reforms to mass scale acquisition of land in the guise of promoting development. The use of eminent domain powers by the state is significantly followed by excessive litigation in courts on the issues related to compensation. This article in the first part discusses the various constitutional amendments that emnated as a consequence of the struggle between the Legislature and the Judiciary and in the second part; explains the methods adopted by the Judiciary and the Legislature for measuring compensation and analyzes the various issues related to compensation adjudicated in the court of law since 1991.

2. Tussle between Fundamental Rights and Directive Principles of State Policy

The socialistic ideologue played an imperative role in formulating our Constitution, and the constitution was indeed viewed as an instrument to bring about social revolution. Socialism came to be defined as a means to inhibit the accumulation of capital in the hands of a few aristocrat and landowning classes and to promote distribution of resources and means of production in a just and equitable manner.

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The concept of socialism came in the backdrop of the prevailing system of landlordism during colonial times that gave exclusive rights to certain sections of society like zamindars to exert their domination over the tenant and landless farmers.

The makers of our Constitution struggled to construct a perfect balance between the attempt of the state to bring about social and political transformation through the process of land reforms and simultaneously, protecting the legal entitlement of individual land owners. The Constituent Assembly at that time had in vision the Fifth Amendment of the American Constitution which says that "payment of just compensation is necessary for the acquiring private property, meant for public use". The state's incessant authority to acquire land rests on the concept of eminent domain that gives absolute powers to the state to undermine the right of an individual to hold the property for the larger public good. The word "just" used to designate compensation holds a very significant place in the American law as it centres on the 'due process' of law that aims to protect the rights of the individual property owners subjected to state's discriminatory power. However, the Constitution makers felt that if the provision of "due process" of law were allowed, it would hamper the legislative authority of the state to bring about land reforms in an effective way.

The drafters of our Constitution concluded separate chapters for justiciable and non-justiciable rights to struck a harmonious balance between the idea of political justice as defined out in Part III (defined as Fundamental Rights) and social and economic justice as laid out in Part IV of the constitution (defined as Directive Principles of State Policy) (Ananth, 2015, p. XII). This process finally culminated in making "Right to Property" as a Fundamental Right under Article 19 (1) (f) that "guarantees all the citizens to acquire, hold and dispose of property subject to the imposition of reasonable restrictions by the state in the interest of the general public". The Fundamental Rights empowered all the citizens to appeal to the court in case of infringement of their rights. Article 19 (1) (f) that delineated "Right to Property" could be deprived under Article 31 of the Constitution, which says that "state can acquire land for the use of public good on the payment of compensation." The word "just" as mentioned in the Fifth Amendment of the U.S. Constitution did not find a locus in Article 31 of the Indian Constitution as the Constitution makers wanted to go ahead with the process of social and political transformation. In addition to protection of individual land owners right over their property, Article 39 (b) and (c) of the Directive Principles of State Policy aimed to

promote dissemination of wealth in a manner so as to promote the public good and preclude accumulation of wealth in the hands of few landowning classes.

The Article 31 of the Constitution can be traced back to Section 299 of the Government of India Act, 1935 which says that "No person shall be deprived of his property in British India save by authority of law." This section provided protection to the holders of both moveable and immoveable kind of property. Before the induction of "Right to Property" in the constitution, it underwent a series of debates in the Constituent Assembly. The 'Sub-Committee on Fundamental Rights" submitted its report on 16 April 1947, explicitly makes reference to "Right to Property" along with the provision of right to life and property in Clause 12, which was later changed to Article 21. The amalgamation of right to property with life and liberty was challenged by K.M. Panikkar, who was part of the Constituent Assembly on the pretext that it will lead to misappropriation of the right by the zamindars and landed aristocracy. Clause 26 of the report explicitly mentioned that payment of just compensation is a prerequisite to acquire private property for public use. In the first draft of the Constituent Assembly, Article 24 (i.e. Clause 2 of the report) found its due place with special focus on the statutory provisions of the Section 299 of the Government of India Act 1935. The challenge before the drafters was to make substantive changes to state's authority to acquire land as restricted by the Section 299 of the 1935 Act to fulfil its obectives of social transformation. The series of debates in the Constituent Assembly finally culminated in the adoption of Article 31 on 26 November, 1949, that made compensation as a prerequisite for the state to acquire private land for public use.

3. Constitutional Amendments to the Right to Property

The attempt of the State to introduce various land reform legislations suffered a major setback in the northern states of the country namely, Madhya Pradesh Bihar and Uttar Pradesh. The Legislative Assembly of Bihar immediately after independence started the task of implementing land reforms and for that purpose introduced Bihar Land Reforms Bill on 30 December, 1949. The President granted his assent to Bihar Land Reforms Bill and the Act came to be enforced on 25 September, 1950. A notification was issued which stated that as per the provisions of the Act the estates and tenures of Kameshwar Singh, the Raja of Darbanga and two zamindars had become vested in the State of Bihar (Ananth, 2015, p. 123). The Raja of Darbanga, Kameshwar Singh challenged the Act under Article 226 of the Constitution, and the Bihar High Court struck down the Act as unconstitutional and

void on the pretext that it breached the legality of Article 14 as granted by the Constitution. The Bihar Act was declared invalid on the pretext that it had defined different criteria for providing compensation to the claimants. The High Court held that the differential rates of compensation violated "Right to Equality" as granted by Article 14 of the Constitution. Eventually the decision of the Bihar High Court was taken as a precedent and was followed by the High Courts of Lucknow and Allahabad to inhibit the power of the State legislature to introduce land reforms.

3.1 Implementation of First Amendment Act

The interventionist role administered by the judiciary in the working of the State to implement land reforms ultimately resulted in the introduction of First Amendment to the Constitution. The First Amendment inserted Article 31 A, 31B and Ninth Schedule to the Constitution. Article 31 A empowered the State to acquire estates and such law could not be brought into question by the judiciary on the pretext that it violates the fundamental rights of the claimants. The Act was mainly introduced to ward off the challenges expressed by the High Courts of Northern States namely, Uttar Pradesh Bihar and Madhya Pradesh against the attempt of the State to introduce land reforms. Article 31 B indemnifies the various Acts and legislations ratified by the Parliament and various State Legislative Assemblies by underlining that the laws mentioned in the Ninth Schedule of the Constitution could not be declared void on the ground that they violate Fundamental Rights. The Amendment added 13 Acts to the Ninth Schedule of the Constitution.

The First Amendment Act was challenged in the *Shankari Prasad Deo* case[1] and an appeal was made to the Apex Court on the basis of Article 13 (2) of the Constitution which states that "state shall not make any law that infringes the fundamental rights conferred to the citizens." The five-member bench[2] led by Justice M.H. Kania (Chief Justice of India) upheld the First Amendment Act and held that the various legislations placed under the Ninth Schedule of the Constitution were exempted from the reach of judicial review.

The Supreme Court in the *Kameshwar Singh's* case[3] case brought to light two important issues that dealt with the acquisition of land. The first issue examined whether it is necessary to enumerate the public purpose for which land is being acquired and the second issue dealt with the justiciability with regard to the

1 *Shankari Prasad Deo and Others* v. *Union of India*, AIR 1951 SC 458.

2 The five member bench comprised of Justice M.H. Kania, M. Patanjali Sastri, B.K. Mukherjea, S.R. Das and N. Chandrasekhara Aiyar, JJ.

3 *State of Bihar* v. *Kameshwar Singh* AIR 1952 SC 0 (252).

quantum of compensation specified as per the provisions of the Act. The bench agreed in principle that while acquiring land, it was not necessary to mention the public purpose. On the issue delineating the quantum of compensation, the bench held that under Article 31 of the Constitution compensation was a necessary precedence for the acquisition of land, but the justiciability of the quantum of compensation was beyond the scope of the judicial purview.

3.2 Fourth Amendment Act: Restrained the domain of Judiciary to act in matters related to compensation

In the year 1948, the West Bengal Legislative Assembly enacted the "*West Bengal Land Development and Planning Act"* to acquire land for the immigrants who had migrated to the state after the partition. On 28 July, 1950, one of the owners of the land, Bela Banerjee[4], contested the legitimacy of the Act on the grounds of inadequate compensation. The State held that Legislature had full discretion to determine the measures of compensation and the Judiciary had no right to intervene in the measures of compensation determined by the Legislature. The Supreme Court repealed the judgment as rendered in the Kameshwar Singh case and declared the Bengal Act as void on the grounds that the owners of expropriated land were entitled to be paid full market value as compensation. Justice Patanjali Sikri held that "the rules prescribing the payment of compensation must be just equivalent of what the owner has been deprived of" (Ananth, 2015, p. 144). It was held by the court that the principles or the law governing the amount of compensation were justiciable and thus the judgment in the *Bela Banerjee* case went against the mandate of Article 24 of the Draft Constitution where Nehru laid emphasis on the fact that judiciary should refrain itself from interfering on the issue of compensation. The immediate effect of this led to the introduction of Fourth Amendment Act that added a clause to Article 31 (2) of the Constitution which said that "no such law shall be called in question on the ground that the compensation provided by that law was not adequate" (Sankaranarayanan, 2011, p. 227). Similarly, in *Shantilal Mangaldas* case[5], the constitutionality of *Bombay Town Planning Act, 1958* was declined on the ground that the compensation paid did not adhere to the existing value of the land. The Court held that after the enactment of Fourth Amendment Act, the power of the judiciary had been restrained from interfering in the matters related to the sufficiency of compensation

[4] *State of West Bengal* v. *Mrs. Bela Banerjee and Others* AIR 1954 SC 0 (170). The five member bench in Bela Banerjee case comprised of Justice Patanjali Sastri (Chief Justice of India), M.C. Mahajan, S.R. Das, Ghulam Hasan, and B. Jagannadhadas, JJ.

[5] *State of Gujarat* v. *Shantilal Mangaldas* AIR 1969 SC 624, 1969 (1).

and it thus reiterated the supremacy of the Legislature over the Judiciary on the issue of compensation.

3.3 Golaknath Case: Challenging the Constitutionality of Seventeenth Amendment Act

The attempt of the State to implement land reforms gained track after the inclusion of First and Fourth Amendment Act to the Constitution. However, the Supreme Court struck down the *Kerala Agrarian Relations Act, 1961* in *Karimbil Kunhikoman* case[6]. The Kerala Act was introduced to provide a ceiling to the property held by the landowners and transfer the excess land to the landless or cultivating tenants. The Act was held unconstitutional on the ground that the land involved in the case belonged to ryotwari settlements and, hence, did not fall under the definition of estates set out in Article 31 (2) of the Constitution[7] and it also declared that the differential rates of compensation accorded by the Kerala Act, 1961 were in violation to the principle of "Right to Equality" guaranteed under Article 14 of the Constitution. The decision by the Apex Court went against the mandate of Fourth Amendment Act that said that judiciary should refrain itself from interfering on matters related to adequacy of compensation provided to the claimants. This paved way for the introduction of Constitution (Seventeenth Amendment) Act, 1964. The amendment brought about changes in the Article 31-A and Ninth Schedule of the Constitution. The scope of the term estate was expanded to include "any land held under janman right, ryotwari settlement or any land held for the purpose of agriculture or any ancillary purposes including waste land, forest land, pasture land or land occupied by cultivators, agricultural labourers or village artisans" (Ananth, 2015, p. 157). The Act also added 44 more laws to the Ninth Schedule by amending Article 31-B of the Constitution.

The constitutionality of the Seventeenth Amendment Act was challenged in *I.C. Golak Nath's*[8] *case* on the ground that the Punjab Security of Land Tenures Act, 1953 violated the rights guaranteed under Article 14, 19 (1) (f) and (g) and Article 31 of the Constitution. The Punjab Act was inserted in the Ninth Schedule as part of the Constitution (Seventeenth Amendment) Act, 1964 that gave immunity to the Act from judicial intervention. The central theme of the case hovered around the powers of the Parliament to amend all parts of the Constitution and the Apex Court

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6 *Karimbil Kunhikoman and Another* v. *State of Kerala* AIR 1962 SC (723).

7 The Fourth Amendment act to the Constitution defined certain kinds of land rights such as Janmam Lands, Raiyat and Under-Raiyats in Article 31-A (2) (a) and rendered immunity to such types of land rights from the intervention by the Judiciary.

8 *L.C. Golaknath and Others* v. *State of Punjab and Another* AIR 1967 SC (1643).

held that the "Parliament does not have the authority to amend Fundamental Rights of the Constitution." The mandate provided by the Apex Court in *Golak Nath's* case overruled its judgment in *Shankari Prasad Deo,* and *Sajjan Singh's* case where it had ruled that Parliament have the mandate to amend any part of the Constitution. The judgment of the Supreme Court thus restricted the supremacy of the Parliament to amend the rights guaranteed under Part III of the Constitution.

The challenge to the quantum of compensation was once again raised by the Judiciary in the *Bank Nationalization* Case[9]. The *Banking Companies Act, 1949* was amended in 1968 to assert state's control over 14 commercial banks. The legality of the Act was challenged by R.C. Cooper on the premise that the Act violated the principles of Article 14, 19 and 31 of the Constitution (Ananth, 2015, p. 212). The court held that the compensation paid to the banks constituted just a fragment of their total net assets as it did not take into consideration banks intangible assets such as "goodwill and unexpired leases", and there was no immediate dispersal of compensation as the payment would be provided to the banks in the form of bonds. This prevented the nationalized banks from carrying out any other business activity apart from banking. Even while the Constitution (Fourth Amendment) Act, 1955 prevented the courts from interfering into the question of adequacy of compensation, the majority in this case held that the courts still had the jurisdiction to interfere in matters where the compensation was grossly illusory or where the principles ascertaining the compensation were based on irrelevant factors (Ananth, 2015, p. 218). Thus, the court held that the "award of compensation should reflect the amount equivalent to his property with its existing advantages and its existing potentialities" (Singh, 2004, p. 16).

3.4 Twenty-Fourth and Twenty-Fifth Amendment Act

The Parliament responded to the decree of the Supreme Court in Golaknath and Bank Nationalization case by enacting Twenty-Fourth and Twenty-Fifth Amendments to the Constitution. The Constitution (Twenty-Fourth Amendment) Act, 1971 introduced amendments to Articles 13 and 368 of the Constitution to reverse the mandate of the court held in Golaknath case which said that Parliament did not have any authority to amend fundamental rights guaranteed by the Constitution. The amendment, thus asserted the supremacy of the legislature over the courts to bring about any constitutional amendment that comes in between the socialist objectives of the state contained in Directive Principles of State Policy. In

[9] *R.C. Cooper* v. *Union of India*, (1970) I Supreme Court Cases 248.

the *Bank Nationalization* case, the Apex Court held that every individual had a right to compensation, which should be equivalent to the loss accrued by the dispossession of property. The factors determining the principles of compensation, thus, became justiciable in the court of law and, hence, prompted the Parliament to replace the word "compensation" by "amount" by way of enactment of Constitution (Twenty-Fifth Amendment) Act, 1971. Article 31 C was also added by way of constitutional amendment to give exemption to the state's socialist objective as mentioned in Articles 39 (b) and 39 (c) of the Directive Principles of States Policy from the application of Articles 14, 19 and 31 of the Constitution. The substitution of the word "compensation" with "amount" in Article 31 (2) was meant to overcome all the interpretations by the court on the issue of just compensation.

3.5 Keshavnanda Bharti case

The Constitutional (Twenty-Fourth and Twenty-Fifth Amendments) to the constitution were challenged in the *Keshavnanda Bharati* case[10], wherein, the thirteen judge bench of Apex Court by a majority of 7 against 6, sustained the Twenty-Fourth Amendment Act, 1971, to overrule the *Golaknath* case judgment and held that "Article 368 of the Constitution does not provide the Parliament with the powers to amend the basic structure of the Constitution." The court also upheld Section 2 of the Constitution (Twenty-Fifth Amendment) Act, 1971, that replaced the word "compensation" with "amount" but struck down second part of Section 2 of the Act, by which the court was prohibited to interfere in matters related to fixing the amount or adequacy of compensation. The court held that even while questioning the adequacy of compensation was beyond its powers, it still had the authority to intervene in cases where the principle ascertaining compensation were inadequate or illusory.

The Supreme Court also reiterated the power of judicial review as part of the basic structure doctrine (Ananth, 2015, p. 302). The basic structure doctrine was meant to provide protection to the constitution and certain rights guaranteed under Articles 14, 15, 19 and 21 were held as sacred and insurmountable. The court observed that the suspension of fundamental rights would result in the abrogation of these essential features. The basic structure doctrine was again invoked in *M.Nagraj*[11] case, in which the court held that "fundamental rights are not gifts from

[10] *Keshavnanda Bharati* v. *State of Kerala* AIR 1973 SC (1461).
[11] *M. Nagraj* v. *Union of India*, (2006) 8 Supreme Court Cases 212.

the state to its citizens, but are basic human rights of intrinsic value" (Sankaranarayanan, 2011, p. 232).

3.6 Forty-Fourth Amendment Act: Deletion of Right to Property

The disjuncture between the Executive and the Judiciary on the issue of acquisition finally culminated in restricting the property rights of individuals by way of Constitution (44th Amendment) Act, 1978. Prior to the enactment of this amendment, Article 31 (1) defined due procedure established by law related to acquisition of property and Article 31 (2) gave the assurance of compensation to be paid in case of acquisition. With the enactment of 44th Constitutional Amendment, Article 19 (1)(f) that guaranteed the "right to acquire, hold and dispose of property subjected to reasonable restrictions by the state in the interest of general public" and Article 31 were deleted from the Constitution with the only exception that the first clause of Article 31 was reproduced as a legal right under Article 300-A, which says that *"No person shall be deprived of his property save by authority of law".* Article 31 (2) of the Constitution that contained provisions related to protection of compensation was omitted by the Constitutional (44th Amendment) Act, 1978 to restrict the power of judiciary to interfere in matters related to acquisition of property. The "right to property" no longer remained as a fundamental right, thus deprived the right of the citizens to approach the Supreme Court and the High Court under Article 32 and Article 226 of the Constitution respectively. The stance of the Supreme Court after the passage of the Constitution (Forty-Fourth Amendment) act, was clearly evident in *Jilubai's* case[12], where the state acquired land of the farmers for the purpose of mining. The court had held that the "right to property" under Article 300-A of the constitution is not part of the basic structure doctrine, and hence the judiciary had no power to comment on the adequacy of compensation.

The "right to property" was constituted as a legal right, but still it contained provisions that breached the provisions of "right to equality" guaranteed under the Constitution. Article 30 (1A) was added to provide the assurance of compensation to a minority institution; second provision of the same Article mentioned that market estate owner who cultivated his land with a ceiling limit was entitled to receive market value of land. In case of a landless labourer, the Act specified that no compensation had to be paid (Sankaranarayanan, 2011, p. 235). Sankaranarayanan (2011), argues that these provisions were against the ideals of

[12] *Jilubai Nanbhai Kachar* v. *State of Gujarat* 1995 Supp (1) SCC 596, AIR 1995 SC 142.

economic and social justice enshrined in Directive Principles of State Policy as it discriminated between the majority and minority sections of population and between the cultivators of land and landless sections of society.

The Forty-Fourth Amendment Act paved the way to implement the state's agenda of socio-political restructuring as laid down in the Directive Principles of State Policy, but instead it led to widespread acquisition of property held by private individuals. Land acquisition under the Eminent Domain power of the state is governed by the Land Acquisition Act, 1894 (LAA, 1894 had been repealed by Land Acquisition Rehabilitation and Resettlement Act, 2013). The Section 18 of the LAA, 1894 allows the provision of approaching the court on matters related to payment of compensation.

4. Measuring Compensation: Dissent between the Judiciary and Legislature

The doctrine of eminent domain says that individual whose property had been acquired was entitled to receive just compensation. The question then arises as to what should be the principles for ascertaining just compensation, which is, fair market value of the land. As per the land acquisition law, the power to determine compensation was the prerogative of the land acquisition Collector. Section 23 and Section 24[13] of the Land Acquisition Act provides methodology to be adopted by

[13] Section 23 of the act, mentions that the award paid by the collector should take into account the following while deciding the amount of compensation:
"(i) the true area of the land;
(ii) the compensation which in his opinion should be allowed for the land; and
(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, or whom, or of whose claims, he has information, whether or not they have respectively appeared before him" (*Land Acquisition Act*, 1894).
The court has to follow the subsequent guidelines while calculating compensation:
1. "Market value of the land on the date of the declaration;
2. Damage sustained by the person interested by reason of destruction of standing crops and trees at the time of taking possession by the Collector;
3. Damage sustained by reason of severing the land from the interested persons, other land;
4. Damage sustained due to injury to other property or earnings;
5. Damage sustained due to change of residence or place of business warranted by the acquisition; and
6. Damage sustained due to diminution of profits between time of declaration and actual possession" (*Land Acquisition Act*, 1894)
In Section 24, the court is instructed, 'not to take into consideration' the following factors in determining compensation:
1. "Degree of urgency;
2. Disinclination of person interested to part with the land;
3. Damage sustained which would not have fetched damages if a private person had caused it;
4. Damage likely to be caused by the use to which the land is put after acquisition;
5. Increase in the value of land due to the new use;
6. Any increase in the value of other land of the interested person due to the new use of the acquired land;
7. Any improvements made on the land after the notification was issued; and
8. Increase in value caused by use opposed to public policy or forbidden by law" (*Land Acquisition Act*, 1894).

the Collector for determining a fair market value of compensation and also stipulated certain procedures which could be termed as statutory guidelines that had to be followed by the courts while assessing market value of the acquired land. In the absence of a well-defined methodology, the courts had adopted different methods for computing the compensation by relying upon the facts and circumstances of the case. The different methods adopted by the courts were as follows:

i) **Comparable sales method:** In this method, the court relies on the sale instances of adjoining lands, provided they are comparable in nature. There are various factors that are required to be followed by the court and it is only on the fulfilment of the subsequent factors, that compensation can be awarded. The various factors which need to be followed were: sale instances produced for calculating compensation for acquired land must be genuine and bona fide; the time at which the sale deeds had been executed must be proximate to the notification of land acquisition; the land mentioned in the sale deed must be situated in the vicinity of the acquired land; the nature of the land in the sale deed must be similar to the land under acquisition and the size of the land mentioned in the sale deed must bear resemblance to the acquired land. This method was the best way to arrive at a fair market value of compensation as it applied the principle of prudent and willing purchaser, which hypothetically determined what price a land would fetch if transacted in an open market.

ii) **Capitalisation of the net income method:** In this method, compensation is determined by appropriating the income incurred from the land in supplement to the market value of the land. The income incurred from the land is multiplied by appropriate capitalisation of 10-15 years, depending upon the nature of facts and circumstances in each case. The principle of multiplier is generally applied by the courts to calculate the fair market value of the land.

iii) **Agricultural yield basis method:** The nature and potential of the land whether it is wet (irrigated), dry or barren (banjar) in supplementary to the

agricultural output of the acquired land is taken into account while determining compensation on the basis of agricultural yield method. This method also applies the principle of multiplier while calculating compensation.

In contrast to the methods adopted by the Judiciary, the land acquisition law calculates compensation as per the basis of the "circle rates" or the "sale deed of the similar property." Circle rate is defined as the bare minimum rate of the land as stipulated by the government authorities and this is generally undervalued and much lower than the actual price of the land. In order to save the stamp duty charges, the price mentioned in the sale deed does not reveal the current prevailing market value of the land. Thus, both the criteria of measuring the price of the land on the basis of circle rate and sale deed do not take into account the prevailing market price of the land. According to Singh (2012), the mismatch between the two factors for determining compensation has led the judiciary to ascertain that "the market value should be determined on the basis of the circle rate or the registered sale deed rates of similar properties, whichever is higher" (p. 2). Thus, the difference between the land acquisition collectors (LACs) and the judiciary in terms of deciding the award of the compensation is the primary reason for excessive litigation over the issues of compensation.

4.1 Analysis of Supreme Court Cases since 1991

In the process of determining fair compensation, the court has to rely on sale instances in the same village, and where such evidence is not available, on sale statistics of adjoining lands provided they are comparable in nature. In *Kanwar Singh v. Union of India case*[14], appellant filed an appeal against the judgment of a divisional bench of the High Court for fixing the award of compensation for their land in Rangpuri village at Rs. 3000 per bigha, claiming that they should be awarded the rate of compensation as provided for lands in the adjoining villages of Masoodpur and Mahipalpur at a rate of Rs.14,340 per bigha. In this case, the Supreme Court held the decision of the High Court as tenable as there was no reason for the court to rely upon the sale deeds of land in adjoining villages of Mahipalpur and Masoodpur when sale instances of village Rangpuri were available to calculate the market value of the acquired land. In *Mohammad Roofuddin v. Land Acquisition Officer case*[15], the Supreme Court dismissed the appeal of claimants for enhancing compensation on the ground that the court could only

[14] *Kanwar Singh and Others* v. *Union of India*, (1998) 8 Supreme Court Cases 136.
[15] *Mohammad Roofuddin* v. *Land Acquisition Officer*, (2009) 14 Supreme Court cases 367.

interfere with the decision of the High Court when wrong principle had been applied in determining the fair value of compensation and held that the possibility of different conclusion on two sets of sale/acquisition was not a ground to intervene with the award declared by the High Court.

In cases where several sale deeds were available, it was the general rule that the highest had to be considered provided it was a bona fide transaction. This principle was applied in *Mehrawal Khewaji Trust, Faridkot and Others v. State of* Punjab[16] where the Reference Court did not consider the highest sale deed while computing the amount of compensation and also did not grant interest on solatium. The High Court upheld the decision given by the Reference Court. The claimants then approached the Supreme Court seeking an appeal on two aspects, first on the ground of providing compensation on the basis of highest sale deed and second, interest should be given on the solatium. The Supreme Court accepted the appeal of the claimants by considering the highest sale deed and also granted interest on the solatium.

In the process of calibrating the compensation, the court has to measure the value of the land along with its advantages which can be classified mainly as, the structures or the trees or crops standing on the land. While assessing the compensation it is necessary to consider that both the value of the land and the structures or trees or crops standing on it constitute as two separate units, and the compensation has to be assessed taking into account all the factors. The trees standing on the land had to be distinctly valued as timber after deducting the salvage expenses or in situations where there was evidence of annual returns from the fruit bearing trees, the court has to apply the principle of capitalisation of net income method. In *Koyappathodi v. State of Kerala* case[17], an appeal was made against the decision of Kerala High Court that the Court while calculating the amount of compensation set aside the decision of the civil court and evaluated the value of the land and the trees standing thereon as single unit. As per the principle, the value of the land and its subsequent advantages such as timber or the number of crops or fruit bearing trees has to be valued separately, and that in turn world reflect its true and fair market value. The Supreme Court, in this case, overruled the judgment of the High Court and upheld the value of the land as enumerated by the civil court at Rs. 3,00,000 and awarded an additional amount of Rs. 10,000 as

16 *Mehrawal Khewaji Trust (Registered), Faridkot and Others* v. *State of Punjab and Others*, (2015) 5 Supreme Court Cases 432.

17 *Koyappathodi M. Ayisha Umma* v. *State of Kerala*, (1991) 2 Supreme Court Cases 8.

reasonable compensation towards the value of the trees after deducting the salvage expenses. In *Tejumal Bhojwani v. State of U.P.* case[18], a special leave petition was filed against High Court decision for not awarding distinct compensation for the tubewell and the structures standing on the land. The Supreme Court held that "*when there was no capitalisation of the value of land and structure by the LAO in his award, and the LAO has awarded separate compensation for the land, building, and tubewell; the claimants are entitled to separate compensation for land, tubewell and structure*."

In cases where sale transactions of relatively small pieces of land were taken into account for ascertaining the market value of a large property, the principle for deduction had to be applied to incur the expenses required for developing the large tract of land. In *State of Maharashtra v. Santaram Mahadu case*[19], a notification to acquire land was issued by the state government on 18th June 1994 in Village Deshmukhwadi, Pune, for the construction of Bhama Akshed Project. The Special Land Acquisition Officer (SLAO), after considering all the relevant facts divided the land into three different groups and awarded compensation at Rs. 25000, Rs.29,000, and Rs.32,000 per hectare, respectively. The claimants of the award being dissatisfied with the award of compensation filed an appeal before the Additional District Judge, and the ADJ enhanced the award of compensation to Rs.1,25,000 per hectare uniformly. The state of Maharashtra being aggrieved by the award made an appeal to the Supreme Court that the ADJ has enhanced the compensation without considering the principle of average and deduction. The principle of average asserts that when there are varied sale instances, the court can average the various sale instances and arrive at a fair market value of the land. The Supreme Court, in this case, applied the principle of average by taking an estimate of the various sale instances available on record and averaged the compensation at the rate of Rs. 1,79,613 per hectare. The principle of deduction was also applied as the sale instances mentioned in this case were of small piece of lands. Thus, the court applied a deduction of 30 per cent and awarded the compensation at Rs.1,25, 729 per hectare.

In *Bhagwathula Samanna* case[20], an appeal to the Supreme Court was made against the decision of the High Court on the ground that the court had wrongly applied the principle of deduction while awarding compensation. The land under acquisition

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18 (2003) 10 Supreme Court Cases 525.

19 (2008) 5 Mh. L.J. (1996) 3 Supreme Court Cases 766.

20 *Bhagwathula Samanna and Others* v. *Special Tahsildar and Land Acquisition Officer*, Visakhapatnam Municipality, Visakhapatnam, (1991) 4 Supreme Court Cases 506.

was a developed land, and the High Court had committed a mistake in making a deduction of one-third of the value of a comparable sale by relying on the principle laid down in *Tribeni Devi* case without considering all the relevant factors. The Apex Court held that if the larger tract of land under acquisition is already developed with all the amenities such as infrastructure, roads, electricity, drainage and communication systems, then the principle of deduction cannot be applied on the ground that land under acquisition was a large tract of land.

In *Nelson Fernandes and Others v. Special Land Acquisition*, South Goa[21], the appellant filed an appeal in the Supreme Court against the division bench of the Bombay High Court for diminishing the compensation from Rs.192 per sq m as awarded by the District Judge to Rs.38 per sq m without considering the evidences submitted by the appellants. The High Court considered the nature of the acquired land as hilly and applied the principle of deduction at the rate of 65 per cent towards the development of roads, level terracing, etc. The court also applied a further deduction of 10 per cent by claiming that the sale instances of small plots cannot be used to fetch the price of land covering a large tract of land. The Apex Court, in this case, held that the award decided by the High Court had no value as it did not acknowledge the future prospects of the development of land and failed to assess the loss sustained by the appellant due to the acquisition of land. The Supreme Court referred to the judgment delivered in the *Viluben Jhalejar v. State of Gujarat* case [22] and held that while determining the award of compensation and the principle of deduction, it is imperative to consider the purpose land acquisition. In this case, the land in question had been acquired for laying a railway line, thus there was no justification for applying the principle of deduction towards development. However, the Supreme Court determined the award of compensation at Rs. 250 per sq m with a deduction of 20 per cent for the development of basic amenities, such as, school, transport, highway, industry, telecommunications, etc.

The principle of belting has to be applied in situations where certain large tract of land is acquired, in which the land situated at a levelled area would command a higher price than the land situated in a low-lying area. The principle is based on the assumption that the lands situated near the developed area and the land situated in the interior cannot command the same market value and taking into account all these factors the court had to arrive at a fair market value of compensation. This principle was applied in *Ludhiana Improvement Trust v. Brijeshawar Singh Chhal*

21 (2007) 9 Supreme Court Cases 44.
22 (2005) 4 Supreme Court Cases 789.

case[23] where a petition was filed by the Ludhiana Improvement Trust against the decision of the High Court for awarding compensation uniformly at Rs. 107 per square yard, thus ignoring the principle of deduction while awarding compensation. The Apex Court held that "*it is the duty of the claimants to establish that the levelled-up lands and the low-lying lands command same market value and that, therefore, they are required to be awarded at the same rate*." The Land Acquisition Officer after considering all the factors had stated that the depth of the land was 3 to 6 feet, and this was not challenged in the Reference Court. The principle of belting asserts that the levelled-up and low-lying area cannot command same market value and thus, the Supreme Court struck down the judgment delivered by the High Court and allowed the decision ascertained by the Reference Court to award compensation at Rs. 50 per square yard for the low-lying land.

In another case, *V.Hanumantha Reddy v. Land Acquisition Officer*[24], an appeal was made against High Court decision for diminishing the award of compensation. In this case, the High Court applied the principle of deduction and brought down the amount of compensation as decided by the Reference Court at Rs 58 per square yard to Rs.30 per square yard in lieu of the fact that the land abutting the national highway would command a higher price than the land lying in the interior of the developed land. The Supreme Court made a distinction between a developed area having all the basic infrastructure facilities and an area with high potentiality, which was yet to be developed. The court said that a land with high potentiality even if situated close or adjacent to the developed land would not fetch the same market value as the developed land. Thus, the decision of the High Court was upheld by the Supreme Court.

The burden to prove enhanced compensation always lied on the claimants and once the burden to receive higher compensation was discharged by them, the duty shifted on to the state to justify whether the amount claimed was just and in compliance with the land acquisition Act or not. In situations where the land acquisition collector or the counsel for the state failed to assess the fair compensation, then it was the responsibility of the court to precisely study the evidences and apply the test of prudent and willing purchaser and determine just and adequate compensation. This principle was affirmed in *Hookiyar Singh and Others v. Special Land Acquisition Officer, Mooradabad*[25]. Similarly, in

[23] (1996) 9 Supreme Court Cases 188.
[24] (2003) 12 Supreme Court Cases 642.
[25] (1996) 3 Supreme Court Cases 766.

Ahmedabad Municipal Corporation v. Shardaben and Others[26], the Municipal Corporation brought a petition against the order of the court for adopting the principle of average when evidence related to particular survey number of comparable sale was not available. The Supreme Court applied the principle of prudent and willing purchaser and held that the decision of the High Court was tenable in applying the principle of average on the basis of the sale deed produced by the claimants as there was no specific sale deed available for measuring the market value of the acquired land.

In situations where the claimants produce flawed evidence or fail to provide adequate evidence for determining fair value of compensation, it was the responsibility of the court to carefully examine the value of the land on the date of issue of notification for land acquisition and provide compensation to claimants which is reasonable and just in the eyes of the law (LAA, 1894). For instance, in *Trishala Jain and Another Versus State of Uttaranchal and Another*[27], Uttar Pradesh government (now Uttaranchal) issued a notification on 30/1/1992 under Section 4 (1) of the LAA, 1894 for the establishment of government polytechnic institute in Dehradun. The evidence produced by the claimants for enhanced compensation in the court appeared to be mala fide as it clearly indicated that the claimants had executed the sale deeds just before the acquisition to inflate the price of the land. Under such circumstances where the evidence produced by the claimants appeared to be mala fide or where it was difficult to produce evidence, the court could not award compensation merely on the basis of imagination, the court had to resort to some other method of determining the compensation, viz., sales statistical method, capitalisation of net income method or on the basis of agricultural yield generated on the land on the date of notification, etc.

In *Special Land Acquisition Officer Versus Karigowda and Others*[28], the state appealed to the honourable Supreme Court of India asking whether consequential or remote benefits from agricultural activity could be set as the benchmark for deciding the amount of compensation. The land acquired was agricultural land on which mulberry crop was grown, mulberry leaves were used for feeding silkworms in the production of silk. The claimants thus demanded that compensation should be calculated on the basis of silk produced as mulberry leaves were used for feeding silkworms. The Supreme Court rejected the methodology envisaged by the

[26] (1996) 8 Supreme Court Cases 93.
[27] (2011) 6 Supreme Court Cases 47.
[28] (2010) 5 Supreme Court Cases 708.

claimants on the ground that compensation has to be assessed by examining the existing potentiality of the land on the date of acquisition. The commercial activity generated from the crop being produced on the land could not be taken as a yardstick for determining the market value of the land.

In *Narain Das Jain v. Agra Nagar Mahapalika*[29], a special leave petition was filed against the order of the Division Bench of the Allahabad High Court on the ground that the High Court only allowed solatium on the enhanced compensation directed by it and did not grant solatium on the sum awarded by the Tribunal. As per the facts of the case, the High Court awarded a sum of Rs.48,613 in addition to Rs.1,45,839 awarded by the Tribunal and held that the appellants were entitled to receive solatium at the rate of 15 per cent on the sum awarded by the High Court. The High Court justified its decision to grant solatium only on the sum enhanced by it on the grounds that the appellants had not appealed for the grants of solatium. The Supreme Court, in this case, referred to *Om Prakash v. State of U.P.*[30] which defined solatium as the "*money comfort, quantified by the statute, and given as a conciliatory measure for the compulsory acquisition of land of the citizen".* Solatium is regarded as a measure to compensate the loss afflicted on the claimants due to compulsory nature of acquisition. The Supreme Court held that while the High Court did not completely reject the claims of solatium but still it committed a legal error by not awarding solatium on the sum awarded by the Tribunal. Thus, the appeal of the claimants was accepted, and they were awarded solatium at the rate of 15 per cent on the remaining amount of Rs. 1,45,838 and an interest at the rate of 6 per cent from the date of possession till the payment of compensation was also paid.

While fixing the award of compensation for the land acquired under several different numbers, it is essential for the court to consider the sale deeds of lands belonging to same survey number, executed prior to the notification declaring the acquisition of land. This principle was applied in *Land Acquisition Officer v. Morisetty Satyanarayana and Others*[31], where the LAO brought an appeal against the verdict of the High Court that had fixed compensation at Rs.2,25,000 per acre by relying upon Ext. A-10, which was based on survey, no. 367 for which notification for acquisition was issued on 29-8-1980. The court ignored the fact that the pertinent date for fixing the market value of the land was 7-7-1977, which was three years prior to the sale deed for fixing the award of compensation. The

29 (1991) 4 Supreme Court Cases 212.
30 (1974) 1 Supreme Court Cases 628.
31 (2002) 10 Supreme Court Cases 570.

Supreme Court held that portions of land of survey no. 263, 264 and 265 were acquired, therefore the most relevant evidence for the court to determine the market value of land would be to look into the sale deeds pertaining to same survey no's. Thus, the court accepted the sale deed of survey no.263 dated 11-12-1975 and fixed the award of compensation at Rs.1,40,000 per acre.

The determination of compensation depends upon the nature and area of acquired land, which is to say, when a large tract of land is acquired the correct principle would be to calculate the market price of land on acreage basis whereas when developed land is acquired with all the basic and infrastructural facilities then it is necessary for the court to determine the compensation as per the principle of square foot or square yard basis. The principle of square yard or square foot would have to be applied in areas with high potentiality such as Connaught Place in Delhi or Nariman Point in Bombay. This principle was highlighted in the case *P.Rajan v. Kerala State Electricity Board*[32], where the appellant brought an appeal in the Apex Court challenging the reduction of award of compensation by the High Court. As per the facts of case, the High Court reduced the sum of compensation awarded by the Reference Court on the ground that lands mentioned in the sale deed were located in a developed area, and the distance between the acquired land and the land covered by the sale deed was 2 ½ kms. The Supreme Court in this case concluded that the decision of the High Court was justified on the premise that when a large tract of land is acquired, the market value of the land had to be determined on acreage basis, and the court could not rely on the sale deeds measuring small extent of land for determining the award of compensation.

The "Land Acquisition Rehabilitation and Resettlement Act, 2013" added a new Section 24 (2)[33], to ensure justice for those whose claims for compensation had not yet been addressed. The Section 24 (2) of the LARR Act also included the period of time spent in litigation challenging the award provided that possession of the land had not been taken, and compensation had not been awarded to the claimants.

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32 (1997) 9 Supreme Court Cases 330.

33 Notwithstanding anything contained in sub-section (1) of the act, in case of land acquisition proceedings initiated under the *Land Acquisition Act* 1894, where an award under the said Section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken, or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act: Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of beneficiaries, then, all beneficiaries specified in the notification for acquisition under Section 4 of the said *Land Acquisition Act*, shall be entitled to compensation in accordance with the provisions of this Act (LARR, 2013).

This provision was contended by the Supreme Court in *Ram Kishan*[34], *Sharma Agro Industries*[35], and *Karnail Kaur cases*[36].

5. Conclusion

The excessive litigation in courts over the issues of compensation explicitly point out to the inefficiency of the land acquisition law with regard to determining what constituted 'fair' compensation. The yardstick used for calculating the market value of the land by the appropriate authority and the Judiciary remained the same, that is, the value of the land was calculated by looking at the circle rate or the sale deeds available on records. Different principles and methods were applied by the Judiciary, but the fact remained that it was the circle rate or the sale deed which was used as criteria for calculating the value of land. The fact was that land markets in India continued to be underdeveloped and were not updated on a regular basis. There existed a huge gap between the current market value of the land and the price mentioned in the official documents of sale deeds.

Thus, the compensation provided to the dispossessed should be reasonably fair, that is, the benefits in terms of providing compensation should be greater than the costs borne by the dispossessed.

34 *Ram Kishan and Others* v. *State of Haryana and Others*, (2015) 4 Supreme Court Cases 347.
35 *Sharma Agro Industries* v. *State of Haryana*, (2015) 3 Supreme Court Cases 341.
36 *Karnail Kaur and Others* v. *State of Punjab and Other*, (2015) 3 Supreme Court Cases 206.

DNA DATABASE, HUMAN RIGHTS AND PRIVACY

Deepti Singla*

1. Introduction

The application of DNA technology in justice delivery system has proved to be a worthy investigative tool used all over the world both in the civil and criminal proceedings, including rape, murder, paternity testing, identification of victims of mass disaster, or identification of missing person, etc. Unarguably, the DNA technology is supporting and encouraging a pathway to reform in the administration of justice and the courts, everywhere, swiftly embraced DNA evidence as legally admissible. The use of DNA technology for various civil as well criminal investigative purposes has insisted on the creation of DNA databases which could play a crucial role in the reform of justice process and in order to meet this requirement, various countries around the world have created the DNA databases and several other countries are planning to create. The oldest, largest and most inclusive National DNA Database in the world was established in *the United Kingdom* in 1995.

DNA databases store thousands of DNA profiles, against which DNA profiles collected from crime scenes can be cross-compared. The DNA database generally stores DNA profiles of convicted felons, of suspects for the purpose of identifying the source of DNA sample found at a crime scene. The criteria for storage and retention of DNA profiles into DNA database may vary in structure across the country, for instance, *the United Kingdom* has National DNA database for all suspects for indefinite period even if the suspect is released or acquitted. Likewise, some DNA databases store only DNA profile, while some others store both DNA profiles and DNA samples, for instance, *the United Kingdom's* National DNA database.

The fact that new technologies always bring with them social-legal concerns is undeniable. The use of DNA technology and the creation of DNA database is no exception. Apart from its effectiveness in the detection and prosecution of crime, the growth of DNA database and its use has also raised some social-legal concerns including free or informed consent of sample provider, access to data, misuse of personal information, and privacy violations. For that reason, efforts should be made to strike a balance between the effectiveness of DNA database and the potential intrusiveness while making a legislation for regulating its policies regarding storage or

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retention of DNA data, access of DNA information, use of personal genetic information and privacy policy, etc. At present, however, there are insufficient regulations concerning how the information stored in database can be accessed and for what for reasons. Once DNA databases are regulated and protected, the benefits of DNA databases would outweigh its problems.

The focus of this article is limited to cover different aspects associated with:

- the establishment of DNA databases,
- its role in computer forensics,
- national DNA database programmes and
- the related concerns, particularly in regard to human rights and privacy violations.

2. DNA Database - Meaning

Often abbreviated as DB, a database is an organised and structured repository of indexed information stored for a specific purpose in a computer, especially one that is arranged in a way that it can be easily looked at, managed and retrieved. A DNA database is a computer database containing data obtained from DNA sequence.

3. Need of Creating A DNA Database and Its Role in Investigation

The forensic hits of DNA testing are undeniable. The DNA technology has so far been used to compare DNA samples from known suspects with the DNA samples from crime scene. However, that application constitutes only the tip of the iceberg of potential law enforcement applications.[1] DNA databases can lead to unique and implausible results as one can change his name, even his appearance, but it is not possible to change the DNA profile. Such DNA profile could confirm or deny a person's presence by giving the information of potential suspects. If DNA profiles were stored in DNA databases, DNA information could be applied in crime without suspect that could be used as an aid for law enforcement agency to search for suspects by comparing DNA profiles from crime scene with DNA profile stored in database. Therefore, DNA database is a need of the hour. Every country (where no such DNA database has yet been introduced) must take a step forward to establish DNA database in their respective jurisdiction as the establishment of databases containing DNA profiles (such as in the *United Kingdom's* National DNA Database) have greatly enhanced law enforcement agencies' ability to

[1] Harita Shinde, *'Socio-Legal Dimensions of DNA Technology: It's Interface with Indian Legal System'*, The Maharaja Sayajirao University of Baroda Vadodara, p. 265, available at *14.139.121.106/pdf/2014/oct-nov14/4.pdf* (last accessed 27 February 2018).

combat crimes.

Generally DNA databases consist of two different indices: DNA samples collected from crime scenes and DNA samples from persons who have either volunteered or been forced to submit. When a new DNA profile from a person is added to the database it is matched against all the crime scene DNA profiles stored on the database. A match may possibly signify that a person could be a suspect for the crime. Or it can be matched with a person's DNA profile, again, signifying that he might be a suspect for the crime. This process is often known as 'speculative searching' and it results in details of matches that could be sent to the law enforcement for further investigation and when a DNA match report is sent to the police they are required to do further investigation to make use of the DNA information in an attempt to solve the crime. The 'added value' of putting individuals on the database is only to bring in new suspects into an investigation in crimes for which no suspect has been identified through other means, or if the crime scene DNA does not match with any person who has already been identified. This all depends on the number of 'cold hits' (unexpected DNA matches) and the extent to which these cold hits lead to successful prosecutions.

4. Benefits of DNA Databases

The purpose of creating DNA databases is to spruce up investigation that can facilitate law enforcement in many ways, including finding the guilty, freeing the innocent, establishing the biological relationships, using the genetic information to cure diseases and so on. Putting everyone on DNA database could easily identify suspects on their first offence. This is because DNA is left at the scene of almost every crime. This makes it feasible to determine, with a national database, exactly who was at the scene of the crime, and to immediately narrow the list of suspects from potentially thousands, to usually just a couple of individuals. This makes it much more possible to identify, try, and convict criminals, to execute justice, and to protect innocent persons.

DNA databases would have mammoth benefits helping law enforcement in many ways, such as:

- It can be used to track new suspects whenever necessary to ensure justice i.e. in cases where there are no known suspects or when DNA profile from crime scene does not match with anyone who has already been identified.
- It can be used to track the genetic roots of individuals or their relatives through familial searching in cases of missing persons or in cases of adoption to find appropriate matches for children.
- It can be used to eliminate suspects where there is no match between DNA

profiles from databases and DNA profiles from crime scenes.

- It can be used to track the genetic predictors of recidivism, paedophilia or aggression[2].
- It can be used to deter released convicts from re-offending if he knows that his DNA is on file and he can, therefore, be easily detected.

5. National DNA Database Programmes

There has been wide acceptance of the establishment of a forensic DNA database, and large-scale DNA database programs now exist in most developed countries. The first government National DNA database (NDNAD) was set up by the United Kingdom in 1995. The UK's NDNAD is the largest database of its kind in the world. The Criminal Justice and Public Order Act was passed in 1994 which authorized the creation of the NDNAD. Initially, the Act allowed the police to obtain DNA samples without consent only from persons charged with a recordable offense. However, legislation has persistently expanded police powers to collect and retain DNA samples, with the goal of including "virtually the entire active criminal population" in the NDNAD. For example, a 2001 law in England allowed to permanently retain DNA profiles and DNA samples from people who are merely arrested but subsequently acquitted or not prosecuted. The scope and usage of the NDNAD has raised serious concerns and, not surprisingly, has led to legal challenges. In Marper case of 2004[3], the House of Lords ruled that the police can retain DNA samples and profiles from people who were never convicted of a crime because the reasonably trivial invasion of privacy is justified by the legitimate aim of preventing crime. However, the European Court of Human Rights unanimously held in 2008 that retaining DNA samples and profiles of innocent people is a violation of right of privacy under Article 8 of the European Convention on Human Rights.[4]

The New Zealand National DNA database was set up in 1995 as the second national database in the world. In USA, the FBI Laboratory's The Combined DNA Index System or CODIS began as a pilot software project in 1990, serving 14 state and local laboratories. The DNA Identification Act of 1994 formalized the FBI's authority to establish a National DNA Index System (NDIS) for law enforcement purposes. Initially, it was including convicted offender index and crime scene index but now they have been extended to include the arrestee index and the missing person's index. The FBI

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2 Abhijeet Sharma, *Guide to DNA Tests in Paternity Determination and Criminal Investigation*, Wadhwa and Company, Nagpur, 2007, p. 314.

3 *S. and Marper* v. *United Kingdom* (2008), available at *https://en.wikipedia.org/wiki/S_and_Marper_v_United_Kingdom* (last assessed 09 March 2018).

4 *S. and Marper* v. *United Kingdom* (2008), available at *https://www.theguardian.com/uk/2008/dec/04/law-genetics* (last assessed 09 September 2019).

established a set of 13 STR loci (known as the CODIS loci) as the standard for human identification. As of January 2017, a requirement for upload to national level for known offenders has expanded to include 7 additional loci. The CODIS exists at 3 levels, Local level (where the DNA profiles originate), State level (which allows for laboratories within states to share database information) and National level (which allows states to compare database information with one another). All 50 states have enacted legislation to establish a State Index, and once uploaded at the State level, the data are combined at the National level through CODIS.

In Canada, the National DNA database was created in 2000. China recognized a National DNA Database program in 2005. There is no National DNA database in India, although mechanisms to develop one are in progress. A draft DNA Profiling Bill[5] has been released in July 2017 supporting the establishment of National DNA database at central and regional levels. The bill is envisaged to include profiles from convicts, crime scene, suspects', missing persons and profiles of unidentified bodies. There is a provision relating to collection of DNA with the consent of person arrested for a crime punishable with imprisonment of not more than seven years. The bill restricts the use of DNA testing only for identification of a person. The bill also puts in place safeguards against the misuse of data. Andhra Pradesh government is also planning to draft a bill which will allow the state police to investigate and collect and store the DNA samples or genetic fingerprints in a centralized database to solve crime and track offenders.

6. Establishment of A DNA Database

The establishment of a DNA database, commonly, includes the following essential elements:

6.1 Data Entry Criteria

Rules on what data can be collected and stored and how it can be used differ greatly among countries. Initially, DNA testing was mostly used to solve serious offences which nowadays adds to the analysis of a broad range of offences. The scheme of offences for which an obligatory DNA sample can be collected has expanded to include property offences and sometimes, even trivial offences.

Generally, DNA database consists DNA profiles only of the criminal offenders as in such cases there are more chances to re-offend a crime which is sufficient to solve cases at some point in the future. These persons were identified as a 'risky population' who might re-offend. But, this criteria of entering of DNA information on the database is

[5] Available at, *lawcommissionofindia.nic.in/reports/Report271.pd* (last assessed 14 March 2018).

now shifting. The requirement for an individual to be convicted is now not compulsory in many cases, and individuals can be required to provide DNA sample upon suspicion or arrest. DNA profiles of suspects may be of use to connect a person with present or past or future unsolved cases pending in other states. In some countries, a DNA database of the whole population is proposed.

6.2 Collection of DNA samples

Legislative provisions have been established for the collection of DNA samples with or without the consent of a person arrested for particular offence.[6] Also, regular training programs have been provided to police staff about the collection and use of DNA evidence to enable them to cope with the growing demands of the technology.

6.3 Removal of DNA information

Rules about when DNA samples or profiles to be removed from the database differ greatly among countries. In countries like *UK*, both DNA samples and DNA profiles of both convicts and suspects' are retained for indefinite period[7] while in Austria, profiles of convicted persons are retained indefinitely but suspects' profiles are removed upon acquittal after submitting a written request.[8]

6.4 Retention of DNA information

Retention of DNA information creates prospect for misuses. Access to this information can reveal more detailed information about a person's health or can also be used to track an individual or their relatives. Even though, there is a practical rationale to retain DNA samples for short periods. Since the technology is changing so rapidly, it can be anticipated that the profiles created with today's techniques might be incompatible with tomorrow's techniques. Therefore, today's profiles will required to be destroyed and substituted with profiles based on the new techniques. That is why, retention of samples after typing should be permitted for the short term only during the commencement phase of DNA profile databases. As databases set up and technology alleviates somewhat, samples should be destroyed without delay after profiling.

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6 In India, section 53 of *the Code of Criminal Procedure*, 1973, authorises the investigating officer to collect DNA sample from the body of the accused and the victim with the help of a medical practitioner.

7 *The Criminal Justice and Police Act* of 2001 brought out several amendments to *the Police and Criminal Evidence Act* of 1984 (PACE). Main provisions incorporated were the indefinite retention of both the DNA samples and the DNA profiles collected from both suspected criminals (who are then acquitted or discharged) and convicted criminals.

8 Nathan Van Camp & Kris Dierickx, GeneBanc, National Forensic DNA Databases: Socio-Ethical Challenges & Current Practices in the EU 31 (2007), available at *http://dnapolicyinitiative.org/wiki/index.php?title=Austria#cite_note-ftn4-4* (last assessed 09 September 2019).

6.5 Access to Database Information

DNA database is generally accessible only to a small number of officially authorized persons. Legal provisions concerning access and use of DNA database information is there which also varies country to country. Also, criminal sanctions (in the form of fine and/or prison) are provided in case of breach of those legal provisions.

7. Concerns About DNA Database

New technologies always get with them social-legal concerns. The use of DNA technology and the creation of DNA database is no exception. There are concerns that this information could be used in ways that threaten people's individual privacy and rights and that of their families. Following are the concerns, individually and jointly, concentrating towards the main problem, viz., human rights and privacy violations.

7.1 Concerns about collection of DNA samples

The identification of victims or suspects and collection and use of DNA samples from crime scene is the most important stage. Generally, they are not aware about how to collect biological samples without losing its evidentiary value. There is a lack of awareness among police about the potentiality and sensitivity of DNA samples rendering the process in wrong convictions or exonerations. If DNA samples are not collected and used properly, the parties involved would not get justice that can therefore be detrimental in terms of human rights and privacy violations.

Most DNA samples are collected by the police, usually, with the exercise of this power, the police has gained public trust and confidence (for maintaining law and order condition), despite the fact, whether or not, coercive methods are in reality used. Samples may taken without consent when the individual is in police custody. In such circumstances, the police may be allowed to use 'reasonable force' if someone refuses to give a sample, for example, using a mouth swab. The existing power of the police in *the UK* to collect DNA samples is wider than those in any other country.[9] Their authority is incomparable globally in consideration to (i) the collection of DNA sample without the consent of any person arrested for a recordable offence but not convicted; and (ii) the storage of that DNA sample on the NDNAD indefinitely. This extensive power and practice of UK police concerning the use of NDNAD raises reasonable fears about an individual's privacy rights.

[9] *The Criminal Justice Act* 2003 significantly advanced the conditions in which a non-intimate sample, without an appropriate consent, may be collected from any person.

An additional considerable concern about to the use of stored DNA information is the 'informed consent issue'. There are some suspicions regarding the informed consent, as sometimes they consent to give their sample to help police in an investigation and defending themselves without even understanding that the DNA profile produced from their DNA sample would be stored on the database. The situation becomes more complicated for individuals to consent, especially in cases, where the consent is for the retention of DNA sample with no right to withdraw it later as such consent is non-revocable.

DNA samples may also be asked for in an investigation on a voluntary basis. In a DNA mass screening, police usually requests individuals to give their DNA samples as a part of case investigations. These samples are collected to compare them with the crime scene samples in order to discover a match. Individuals generally consent to give their DNA samples sometimes to assist a police in an investigation or sometimes to defend themselves from the investigation. It hardly ever happens that individuals refuse to give their DNA sample, as such a refusal instantaneously raises suspicions about that individual. In reality, they have no choice but to consent because if they refuse to consent, greater suspicion will attach to them.

7.2 Concerns about Retention of DNA Information

Database has proved to be an excellent tool in the crime-solving process. However, inclusion and retention of DNA data on the DNA database has become another sensitive issue. In *UK*, *Section 82 of the Criminal Justice and Police Act* allows samples to be retained indefinitely, even where an individual is acquitted or the prosecution not proceeded with. Retention of DNA samples and/or profiles from unconvicted suspects or innocent persons has been greatly criticised. Because of the lack of universality of DNA sampling, such indefinite retention of the DNA data of innocent people could associate the stigma of criminality with them, even if their inclusion on the database only signifies that they have provided such data or sample voluntarily or in a mass screening. Therefore, it is not irrational to raise an objection regarding the retention of DNA samples and profiles of innocent people in the database.

In *S and Marper v. United Kingdom*[10], the legality of retention of DNA samples of unconvicted suspects or innocent persons was reviewed by the House of Lords. It was considered that the retention of DNA from individuals not convicted was not discriminatory and not violating their right to privacy this was justified as these

[10] *Supra Note* 4.

samples may possibly only be used for the purpose of prevention or detection of crime[11] aiming to promote the public interest. However, *the ECHR* ruled that there had been a violation of *Article 8 of the Convention* through the indiscriminate retention of DNA samples and profiles in the NDNAD. In conclusion, it was held in this case that the practice of retaining of the DNA samples and profiles on the NDNAD of persons not convicted is a violation of the right to privacy under the European Convention on Human Rights and would continue to be violated until some protective legislation is enacted.

7.3 Risk with inclusion of minors in the DNA database

If a person's DNA is collected routinely on arrest (as has happened in *England* since 2004) their human rights and privacy rights may be inexplicably affected. It has been generally accepted that early exposure to the criminal justice system or stigmatizing minors for trivial crimes might be counter-productive and dangerous increasing the risk that they are locked into jail for the rest of their lives. It is for this reason that the system of admonishing and rehabilitation was developed with the submission following that they would only be taken to court for the serious crimes or where possibilities to change their conduct had failed.

The Nuffield Council on Bioethics argued that[12]:

It may be argued that keeping DNA information of children is violation of *Article 40 of the UN Convention on the Rights of the Child*, in that the Convention requires special attention to be given to the treatment of children by legal systems, to protect them from stigma, and that if they have offended, opportunities for rehabilitation should be maximised. The destruction of relevant criminal justice records and accompanying body samples could become one aspect in such a rehabilitative process.

7.4 Risk Associated with Racial Discrimination

Information stored in DNA databases often include information relating to ethnicity. Records of names can also be searched for distinctive surnames connected with a particular country of origin or religion, and the computer records of such persons can therefore be identified. In many countries, ethnic minorities are more prone to be arrested and prosecuted for criminal offences. While investigating a case, investigators may only target individuals of a particular racial minority for DNA testing and there

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11 Section 64(1A) of *the Police and Criminal Evidence Act* (*PACE Act*) as amended by section 82 of the *CJPA*.

12 Available at *nuffieldbioethics.org/wp.../The-forensic-use-of-bioinformation-ethical-issues.pdf* (last assessed 02 March 2018).

arises the concerns of racial bias (that is, racial profiling) associated with the use of DNA information in the criminal justice system. This increases the chances of such information being abused or misused to exacerbate discrimination such as denying employment, visas or accommodation or more serious abuses of human rights, including ethnic bias and even genocide. The use of racial profiling can skew results by targeting particular visibly identifiable groups, further intensifying not only stereotypical insights but furnishing highly suspect proof for their perpetuation. Its use is often regarded as 'an unjustified expression of racism'.

7.5 Concerns About Abuse or Misuse of Database Information

Even if a technology is technically accurate and its use is ethically permitted, it is required to seek to prevent abuses and misuses for purposes other than forensic. DNA may reveal personal information about a person' medical records or particular traits. With the augmented use and inclusiveness of DNA databases with genetic information, it is not difficult to foretell gigantic potential for abuse and misuse of such information that could easily be used by unscrupulous persons for commercial or other personal reasons.

Examples of abuses of DNA information are unauthorized access to databases and unauthorized revelation of information. In particular, attempts made by the genetic researchers to study genetic characteristics of criminals for research aimed at identifying race or to identify 'genes for criminality' are controversial. Any attempt to use such databases to represent assumptions about genetic descriptions is therefore in violation of established ethical standards. The release of DNA information of any person stored on the database for purposes other than law enforcement also constitutes misuse. Employers and insurance companies would definitely have an interest in DNA information on prospective employees or customers, for instance, it can be used to refuse someone a job or visa, or insurance services, etc. The prospective for expanded uses of DNA information that might constitute invasions into the privacy of innocent persons needs the setting of guiding principles that parts appropriate use from misuse of the information.

8. Expansion of DNA Database

A move connected with the establishment of DNA database program has been the increasing types of offences submitted for DNA analysis. Initially, DNA testing was mostly used to solve serious crimes. It nowadays adds to the analysis of a broad range of offences including theft and robbery and in some cases, summary offences. Then another shift was connected with the individuals to be included in the database. Initially,

it included only convicts but then expanded further to include individuals who have only been arrested on suspicion. It challenges the presumption of innocence by treating arrested and innocent on equal guilt. It also shifts the burden of proof because persons with DNA profile stored on the database may be needed to prove their innocence if a match comes between their DNA profile and a crime scene DNA profile at some point in the future. Another considerable move connected with the database was the type of DNA samples offered for DNA analysis. For instance, in serious offences, blood would usually be the main evidence. Similarly, in sexual offences, semen be the main evidence. Then problem arises in case of offences relating to drug and theft which were not as much easy to categorize in this manner, though, these kinds of offences usually result in the giving other distinctive evidences, such as cigarette butts, hair roots, drinking cups, foodstuff leftovers, implements or swabs from articles or surfaces that the criminals are assumed to have touched. As the DNA testing gains more public confidence, government will continue to expand the database until it includes a huge, if not entire, portion of the public. As time passes, science progresses, and the size and practice of DNA databases develops, the line being drawn between what is and is not acceptable will infringe more and more on individual privacy. Therefore, rather than bigger databases being better, limits on criteria of entering and storing DNA profile and other safeguards ensuring human rights and privacy concerns should be chalked out carefully if a database is to be productive.

9. DNA Is Not Infallible

DNA is not infallible so procedures are required to be in place to make sure that matches between crime scene DNA profiles and stored DNA profiles do not result in miscarriages of justice. The more DNA profiles that are compared the more likely errors are to occur. False matches between stored DNA profiles and a crime scene DNA profile can occur by chance, and due to poor laboratory procedures, failure to require corroborating evidence, or when someone's DNA sample is implicated at a crime scene.

The chance of a false match between an stored DNA profile and a crime scene DNA profile depends on the method of DNA testing that is used. The standards used to create a DNA profile have changed with time and differ from country to country, the US uses 13 STRs at different places in the genetic sequence, but most other countries use fewer STRs. If every crime scene DNA profile is compared against every stored DNA profile on a large database by speculative searching, a small number of false matches are expected to occur simply by chance. False matches are more likely to occur with relatives, as the brother or cousin of someone who has committed a crime will share some of their relative’s DNA sequence.

The quality of DNA profiles taken from a crime scene can vary according to the source of the DNA, whether it has become degraded over time, and whether the DNA is a mixture from more than one person. Many DNA profiles taken from crime scenes are not complete or contain mixtures of more than one person's DNA; this increases the likelihood of a false match with the wrong person. Environmental factors such as heat, sunlight, bacteria are capable of corrupting the samples or it can also be wrongly analyzed or mixed up during laboratory procedures, resulting in a match with the wrong person if quality assurance procedures are not followed.

Even if a DNA match is genuine, a person's presence at a crime scene may not mean that he/she committed the crime. Any individual with a record on a DNA database may also be vulnerable to being falsely implicated in a crime by the planting of evidence, by corrupt police officers, or by criminals. Even if a miscarriage of justice does not occur, an individual who is falsely accused of a crime as a result of a DNA match may be subjected to a stressful police inquiry, pre-trial detention, or extradition to a foreign country.

10. Conclusion

In the end, it could be concluded that in a relatively short period, the development of DNA databases worldwide has been rapid with DNA profiles of convicted offenders, suspects, and unsolved crimes. Matches offered through DNA database searches have added valuable intelligence to number of criminal investigations. Notwithstanding the quite magnificent results that have resulted with the establishment and use of DNA databases, the technology remains a rather new development and one that will persist to develop over time. It is essential to bear in mind that as databases develop and age, they will become more difficult to cope, as a lot of the information stored in there will become more and more obsolete. The international extent of DNA database use, its comparative infancy, the intricacy of dealing with vital socio-legal concerns, and the intensifying potential of forensic DNA profiling come together to generate a demanding law enforcement tool insisting cautious assessment and management. Therefore, it is essential that forensic experts and administrators continue to explore and improve DNA database uses to make sure they persist to have a valuable, encouraging impact.

CRITICAL ANALYSIS OF JURISDICTIONAL ASPECTS ON DOMAIN NAME DISPUTES WITH THE EXPANSION OF SECTIONS 29(4) AND (5) OF THE TRADE MARK ACT, 1999- A GLIMPSE

J. Star, M. L.*

1. Introduction

Such domain names are rapidly developing as the most significant assets of modern day business enterprises, since they have the great potentiality to promote the business on the Internet. They are equated to the trademarks in virtual world of Internet, as they perform the same task of business identification that the traditional trademarks perform in the real world. Unfortunately, though the same trademark can similarly exist with different owners; there cannot be more than one holders of same domain name. These features of the domain names in the era of electronic commerce have been a bone of contention, which caused the conflicts among the owners of trademark and the holders of domain name. The development of online business reflects for the violations/ misuses of rules. The national responses to such misuses initiated with the support of United States, which has enacting a separate legislation in the form of 'Anti-Cyber Squatting Consumer Protection Act', and other countries are not even taking effective steps to enact traditional trademark laws. However, they all suffer from one or other ambiguities, since it had been practically improbable for the national laws to reconcile the national nature of the trademarks with that of the international nature of such names. The inadequacy of national laws, the "Internet Corporation for Assigned

Names and Numbers" (ICANN) has managed as a global dispute resolution mechanism by the shape of "Uniform Domain Name Dispute Resolution Policy" (UDRP). However, neither 'UDRP' nor the dispute settlement services provided by the national registries is free from defects, since they adopt a uniform approach to all kinds of disputes and fail to provide a single comprehensive forum for the settlement of the disputes.

2. Domain Name Meaning

It is a simple form of address on the internet. This was created to fulfill an analogous necessitate on the internet. A computer is connected to the Internet such

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as called as Internet Protocol (IP) address[1]. That IP addresses are so hard to memorize, hence the 'Domain Name System' (DNS) was found in the year 1983. These addresses assist the users to find out the websites which has related to their business in an uncomplicated manner[2].

It is different from Website and 'Universal Resource Locator' (URL). Domain name, is a proxy to IP address, it forms division alone of other two. However the division between domain name and website is hazing. Since it does not have much sensible implication, therefore many people employ these terms interchangeably. Even though domain name is a part of the website, the URL is the extended path of the website,[3] which helps in locating the website[4]. This can be better illustrated by the following example. Ex: In "http://www.un.org", 'un.org' is the domain name, "www.un.org" is the website, and http://www.un.org is the URL. Initially the role of domain name, just like postal addresses, was confined to provide the address for computers on the Internet for the purpose of communication. However, the situation changed soon with the beginning of commercial activities over the Internet. The domain name system has played a pivotal role in the development of the modern day e-commerce. The identification of goods and services as the goods or services are provided by respective entities is indispensible in the modern day commerce, since it helps the buyers to go for quality goods and services. While in the traditional commerce this function of identification is performed by the trademarks of the business entities[5], on the Internet, the domain names perform the same function.

2.1. Domain Name Disputes

Internet is now increasingly turning to be an ultimate marketing tool in computer age[6]. Internet now facilities execution of multifarious transactions and businesses have discovered it an invaluable environment for promoting and selling of goods

1 IP stands for Internet Protocol, example 192.91.247.53

2 Available at, *www.howstuffworks.com/dns.htm*, visited on 21.4.2014.

3 Clacky Mc Snackins, "Explaining the Difference between a URL and a Domain", available at, *http://www.helium.com/items/235627-explaining-the-difference-between-a-url-and-a-domain*

4 Suzanne James, "Explaining the Difference Between a URL and a Domain", available at, *<http://www.helium.com/items/56913-explaining-the-difference-between-a-url-and-a-domain*, visited on 2.12.2017.

5 *Shahid Ali Khan and Raghunath Mashelkar*, Intellectual Property and Competitive Strategies in the 21st Century, (the Netherlands: Kluwer Law International, 2004) P. 191.

6 W. Mc Donald Daniel et al, "Intellectual Property and the Internet," *COMPUTER Journal*, December 1996 at 8.

and services[7]. Consumers have found it easily accessible and convenient to effect transactions. The above advantages cannot be fully reaped because of the technological constraints. Domain names are based on the principle of 'first come first serve' basis and are not caps sensitive. There is no mechanism in place to establish identity of the person interested in registering any name and due to technological constraints, one name can be registered only once in a top level domain name[8]. When the dispute arises is, when the registrant uses the domain name of others or created a similar domain name which intent to confusing others in their domain names.

3. International Guideline

The international regulation of the domain name system (DNS) was effected through WIPO and ICANN. The outcome of consultation between ICANN and WIPO has resulted in the setting up of not only a system of registration of domain names with accredited Registrars but also the evolution of the Uniform Domain Name Disputes Resolution Policy (UDNDR Policy) by ICANN on 24th October 1999. As far as registration is concerned, it is provided on a first come first serve basis. As per Rule 4 (k) of that policy provides that, the proceedings under the UDNDR Policy would not prevent either the domain-name owner/registrant or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution, either before proceeding under ICANN's policy or after such proceeding is concluded.

4. Trademark

Trademark means a mark which is competent of distinctions between the merchandise and services of a person from others[9]. Such employed in relations to goods or services for the purpose of indicating or as to indicate a connection in the course of trade between the goods and services. Mark which defined under Section 2 (1) (m) of the Act includes name, word, letters and others. Name includes abbreviation of name also. 'Goods' means for whatever thing which is focus to trade or produce. 'Services' means for 'which is made available to probable users

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7 D. W. Swartz, "The Limitations of Trademark Law in Addressing Domain Name Disputes", 45 *UCLA Law Review*, 1998.

8 M. Tariq Banday and Farooq A. Mir, World Academy of Science, Engineering and Technology, *International Journal of Computer, Electrical, Automation, Control and Information Engineering* Vol: 8, No: 1, 2014, *International Scholarly and Scientific Research & Innovation* 8(1) 2014 *scholar.waset.org/1999.4/9997604*

9 Section 2 (1) (zb) of *Trademark Act*, 1999.

and also includes services in connection with business of any industrial or marketable matters'.

4.1. Trademark Infringement

The registration of trademark in India is not compulsory and its protection is not depends on registration. The unregistered trademark is comes under 'Passing off' protection[10]. The infringement of the registered trademark takes place when a person who is not the registered proprietor or who is not having permission to use, uses in the course of trade a mark which is identical with, or deceptively similar to the trademark in relation to goods or services in respect of which the trade mark is registered[11].

A registered trade mark is also infringed when a mark is used in the course of trade but because of[12]: a) Its identity with the registered trade mark and the similarity of the goods or services covered by such registered trademarks; or b) Its similarity to the registered trade mark and the identity and similarity of the goods or services covered by such registered trade mark[13]; or c) Its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark; or d) Its likely to cause confusion on the part of public or which is likely to have an association with the registered trade mark[14]. Similarly, a registered trade mark is infringed by a person if he uses such registered trade mark as his trade name or uses such registered trade mark as a part of his trade name of his business concern or part of the name of his business concern dealing in goods or services in respect of which the trade mark is registered[15].

5 Domain Name protection in Trademark Law

Domain names are not only source of information but are of immense importance and a valuable corporate asset. A domain name is more than an internet address and is entitled to equal protection as trademark[16]. The domain names perform the same function in cyberspace which the trade names perform in real space. The original role of domain name was to provide an address for computers on the internet. But the

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10 B.W. Borchert, *"Imminent Domain Name: The Technological Land-Grab and ICANN's Lifting of Domain Name Restrictions*," *Valparaiso University Law Review*, 45 (2), pp. 505-549, 2011.

11 *T1 Diamond Chain Ltd* v. *Santokh Singh* 2004 (28) PTC (Delhi) 400.

12 *Smith Kline Beecham Plc* v. *Lalithbhai Patel* 2004 (28) PTC (Delhi) 330.

13 *Hawkins Cookers Ltd* v. *Rakesh Kumar and Mukesh Kumar & Ors.* 2005(30) PTC (Delhi) 375.

14 GOI, "*The Trademark Act* 1999", The Gazette of India Extraordinary, 47(2) Section 25, of the Trademark Act, *http://ipindia.nic.in/tmr_new/tmr_act_rules/TMRAct_New.pdf.visited* on 22.12.2017

15 *Time Incorporated* v. *Lakes Srivastava* 2005 (30) PTC (Delhi) 3.

16 *Rediff Communication Ltd.*, v. *Cyberbooth and Another*, 2000 PTC 209.

internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. The domain name not only serves as an address for internet communication but also identifies the specific internet site. In commercial field, each domain-name owner provides information/services which are associated with such domain name. Thus a domain name may pertain to provision of services within the meaning of Section 2 (1) (z) of the Act. A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise not only because it facilitates the ability of consumers to navigate the internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify its corresponding online internet location[17]. Therefore, the domain name is an utterance or name which is competent to the unique theme of business or service made available to probable consumers on the internet[18]. There was a first case in India, which accorded trademark protection to the domain name in Titan Industries Ltd., v. Prashant Koorapati and others[19], wherein the court held that domain name is based on his trade name and it is likely to create perplexity and mislead the community and in due course redirect the business passage to the opponent and this would give an unfair advantage to him.

Domain names are capable of using or reflecting the available trademarks or trade names. When third parties started to exploit trademarks or trade names which belong to others with intent to damage the registrar is amount to infringement. Domain names are therefore in certain circumstances, also capable of infringing trademarks or trade names. The domain name disputes are more challenging one and to be resolved only by the available legislation within the prescribed territorial limit. Since inception the law of trademark is administered by territorial principle. Though, the domain name system functions in the borderless virtual world. In Indian courts dealt with the domain name disputes under Section 29 of the Trade Mark Act, 1999. As per Section 29 (4) and (5) of Trade Mark Act, 1999, when a person uses a registered trade mark as his trade name or part of his trade name or business concern, then using of any mark which is identical or similar to such mark is an infringement of trade mark[20].

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17 Ryder, Rodney D.: Intellectual Property and the Internet, pp. 96-97.

18 *Satyam Infoway Ltd.,* v. *Sifynet Solutions Pvt. Ltd.*, (2004) 6 SCC 145.

19 (1998) (Application 787 in action 179, Delhi High Court).

20 *Raymond Ltd.* v. *Raymond Pharmaceuticals Pvt. Ltd*, 2010 (44) PTC 25 (Bom.), *CIPLA Ltd* v. *CIPLA Industries Pvt Ltd*., 2017 (2) CTC 465.

6. Cyber Squatting

The term "cybersquatter" may actually refer to a host of different individuals. The United States Congress defines "cybersquatting" as 'registering, trafficking in, or using domain names that are identical or confusingly similar to trademarks with the bad faith intent to profit from the goodwill of the trademarks'[21]. An important distinction may often be made between cybersquatters based on their intent in acquiring a domain name[22]. In deciding how to deal with a domain name problem, one should take notice that there are large differences between a person who has an interest in the name, a person who believes that he has an interest in a name or has taken a trademark by mistake, and those individuals who hold the name as a 'hostage' in order to profit, or for some form of harassment or political activism[23].According to Black's Law Dictionary Cyber Squatting is 'anyone having and buying that are to be demand soon to be sold at high prices' for the purpose of money[24]. The Law Lexicon, someone who registered a fake domain name which has already exists only intent to yielding money is called as cyber squatting[25].

It is an offence committed through online and the cyber squatters register a domain name in a well-known brand name in order to force the rightful owners of the marks to disburse their rights on that mark connect in electronic commerce in his own name[26]. The registration of domain name is considered to be abusive when the conditions[27] specified as per ICNN are fulfilled. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication but also identifies the specific internet site. In the mercantile field, every owner of domain name should give the related information and their services along with their domain name[28]. It permits well known and established trade marks

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21 Philip G. Hampton, II, Legal issues in Cyberspace, (*PLI Pat. Copy, Trademarks and Literary Prop. Course Handbook Series*, No. GO.00OV, 2001) (available in *WL, 663 PLI/Pat 585*).

22 *Pen Books Pvt Ltd.* v. *Padmaraj*, 2004 (29) PTC 137 (Ker).

23 Jonathan O. Nilsen, 'Mixing Oil with Water: Resolving the Differences between Domain Names and Trademark Law' [2002] *Journal of High Technology Law*.

24 Cyber Squatting meaning in the Garner Bryan, A Black's Law Dictionary, 7th edn., (*West Group, Minnesota*) 1999.

25 The Major Law Lexicon, (4th edition, *Lexis Nexis*, 2010).

26 *Interstellar Star Ship Servs. Ltd.* v. *Epix. Inc*., 304 F. 3d 936: 946 (9th Cir. 2002).

27 The conditions specified in WIPO Uniform Dispute Resolution Policy, 1999 as adopted by the Internet Corporation of Names and Numbers are - (i) The domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and (ii) The holder has no rights or legitimate interests in respect of the domain name; and (iii) The domain name has been registered and is being used in bad faith.

28 *Satyam Infoway Ltd.* v. *Sifynet Solutions* (P) Ltd. AIR 2004 SC 3540.

and names, product names, company names, names of well-known personalities, politicians to be 'captured' as a 'registrant' with such name and get it as registered domain name[29].

In India there is no such specified legislation is available on cyber squatting and domain name dispute resolution. By way of the Trade Marks Act, 1999 alone the domain names are protected in India[30]. Such domain name disputes are managed in India by the Trade Mark Act alone in number of cases. In the case of Yahoo Inc., v. Akash Arora and another[31], court held that the trademark laws applied on internet in an equal manner in the physical world. Similar point decided by the High Court of Bombay in the case of Rediff Communication v. Cyberbooth and another[32], on which the court states that "the Internet domain names are of importance and can be a valuable corporate asset. A domain name is more than an Internet address and is entitled to the equal protection as trade mark". In addition to that, the Delhi High Court in Tata Sons Limited v. Manu Kishori and others[33] held that, with the arrival of modern technology particularly relating to cyberspace, domain names or internet sites are entitled to claim protection as a trade mark, because they are more than a mere address. The provider of internet services is also entitled to claim protection in the same manner as like trade mark law applies to internet activities. Even though courts has rendered various principles for solving the domain name disputes, until now such disputes are in tunnel.

7. Applicability of Passing Off Action to Domain Name Disputes

An achievement for passing off is to restrain the defendant from passing off its goods

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29 *Jagdish Purohit* v. *Stephen Koenig*., 2012(49) PTC 304 (Del).

30 AIR 2004 SC 3540.

31 78 (1999) DLT 285-wherein the dispute regarding the 'Yahoo.com' and 'Yahooindia.com'. The plaintiff as the owner of the trademark 'Yahoo!' and domain name 'Yahoo.Com', which are very well-known and have acquired distinctive reputation and goodwill. The defendants by adopting the name 'Yahooindia' for similar services have been passing off the services and goods of the defendants as that of the plaintiff's trademark 'Yahoo!' which is identical to or deceptively similar to the plaintiff's trademark. It was contended that "trademarks and domain names are not mutually exclusive and there is an overlap between the trademarks and services rendered under domain names and thus by adopting a deceptively similar trademark 'Yahooindia', the defendants have verbatim copied the format, contents, lay out, colour scheme, source code of the plaintiff's prior created regional section on India at Yahoo.com and thus passing off the services of the defendants as that of the plaintiff." The consideration brought to the notice of the court was that it would not be unusual for someone looking for an authorized 'Yahoo!' site with India-specific content to type in '*Yahooindia.com*', i.e., the defendants domain name and thereby instead of reaching the Internet site of the plaintiff, the said person would reach the Internet site of the defendants'.

32 AIR 2000 Bom 27.

33 2001 PTC 432.

or services to the public. It is an action not only to preserve the reputation of the plaintiff but also safeguard the public. The action is normally available to the owner of a distinctive trademark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claims to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The exercise of same or else similar domain name may lead to a diversion of users; result from such user's mistakenly accessing one domain name instead of another. Generally consumers or users seeking to locate the functions available less than one domain name may be confused if they accidently arrived at a different site but similar website has not offers those services. Such users could well conclude that the first domain name holder had misrepresented its goods and services through its promotional activities and the first domain name owner would thereby lose its norm and reputation. It is obvious that a domain name has all the characteristics of a trademark and takes an action for passing off[34].

In India, firstly, the passing off action was invoked for adjudication of domain name disputes in *Yahoo Inc. v. Akash Arora & Netlink Internet Services*[35] , wherein it was held that the domain name was service marks and it fell within the domain of the passing off action. The advancement and progress in technology, services rendered on the Internet have also come to be recognised and accepted and are given protection, so as to protect such service provider of service[36]. The words that have acquired uniqueness and distinctiveness are entitled to be protectable. Such words have come to receive maximum degree of protection by courts. There was no difficulty to access Internet from all parts of the globe; a strict stand against copying should be taken as the potential of harm is far greater in cyberspace than it is in real space[37].

8. Application of Doctrine of Trade Dilution

Cyber squatting has seized the attention of the courts in the issue of jurisdiction. In India, Tata Sons limited v. Manu Kosuri and others[38], the court did not decide this case on the legal principles established by the other states courts. This case has recognized, for the first time, 'trade dilution' as a ground to object domain name

34 (2004) 6 SCC 145.
35 1999 PTC (19) 201 (Delhi): 78 (1999) DLT 285.
36 *Marks and Spencer Plc and Ladbroke Group Plc* v. *One In a Million Ltd and Others CA*, [1998] EWCA Civ. 1272, [1999] FSR 1, [1999] 1 WLR 903, [1998] 4 All ER 476).
37 *N.R. Dongre* v. *Whirpool Corp. and Another*, 1996 PTC (16) 583 (SC): 1996 SCR (5) SUPP 369.
38 *Tata Sons limited* v. *Manu Kosuri and Others*, 2001 III AD Delhi 545: 90 (2001) DLT 659.

registration. In Acqua Minerals limited v. Pramod Bose and another[39], the court held that, marks a new era for domain name protection. The Supreme Court in Satyam *Infoway Ltd.* v. *Sifynet Solutions Pvt. Ltd*[40]., gave mandate to the subordinate courts to follow UDRP which was reasoned as a domain name is potentially accessible irrespective of the geographical location of the consumers.

9. Conclusion

Internet plays a crucial role in day to day life without internet nothing will survive; because the advantages of internet are so high. It is very cost effective and efficient advertising tool. The consumers as well as businesses now turn to internet because they have found it a convenient medium to online shopping. The information for consumer is available on different website. These websites have unique addresses called domain names. The information seekers must either know domain name of the sites which they are looking for or they have to enter key words in search engines. If they have to enter key words, they will invariably try for the already established trade name for the traders. Businesses would always prefer to have their domain names based on the trade name by which they are known to their consumers. It has been now observed that the domain names are based on a well known trade mark or trade names are being registered by a person those who are not in any way associated with these trade names with an intent to confuse the consumers who will take it as the associate of the such trademark owner or resell the domain name to the true owner of the trademark at some exorbitant price. Neither should be allowed to usurp the trade name of other nor to use domain name which is closely identical with or confusingly similar to the trademark which belongs other.

Internet permits the right of entry without any jurisdictional limitation. Likewise domain name is probably accessible irrespective of the jurisdictional locality of the consumers. The result of this causes universal connectivity is not only that a domain name would require worldwide exclusivity and insufficient to safeguard domain name. In India there is no such specified legislation is exists regarding the domain name disputes resolution. However, judiciary in India have consistently interpreted the Trade Mark Act, 1999 and held that the domain name is not merely an address but an effective source identifier with all the trappings of a trademark and accorded trademark protection to the domain names. Therefore, appropriate legislation has to be enacted for protecting the domain name within the territorial jurisdiction of trademark.

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39 *Acqua Minerals Limited* v. *Pramod Bose and Another*, AIR 2001 Delhi 463: 2001 PTC 619.

40 *Supra note* 28, (2004) (28) PTC 566 (SC).

- The domain names perform the same function in cyberspace which the trade names perform in real space. Every court shall have jurisdiction to try domain name dispute in view of the fact that a website can be accessed from any place. There should be cooperation amongst the comity of nations requiring registered trademark owners to register these marks as domain names with the accredited Registrars of ICANN. If one tries to register a domain name based on such registered trade mark, he may be asked to produce no objection from the trademark owner. This suggestion may be helpful to reduce litigation but will not eliminate it altogether.

RIGHT TO PRIVACY IS A POSTULATE OF DIGNITY: AN INDIAN JUDICIAL CRAFTSMANSHIP

Dr. Sanjeev Mehta*

1. Introduction

Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty.

"Privacy" defined as "the state of being free from intrusion or disturbance in one's private life or affairs."[1] Right to Privacy is defined as "right to be let alone" the right of a person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned". [2]Though Right to Privacy is not just , confined to this definition, it also includes rights such as protection from trespassers into family and home life, control of sexual and reproductive rights and communications secrecy (Doctor-patient communication, Lawyer-client privileges) etc.

2. Research Methodology

This paper is descriptive and analytical in nature .The source materials of the present paper are the important constitutional decisions in India and other relevant countries, beside, valuable works of distinguished writers, jurists and judges are consulted, which have been duly cited in the footnotes. The study is not designed to be merely a digest of the cases decided by the Supreme Court but is based on selected and important trend-setter cases which have a relevance to the subject matter of study and then to study their effect on the common man in India. However, objective be the selection of cases, the subjective element in the selection cannot be eliminated altogether. The selection of cases has been made with utmost care, yet difference of opinion regarding the cases selected is always within the realm of possibility.

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1 *Distt. Registrar & Collector* v. *Canara Bank*, 2005 (1) SCC 496; *Sharda* v. *Dharmpal*, AIR 2003 SC 450.

2 In Black's Law Dictionary

3. Origin Of The Concept Of Privacy

Many jurists developed the right to privacy in different times. The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*). This dichotomy may provide an early recognition of "a confidential zone on behalf of the citizen"[3] . Aristotle's distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand, activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination"[4].

John Stuart Mill in his essay, 'On Liberty' (1859) gave expression to the need to preserve a zone within which the liberty of the citizen would be free from the authority of the state. According to Mill:

> The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[5]

While speaking of a "struggle between liberty and authority"[6], Mill posited that the tyranny of the majority could be reined by the recognition of civil rights such as the individual right to privacy, free speech, assembly and expression.

Samuel D Warren and Louis Brandeis adverted to the evolution of the law to incorporate within it, the right to life as "a recognition of man's spiritual nature, of his feelings and his intellect"[7] As legal rights were broadened, the right to life had "come to mean the right to enjoy life – the right to be let alone".

In their seminal article, Warren and Brandeis observed that:

> The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate

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3 Michael C. James, "A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe", *Connecticut Journal of International Law* (Spring 2014), Vol. 29, Issue 2, at page 261

4 Id., at page 262

5 John Stuart Mill, *On Liberty*, Batoche Books (1859), at page 13

6 *Id*., at page 6

7 Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* (1890), Vol. 4, No. 5, at page 193

personality.[8]

Thomas Cooley who adopted the phrase "the right to be let alone", in his Treatise on the Law of Torts[9], Cooley stated:

> The right of one's person may be said to be a right of complete immunity; the right to be alone. The right to be let alone is a part of the right to enjoy life. The right to enjoy life is, in its turn, a part of the fundamental right to life of the individual.[10]

Roscoe Pound described it as natural rights:

> Natural rights mean simply interests which we think ought to be secured demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor state creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these interests as it is expedient to recognize, are the work of the law and in that sense the work of the state.[11]

4. Sources of the Right to Privacy

4.1 International Instruments

India is party to two international instruments containing privacy protections. These are The Universal Declaration on Human Rights 1948[12](Article 12) and The International Covenant on Civil and Political 1966[13](Article 17).The ICCPR specifically casts an obligation on the signatory states to respect, protect and fulfil its norms. While becoming a party to the ICCPR, India filed reservations against Articles 1, 9 and 13, however, no such reservation was filed against Article 17 and this indicates the acceptance of the right to privacy and a commitment to respect and protect it.

4.2 Ancient and Religious Texts

Even in the ancient and religious texts of India, a well-developed sense of privacy

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8 *Id.*, at page 205

9 Thomas Cooley, *Treatise on the Law of Torts* ,Chicago, Callaghan & Co., (1888) 2nd edition

10 *Id.*, at page 29

11 Roscoe Pound, The Spirit of The Common Law 88 (1921)at p. 92

12 Article 12 of the UDHR states: The Right to Privacy. Nobody should try to harm our good name. Nobody has the right to come into our home, open our letters, or bother us or our family without a good reason.

13 Article 17 of the ICCPR states:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

is evident. A woman ought not to be seen by a male stranger seems to be a well-established rule in the Ramayana. *Grihya Sutras* prescribe the manner in which one ought to build one's house in order to protect the privacy of its inmates and preserve its sanctity during the performance of religious rites, or when studying the Vedas or taking meals. The *Arthashastra* prohibits entry into another's house, without the owner's consent[14]. There is still a denomination known as the *Ramanuj Sampradaya* in southern India, members of which continue to observe the practice of not eating and drinking in the presence of anyone else. Similarly, in Islam, peeping into others' houses is strictly prohibited.[15] Just as the United States Fourth Amendment guarantees privacy in one's papers and personal effects, the *Hadith* makes it reprehensible to read correspondence between others. In Christianity, we find the aspiration to live without interfering in the affairs of others in the text of the Bible[16]. Confession of one's sins is a private act[17].

Religious and social customs affirming privacy also find acknowledgement in our laws, for example, in the Civil Procedure Code's exemption of a *pardanashin* lady's appearance in Court[18].

4.3 Indian constitutional framework

The Supreme Court stated that the Preamble sets the humane tone and temper of the Founding Document and highlights Justice, Equality and the dignity of the individual. [19] Dignity as a constitutional value is a very important element of the scheme of protections offered in the Constitution to individuals.[20]

The Constitution is meant to govern people's lives, and as people's lives keep evolving and changing with the times, so does the interpretation of the Constitution to keep pace with such changes. Over the course of the Supreme Court's jurisprudence on the right to life and liberty under Article 21, we see repeated allusions to 'dignity' and 'life beyond animal existence' in order to expand the nature and scope of protection under Article 21.

Constitution Bench of Supreme Court to be intrinsic to and inseparable from human existence. Dignity, the Court held, is not something which is conferred and

14 Kautilya's Arthashastra 189-90 (R. Shamasastri, Trans., Low Price Publication, ed., 2012).
15 AA Maududi, Human Rights in Islam 27 Leicester: The Islamic Foundation, (1976).
16 Thessalonians 4:11 THE BIBLE, *www.biblestudytools.com* (visited on 1/09/2019).
17 James 5:16 THE BIBLE. *www.biblestudytools.com* (visited on 1/09/2019).
18 *Code of Civil Procedure*, 1989, S. 132
19 *Prem Shankar Shukla* v. *Delhi Administration*, (1980) 3 SCC 526
20 *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225.

which can be taken away, because it is inalienable:[21]

It is the duty of the State not only to protect the human dignity but also to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give. It simply is. Every human being has dignity by virtue of his existence.[22]

In *Maneka Gandhi case*, the Supreme Court gave a new dimension to Article 21 and it was with this decision that the Court started laying down a new constitutional jurisprudence."[23]

Article 51(c) of the Indian Constitution directs the State to 'endeavor to', inter alia, 'foster respect for international law and treaty obligations in the dealings of organized peoples with one another'.

The international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognized and given the status of being fundamental.

In Justice K S Puttaswamy (Retd.), and anr. v. *Union of India and Ors.*[24] A nine Judges Bench declare privacy a fundamental right under Art.21.The reference is disposed of in the following terms**:**

- The decision in *M P Sharma* which holds that the right to privacy is not protected by the Constitution stands over-ruled;
- The decision in *Kharak Singh* to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled;
- The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.
- Decisions subsequent to *Kharak Singh* which have enunciated the position

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21 *M Nagaraj* v. *Union of India* (2006) 8 SCC 212: see also *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161.

22 *Id*., at page 243-244 (para 26): See also *Francis Coralie Mullin* v. *Union Territory of Delhi* (1981) 1 SCC 608.

23 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.; *Bombay Dyeing and Manufacturing Co. Ltd.* v. *Bombay Environmental Action Group*, (2006) 3 SCC 434.

24 AIR 2017 SC 4161: AIR 1954 SC 300, AIR 1963 SC 1925 & AIR 1976 SC 1207 judgments overruled.

in (iii) above lay down the correct position in law.

5. Evolution of the Concept of Privacy in India

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.[25]

In *Malak Singh* v. *State of Punjab and Haryana* [26]on the issue of privacy indicate that an encroachment on privacy infringes personal liberty under Article 21 and the right to the freedom of movement under Article 19(1)(d).[27]

In *Indian Express Newspapers (Bombay) Pvt Ltd* v. *Union of India*[28] the principle that the right to free expression under Article 19(1)(a) includes the privacy of communications.

In *Rajagopal case* [29], in a proceeding under Article 32 of the Constitution, a writ was sought for restraining the state and prison authorities from interfering with the publication of an autobiography of a condemned prisoner in a magazine. The prison authorities, in a communication to the publisher, denied the claim that the prisoner had authored the autobiography while he was confined to jail and opined that a publication in the name of a convict was against prison rules. The prisoner in question had been found guilty of six murders and was sentenced to death. Among the questions, which were posed by this Court for decision, was whether a citizen could prevent another from writing about the life story of the former and whether an unauthorized publication infringes the citizen's right to privacy. Justice Jeevan Reddy speaking for a Bench of two judges recognised that the right of privacy has two aspects: the first affording an action in tort for damages resulting from an unlawful invasion of privacy, while the second is a constitutional right.

The Court held that neither the State nor its officials could impose prior restrictions on the publication of an autobiography of a convict.

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25 *Gobind's case* (1975) 2 SCC 148, at page 157 (para 28).
26 (1981) 1 SCC 420.
27 *Id*., at page 426 *(para 9).*
28 (1985) 1 SCC 641.
29 (1994) 6 SCC 632.

In *M. Nagaraj & Ors.* v. *Union of India & Ors*.,[30] court observed that any true interpretation of fundamental rights must be expansive, like the universe in which we live. The content of fundamental rights keeps expanding to keep pace with human activity.

In *People's Union of Civil Liberties* v. *Union of India*[31], it has recently been affirmed that the objective of Part III is to place citizens at Centre stage and make the state accountable to them.

In *P R Metrani* v. *Commissioner of Income Tax* [32]Supreme Court on the ground that they constitute a "serious intrusion into the privacy of a citizen".

Similarly, the search and seizure provisions of *Sections* 42 and 43 of the *NDPS Act* [33] were construed by this Court in *Directorate of Revenue* v *Mohd Nisar Holia* [34] Adverting to Canara Bank, among other decisions, the Court held that the right to privacy is crucial and imposes a requirement of a written recording of reasons before a search and seizure could be carried out.

In *Hinsa Virodhak Sangh* v *Mirzapur Moti Kuresh Jamat* [35] Supreme Court held that what one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court.

In *Amar Singh* v *Union of India*[36], a Bench of two judges of this Court dealt with a petition under Article 32 alleging that the fundamental right to privacy of the petitioner was being breached by intercepting his conversations on telephone services provided by a service provider.[37]

In *Ram Jethmalani* v *Union of India*[38], a Bench of two judges held that the revelation of the details of the bank accounts of individuals without the establishment of a *prima facie* ground of wrongdoing would be a violation of the right to privacy

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30 (2006) 8 SCC 212 paragraph 19.
31 (2005) 2 SCC 436
32 (2007) 1 SCC 789
33 *Narcotic Drugs and Psychotropic Substances Act*, 1985
34 (2008) 2 SCC 370
35 (2008) 5 SCC 33
36 (2011) 7 SCC 69
37 *Id*., at page 84 (para 39)
38 (2011) 8 SCC 1

In *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[39], it was held that "Fundamental rights have two aspects, firstly, they act as fetter on plenary legislative powers, and secondly, they provide conditions for fuller development of our people including their individual dignity."

Court in *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi* [40]dealt with the provisions of Section 8(1) (g) of the Right to Information Act, 2005. "Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement and security purposes."

In *Manoj Narula* v *Union of India*[41], a Constitution Bench of this Court was hearing a petition filed in the public interest complaining of the increasing criminalization of politics. Dealing with the provisions of Article 75(1) of the Constitution, Justice Dipak Misra, while explaining the doctrine of "constitutional implications", considered whether the Court could read a disqualification into the provisions made by the Constitution in addition to those which have been provided by the legislature.

In *National Legal Services Authority* v. *Union of India* [42] ("NALSA"), a Bench of two judges, while dealing with the rights of transgenders, adverted to international conventions acceded to by India including the UDHR and ICCPR. Justice K S Radhakrishnan held that:

"Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the Transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the

39 (2012) 6 SCC 1 at 27
40 (2012) 13 SCC 61
41 (2014) 9 SCC 1
42 (2014) 5 SCC 438

State is bound to protect and recognise those rights."[43]

In *ABC* v. *The State (NCT of Delhi)*[44], the Court dealt with the question whether it is imperative for an unwed mother to specifically notify the putative father of the child of her petition for appointment as guardian of her child. The Bench directed that

"If a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary"[45].

In *Supreme Court Advocates on Record Association,* v. *Union of India*[46] dealt with privacy issues involved if disclosures were made about a candidate under consideration for appointment as a Judge of the Supreme Court or High Court. Dealing with the right to know of the public on the one hand and the right to privacy on the other hand, Justice Lokur noted that the latter is an "implicit fundamental right that all people enjoy".

In Justice K S Puttaswamy (Retd.), and anr. v. *Union of India and Ors* [47]Supreme Court held that right to life includes right to privacy as an integral part guaranteed under part III of Constitution.

6. Different Dimensions of Right to Privacy

Supreme Court recognize human dignity as being an essential part of the fundamental rights in many cases. [48] The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21. Different dimensions of right to privacy were recognize by Supreme Court in different cases.[49]Important aspects of privacy declared by Supreme Court as part of the

43 *Id*., at page 490 (para 72)
44 (2015) 10 SCC 1
45 *Id*., at page 18 (para 28)
46 (2016) 5 SCC 1
47 AIR 2017 SC 4161.
48 See : *Prem Shankar Shukla* v. *Delhi Administration*, (1980) 3 SCC 526 at paragraph 21; *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi & Ors*., (1981) 1 SCC 608 at paragraphs 6, 7 and 8 ; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 at paragraph 10; *Maharashtra University of Health Sciences* v. *Satchikitsa Prasarak Mandal,* (2010) 3 SCC 786 at paragraph 37 ; *Shabnam* v. *Union of India*, (2015) 6 SCC 702 at paragraphs 12.4 and 14 and *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761 at paragraph 37.
49 See: *PUCL* v. *Union of India*, (1997) 1 SCC 301 at paragraph 14; *Mr. 'X'* v. *Hospital 'Z'*, (1998) 8 SCC 296 at paragraphs 21 and 22*; District Registrar and 49 Collector, Hyderabad & Anr*. v. *Canara Bank, etc*., (2005) 1 SCC 496 at paragraph 36; and *Thalappalam Service Cooperative Bank Limited & Ors*. v. *State of Kerala & Ors*., (2013) 16 SCC 82 at paragraph 57.

dignified life of individual are:

In R. Rajagopal v. *State of Tamil Nadu*,[50] the Supreme Court observed that:

A citizen has a right to safeguard the privacy of his own, his family marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent-whether truthful or otherwise and whether laudatory or critical.[51]

The right to be forgotten, as practiced presently, allows individuals to request that personal information be removed from the Internet (not show up in search engine searches) and seeks to give individual's increased control over their personal information stored online. In India, the "Right to be forgotten" has travelled on different paths. In *Sri Vasunathan* v *The Registrar General*[52] Karnataka High Court had heard through the woman's father that the woman was concerned that if a previous court order bearing her name were to show up in an internet search, it would have repercussions on her reputation and her marriage. Recognising the right in the Indian context, the Court's registry was directed to ensure that the woman's name would not appear in any internet search on the public domain, relying on the new right to be forgotten.

In *Surjit Singh Thind* v. *Kanwaljit Kaur*,[53] the question was whether the marriage between the parties had been consummated. As the Wife had filed a petition for a decree of nullity of marriage on ground, inter alia, that the marriage had never been consummated. Court held that an order for allowing medical examination of woman to prove her virginity would amount to violation of her right to privacy and personal liberty enshrined in Article 21, the Court said virginity test could not constitute the sole basis to prove the consummation of marriage.

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50 AIR 1995 SC 264. See also *Distt. Registrar & Collector* v. *Canara Bank*, 2005 (1) SCC 496. The right to privacy has been defined by Justice Louis D. Brandeis of the American Supreme Court as "the right to be let alone the most comprehensive of rights and the most valued by civilised men" See *Olmstead* v. *United States*, (1927) 277 US 438.

51 In case of crimes relating to sexual offences, it has been held that a trial by press, electronic media or public agitation, is the very antithesis of rule of law. It can lead to miscarriage of justice. See *State of Maharashtra* v. *R.J. Gandhi*, AIR 1997 SC 3986. In order to avoid any error in the reporting of Court proceedings, particularly relating to legal intricacies, the then CJI on 19-9-2007 proposed to start a Special Court for journalists at the National Judicial Academy, Bhopal.

52 WRIT PETITION No. 62038 OF 2016 (GM-RES) judgment dated on 23RD DAY OF JANUARY, 2017

53 AIR 2003 P. & H. 353: see also *Sharda* v. *Dharmpal* AIR 2003 SC 3950.

In *State of Maharashtra* v. *A. Madhulkar Narain*[54] the Supreme Court held that even a woman of easy virtue was entitled to the "right to privacy" under Article 21 and that no one could invade her privacy as and when he liked.

It can be done in the event of the occurrence of a public emergency or in the interest of public safety for reasons to be recorded in writing. A Division Bench of the Supreme Court in People's Union for Civil Liberties v. Union of India[55] laid down certain procedural safeguards to be observed before resorting to telephone tapping under Section 5 (2) of the Act. Except in cases, when the Indian Telegraph Act, 1885 empowers the State to intercept messages, telephone tapping would be *violative of the right to privacy*, the Court held.

In *Suchita Srivastava* v. *Chandigarh Administration* [56] Supreme Court, headed by Hon'ble Chief Justice held that a woman's right to make reproductive choices includes the woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Woman's right to choose birth-control methods such as undergoing sterilisation procedures; woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.

Two adult person living together of their free will has come to be termed as "Live-in-Relationship", Hon'ble Justice S.N. Dhingra of the Delhi High Court has recently [57] Hindu, August 10, 2010. defined the concept as "a walk in and walk out" relationship which entailed no obligation on the parties who enter into it. Explaining that it was a contract of living together, which was renewed every day, Hon'ble Judge said that either party to such relationship could terminate it without consent of the other.

In *Selvi* v. *State of Karnataka*[58], this Court went into an in depth analysis of the right in the context of lie detector tests used to detect alleged criminals. This Court, recognizing the difference between privacy in a physical sense and the privacy of one's mental processes, held that both received constitutional

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54 AIR 1991 SC 207.

55 AIR 1997 SC 568. In this case, the PUCL filed a petition, by way of PIL, in the wake of the report on "Tapping of politicians' phones" by the CBI, published in an issue of "Mainstream".

56 AIR 2010 SC 235 The Court referred the decision of *the U.S. Supreme Court in Roe* v. *Wade*, 410 US 113 (1973), wherein the right of a Woman to seek an abortion during the early stage of pregnancy held to be included within the constitutional protected right to privacy".

57 *Indra Sharma* v. *KV Sarma*, AIR 2014"SC 309. See also *S. Khushboo* v. *Kanniamma*, AIR 2010 SC 3196*; D. Velusamy* v. *D. Patchaiammal,* AIR 2011 SC 479. K

58 *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263 at 363.

protection.

So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties."[59]

Trial by media has been held to be the very antithesis of the rule of law.[60] In cases of crimes relating to sexual offences, a trial by press, electronic media or public agitation, can lead to injustice.

7. Right to Privacy not an Absolute Right

Fundamental Rights are subject to reasonable regulations made by the State to protect legitimate State interests or public interest. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

In *Govind* v. *State of M.P.*,[61] it was held that right to privacy was not absolute and would always be subjected to reasonable restrictions.

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59 *Id.*, at paragraph 225. (at pages 369-370)
60 *State of Maharashtra* v. *R.J. Gandhi*, AIR 1997 SC 3986.
61 AIR 1975 SC 1378.

The problem of population explosion is a national and global issue. It provides justification for priority in policy-oriented legislations wherever needed. So observed, the Apex Court in *Javed* v. *State of Haryana*,[62] upheld the validity of Section 175(1) (q) of the Haryana Panchayati Raj Act, 1994, which disqualified a person with more than two living children from holding office in Panchayati Raj Institutions. The provision was held not violative of the right to life and liberty, howsoever expanded the meanings of the right might be.

In *Mr. 'X'* v. *Hospital 'Z'*[63] the question before the Supreme Court was whether the disclosure by the Doctor that his patient, who was to get married had tested HIV positive, would be violative of the patient's right to privacy,an essential component of right to life envisaged by Article 21 . Answering the question in the negative, a Division Bench of the Supreme Court ruled that the right to privacy was not absolute and might be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

In *R. Rajagopal case*,[64](*auto Shankar case*) The Court held that there would be no violation of the right to privacy if the person concerned voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

In *A. Raja* v. *P. Srinivasan* [65] court held that any publication concerning the previously mentioned aspects (i.e., right to privacy) would be unobjectionable if such publication was based upon public records including Court records.[66]

In *People's Union for Civil Liberties (PUCL)* v. *Union of India*,[67] ruled that "once a person becomes a candidate to acquire public office" declaration about his criminal antecedents[68] as also about his assets and liabilities[69] would not affect his

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62 AIR 2003 SC 3057. See also *Rameshwar Singh* v. *State of Haryana*, 2003(8) SCC 396.

63 AIR 1999 SC 495. See also *Mr. ZX'* v. *Hospital 'Z'*, AIR 2003 SC 664.

64 *R. Rajagopal* v. *State of T.N*., AIR 1995 SC 264.

65 *A. Raja* v. *P. Srinivasan* AIR 2010 Mad. 77

66 Thus, publication in the Press of conduct of person connected to his public office even without prior verification of facts would not be violative of Article 21. See *A. Raja* v. *P. Srinivasan*, AIR 2010 Mad. 77. Likewise, screening of film based on the life of plaintiff and the plaintiff could not restrain her husband, late Veerappan, as based on criminal cases, filed against him and on factual aspects, on ground of violation of her right to privacy. See *M / s. Akshya Creations* v. *V. Muthulakshmi,* AIR 2013 Mad. 125.

67 AIR 2003 SC 2363.

68 It is a matter of public record that a candidate was involved in various criminal cases.

69 Such information is normally required to be disclosed under *the Income-Tax Act* or such similar legislation.

right of privacy.

Supreme Court in *State of Gujarat* v. *Anirudh Singh*,[70] observed that it was the salutary duty of every witness, who has the knowledge of the commission of the crime, to assist the State in giving evidence. Section 14 of the Prevention of Terrorism Act, 2002, conferred power on the investigating officer to ask for furnishing information that was useful for or relevant to the purpose of the Act. Upholding the constitutionality of this provision in *People's Union for Civil Liberties* v. *Union of India*, [71]the Supreme Court observed that it was settled law that a journalist or a lawyer did not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics.

In *Girish Ramchandra Deshpande* v. *Central Information Commissioner*[72], wherein Supreme Court held that since there is no bona fide public interest in seeking information, the disclosure of said information would cause unwarranted invasion of privacy of the individual under Section 8(1) (j) [73] of *Right to Information Act*, 2005. Further, if the authority finds that information sought for can be made available in the larger public interest, then the officer should record his reasons in writing before providing the information, because the person from whom information is sought for, has also a right to privacy guaranteed under Article 21 of the Constitution."

In *Sharda* v. *Dharmpal,*[74] Court was concerned with whether a medical examination could be ordered by a Court in a divorce proceeding. After referring to some of the judgments of this Court and the U.K. Courts, this Court held that a matrimonial court has the power to order a person to undergo medical test. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution. However, the court should

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70 AIR 1997 SC 2780. See also *Sharda* v. *Dharmpal*, AIR 2003 SC 3450.

71 AIR 2004 SC 456,

72 (2013) 1 SCC 212.

73 Sec. 8. Exemption from disclosure of information – (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen
(a) to (i) xxx xxx xxx
(j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:
Provided that the information which cannot be denied to Parliament or a State Legislature shall not be denied to any person."

74 (2003) 4 SCC 493 at 513-514 paragraph 81(at page 524)

exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

The decision is pending on the issue but the Apex Court validate it to some extent for some govt. schemes. Aadhaar is not Just about Privacy there are 30 other challenges the Govt. is facing in Supreme Court .The number of cases against Aadhaar have bloated since 2012. Several petitions have challenged the constitutionality of the entire Act and its associated programme. For example, Shantha Sinha's petition has challenged the Act and the tens of notifications, which the government has issued under section 7 of the *Aadhaar Act*. These notifications have made Aadhaar virtually "mandatory" for several government services.

8. Conclusion

The technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible by both the State and non-State actors. It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation, which are all important aspects of dignity.

If the individual permits someone to enter the house, it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognized as a fundamental right. How it thereafter works out in its inter-play with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognize this important, natural, primordial right as a fundamental right.

Petitions currently before the Supreme Court have also challenged the seeding of Aadhaar *with the national population register,* the government circular, which made Aadhaar verification necessary for SIM cards, the recent amendment in the Income Tax Act, which asked for the linking of PAN cards with Aadhaar, the amendment to the Prevention of Money Laundering Act, which also mandated

Aadhaar. Others are challenging more specific issues, such as Aadhaar as a tool of surveillance, its interference with federalism and its role in causing exclusion and denial of rights. Decision is pending on above-mentioned issues.

Nine-judge bench delivered landmark judgement and unanimously declaring the Right to Privacy is a fundamental right under Article 21 of the constitution. This verdict has a huge impact on the lives of 134 crore Indians.

AN ANALYSIS OF SOCIO- LEGAL ASPECTS OF RAGGING IN INDIA

Rohini Attri*

1. Introduction

Education is the crucial plank in the process of development in any nation. It empowers the citizens of a country to become active stakeholders in the functioning of the country. Especially in a country like India where illiteracy is still a crucial factor, the importance of education becomes all the more pronounced.[1] It is a pity that education system in India is facing a number of problems. Institutions of Higher Education (IHEs) are generally considered to be the platform where young and innovative minds go through their learning process and which also provide them with secured and congenial atmosphere to explore their creative minds. But rise in the incidents of violence in educational institutions enkindles question about whether these campuses are actually a safe refuge. An abundance of such reports reflects that in fact campuses are not immune from such incidents. Ragging is a rampant social menace that has led down humanity on several occasions but unfortunately due to the involvement of only one section of the society i.e. the students, not much attention has been paid to combat it.[2]

In India, Ragging is one of the evils in general as well as professional courses. It has become one of the serious forms of violence in educational institutions which not only affects human dignity but even sometimes, leads to loss life though suicidal attempts. Ragging is a form of activity where new entrants are abused in the educational institutions by the senior students, wherein the former are often harassed and made to undergo various forms of physical, mental and sexual torture.

2. Meaning and Definition of Ragging

The term 'ragging' has been perceived differently by different classes of people. Some people consider it as a fun and frolic activity which includes singing and

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1 M.I. Hussain, "The Education System: A Critical Overview", *The Indian Express*, 12 March 2012, at p. 8.

2 'Ragging: The Bane of Educated Society', *Competition Success Review*, Special Issue, June 2009, at p. 14.

dancing before the seniors, while others perceive it to be an activity where juniors are forced to do daily chores of their seniors. On the other hand, many others believe that it constitutes physically tiring, verbally abusive or even sexually assaulting acts. There are various diverging opinions over the same.

The young newcomers remain under fear to resist this organized group of tormentors. Ragging can be thought of in terms of verbal, physical and sexual aggression, which often goes on for months and sometimes a single act of ragging may be a combination of more than one of these.[3]

According to the *Oxford English Dictionary*, 'Ragging means the act of practice of playing, singing or dancing in ragtime.'[4] Ragging means any noisy disorderly conduct, where students are made to parade in fancy dress and playing rough jokes with them.[5]

Ragging is an outburst of organized horseplay, usually in defiance of authority, riotous festivity, especially of under-graduates in British Universities, associated with the raising of money for charity.[6]

Ragging constitutes one or more of any of the following acts[7]:

a. any conduct by a student or group of students, either verbally or in writing, which shall consequently led to tease or harass or handle with rudeness, any newcomer or any other student;
b. involvement in rowdy, hooligan, uncultured or indisciplined activities by any student or group of students, which raise any fear or apprehension of threat, or may causes or likely to cause annoyance, hardship, or any physical or mental harm to any newcomer or any other student;
c. asking or compelling any student to do any act which could cause shame or embarrassment to the other student and will not be able pursue by the other student in the ordinary course to do;
d. any act by a senior student that disturbs, halts, disrupts or prevents the fresher or any other student to continue with his activity of his regular academics;

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3 Rajesh Garg, "Ragging: A Public health problem in India", *Indian Journal of Medical Sciences,* Vol. 63(6), July 2009, p. 263- 271

4 Second Edition, Vol. XIII, Oxford University Press , 1991

5 Reader's Digest Great Encyclopedia Dictionary, First Edition, 1964

6 The Chambers English Dictionary, Thirteenth Edition, 2014.

7 Reg. 2, UGC Regulations on curbing the menace of Ragging in Higher Educational Institutions, 2009.

e. exploitation of a fresher or any other student by making him render undue services such as completing and doing the academic tasks of their senior or any group of students;
f. any activity of extorting money or finances or forcefully burdening a fresher or any other student by students to spend expenditure;
g. any type of physical abuse including: causing bodily injury or any other harm or danger to the health of the person, sexual abuse, stripping, homosexual assaults, compelling to perform obscene and vulgar acts;
h. any act of public insult or abuse, either verbal or written(i.e. through emails, post), which would include deriving sadistic thrill and pleasure, perverted pleasures, or passively enjoying annoying or discomforting the fresher or any other student;
i. any act that affects the self-confidence, self-esteem or mental health of a fresher or any other student with or without an intent to derive a sadistic pleasure or showing off power or superiority by any student over any newcomer or any other student.

Ragging could be deliberated positively if it is being conducted in a decent healthy manner and within the limits to preserve the dignity of fresher students, or if it aims to reduce the gap between junior and seniors and breaking the ice between them; help fresher to shake themselves out of inhibitions and inferiority complex and to smoothen their angularities; helps driving away the tendency among newcomers to remain in isolation. But over the years the word 'ragging' ceased to indicate the healthy practice it used to be and has acquired and grabbed more negative connotations and notoriety.

3. Origin and Development: A Western Concept

Ragging is not new phenomenon. It could be trace back in older times as well and was a part of civilized societies. In ancient learning schools like *Athens* and *Berytus,* practice of ragging was prevalent.[8] This phenomenon can be discovered back in seventh or eighth century A.D. in Greek culture where, in the sport community, new entrants were harassed, subjected to all kinds of teasing, insults and humiliation to inculcate a team spirit in them. Over the passage of time this type of activities were subjected to myriad modifications and was later adopted by Armed Forces in which

[8] Harsh Agarwal, 'Ragging: History and Evolution', Coalition to Uproot Ragging from Education, available at *http://www.noragging.com/index2.php?option=com_content&do_pdf=1&id=36* (last accessed 12 December 2017).

new entrants have to pass out by obeying the seniors in off-duty time.[9] In England, ragging used to exist as a tradition in Army schools. Later on, this tradition was further followed ans took its root in engineering and medical colleges. In English society ragging took the form of fresher were made to parade on street which caused much annoyance not only to freshmen but even to general public especially girls.[10]

Initially ragging had been a harmless practice rather permissible in the society but over a period of time, specifically after the First World War, it had taken shape of brutality, humiliation and harassment. This concept was later adopted by the U.S. universities as well. During 1828-1845, various student organizations and federations came out in the U.S. educational campuses.[11] Gradually in the early 20th century phenomenon of ragging underwent various changes and modifications before morphing its final shape into an organized form of campus violence.

The practice of Ragging is not confined to a particular region, states, country or continent; rather it has been prevailing at an global level with varied names. The word ragging is mainly used in countries like, Bangladesh, India, Pakistan and Sri Lanka.[12] A similar kind of practice named as 'hazing' in prevailing in U.S, U.K and Philippines. Also in various other parts of the globe it has different nomenclature and terminology like bullying, fagging; *doop* in Dutch*; bapteme* in French and *Mopokaste* in Finnish**.**

Undoubtedly, ragging evolved as a western concept but today, it has grown its roots in the Indian educational establishment as well. India had inherited ragging as a legacy from the British Raj and since then it had failed to liberate itself from the clutches of this inhuman practice. Various incidents are taking place in educational institutions now a days, makes it evident that the worst form of ragging is being committed in India. According to a research conducted by Coalition to Uproot Ragging from Education (CURE), India and Sri Lanka are the only two countries in the world where worst form of ragging exists.[13] It has been seen that such forms of practice is prevailing at a high rate in institutes and professional colleges mainly

9 Dhananjay Mahapatra, 'Ragging needs social ban, more than laws', The Times of India, available at http://timesofindia.indiatimes.com/home/sunday-times/deep-focus/Ragging-needs-social-ban-more-than-laws/articleshow/4298362.cms (last accessed 22 January 2018)

10 *Ibid.*

11 C. H. Venkateswarlu and N. Satyasri, "Effects of Ragging on human dignity - A Critique", *International Journal of Multidisciplinary Educational Research*, Vol. 1(4), September 2012, p. 229-242

12 Ragging. available at *https://en.wikipedia.org/wiki/Ragging* (last assessed 11 January 2018)

13 Madhavi Chopra, 'Ragging In Educational Institutes: A Human Rights Perspective', available at *http://www.legalserviceindia.com/articles/ragging.htm* (last accessed 18 January 2018)

because of majority of students prefer to reside in hostels.[14]

4. Forms and Causes of Ragging

It is said that man's imagination knows no bounds. This thing stands correct in terms to ragging too, that man's perverted imagination too knows no bounds. The basic intention behind ragging was to comfort the young newcomers and just to provide harmless fun and good humor to new entrants but this practice today has become inhuman, vulgar and torturous, passing over all norms of morality and decency. There is no strict categorization of ragging but some of the popular forms of ragging of residential and non- residential students have been categorized as:[15]

I. Formal introduction: This procedure involves the newcomer to introduce himself in *'Shudh hindi'* or other vernacular language which includes his name, address, school, marks, interests and hobbies etc.;

II. Playing the fool**:** In this, the newcomer is made to enact or imitate a film star from any particular movie and sometimes made to do silly things like to propose somebody from the opposite sex, climbing a tree, kissing a tree, etc.;

III. Dress code ragging: Fresher students are required to dress in a fancy way or sometimes required to follow a particular dress code for a particular period of time. This sometimes embarrasses the freshermen and make them feel uncomfortable and awkward and uncomfortable;

IV. Verbal abuse: this includes insults, abusive talks and involving in loose talks. The fresher is compelled to sing vulgar songs or use abusive language while talking to the seniors;

V. Sexual abuse**:** This is one of the worst form of ragging existing in educational institutions. In this, the freshmen is forced to imitate or perform some sexual acts or to strip and dance naked in front the seniors;

VI. Hostel ragging: this again is one of the most common forms of ragging in which the outstation students who resides in hostels are most vulnerable. They ar made to do some weird form of activities like doing daily chores of the seniors, completing their assignments, cleaning their rooms,

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[14] Report of Committee to curb the menace of Ragging in Universities/ Educational Institutions (1999), available at *http://www.ugc.ac.in/page/Ragging-Related-circulars.aspx* (last accessed 10 January 2018)

[15] Mohit Garg, 'Forms of Ragging', Coalition to Uproot Ragging from Education, available at *http://www.noragging.com/analysis/forms-of-ragging.html* (last accessed 12 January 2018)

fetching them water, washing their clothes, etc.;

VII. Drug abuse: This activity involves where the new entrants are forced to try drugs consequently pushes them into drug dependence addiction.

The factors contributing incidents of ragging is not a single but various. The major reasons responsible for ragging are that it gives a sadistic pleasure and satisfaction in showing off the power, superiority and authority over the fresher students. Sometimes, a student who himself had been subjected to ragging pursues to rag his juniors as measure of retaliating or to derive revenge or to pacify his frustration. Peer pressure and means of retaliation also encourages such problems amongst students. Another fact is that not every student involves in this activity but sometime seeing others doing this activity encourages them to experience the same so that they don't remain left out and consequently, they too join the herd to get rid of isolation. A lot of students feel that indulging in ragging is a style quotient which allows them to be a part of 'influential and popular crowd' of the campus.

5. Visualizing the Problem through Social Prism

The social aspects of ragging clearly state the plight of victims of ragging and their family members. It is not only the victim student, but his parents too suffer through stress and pain. Apart from dealing with the rehabilitative process of their child, which requires medical and other expenses, they have to go through the mental trauma of witnessing their child's potential career a straight downfall. The Indian cinema has depicted the plight of ragging victims in movies like *3 idiots* and *Table No. 21.* In extreme cases of ragging, media bombardment lowers the reputation of colleges and institutions and ceases to restore the faith of people and society on these educational institutions. The perpetrator of ragging definitely brings a shame, disgrace and disrespect to their college which in return causes hindrance to its goodwill and reputation it had earned in the society.

Besides this, there are so many myths in the minds of general public about ragging. Many people, especially parents, perceive ragging to be a mere verbal interaction which involves fun activities or humorous talks. The general perception of society is that it only seeks to break the ice between the seniors and the newcomer so that they can develop friendly relation between them through interaction. The ignorant notions regarding ragging get its bone from the society itself.

According to a recent UGC funded research study led by scholars of Jawaharlal Nehru University, it was concluded that forty per cent of college students in across India witness and experience one or the other forms of ragging. Out of this figure,

around 8.6 per cent of the incidents are reported. This shows that ragging has been an underreported offence. The study also brought out that nearly 25 per cent of ragging incidents takes place because of area/region of the victim he belongs to and the language he speaks, whereas 8 per cent cases are related to the caste-based factor.[16]

Ragging does not only affects the victim but proves to be fatal to its perpetrators Blacklisting, rustications, temporary suspension from classes and even permanent expulsion from the institute are the common consequences raggers face on account of ragging. Sometimes it also ended up with lodging criminal cases against them. Therefore, the ill-practice of ragging does well to nobody. From victims to perpetrators of it, ragging spares none. In some cases it leads to physical injuries, sexual abuse, psychological disorders, human rights abuse, group violence, forceful initiation to alcoholism, smoking and drugs, suicidal attempts and even deaths. The ill-effects of ragging reflects that ragging is associated with a broad spectrum of physical, psychological, behavioral, emotional and social problems among the victims and its consequences are also multidimensional.

6. Legal Mechanism to Control Ragging in India

Due to the rampant increase in the incidents of ragging in the past few years, this ill-practice of ragging has grabbed the attention of law makers, law enforcers, Courts and various other sections of the society. Consequently, various committees had been established, recommendations formulated, regulations passed, guidelines directed and state laws have been enforced to curb the menace of ragging. Some of the efforts in this direction at central, state, institutional and judicial level are as under:

6.1. At Central Level

6.1.1 Legislative Measures

The Constitution of India guarantees a fundamental Right to Life and Personal Liberty which expresses that no person shall be deprived of his life or personal liberty except according to procedure established by law.[17] Under the ordinary Criminal Law, *Indian Penal Code, 1860* [18]provides punishment for various offences such as assault, criminal intimidation, wrongful restraint, wrongful confinement,

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16 Deeptiman Tiwary, '40% are ragged, less than 9% speak out: UGC-funded', The Indian Express, 21 January 2016, available at *http://indianexpress.com/article/india/india-news-india/40-are-ragged-less-than-9-speak-out-ugc-funded-study/* (last accessed 29 January 2018)

17 Article 21

18 Act No. 45 of 1860

abetment to suicide, culpable homicide, murder, etc. The complaint can be lodged by the victim in the police station and the procedure under the *Code of Criminal Procedure, 1973* can be established. In addition to this, the *Protection of Human Rights Act, 1993* provide for the constitution of a National Human Rights Commission, State Human Rights Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.[19] The *Prevention of Children from Sexual Offences Act, 2012* is a special law which provides to protect children, below eighteen years of age, from offences of sexual assault, sexual harassment and pornography. It also provides for establishment of Special Courts for trial of such offences and matters connected therewith or incidental too.[20] Besides this, the *Right to Information Act, 2005* is yet another legislative tool to bring the governmental or public institutions into action. It empowers the citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. Therefore, the ragging victims can ask what action has been taken by the college or police on the ragging complaint made or action taken by RTI-helpline on the ragging complaint.

6.1.2 Role of University Grants Commission and other Regulatory Bodies

In India, the higher education is coordinated by various regulatory bodies. These bodies are very much professional in character. The University Grants Commission (UGC), All India Council of Technical Education (AICTE) and other bodies like Bar Council of India (BCI), Medical Council of India (MCI), Central Council of Indian Medicine, The Homeopathy Central Council, The Indian Council of Medical Research (ICMR), Indian Nursing Council, The Dental Council, The Pharmacy Council, The Bar Council of India (BCI), and The Indian Council of Agriculture Research (ICAR) etc, works in co-ordination up to certain degree and performing the role of laying down professional standards, helping institutions with funds in certain cases, and in general, help them to maintain professional standards.

In consequence to the Judgment of the Supreme Court of India,[21] the University Grants Commission framed '*UGC Regulations on Curbing the Menace of Ragging in Higher Educational Institutions, 2009'*.[22] These Regulations came into effect from

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19 Act 10 of 1994

20 Act No. 32 of 2012

21 *University of Kerala* v. *Councils, Principal's College in Kerala and Ors.,* (2009) 7 SCC 726

22 Available at, *http://www.ugc.ac.in/page/Ragging-Related-circulars.aspx* (last accessed 10 January 2016)

the date of notification. It is mandatory for all educational institutions to incorporate in their prospectus the directions of the Government regarding prohibition and consequences of ragging. It reminds all Universities every year before the start of the academic session through public notices, UGC website and letters to Universities to ensure strict compliance of anti-ragging measures

A toll free anti-ragging helpline in twelve languages has been established nationwide. The students who face any incident of ragging can access to this helpline which directly receives complaints from the complainant/victim of ragging. The same is forwarded by the helpline to the respective institutions and the local administration for taking necessary corrective action. On receipt of complaints about ragging, the UGC seeks the action taken report from the concerned institutions.

The official website of UGC also displays a documentary video film on anti-ragging and all educational institutes have been asked to give it wide publicity amongst students, staff, other stakeholders and colleges under their jurisdiction. Being the premier institution dealing with the issue of higher and professional education in India, the University Grants Commission has been playing a proactive role in directing the Universities and other educational institutions in curbing this evil practice.

6.1.3 Committees

6.1.3.1 Prof. K.P.S Unny Committee

It can be seen that the UGC constituted a committee in 1999 under the chairmanship of Professor K.P.S. Unny which had made some important recommendations.[23] The committee in its report explained the concept of ragging, its various forms and cause for ragging. It also traced the vulnerable locations of ragging, factors responsible for the growth of practice of ragging and ineffectiveness of measures against it and existing governmental/ institutional efforts in curbing ragging. The Unny Committee in its recommended to adopt a three-pronged system to deal with the menace of ragging in educational institutions, namely; Prohibition, Prevention and Punishment System, commonly known as PPP System, which means prohibition by law, prevention by following a set of guidelines and punishment in case ragging takes place in spite of prohibition and prevention.[24]

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23 G.B. Reddy, *Prohibition of Ragging and Law*, Gogia Law Agency, Hyderabad, 2009

24 Available at, *www.ugc.ac.in* (last accessed 10 January 2018)

6.1.3.2 Dr. Raghavan Committee

The Supreme Court of India has been a strong stand to prevent ragging. In 2006, the Apex Court directed The Ministry of Human Resources Development (MHRD) to form a panel to suggest guidelines in order to curb incidence of ragging. The panel was headed by the former Director of C.B.I. Dr. R.K. Raghavan.[25] In May 2007, the committee submitted its report to the Supreme Court in which various recommendations were made to control ragging. The report referred ragging as a 'social menace'. Incorporation of strict and harsh penalties, submission of written undertakings from the students who apply to reside in the hostels and their parents regarding non-involvement in any form of ragging, were the part of recommendations made by the committee in its report.[26]

Instead of prohibiting the acts of ragging, the committee laid its emphasis on prevention of the same. The Committee observed that a law which is prohibitive in nature involves a top down approach while a law which is preventive is a bottom up approach and involves a participatory approach. Therefore, it was important to bring into action such a preventive law which is not only conventional in nature but which serves as a best possible way to root out this practice by putting a long-lived impact.[27] The Committee recommended for constitution of anti-ragging cells at the Central, State and College Levels,[28] installation of toll-free helpline numbers,[29] considering ragging as a key factor while awarding accreditation to the institution,[30]strengthening laws dealing with ragging and shifting the burden of proof on the accused to prove his innocence,[31] conducting interactive sessions between faculty and students and amongst students themselves, engaging professional counselors during the orientation of freshmen,[32] arrangement psychological counselors on anti-ragging and human rights at high school levels and including it be the part of NCERT, SCERT school curriculum to spread awareness on this issue. Further, issuance of character certificate at the time of leaving the school be dealt with seriously by the school authorities.[33] The effectiveness of character certificate is dubious as many schools refrain from giving negative remarks on character

25 This Committee was constituted by the Supreme Court in SLP 24295/2006
26 *Supra Note* 23.
27 *The Raghavan Committee Report* (2007), Para 3.15
28 Paras 5.02 and 5.03
29 Para 5.43
30 Para 5.42
31 Para 5.26
32 Para 5.14
33 Para 5.06

certificate. Consequent to this report, certain selective recommendations were implemented by the Supreme Court with immediate effect to curb ragging incidents in educational institutions.

6.2 *At State Level*

Despite rise in incidence of Ragging in all the states in India, very few states, namely, Tamil Nadu, Kerala, Maharashtra, Andhra Pradesh, West Bengal, Assam and Chhattisgarh, came up with legislative measures to deal with it and the provisions of all the concerned Acts are applicable only to the concerned State respectively. Other than these States, ragging is banned in rest of the parts of India through circulars and administrative orders. Following are the legislations of various states[34]:

I. *The Karnataka Education Act, 1983*
II. *The Tripura Educational Institutions (Prevention Of Ragging) Act, 1990*
III. *The Tamil Nadu Prohibition of Ragging Act, 1996*
IV. *The Andhra Pradesh Prohibition of Ragging Act,1997*
V. *The Kerala Prohibition of Ragging Act, 1998*
VI. *The Assam Prohibition of Ragging Act, 1998*
VII. *The Maharashtra Prohibition of Ragging Act, 1999*
VIII. *The West Bengal Prohibition of Ragging in Educational Institutes Act, 2000*
IX. *The Chhattisgarh Shaikshanik Sansthan Me Pratarna Ka Pratishedh Act, 2001*
X. *The Himachal Pradesh Educational Institutions (Prohibition of Ragging) Act, 2009*
XI. *The Jammu and Kashmir Prohibition of Ragging Act*, 2011

The above stated legislations prohibit the practice of ragging within or outside educational institutions. Most of these legislations incorporate punishment of two years of imprisonment and a fine but still there is a great disparity between these statues on the basis of punishment. In State of Karnataka, the maximum punishment is one year where as in the case of Chhattisgarh, a person who commits, participates, abets or propagates ragging within or outside an educational institution shall be punishable with five years imprisonment and fine. This shows an inherent inequality

[34] Available at, *http://www.no2ragging.org/rulesregulations.html* (last accessed 12 December 2017)

on account of the offence being committed in a different State. Therefore, this outcries for the introduction of a law which can be uniformly applied to all the States and Union Territories throughout India law to deal with this issue.

7. Attitude of the Judiciary

With ragging becoming a national issue affecting thousands of students across India, the Supreme Court of India too could not remain silent and has seriously condemned the issue. The Supreme Court of India, in *Vishwa Jagriti Mission* v. *Central Government*, perhaps has given a more comprehensive meaning of ragging in as any disorderly conduct, whether by words spoken or written, or by an act which has the effect of teasing, treating or handling with rudeness any student, indulging in rowdy or indisciplined activities which cause or are likely to cause annoyance, hardship or psychological harm or to raise fear or apprehension thereof in a fresher or a junior student and which has the effect of causing or generating a sense of shame or embarrassment so as to adversely affect the psyche of a fresher or a junior student.[35]

In another significant case of *University of Kerala* v. *Councils, Principal's college in Kerala and ors,*[36]the Supreme Court observed that ragging in essence is a Human Rights abuse. Ragging can be in various forms. It can be physical abuse or mental harassment. In present times, shocking incidents of ragging have come to the notice. Sometimes violence is used. The student is physically tortured or psychologically terrorized. All human being should be free to claim, as a matter of right in the society in which they live, for life of dignity but when it is intentionally or recklessly damaged or departed then the person's human right is abused; in that sense ragging is the best example of human rights' abuse. Besides this, the court laid down certain guidelines to curb the menace of ragging. Brief guidelines are as under:

I. Educational institutions should initiate Anti-ragging movements starting from the time of publication of advertisement for admissions. The necessary information regarding ban on ragging and prescribed punishment for the same should be stated in the prospectus and admission forms too.

II. Submission of printed undertaking given by the student and his parent/guardian regarding their knowledge of the above information should be mandatory at the time of seeking admission in the institution.

35 AIR 2001 SC 2814
36 (2009) 7 SCC 726

III. The institutions which are introducing such a system for the first time shall take undertakings from the students already studying in the institutions and their parents/guardians before the commencement of the next educational year/session.

IV. Notices, in printed form, should be issued indicating where to approach for redress in case of ragging along with the addresses and telephone numbers of such persons.

V. The management, Principal and the teaching staff should interact with the freshmen and take them in confidence by apprising them of their right as well as to generate confidence in their mind that any instance of ragging shall be promptly dealt with

VI. At the commencement of the academic session, the institution should constitute a committee consisting of senior faculty members and hostel authorities like wardens and students to keep a continuous watch and vigil and to promptly deal with the incidents of ragging brought to its notice and summarily punish the guilty.

VII. All vulnerable locations in the college such as the canteen, the playground, etc. shall be identified and specially watched.

VIII. The local community and the students in particular must be aware of the dehumanizing effect of ragging inherent in its perversity. Posters, notice boards and signboards wherever necessary, may be used for the purpose.

IX. Failure to prevent ragging to be constructed as an act of negligence in maintaining discipline in the institution on the part of the management, the principal and the persons in authority of the institution. Similar responsibility shall be liable to be fixed on hostel wardens/superintendents.

X. Entry of seniors should be regulated by the hostel authorities and proper security arrangement should be made in the hostels where freshmen shall be staying so as to prevent entry of seniors at late night hours except with the prior permission of hostel wardens or relevant person in-charge.

XI. Migration Certificates should clearly mention about any involvement of the student, who is being migrated, in any practice of ragging or not, and whether he has been punished for the same or not.

XII. There should be withdrawal of financial support and assistance provided, through funds, by UGC or any other funding agency in case the institute fails to bring necessary actions to control ragging within the specified period of time.

XIII. In the event of any incident of ragging, if the aggrieved party does not feels satisfied from the decision of Disciplinary Committee of their respective colleges, they can approach the police for redress of their grievances under law.

8. Conclusion and Suggestions

Ragging is a widespread multidimensional problem covering various legal, educational, social, psychological and behavioral aspects. Although the Centre and the States have shown deep concern to eradicate the menace of ragging through implementation of various legislations, guidelines and directions but, still there is no central legislation so far in this regard. It is often argued that measures to eliminate ragging should go beyond law, but it is equally reasonable to believe and argue that through the intervention of law, ragging can be effectively curbed and uprooted, as has been the case in countries like Canada and Japan. Moreover, relevant data on ragging is not at all available. Colleges and universities are reluctant to share their data with our research work, if at all they do have any. This creates a big hurdle for the researchers, field workers and analysts to analyze the problem for finding out some 'cause and effect relationship' which would also indicate the best possible solutions for necessary corrective and preventive measures.

Following are some of the suggestive measures to control and prevent the menace of ragging:

I. All state legislations and circulars should be replaced by a Central Legislation on ragging, whereby UGC should be made the main agency to devise ways of proper implementation of Supreme Court guidelines and provisions of such legislation. UGC should be given wide powers in this regard.

II. Educational Institutions and police should be reoriented regarding the existing laws and regulations. Tough action must be ensured against institutions which fail to put a curb on ragging. Accountability of management or concerned authority in the institution must be defined by law.

III. The authorities should make sure that whenever such introductory session has to be taken place it must be done in a decent, comfortable and friendly manner and that too in the presence of the authorities, faculty or the staff of the institution.

IV. A periodical review of the implementation of the guidelines needs to be

undertaken to gauge the efficacy of the same. The co-relation between the implementation of the guidelines and the reporting of incidents needs to be analyzed in order to determine whether the implementation of the guidelines is having a positive effect.

V. Along with de-affiliation of institutions and suspension of financial assistance, University Grants Commission (UGC) and other regulatory bodies should not hesitate from taking strict action against the erring authorities of institutes who fails to take necessary action in any incident of ragging.

VI. Installation of CCTV cameras within campuses should be made mandatory. The college authorities must get the CCTV cameras within the classrooms, corridors, playgrounds, canteens and other places within the institution as e preventive measure to control ragging.

VII. Government should initiate to build Anti-ragging activism in India. And for this purpose, it should also extend its help and support to bring advocacy, research and activism in this regard.

VIII. Creating mass awareness in the society regarding ill-effects of ragging and debunking the social myths and perceptions can do wonders. Involvement and participation of general public and NGO's can be an effective measure. Along with this, television, radio and print media like news papers, journals and magazines may be involved immediately. Anti-ragging campaigns and movements by students, parents and general public can also plays great role in curbing the menace.

IX. Short documentaries/ films on ragging should be prepared and screened in regional languages. Such movies should be relaxed from taxes by the government and the entertainment industry.

X. Effective anti-ragging measures should be made the part and parcel of the election manifesto of every registered political party and student welfare organizations.

Unless and until we act on the above issues seriously, educational authorities will continue to label ragging deaths as suicides due to academic pressure; majority of the ragging incidents will continue to go unreported; seniors and teachers will continue to believe that ragging is a healthy interactive and personality development exercise; media will continue to report only sensational stuff about ragging; parents, relatives and society will fail to understand the pain of the ragging victim

The definition of health as given by World Health Organization in the preamble to its

constitution says- 'Health is a state of complete physical, mental and social well-being and not merely an absence of disease or infirmity.' In the light of this definition, ragging is a health hazard as it disturbs all the parameters of health of the newcomers. There is the need to implement some immediate measures to curb the menace of ragging and in order to achieve the same, refreshing ideas from all the corners should bring forward to ponder upon. People should come forward and stand against this practice in any form, and the media agencies should pro-actively perform its role in must spreading awareness among the masses about the hazards of ragging. Let us hope that ragging should not be 'an annual tradition' anymore.

IS MEDIATION A BETTER SOLUTION FOR DISPUTES IN INTERNATIONAL SALE OF GOODS?

*Negar Yaghouti**
*Dr. Rajinder Kaur***

1. Introduction

Cross border transactions have developed rapidly in the current century due to business globalization and international cooperation that resulted in availability of markets. With such development, international commercial contracts that regulate the deals and determine the terms and conditions of transactions which took much more attention. Nowadays, international sale of goods contracts acts as the backbone of global trade. Disputes in international contracts of sale are caused by disagreements on price, mode of payments, carriage of goods and their late delivery, rejection of delivery, non-conformity of goods with contract, breach of contract, choice of law and jurisdictional issues.[1]When a dispute arises, the importance of a fair, speedy, cheap and competent dispute resolution is undeniable. Particularly in case of medium and small size companies, the burden of such expensive processes are heavier. Bigger companies can afford the expenses of submitting a case to the court of law and a series of appeals that results in the final decision of the highest court in the country. Sometimes due to their superior positions, they can even impress the final verdict and turn it to a favourable decision. In fact, lacking of an appropriate dispute resolution system could be a huge barrier in the way of development for international trade.

The traditional litigation has not responded positively to the need for fast and affordable dispute resolution system due to its dilatory and expensive procedure. That is why Alternative Dispute Resolution came to recognition as fast and potential procedure and to avoid national courts which were time consuming and expensive. Among ADR methods, Arbitration raised criticism. Practice has demonstrated that arbitration is not affordable and fast. Therefore, some of the prominent dispute resolution bodies like, the United Nations Commission on International Trade (UNCITRAL), the International Chamber of Commerce (ICC) and American Arbitration Association (AAA) that had their main emphasize on arbitration which commenced projects for exploring, examining and spreading other kinds of ADR

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[1] Morris. S. Rosenthal, "Arbitration in the Settlement of International Trade Disputes", *Law and Contemporary Problems*, Vol. 11, No 4, 1946, pp. 808-834.

including Mediation. This paper discusses common modes of dispute resolution in international sale of goods including litigation, arbitration and mediation.

2. International Contracts for Sale of Goods

Worldwide instruments only define a contract as internationally when the parties of these agreements come from two or more different states. In a wider definition, it can be said that contracts who either have significant connection with more than one state or involves a choice between the laws of different states are international. And unquestionably, not every contract for sale of goods is commercial. For example United Nation Convention on Contracts for the International Sale of Goods (CISG) excludes the consumer contracts and just considers a business to business contract as commercial. Moreover, there are some common features between international contracts. Firstly, they are from different states and different legal backgrounds. So the transaction value is usually higher and larger than domestic contracts. This matter of choice of law and jurisdiction however arises. Hence, these parties usually avoid going to court because of costly and time consuming process of national courts and they tend to resort it to a non-litigation alternative.

On the other hand, when we speak about the disputes in the international sale of good, the inseparable factor which is visible is to create uniformity and having a harmonized law. Efforts in harmonizing international sale of goods started in early 1920th and after a number of decades it resulted in several conventions and certain soft laws which includes CISG. There are two important institutions in harmonizing and unifying international sale of goods which are UNIDROIT AND UNCITRAL. Moreover, Along with these institutions, other international units also passed laws in the same way. One can take European Union as an example. To explain it further, these laws are substantial laws and they did not mention any specification about the procedure. Meanwhile they can also be used in litigation, arbitration or as a guiding legal system in mediation.[2]however, the most important legal instruments in this regard are:

2.1 United Nations Convention on Contracts for International Sale of Goods

United Nations Convention on Contracts for the International Sale of Goods (CISG) came to force in 1 January 1988. The UN Commission on International Trade Law, began working on unification of contracts for the international sale of goods in 1968 which was based on 1964 Convention on Uniform Formation of Contract and 1964

[2] John. Honnold, *Uniform law for international sales under the 1980 United Nations Convention*, Kluwer law international, The Netherlands, 2009

Convention on Uniform Sale of Goods. The convention is the most successful method in sales of goods and with 89 members from least developed to most developed countries which covers different geographical areas. It includes provisions about formation of contract and obligation for sellers and buyers.

2.2 UNIDROIT Principle of International Commercial Contract

The Principles of International Commercial Contracts (PICC) of 2010 are the set of rules which were prepared by UNIDROIT which is aimed to assist in the formation of harmonization and unification of international commercial contract law and moreover to serve as a model law for the national legal systems. Similarly there are three other editions as well. The first edition was published in 1994 and a second edition was published in 2004. The last and the latest edition was published in 2016 which contained issues of long-term contracts.[3]

2.3 Principles of European Contract Law

The Principles of European Contract Law (PECL) was prepared by representatives of each state of the European Union for a project which was supported by the European Commission and other organizations. The principles are cover a wide range of topics in contracts. They are in the form of articles with comments and cases to show how they are applied in different situations.

3. The Common Modes of Solving Disputes in International Sale of Goods Disputes

3.1 Litigation

When a dispute arises, litigation is an option which is picked up by every mind. If we talk about the international scenario, if the dispute arises, the first question is that which court has jurisdiction over the case. However, determining the court in the absence of a jurisdictional clause is again a complex process.

Meanwhile, every party tries to sue the alienated person in his domestic national of court of law and somehow if the court reject the case then the situation becomes difficult. Even submitting the case to a foreign court also is a costly and lengthy process. Also after determining the jurisdiction, the process of the court is again a long procedure. However appealing against the court again and again till the final

[3] James. Smith, "Mediation and the Principles of Unidroit" *Contractacion Internacional Commentarios A Los Principios Sobre Los Contratos Comerciales Internacionales DEL UNIDROIT*, Vol. 237, 1998, pp. 237-251.

decision is declared, somehow consumes lots of time.

In addition, many developing countries have a large number of cases pending unsolved in front of the courts that makes the process even lengthier. For example, in India, according to National Judicial Data Grid, till 01/03/2018 there are 26.4 million cases pending. There are around nine percent of these cases which are pending for more than 10 years. Such delay spoils the court efficiency. The reputation of efficiency is affected because of delay in solving the cases. It is well said that justice which is delayed is justice denied. Indeed, there is a direct relation between solving the cases on time and having desired goals for justice. Delay in solving the cases causes higher litigation cost. It also risks the evidentiary quality as evidences may spoil, or witnesses become unavailable. Such delay also decreases public trust and faith in the ability of the litigation system.[4]

3.2 Alternative Dispute Resolution

In response to insufficiencies of litigation, critics tried to find the alternative ways to settle these disputes. Alternative dispute resolution is the process of resolving disputes out of court by various modes. Two most common ways of ADR are arbitration and mediation.

3.2.1 Arbitration

International commercial arbitration is a private, judicial dispute resolution. It takes place by an autonomous third party and under the mutual willing of parties of international commercial contract. It is an alternative option instead of litigation and it is based on the terms of previously agreed contract. It is seen that most of the contracts contain a dispute resolution clause that determines the mode of dispute resolution. The terms of this contract regulate the details of the arbitration.

Arbitration can be ad hoc and conducted independently by the parties who determine forum, rules, arbitrators and the procedure or be institutional and organized by the tribunal. Usually tribunal provides sessions containing one or three arbitrators. Whereas the arbitrator conducts hearings, takes evidences and if there is any witness, calls the witness to session and after that arbitrator writes the award, which is legally binded and can rarely be appealed except under special circumstances.[5]

Arbitration is well-known for its cost and money saving features. But many

[4] Micheal. Heise, "Justice delayed: An empirical analysis of civil case disposition time", *Case W. Res. L. Rev.* Vol. 50, 1999, p 813.

[5] G. Chukwudi .Nwakoby and Charles. E. Aduaka, "Obstacles facing international commercial arbitration", *Journal of Law and Conflict Resolution,* Vol. 7, No 3, 2015, pp. 15-20.

practitioners complain that international arbitration is too complex and expensive presently. The process however, requires so many document which are to be produced. Some examples are like, written witness statements, which results in lengthy and expensive procedure.[6]According to Queen Mary 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, the main drawback of arbitration is cost. However, cost is not only about absolute costs but also about what type of cost is recoverable. Moreover, there is lack of universal method regarding the allocation of costs between the parties to an arbitration. There is no fixed definition for arbitration costs, but Article 40 (2) of the UNCITRAL Arbitration Rules (2010) gives a definition about arbitration cost and what else includes in it. It mentions that the arbitration cost includes fees of the its tribunal and the reasonable travel and other expenses incurred by the arbitrators, the reasonable cost of expert advice require by the tribunal, the reasonable travel and other expenses of witnesses, the legal and other cost approved by the tribunal, fees of appointing authority and secretary-general. Most of the arbitration institutions follow this definition about their expenses. The tribunal's fees is normally fixed by the institution according to the amount of dispute and institution's fee scale. So this explicit that, the higher amount of claim means higher cost of arbitration. Moreover, a look on three important arbitration centres reveals that the cost of arbitration is not budget friendly. Arbitration cost (administration fee and arbitrator's fee) for 10 million dollar disputes in the international Chamber of commerce, [7]Arbitration Institute of the Stockholm Chamber of Commerce[8], Singapore International Arbitration Centre[9] according to their official websites are as follows:

Table 1: Comparative cost of arbitration in ICC, SCC and SIAC

Institution	One arbitrator	Three arbitrators
ICC	$170799	$397367
SCC	€152605	€283015
SIAC	$134,853.43 (SGD)	$352,191.59 (SGD)

6 Micha. Buhler, "Awarding Costs in International Commercial Arbitration: an Overview", *ASA Bull,* Vol. 22, 2004,p. 249.

7 International Chamber of Commerce, Cost Calculator Available *at,* http://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/ (last accessed 28 September 2018)

8 Arbitration Institute of the Stockholm Chamber of Commerce, Calculator, Available at *http://sccinstitute.com/dispute-resolution/calculator/*(last accessed 28 September 2018)

9 Singapore International Arbitration Centre, fees Calculator, Available at: *http://www.siac.org.sg/component/siaccalculator/* (last accessed 28 September 2018)

Additionally, Arbitration Process may take its desired time for months or even years[10]

3.2.2 Mediation

Mediation is a flexible and non-binding mode of dispute settlement. It takes place along with the assistance of a neutral third party. Mediation is usually referred to as an interest based process in contrast to right based process because it helps the parties to clarify their interests. Moreover, it helps parties to improve their communication. It also increases the feeling of awareness among parties and similarly gives them plenty of flexibility and creative options to settle their disputes.[11]It is undoubtedly a win-win process that tries to give satisfaction to both the parties. It is confidential and the parties cannot use this information which is revealed in the process in other tribunal or the courts. However, an interesting point about mediation is that it is economical and fast. The cost of mediation can be divided into three parts: mediation institution's fees, mediator's fees and parties direct cost, such as travelling cost. Take an example of International Chamber of Commerce, which charges parties $3000 for filing fee and $20000 as an administration fee for 10 million dollars dispute, plus the hourly fees of mediator. Apart from that the average hearing time for mediation of international disputes is normally for one or two days. Hereby table 2 shows the mediation fees in International Chamber of Commerce[12], Arbitration Institute of the Stockholm Chamber of Commerce[13] and the London Court of International Arbitration[14]. This details are according their official websites.

Table 2: Comparative costs of mediation in ICC, SCC and LCIA

ICC	$3000 filing fee	$20000 Administration fee	$400 to $600 Mediator fee per hour
SCC	6450€ Other expenses	35000 €	4000€ mediator's fee for preparation of the case 4000€ mediator's fee each day
LCIA	£750 Registration fee	£225 registrar fee per hour £100 to £150 other personnel	£450 Mediator fee per hour

10 Micheal. P. Malloy, "Current Issues in International Arbitration", *Transnat'l Law*., Vol. 15, 2002, p. 43.

11 S. I. Strong, "Beyond International Commercial Arbitration-The Promise of International Commercial Mediation", *Wash. UJL & Pol'y*, Vol. 45, 2014, p. 10.

12 International Chamber of commerce Available at: *http://iccwbo.org/dispute_services/mediation/costs-payment/ (last* accessed 10 October 2018)

13 Arbitration Institute of the Stockholm Chamber of Commerce, Calculator, Available at: *http://sccinstitute.com/dispute-resolution/calculator/(last* accessed 01 October 2018)

14 The London Court of International Arbitration, Schedule of Cost, Available at: *https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx* (last accessed 01 October 2018)

4. International Mediation

Modern mediation came into recognition in 1970s in the US, 1980s in Australia, Canada and New Zealand and in 1990s in European civil law[15].Number of international institutions began to promote mediation in international disputes which included: The United Nations Commission on International Trade Law (UNCITRAL) which was found in 1966 is one of the main international institutions who supports the international commercial mediation. UNCITRAL which has published several instruments to promote immediate and inexpensive dispute settlement methods. These instruments however, include the Conciliation Rules (1980) and Model Law on International Commercial Conciliation (2002). It has also introduced the Convention Enforceability of Settlement Agreements Resulting from International Commercial Mediation (2014).

World Intellectual Property Organisation (WIPO) commenced an Alternative Dispute Resolution which was in the form of Arbitration and Mediation Centre in 1994. The entire focus of centre is to resolve the commercial issues which are arising out of intellectual property rights.

Another considerable step in establishing mediation in Europe is the European Union Directive 2008/52/EC of 21 May 2008, on certain aspects of mediation in civil and commercial matters[16].As a repercussion of this Directive, the Czech Republic initiated the Mediation Act No. 202/2012 Coll which came in to force on 1st September 2012.

In France the Decree No. 2012-66 on the 20th of January 2012 on amicable resolution of disputes and the Ordinance No. 2011-1540 on the 16th of November 2011 which transposed the Directive who were enacted, to insert a new chapter on out-of-court dispute resolution to the French Code of Civil Procedure. Luxembourg, on the 24th of February 2012, introduced a legislative framework for mediation in civil and commercial matters into its New Code of Civil Procedure. Moreover, Spanish Law on Mediation in Civil and Commercial Matters (Ley 5/2012) was approved on the 6th of July 2012. However, the 2nd Chamber of the Dutch Parliament adopted Act 33 320 which aimed to implement the Directive on the 6th July 2012.[17] These are the few example which showcased the endeavour of governments to support and promote

15 Nadja. M. Alexander, *Global trends in mediation*. Kluwer Law International BV, 2006.

16 AIA European Network of Mediation Centres, available at: *http://https://www.arbitration-adr.org/network/AIA%20European%20Mediation%20Network_Booklet.pdf* (last accessed 03 October 2018)

17 *Ibid.*

Mediation. In practicing as well, the usage of mediation has ameliorated drastically in recent years. Additionally, holding an example of Singapore Mediation Centre which held $2.7 billion in disputed sums in 2017. 538 cases were filed at SMC in 2017 which has showed the proliferation to 8 percent from 2016. Hence, Out of 538 cases, 465 cases mediated which illustrates the 15 percent rise from 2016.[18]

Apparently, another example is China. According to The China International Economic and Trade Arbitration Commission (the CIETAC) in 2016 the Annual Report on International Commercial Arbitration in China was 121,527 cases were resolved through mediation or conciliation in 2016, which were about 58% of the national total caseload. The quantity has escalated to 17% by 64,868 cases as compared to 2015 statistics which were 56,659 cases who settled through it, however this number was 41% of the national total caseload in 2015.[19]

5. Why Mediation is a Better Option for the International Sale of Goods?

International traders as an unwritten rule do not intend to argue with their business partners. They just want to do business and garner profit. However, sometimes the contracts go sour and the trader abruptly faces new and unacquainted problems. The buyer, for example, may fail to pay for goods or may decline to accept delivery. whereas the seller may send low-grade, defective or nonconforming goods, or may sell the promised goods to another buyer in a higher price. Similarly, these are the situations why parties fail to perform in a well-timed manner. In these situations the basic demand of parties is simple. Here they just want to enforce other parties to perform his obligations or they just want to avoid their own performance. This means they want to litigate or arbitrate. However arbitration and ligation processes are complex and burdensome.

5.1 Obtaining Jurisdiction Over a Outlander Defendant

In international contracts of sale when a dispute arises, the first thing to decide is to find an appropriate forum that has jurisdiction over a case. For example an Indian party and American person are in a dispute. If an Indian party prosecutes the case in its county court, or American party starts suing the person in India, all of the responsibility for American party will be with the foreign counsel which is familiar with the Indian court procedure and laws. Moreover, this process requires the foreign

[18] Record year for mediation centre in 2017, available at: *https://www.straitstimes.com singapore/record-year-for-mediation-centre-in-2017* (last accessed 03 October 2018)

[19] Annual Report on International Commercial Arbitration in China, available at: *http://cietac.org/Uploads/201801/5a54703d596e1.pdf* (last accessed 03 October 2018)

party to pay the expenses of foreign counsel, translation of documents and other charges that are costly. On the other hand, if one of the parties wishes to sue the person in the USA, the process will be the same. Plaintiff should establish the jurisdiction of the person who may be anywhere in the world. Subject jurisdiction usually makes no problem because the issue is usually the breach of contract. The main difficulty is jurisdiction against the foreign defendant person. Similarly, the plaintiff should demonstrate, that forum law allows the exercise of personam jurisdiction over the defendant and also exercise such jurisdiction in not contrary with the guarantee of due process of law. Moreover, the process will also take so much time. Perhaps, another problem in international sale of goods is Forum shopping. It is when the lawyer tries to resort to a forum where it is most favourable for his client. Despite the various efforts to avoid it, it still happens in many jurisdictions.

5.2 Choosing the Appropriate Law

An essential query for any national court or arbitral tribunal is choosing the proper law for resolving international commercial issues. The arbitral panel or courts may have several options available for it. Firstly, when a seller or buyer are domiciled in two different countries, either of their laws may be applicable to the issue. However, If parties negotiate and execute their contract in a third neutral jurisdiction, the law of that country is the choice. Also many parties arrange for the contract to be performed in a fourth country. Law of performance of contract, sometimes may be chosen as a proper law. In such cases resorting to a foreign law requires to explore it in a foreign language. Translating statute, case laws and scholarly writings and hiring legal experts need both time and money. Sometimes understanding the true content of law is challenging and last but not the least they may surprise with unexpected outcome of a case under the applicable law.

5.3 Enforcing Judgement or Award in Other Countries

The desire of any legal procedure is to seek final judgment attaining relief. But a judgment is worth only if the court of the country where the defendant has property or other assets give effect and enforce the foreign judgment. Meanwhile, in the absent of any treaty between countries, the enforceability of foreign judgment universally is regarded as a matter of domestic law and the courts hereby are free to apply the judgment. Moreover, the rules relating to enforcement of foreign judgments vary from country to country and similarly, there is no universal principle about it unless that court will enforce it only on the basis of reciprocity. So, most of the times

parties are required to seek a local judgment based on the foreign verdict which can be effective under local law and procedure. Whereas there is no need to mention that double process of acquiring judgment in foreign and local courts which is not only costly but time consuming also. In addition there is a risk of non-enforceability of judgment as well.

In contrast with such complexities, mediation offers a shortcut. Mediation avoids such lengthy processes of choosing jurisdiction and resorting to different forums. It's however, based on mutual and voluntary intentions of parties for solving their problem and protecting their interest and reputation. Also, it is a confidential solution for parties that avoids publicity.[20]Similarly it allows parties to include seller, buyer and third party to sit around a table and speak face to face. For example, the seller does not have the financial means to settle the dispute and provide the goods. So face to face communicating may solve the problem by cooperating with the buyer. Indeed, it is a non-hostile process that tries to improve and protect the relationships for a long time. Filled with the wide range of creative solutions, gives the freedom of mind to the parties. Moreover, the responsibility of the settlement is on their shoulder and they try to communicate more to solve the issue. However, the time and cost effective features of mediation are apparent.[21]

6. Conclusion

International sale of goods is the cornerstone of international trade. Any effort used for reducing barriers in international sale of goods helps in the expansion of trade. One of these barriers is the dispute settlement mechanism in international commercial trade. While litigation is costly and time consuming, whereas Alternative Dispute Resolution can be a proper option to avoid long waiting behind a backlog of cases in courts. On the other hand, Arbitration as the most popular mode of ADR which has lost its speed and time saving features due to the soaring number of cases. In the commercial field, time is money and mediation can be the fastest option in solving disputes with high rate of success. Legal systems should give more awareness in this regard and give priority to mediation which acts as the default option for dispute settlement.

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20 Christian. Bühring-Uhle, Lars. Kirchhoff and Gabriele. Schere. *Arbitration and mediation in international business,* Kluwer Law International, The Netherlands, 2006)

21 Michael. A. Almond, "Settlement of International Commercial Disputes", *NCJ Int'l L. & Com. Reg.* Vol. 4, 1978, p 107.

REJUVENATION OF MENTAL HEALTH LAW IN INDIA: SOME REFLECTIONS

Rangaswamy D.*

1. Introduction

The consanguinity between individual and State constitutes a material component of every political system.[1] In a democratic form of government, its severity is so massive.[2] As stated by *Dr. A.P.J. Abdul Kalam:*

> "Every citizen in the country has a right to live with dignity; every citizen has a right to aspire for distinction. The availability of a large number of opportunities which one can resort to with just and fair means in order to attain that dignity and distinction is what democracy is all about. That is what our Constitution is all about, and that is what makes life wholesome and worth living in a true and vibrant democracy."[3]

Whereas, the dignity of human life demands an approach that transcends inequalities and disabilities and attracts the operation of correlative immunity to counterbalance the deficiency.[4] Furthermore, it is asserted and recognized by the international

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1 *See generally,* Quentin Skinner. *Liberty Before Liberalism* . New York : Cambridge University Press, 2012; Richard H.Fallon. "Strutural Limits on State Power and Resulting Individual Rights ." Richard H.Fallon (ed.), *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice,* Cambridge University Press, Cambridge, 2013,pp.301-314; Jerome Neu. "Plato's Analogy of State and Individual: The Republic and Organic Theory of the State ." *Philosophy*, Vol.46, No.177, June 1971, p.238-254; John Haldane. "The Individual the State and the Common Good." *Social Philosophy and Policy*, Vol.13, No.1, December 1996, pp.59-79; Alisher Faizullaeu. " Individual Experience of States ." *Review of International Studies*, Vol.33. No.3, June 2007: pp.531-554; Lucian W.Pye. "The State and Individual - An Overview Interpretation ." *The China Quarterly* , Vol.127, August 1991, pp.443-446.

2 *See generally,* Martin Rhohneimer. "Fundamental Rights, Moral Law and Legal Defernse of Life in a Constitutional Democracy." *AM.J. of JURIS*, Vol.43. No.1, 1998: 135-183; Rober L.Calhoun."Democracy and Natural Law ." *AM.J. of JURIS*, Vol.05, No.01, 1960: 31-69; William A. Galston. "Expressive Liberty and Constitutional Democracy: The Case fof Freedom of Conscience." *AM.J of JURIS*, Vol.48, No.01, 2003: 149-177; Shinya Sasaoka & Katsunori Seki. "Democracy and Quality of Life in Asian Societies." *Japnese Journal of Political Science*, Vol.12, No.03, 2011: 343-357; Amaney Jamal & Irfan Nooruddin. "The Democratic Utility of Trust: A Cross National Analysis ." *Journal of Politics* , Vol.72, No.01, January 2010: 45-59.

3 Kalam, A.P.J, "Evloution of Happy Life." *NUJS Law Review*, Vol.04, No.03, 1960, pp.31-69. Also *see also* Mark A.Graber, "Constitutional Democracy, Human Dignity, Entrenched Evil." *Pepperdine Law*, Vol.38, No.05, 1960, pp.889-902; Jordan J.Paust, "International Law, Dignity, Democracy and the Arab Spring."*Cornell International Law Journal*, Vol.46, No.01, 2013, pp.1-19; Josiah Ober, "Democray's Dignity."*American Political Sicence Review*, Vol.106, No.04, November 2012, pp.827-846.

4 P. Ishwara Bhat Paper presented at National Workshop on the Rights of Person with Disability, the Older and the Sick Persons, organized by Department of Studies in Law, University Of Mysore and Karnataka Institute for Law and Parliamentary Reform, Bangalore, held on 21st- and 22nd March 2008 at Mysore.

community that all human beings are born free and equal in dignity and rights.[5]

Health is a dynamic essential element required for life and dignity of individual. It is *sine qua non* of every human being to live with dignity and to aspire for distinction It can substantially impact the quality of life of the individual. It could determine developmental path of the citizen. Due to its immense importance, every individual wishes to take care of health and to enlarge the conducive environment for health provisions. The promotion of health is of fundamental value in and of itself. It is a vital public good and a basic human right.[6]International[7] as well as regional[8] documents and constitutional provisions of the various countries[9]on human rights reflects impressive and vibrant scope of this right. Unwavering commitment of the State to Right to Health is further buttressed by judiciary through various verdicts.[10]

Among various dimensions of health, the Mental Health represents a critical

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5 *See Universal Declaration of Human Rights*, G.A.Res.217A,U.N.Doc.A/810 (12 December 1948).

6 Ministry of Health & Family Welfare (GOI), Report of the National Commission on Macroeconomics and Health (August 2005), p. 3.

7 *See* Art. 25 of *Universal Declaration of Human Rights, 1948* ;Art.5 (e) (iv) of *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965; Art. 12 of *International Covenant on Economic, Social and Cultural Rights*, 1966 G.A. RES. 2200, U.N. Doc. A/6316 (1967); Art 11 (1) (*f*), Art. 12 and Art. 14 (2) (*b*) of *the United Nations Convention on the Elimination of All Forms of Discrimination against Women,* 1979 G.A. Res. 34/180, U.N. Doc. A/34/180 (September 1981): Art. 24 of *the Convention on the Rights of the Child, 1989* G.A. Res. 44/25, U.N. Doc. A/44/736 (1989),; Art. 28, Art. 43 (*e*) and Art. 45 (*c*) of *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,* 1990, A/RES/45/158, 2220 UNTS 3(July 2003); Art. 25 of the *United Nations Convention on the Rights of Persons with Disabilities,* 2006. A/RES/45/158, 2515 UNTS 3 (May 2008)

8 *See* Art. 10 of the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Art. 11 of the American Declaration of the Rights and Duties of Man ; Art. 11 of European Social Charter of 1961; Art. 16 of the African Charter on Human and Peoples' Rights of 1981.

9 *See* Sec. 27 of the *Constitution of South Africa, 1996;* Art. 21 and Art. 47 of the *Constitution of India, 1950;* Article 42 of the *Constitution of Ecuador, 1998;* Art. 2, Sec. 15 of *Philippine Constitution*, 1987; Art. 25 of the *Japanese Constitution, 1946*; Preamble of the *French Constitution of 1958*.

10. *See Paschim Bangal Khet Mazdoor Samity and Others* v. *State of W.B. and Another*.; *Pt. Parmanand Katara* v. *Union of India and Others*, (1989) 4 SCC 286; *Consumer Education and Research Centre and Others* v. *Union of India and Others*, (1995) 3 SCC 42; *Mohd Ahmed* v. *Union of India & Ors.*, W.P (C), 7279/2013 (Just because someone is poor, the State cannot allow him to die. In fact, Government is bound to ensure that poor and vulnerable sections of society have access to treatment for rare and chronic diseases)**;** *But also See, State of Punjab & Ors.* v. *Ram Lubhaya Bagga*, (1998) 4 SCC 117; *Confederation of Ex servicemen Associations and Ors.* v. *Union of India & Ors*., AIR 2006 SC 2945; *T. Soobramoney* v. *Minister of Health (Kwazulu-Natal)* (Case CCT 32/97); *Niteki* v. *Poland* (Application No. 65653/2001) (Availability of finance is a relevant factor in ensuring right to health).

indicator of human development. It serves as a key determinant of well-being. It determines quality of life and hope.It has intensive impact on a range of developmental outcomes. It stabilizes social security and prosperity.[11]The PWMD are frequently the most vulnerable group of the society. They are, on many occasions, exposed to severe human rights violations and deprived of minimum services and dignity. Therefore, mental disability or mental illness is so pervasive among all other disabilities.[12]Due to jaundiced view of the society, they have long been stigmatised and marginalised. Therefore, the health status of PWMD is at great risk and it has become immense for jurisprudence, policy makers and enforcement authorities.

Paradoxically, the present legal system which suppose to wipe out the tears of this community, proved its infertility in addressing the various challenges associated with PWMD. There is invariable need of standardisation and implementation of preventive as well as due care mechanism to promote human rights of PWMD.[13] Realising the greatest importance of the issue, the World Health Assembly has adopted Comprehensive Action Plan – 2013-2020 through the consultations with members' States, civil society, and international partners.[14] In this context, India being a poor profiled country in terms of mental health has accelerated a comprehensive and multi-sectoral approach with due emphasis on promotion, prevention, treatment, rehabilitation, care and recovery of PWMD. Though, the country's status of Mental Health moves up on account of various programs such as National Mental Health Program (NMHP),[15]District Mental Health Programme

11 The World Health Organization has identified six dimensions of the health. They are as follows; Effective delivery system of the health provisions; efficient use of available resources to intensify the health provisions; designing the system according to the preferences and aspirations of the people; non-discriminatory practices in distribution of health provisions; maximisation of safety and reduction of risk. WHO, Quality of Care – A Process for Making Strategic Choices in Health Systmes (2006), pp.9-10.

12 According to Article-1 of Convention on the Rights of Persons with Disabilities, "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." *See Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (2006).

13 Michael Dudley, "Derrick Siove And Fran Gale, Mental Health, Human Rights And Their Relationship: An Introduction ," Derrick Siove and Fran Gale Michael Dudley (eds), Oxford Unversity Press,.U.K, 2012, pp.1-49, pp.1-2.

14 *See* WHO, Comprehensive Mental Health Action Plan 2013–2020, WHA 66.8, Agenda item 13.3 (27th May 2013), p. 3.

15 National Mental Health Programme (NMHP) being a striking step of the government of India has set new standards for the health system of the country. The scheme has assuaged the feelings of the downtrodden section of the society in availing the health care system of the country. The prime motto of the programme is to extend the mental health care system to the local and underprivileged sections of the society. The availability and accessibility of the mental health care provisions are elevated to the greater height. The scheme has made strong sounds for the participation of community in rejuvenating mental health system.

(DMHP),[16] in addressing crucial issues such as general hospital psychiatry units, family support programmes, public mental health education, research on mental health, human rights protection of PWMD, rehabilitation of PWMD etc., the performance of the country is not up to the global standards. In this backdrop of complexity of Mental Illness (MI)and PWMD,the present paper is an attempt to review the present legal system on Mental Health in the backdrop of inadequacy of the system and recent efforts made by the government to address the same.

2. Mental Health- Conceptual Analysis

'Mental' is a concept relating to or existing in the mind.[17]It pertains to intellectual, emotional, or psychic, distinguished from bodily or physical.[18]It signifies the ability to understand the nature and effect of an act of a person. In fact, an individual will be a productive and fruitful to the society if he free from mental disorder. As *K.P., Neeraja* work reveals

> "Mental Health' is a sound, efficient and controlled emotions. Body and mind are working together (Psycho-somatic unit) efficiently and harmonious manner, whose behavior is determined in integrated way by both physical and emotional factors. If a person is well adjusted, he had good physical health and desirable social and moral values."[19]

Mental health is highest benchmark of physical, mental and psychological status of the individual. Human experience of socio-cultural developments, political, ecological and spiritual conditions is the indispensible facets of the mental health. Substantial part of the mental health provisions are dealt with under cultural and community practices. These community services are weighty factors in determining the availability and quality of the mental health provisions.[20]

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16 Ramghulam Rajdan *et al*. "District Mental Health Proramme in India." *Delhi Psychiatry Journal*, Vol.12. No.2, October 2009, pp.202-205.

17 William Anderson dictionary define 'mental' to mean mind which denotes – (a) the rational faculty, or the understanding; (b) the state of the mental faculties (c) inclination, desire, purpose, intent (d) a memory, recollection. William Anderson, *A Dictionary of Law – Words, Phrases and Maxims,* Chicago: T.H.Floip and Company Publishers, 1889, p.635.

18 H.C.Black, *Black's Law Dictionary,* St.Paul, Minn: West Publishing Co., 1968, p.1137.

19 K.P.Neeraja, *Essentials of Mental Health and Psychiatric Nursing,* New Delhi: Jaypee Brothers Medical Publishers, 1968, p.3.

20 K.C.Weare, *Promoting Mental, Emotional and Social Health: A Whole School Approach,* London: Routledge, Falmer (2000). quoted in; Michael Dudley *at el* , *Supra* Note 13, at p.3.

According to recently adopted Mental Health Care Act, 2017[21] (hereinafter MHA,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, 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.

The MHA, 2017 has no specific provision on PWMD. Nonetheless, it is noteworthy that the Act has defined the term PWMD to its true substance. The constituent elements of the PWMD are ingrained in its logical sense in the backdrop of the international standards. The Act has made worth mentioning effort to explain the mental illness in its vast dimension. The level of the equilibrium of the MHA, 2017 so as to align the international and national standards in determining the mental illness is inimitable. The MHA, 2017 has made universal centric definition of mental illness rather individual centric definition.[22] The MHA, 2017 has obligated central government to reconcile international and national standards in assessing the mental illness and accordingly notify the same.[23]

The MHA, 2017 has thinned out the role of political, economic and social elements in formulating mental illness. The cultural, racial or religious membership of the patient should not be the criteria in encapsulating mental illness of a person.[24] Whereas, the moral, social, cultural, political values and religious believe should not come in the way of contemplation of the mental illness.[25]Apart from these, the practices of the health establishment giving much importance to the past treatment, hospitalisation[26] and unsound mind[27] of a person in considering his mental wellbeing is prohibited under MHA, 2017.

It is crystal clear from the intention of MHA, 2017 that 'established standards' should be the governing test to determine mental illness of a person and to avail health protection under MHA, 2017. It is significant that the human right jurisprudence is given ample opportunity. The new MHA, 2017 has categorically

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21 The Mental Health Care Act, 2017 Sec 2(1) (s). (hereinafter as MHA, 2017)

22 For example MHA, 2017 stipulates that "No person or authority shall classify a person as a person with mental illness, except for purposes directly relating to the treatment of the mental illness or in other matters as covered under this Act or any other law for the time being in force." *Id* Sec. 3(2).

23 *Id.,* Sec. 3(1)

24 *Id.,* Sec. 3(3)(a)

25 *Id.,* Sec. 3(3) (b)

26 *Id.,* Sec. 3(4)

27 *Id.*

and in plain terms says that the patient, who wants to get human rights benefits of the MHA, 2017, should fit himself within the definition of the MHA, 2017. Notwithstanding, it is equally important to note that the global standards impacted by the divergent global practices should not ignore local socio-economic conditions of the country. There is a vigilant role to be played by the government in setting standards for mental health in the backdrop of the global standards.

3. Mental Ill-Health- Gravity of the Problem

It could be seen from the abundant amount of the literature that mental illness is disturbing factor for healthy development of individual, society and nation. There is no any other basis for the individual to aspire any accomplishment without health in general mental health in particular. Mental health seems to lay stress physical, mental, psychological and inters personal skills of a person.[28]Growing consensus of disability advocates that the most pressing issue faced globally by persons with disabilities is not their specific disability, but rather, their lack of equitable access to resources such as education, employment, health care and the social and legal support systems which results in persons with disabilities having disproportionately high rates of poverty.[29]

Similarly, the nexus between Mental Illness and its devastating impact on human rights has meaningfully been explained by significant amount of literature.The scope of the human rights approach for PWMD is rightly projected by the WHO in following words

> "In light of the widespread human rights violations and discrimination experienced by people with mental disorders, a human rights perspective is essential in responding to the global burden of mental disorders. The action plan emphasizes the need for services, policies, legislation, plans, strategies and programmes to protect, promote and respect the rights of persons with mental disorders in line with the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child and other relevant international and regional human rights instruments."[30]

Similarly, Gaston P Harnois and Benedetto Saraceno opined that:

> "Persons with intellectual disabilities are frequently the most vulnerable group and,

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28 Niraja K.P., *Supra* note 19 at p. 3.

29 United Nations, Disability and Mellenium Development Goals- A Review of the MDG Process And Strategies for Inclusion of Disability Inssues in Mellennium Development Goal Efforts *(*2011), p.1.

30 WHO, Mental Health Action Plan 2013-2020. (2013), p.7.

> on many occasions, are exposed to human rights violations and deprived of minimum services and dignity. These persons are also the most likely to be secluded in large institutions, unable to access basic health and educational services, and excluded from ordinary social relations."[31]

It is apparent from the contemporary practices that there is a imperative need of protecting PWMD against societal stigma and social exclusion. It is entirely within the realm of the health system to protect this marginalised section against misconceptions and malpractices.[32]Besides, WHO identified that:

> "People with mental health conditions meet the major criteria for vulnerability as identified by an analysis of major development stakeholders' projects and publications. They are subjected to stigma and discrimination on a daily basis, and they experience extremely high rates of physical and sexual victimization."[33]

There is no doubt that the opportunities of PWMD to be active part of the mainstream of the society are very limited. They are still traversing to get across agony of mental illness. The occasions of the PWMD finding and keeping the friends are very thin. They are side-lined and ignored by their own relatives and family members. It is eminently desirable that the employment opportunities could be a lucrative source in transforming the status of the PWMD. However, statistics suggested that they are deserted by the employers and their services are depreciated. The matrimonial life of the PWMD is also tragic. Unusual practices are amply practiced by the intimate or sexual partners of PWMD. The limited number of the PWMD who are part of employment, training and education are inappropriately treated.[34]The share of mental illness, according to WHO, in the total percentage of the global ill-health is significantly increasing. According to its report, by 2030 depression will be a leading cause of disease. It is a serious concern that the low and middle income countries are most vulnerable to these unconventional developments. The large amounts of the PWMD are located in these countries.[35]

In Indian subcontinent also, according to P.C. Sikligar persons with disabilities are

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31 WHO, ATLAS: Global Resources For Persons With Intellectual Disabilities. Atlas, World Health Organisation (2007), p. 9.

32 WHO, Mental Health And Development: Integrating Mental Health into All Development Efforts Including MDGS. UN (DESA) - Who Policy Analysis, (September 2010), pp.1-2

33 WHO, Fact Sheet N.220, (2007) *Cited in*; Routledge (Nina Rovinell Hellar & Allex Gitterman ed, 2011). Gitterman *et a*l, *Introduction to Social Problems and Mental Health/illnesh,* London: Routledge (2011), p.9.

34 Thornicroft G *et al*. "Global Pattern of Anticipated and Exprerienced Discrimination against People with Schizophrenia." *Lancet*, Vol.373. No.9661, 2009, pp.408-415, p.410.

35 WHO. Secretariate report on 65th World Health Assembly, Global Burden of Mental Disorders and the Need for a Comprehensive, Co-ordinated Response from Health and Social Sector at Country Level 1, A65/10, Provisional agenda item 13.2 (March 2012).

not able to perform up to their potential due the barriers created against them by the society. According to him the major impediments for persons with disability in India are environment barriers, institutional barriers, attitudinal barriers and information barriers.[36]Untreated patient in the community is a major area of concern in India. As it is revealed from R. Srinivasa Murthy study[37] on mental health status, there are abundant studies to show this unfulfilled situation.[38] It is further evident in the WHO, 2011 report that the country is failed to provide adequate statistics relating to community treatment available in the country.[39]

As explored by Murthy, through various studies[40] undertaken to review the mental hospital and services of PWMD '38% of the hospitals are not patient friendly and many of the hospitals are located in old buildings. The structure of the buildings, instead of creating sense of hope for the better health, psychologically annoying the persons admitted to the hospitals. The study also reveals that many of the hospitals lack adequate beds. There is a remarkable disparity between total number of patients and availability of beds in the hospital. Large amount of patients in rural area are relied upon the local hospitals due to their ignorance on hospital facilities. The governments are also neglected to ensure adequate facilities for the PWMD in these remote areas. These local hospitals meant for general health completely immature to care of the health issues of the PWMD. Those seeking help will not continue to take help unless it is available close to their place of residence and most people in rural areas will not travel long distances to seek help. The financial and inconvenient modes of transportation to travel from rural area to urban hospital have further worsened the conditions of the PWMD.

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36 P.C.Sikligar, " Institutional Arrangements for Upliftement of Persons with Disabilities- A Study in North India." *IASSI Quarterly*, Vol.23, No.04, 1960, pp.67-80, p.68.

37 *See* R.Srinivasa Murthy, "Mental Health Initiatives in India (1947 – 2010) ." *National Medical Journal of India*, Vol.24, No.02, 2011, pp.98-107.

38 *See* Janardhan A. & Raghunandan S, *Care Givers in Community Mental Health – A Research Study,* Bangalore: Basicneeds (2009); V.Ramalakshmi *at el*., " Admission into a Residential Facility for Chronic Mentally ill." *Indian Journal of Psychiatry*, Vol.14, No.1 & 2, 1998, pp.37-40; R.Padmavati *et al*., *"Schizophrenic Patients Who Were Never Treated—A Study In An Indian Urban Community*." *Psychol Med*, Vol.28, No.5, 1998, pp.1113-17; T.N.Srinivasan *et al*., *" Initiating Care for Untreated Schizophrenia Patients and Results of One year follow-up*." *Int.J.Soc Psychiatry*, Vol.47, No.2, 2001, pp.73-80; M.Philip *et al.*, *" Influence of Duration of untreated Psychosis on the Short-term Outcome of Drug-free Schizophrenia Patents*." *Indian J Psychiatry*, Vol.45, No.3, 2003, pp.158-60.

39 *See* WHO, Mental Health Atlas- Report On India, (2011).

40 National Human Rights Commission, Quality Assurance in Mental Health, (1999) & D.Nagaraja & Murthy P (eds), *Mental Health Care and Human Rights,* New Delhi: NHRC, 2008.

In the backdrop of various research works,[41] the study undertaken by Mr. Murthy explores the multiplicity of the problems associated with District Mental Health Programs (DMHP) such as limited development, lack of coordination limited capacity for implementation at the state level, inadequate technical support from professionals, lack of emphasis on creating awareness in the community, lack of mental health indicators and lack of monitoring are the major obstacles for the performance of the DMHP.[42]

World Health Organization, 2011 report reveals that there is no officially approved Mental Health Policy in India and Mental Health is specifically mentioned in the general health policy. The report further reveals that the country's expenditure on Mental Health is 0.06 % of the total health budget which is comparatively very meagre.[43] The Mental Health outpatient beds available in the country are 4000 which constitute 0.329% per 100,000 populations.[44] The vital information regarding availability of Mental Health facilities such as facilities for children and adolescents, day treatment facilities, community residential facilities, are not available in India. The crucial data with respect to access to Mental Health Care such as persons treated in mental health outpatient facilities, persons treated in Mental Health day treatment facilities, admissions to psychiatric beds in general hospitals, persons staying in community residential facilities at the end of the year are not available in the country. [45]

4. Mental Health – Legal Regime

The health being a basic accelerator of the human development has been given remarkable consideration various international,[46] regional instruments[47] and constitutional documents.[48] The prosperity and health security of the PWMD could

41 Anant Kumar, " District Mental Health Programme in India: A Case Study." *Journal H & D,* Vol.1, No.1, 2005, pp.24-35; P.Kumari *et al*, " District Mental Health Programme – A Critical Appraisal."*Indian J Soc Psychiatry,* Vol.23, No.1, 2007, pp.88-96; K.Krishnamurthy *et al*, " District Mental Health Programme – Role of Medical Officers." *Indian J Psychol Med,* Vol.26, No.1, 2005, pp.23-27; Jain S & Jadhav S, " Pills that Swallow Policy: Clinical Ethnography of a Community Mental Health Programae in Northern India." *Transcult Psychiatry,* Vol.46, No.1, 2009, pp.60-85; Waraich B.K *et al*, "Decentralisation of Mental Health Serivces under DMHP."*Indian J Psychiatry,* Vol.45, No.1, 2003, pp.161-65; Jacob K.S , "Community Care for People with Mental Disorders in Development Countries: Problem and Possible Solutions." *Br J Psychiatry,* Vol.178, No.4, 2001, pp.296-98; Jacob K.S *et al*., "Mental Health Systems in Countries : Where are we now?." *Lancet,* Vol.370, 2007, pp.1061-77.

42 R Srinivasa Murthy, *supra* note 37 at p. 105.

43 *See* WHO 2011, *Supra* note 29.

44 *Id.*

45 *Id.*

46 *See Supra* Note 7

47 See *Supra* Note 8

48 *See Supra* Note 9

be gauged and guaranteed by the way particular legal system views and cares for this ill-fated people.[49] The dynamic role of law is a crucial strategy in the planning, execution and monitoring of healthcare facilities of Mental Illness. The unseverable affinity between legal system and disability has rationally been viewed by Justice Krishna Iyyer as follows, 'the core truth that there is personhood in all the 'disabled' is the foundational faith of the rule of law.'[50] In fact, since time immemorial considerable amount of interest has cautiously been paid by rulers and legal system on this issue. The ancient Indian jurisprudence says that 'the King should look after the welfare (*yogakshema*) of the helpless, the aged, the blind, the cripple, lunatics, widows, orphans, those suffering from diseases and calamities, pregnant women, by giving them food, lodging, clothing and medicines according to their needs.'[51]Beotra B.R writes that the State responsibility towards mentally ill-health people can be traced with a well-known legal maximum *jure protectionnessuaeregice* which means the subject who is not able to govern neither himself, nor the lands or tenements he has, the King has to take custody of the person and protect him.[52]

During the British period, however, the development of the civil as well as criminal legal landscape of mental ill-health in India was not matured and it was yet to be designed in appropriate manner. Even after the independence, certain laws enacted by the Parliament of India provided very limited scope for the mental ill-health. Constitutionally, the task of welfare of the persons with disability lies with State governments.[53] The directions have been given towards the State to promote with special care the educational and economic interest of the weaker sections of the society.[54] The Central Government has created and adopted various legislative measures in the context of international obligation towards human rights law.[55]As it

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49 *See generally*, Iain K, "Carers of People with Mental Health Problems: Proposal Embodied in Current Public Mental Health Policy in Nine Countiries" *Economic and Political Weekly,* Vol.28, No.4, 2002, pp.465-481; *Bhargavi* v. *Davar*, "Draft National Health Policy 2001 – III – Mental Health: Series Misconceptions" *Economic and Political Weekly,* Vol.37, No.1, 2002, pp.20-22; *Bhargavi* v. *Davar*, "Legal Framework for and against People with Psychosoicial Disabilities" *Economic and Political Weekly,* Vol.37, No.52, 2012, pp.123-131; Byron J Good, "Mental Health Consequences of Displacment and Resttlement" *Economic and Political Weekly,* Vol.31, No.24, 2012, pp.1504-1508.

50 V.K Krishna Iyer, *Law Justice and the Disabled,* New Delhi: Deep and Deep Publication, 1982, p.19.

51 *Mahabharatha Santi Parva* 86. 24-5. Cited by; P. Ishwara Bhat, *Supra* Note 4.

52 Beotra B.R, *The Mental Health Act -1987,* New Delhi: Butterworth's India, 2000, p.43.

53 *The Constitution of India*, 1950, 7th Schedule, Entry 9.

54 *Id*, Art. 46.

55 The prominent Human Rights Conventions ratified by the government of India are; International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. Doc. A/6316 (1967); International Covenant on Social, Economic and Cultural Rights, G.A. RES. 2200, U.N. Doc. A/6316 (1967); Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 27 (December 1948), International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (March 1966), Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res.34/180, U.N. Doc. A/34/180 (September 1981), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. Doc. A/39/51 (1984), Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/736 (1989)

is pointed out by Prof P.Ishwara Bhat' providing of adequate accommodations, sanitation, psychiatrists, doctors and assistants is a responsibility of State developed under the aegis of positive right jurisprudence under Article 21 of the Constitution.'[56] The State governments have the role to play in promoting the rights and opportunities of persons with disability by creating awareness and implementation of these schemes and programs. This part of the paper would be dealing with Indian legal system relating to persons with mental ill-health in brief.

4.1 Indian Lunacy Act, 1912[57]

The first committed legislative effort to address the challenges of PWMD in India was Indian Lunacy Act, 1912. It was a coherent and consistent approach of the British India on Mental Health. The Act was exceptionally a dynamic law enacted by the British India so as to consolidate law relating to Mental Health in the country. The routine issues of mental health were raised to such an extent that there was a open confrontation between government and PWMD. The Act was relatively more welcoming initiative to address these issues of mental ill-health. It offered ambitious plans for development the conditions of the PWMD. The Act, though not complete in its scope, it was regarded as a concrete step taken by the government towards the mass people who had faced extreme discrimination for decades.

The 1912 Act made bold provisions as to reception, care and treatment of lunatics in order to provide vast amounts of assistance to the patients. The Act provided provision for the discharge of the lunatic and temporary release of the lunatic on certain grounds. The Act outlined the provision relating to the power of the Court to make order inquisition as to persons alleged to be insane. The judicial powers extend over person and estate of lunatic, management and administration of movable and immovable property. The duty was imposed on government to establish or license the establishment of the asylums for the curative treatment of the persons suffering from mental diseases. The governmental obligations were also extended to payment of cost for maintenance in licensed asylums in certain cases.

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56 Paper presented at National Workshop on the Rights o Person with Disability, the Older and the Ssic Persons, organized by Department of Studies in Law, University of Mysore and Karnataka Institute for Law and Parliamentary Reform, Bangalore, held on 21 and 22 March 2008.

57 Act No IV of 1915.

It is evident from the scheme of the Act that it articulated legislative strategies towards mental health system of the country in concrete terms. It is undeniable fact that it sought to achieve impressive accomplishments in the field of care and treatment of the PWMD. The philanthropic task performed by the Act can be witnessed through the wide provisions relating to reception, care and treatment of the PWMD. These provisions revolutionized the role of the government to succor to the needy people. The intensive care to be taken and extensive role to be paid by the government result in substantial changes in the destiny of the PWMD.

Though the Act triggered a reformative and reconstructive step, the Act failed to establish exhaustive health care system required for the country. There were inherent and lurking defects with comprehensibility of the Act. It was also disappointing that the Act did not accept socio-economic and cultural background of the country while drafting it. Had it be addressed, the Act could have been a potential tool that would further strengthen the status of PWMD.

4.2 Mental Health Act, 1987[58]

The Mental Health Act, 1987 (hereinafter in text MHA, 1987) was the fundamental legislation which was in force in India for considerable period and till recent.[59] This landmark legislation was put in place to provide for the care, treatment and protection of PWMD. As specifically outlined under the preamble of the Act, the legislation had following objectives: to regulate admission to psychiatric hospitals or psychiatric nursing homes of mentally ill-persons who do not have sufficient understanding to seek treatment on a voluntary basis, and to protect the rights of such persons while being detained; To protect society from the presence of mentally ill persons who have become or might become a danger or nuisance to others; To protect citizens from being detained in psychiatric hospitals or psychiatric nursing homes without sufficient cause; To regulate responsibility for maintenance charges of mentally ill persons who are admitted to psychiatric hospitals or psychiatric nursing homes; To provide facilities for establishing guardianship or custody of mentally ill persons who are incapable of managing their own affairs; To provide for the establishment of Central Authority and State Authorities for Mental Health Services; To regulate the powers of the Government for establishing, licensing and controlling psychiatric hospitals and psychiatric nursing homes for mentally ill persons; To provide for legal aid to mentally ill persons at State expense in certain cases.[60]

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58 No. 14 of 1987.

59 The Act has replaced *the Indian Lunacy Act*, 1912.

60 *See*, *Preamble of Mental Health Act* (hereinafter MHA, 1987)

The MHA,1987 empowered the Central[61] and State Government[62] to constitute Mental Health Authorities to supervise the psychiatric hospitals and psychiatric nursing homes and other Mental Health Service Agencies under the control of the respective governments and advise them. The MHA, 1987 contemplated very explicit provisions pertaining to establishment and maintenance of psychiatric nursing homes by government[63] and private entities.[64] Comprehensive provisions were introduced under MHA, 1987 to regulate psychiatric hospital or psychiatric nursing homes established by the private entities through licensing system.[65] The MHA laid down the procedure for admission of a minor mental ill persons and voluntary patients to a psychiatric hospital/nursing home for treatment.[66]

The MHA,1987 made a striking departure from its previous model by contemplating elaborative provision on the establishment or maintenance of the psychiatric hospital or psychiatric nursing home or the continuance of the maintenance of any such hospital by subjecting them to licensing process. The MHA, 1987 not only mandated health provision for mental health, it contemplated provisions for Central as well as State Mental Health Authorities for regulation, development, direction and coordination with respect to Mental Health Services. The provisions of the MHA, 1987 were the reflections of the intellectual ability of the Parliamentarians in establishing a healthy regulatory mechanism to deal with intricacies of mental health system of the country. The MHA, 1987 accelerated the effort of the government in eradication of unregulated and unsystematic area of mental health. The provisions of the MHA, 1987 though not complete in its true sense, proved prudent effort of the government to deal with infertile situation during vacant period. Even more notably, certain controversial issues render the MHA, 1987 perfect in some respect and obsolete in some others.

4.3 The Rehabilitation Council of India Act, 1992[67]

Under the Rehabilitation Council of India Act, 1992[68](hereinafter RCIA)

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61 *See Id.,* Sec. 3.
62 *See Id.,* Sec. 4.
63 *See Id.,* Sec. 5.
64 *See Id.,* Sec. 6.
65 *See Id.,* Sec. 6-12.
66 *See Id.,* Sec. 15-18.
67 No 34 of 1992. (hereinafter RCIA)
68 The Rehabilitation Council was initially set up under *the Societies Registration Act* XXI of 1860 vide Resolution No. 22-17/83-HW. III dated 31st January 1986 to have uniformity and to ensure minimum standards and quality of education and training in the field of special education and rehabilitation. It was given statutory status by this Act of Parliament. *See*, Rehabilitation Council of India. *Annual Report- 2011-2012.* New Delhi: RCI, 2012, p.1.

Rehabilitation professionals[69] have the responsibility of upholding the interest of the patient while conducting themselves as members of responsible profession. Accordingly, they are expected to adhere to the highest standards of professionalism and services. A Rehabilitation professional's conduct should reflect their privileged position in society which derives from the nobility of the medical profession. To make this profession compassionate, moral and lawful, RCIA came into force by regulating standards of professional conduct and etiquette to be adopted by the rehabilitation professionals. It is thus obvious from the scheme of RCIA that the fundamental task of RCIA is to establishment of Rehabilitation Council of India (hereinafter RCI) and to regulate training of rehabilitation professionals.

The RCI has the power to recognise the qualification granted by Indian Universities.[70] It has also authority to determine of the validity of the degrees issued by the institutions outside the country. In view of the compatibility and efficacy of the rehabilitation professionals, the RCI has authority to negotiate with similar kind of authorities involving recognition of rehabilitation professionals in outside the country. These negotiations may be relating to setting up of a scheme or reciprocity for the recognition of qualifications, and the pursuance of any such Scheme.[71] The higher educational institutions involving in granting the degrees for rehabilitation professions have to provide information to the RCI which may require by this regulatory authority. The qualifications, curriculum, examinations and other incidental matters shall be communicated to the RCI as this authority is the custodian of the quality of the rehabilitation education of the country.[72]

The RCI shall appoint such number of inspector as it may deem requisite to inspect any University or Institution imparting rehabilitation professional education. It can make some recommendation to the Central Government as to recognition of qualifications granted by that University or Institution to determine recognized rehabilitation qualifications.[73]

As successful effort to rejuvenate the rehabilitation professionals, the RCI has the

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69 According to Sec. 2 of RCIA Rehabilitation Professionals means- (i) audiologists and speech therapists; (ii) clinical psychologists; (iii) hearing aid and ear mould technicians; (iv) rehabilitation engineers and technicians; (v) special teachers for educating and training the handicapped; (vi) vocational counselors, employment officers and placement officers dealing with handicapped; (vii) multi-purpose rehabilitation therapists, technicians; or (viii) such other category of professionals as the Central Government may, in consultation with the Council, notify from time to time.

70 RCIA Sec. 11.

71 *Id.,* Sec. 12.

72 *Id.,* Sec. 14.

73 *Id.,* Sec. 15.

authority to report to the central government as to the proficiencies of the professionals graduated from the universities. RCI acts as custodian of the standards by imposed by RCI. It can also update central government with respect to the staff and infrastructure of the University so as to make government to take up possible reformations. However, the report of RCI to the central government should be based on reports of the inspector and visitors of the universities and institutions. Much importantly, before reporting any adverse remarks against any institution or university, the institutions should provide an opportunity to be heard.[74]

Rehabilitation is a good investment because it builds human capacity. It should be incorporated into general legislation on health, employment, education, and social services. The distinctive feature and basic tenets of the RCIA is rehabilitation of persons with disabilities. Indeed, rehabilitation is one of the pillars upon which seeds of the mental health law can be yielded and prosperity of persons with mental disability mounted. The RCIA guarantees a comprehensive array for rehabilitation and allied processes that were to be addressed with explicit law that India lacked prior to 1992.

It is to be noticed that despite fair amount of community based rehabilitation programs initiated by the government of India, system of country lacks professionalism. Unpleasant planning, irrational implementation and absence of evaluating mechanisms have aggravated the conditions.[75]It is stated that "…besides biological and individual psychology, factors like family, society and culture also play a significant role in the formation of an individual's psyche; thus, it becomes essential to understand how these factors relate to the concepts of mental health and illness and their relevance in achieving the rehabilitative goals".[76]

4.4 Rights of Persons with Disabilities Act (RPDA) 2016[77]

Rights of Persons with Disabilities Act (RPDA) 2016[78] (hereinafter RPDA)

74 *Id.*

75 Sushma Batra & Neera Agnimitra. "The Role of Family, Society and Culture: A Collaborative Perspective on Management and Rehabilitation of Individual with Mental Illness." *Journal of Rehabilitation Council of India*, Jan-Dec, 2008: 46-57, p. 50.

76 Prerna Duggal & Tej Bahadur Sing. "The Role of Family, Society and Culture: A Collaborative Perspective on Management and Rehabilitation of Individual with Mental Illness." *Journal of Rehabilitation Council of India*, Jan-Dec, 2008: 58-66, p.58.

77 No. 49 of 2016.(Hereinafter RPDA).

78 Prior to this legislation, Persons with Disability Act, 1995 was in force. The Act had been enacted by the Parliament of India to give effect to the 'Proclamation on the Full Participation and Equality of the People with Disabilities' in the Asian and Pacific Region adopted in the meeting to launch the Asian and Pacific Decade of Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asia and Pacific held at Beijing on 1 to 5. Dec, 1992

specifies seven conditions as disabilities and makes special provisions for disabled persons with regard to their rehabilitation, and opportunities for education and employment. The PWDA governs various aspects such as constitution of Central[79] and State Advisory Boards,[80] obligation of educational institutions,[81] promotion and facilitation of inclusive Education of persons with disabilities[82] and skill development and employment[83] of disabled. The RPDA also concentrate on affirmative actions[84]to be taken by the appropriate governments in favour of persons with disabilities, for the preferential allotment of land at concession rates for various purposes such as housing, setting up of businesses, establishment of special recreation center, special schools, research centers, factories by entrepreneurs with disabilities.

Non-discriminatory practices are to be adopted by the State by making certain enabling provisions for transport sector such as rail compartments, buses, Vessels and aircrafts. Furthermore, same special measures are to be taken in public buildings, elevators or lifts, hospitals, primary health centers and other medical care and rehabilitation institution.[85]

The RPDA has scaled up research activities relating to persons with disabilities. The core areas such as preventive are rehabilitative measures are to be dealt with under the RPDA.[86] The RPDA mandates that the government should provide financial assistance to professional bodies, non-governmental organisations and higher educational institutions to encourage them to take up research activities on disability aspects.[87] Much importantly, the RPDA has made explicit provisions relating to appointment of the Chief Commissioner and Commissioners for Persons with Disabilities[88], constitution of Special Courts,[89] and creation of National Fund for persons with disability.[90]

RPDA has inundated impact on mental health sector of the country with accounts of

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79 RPDA, 2016, ch.XI, Sec. 60-65.
80 *Id.*, Sec. 66-73.
81 *Id.,* Sec. 16.
82 *Id.,* Sec. 17.
83 *Id.* Sec. 19-23.
84 *Id.,* Sec. 24-30.
85 *Id.,* Sec. 40.
86 *Id.,* Sec. 48-49.
87 *Id.*, Sec. 28.
88 *Id.,* Sec. 74-83.
89 *Id.,* Sec. 84-85.
90 *Id.,* Sec. 86.

success. The changes brought out by this legislative step have made RPDA inscriptible in the history of disabled law in India. It is undoubted that the RPDA has paved way for innovative programs and schemes of the Central as well as State Government to activate finest fighting mechanism against disability both in strength and in character. Nevertheless, it is fact that the greatness of the legislative step alone falls terribly short if we do not bring the legislative intention into execution.

4.5 National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (hereinafter Trust Act)[91]

The Trust Act intent to constitute a trust system at the National level for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (PACPMRMD). The core objectives of the system are to receive gifts and donations from the contributors and hold the properties for the benefit of the PACPMRMD. The bequests given for the welfare of the PACPMRMD, are to be administered by the trust system keep in view the objectives of the bequests and standards of living of PACPMRMD. The Board of the trust is at liberty to utilize the bequeathed property in its own way to maximise the best interest of the PACPMRMD. Besides, the trust could receive grants from the government in order to administer the programs relating to PACPMRMD and assist the other registered organisations which are working for the betterment of PACPMRMD.[92]

The Trust system under the Act has the following specific objectives: [93] to enable and empower persons with disability to live as independently and as fully as possible

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[91] No. 44 of 1999. The Act has been supplemented with National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000.

[92] In addition to Trust Ship, the provisions for Authority of Trust to carry out approved program have substantially been contributed for the enhancement of the status of disabled in India. For the purpose of the Act, according to Sec. 11 (2) of the Act following are the approved pgrammes as defined under the Act.

a. Any programme which promotes independent living in the community for persons with disability by creating a conducive environment in the community, counseling and training of family members of persons with disability, setting up of adult training units, individual and group homes;
b. Any programme which promotes respite care, foster family care or day care service for persons with disability;
c. Setting up of residential hostels and residential homes for persons with disability;
d. development of self-help groups of persons with disability to pursue the realization of their rights; (e) setting up Local Level Committee to grant approval for guardianship; and
e. Such other programmes which promote the objectives of the Trust.

See National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, Sec. 11 (2).

[93] *See Id.,* Ch. III, Sec. 10.

within and as close to the community to which they belong; to strengthen facilities to provide support to persons with disability to live within their own families; to extend support to registered organizations to provide need based services during period of crisis in the family of persons with disability; to deal with problems of persons with disability who do not have family support; to promote measures for the care and protection of persons with disability in the event of death of their parents or guardians; to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection; to facilitate the realization of equal opportunities, protection of rights and full participation of persons with disability; and to do any other act which is incidental to the aforesaid objects.

For some, specifically the people seeking for legislative support for empowerment of marginalized section of the society, enacting laws and making rules under the laws may be all they ask and so enacting laws for the betterment of the weaker section of the society is essential. Enacting law, however, is not enough and the executing authorities and persons who sought for enactment of the laws have the obligation to do more than legislature in enforceability of the goals of the legislature. Under the context of strong demand made by the group working for PWMD, the Trust Act has been enacted in order to infuse statutory powers. In fact, the trust system is regarded as optimistic way to address the difficulties of the vulnerable section of the society. It can create honest and compassionate relationship between the beneficiary and trustee. The able and competent trust system can could upgrade the status of the PWMD being a significant part of the vulnerable section of the society.

4.6 National Mental Health Policy of India, 2014[94]

The crucial terms such as mental health, mental illness, mental disability, and mental health problems have been clarified under the policy. It has concretized the efforts for the advancement of mental health in constructive terms. Primary Health Care approach through the existing health care system has been emphasized and, equity and justice for PWMD as the vulnerable section of society has been stressed upon

[94] The 65th World Health Assembly held in 2013 approved and adopted resolution WHA 65.4 on global burden of mental disorders and the need for a comprehensive, co-ordinated response from the health and social sectors at community level. As India was one of the main sponsor of the resolution, government of India come out with National Mental Health Policy, 2014 under the title "New Pathways and New Hope- National Mental Health Policy of India." *See,* GOI, *National Mental Health Policy - 2014,* New Delhi: Ministry of Health and Family Welfare Government, Oct. 2014. For critical analysis of the role of Mental Health Policy in rejuventating the mental health, through the innovative ideas and inducement *see*, Janet A.Weiss, " Ideas and Inducements in Mental Policy, "*Journal of Policy Analysis and Managment,* VOL. 9, NO. 2, Spring.1990, pp. 178-200. *See also*, GOI, *National Health Policy - 2002,* New Delhi: Ministry of Health and Family Welfare Government, 2000.

under the policy. Particularly in the context of rising importance of human rights of PWMD, participatory and rights based approach, backed by the good governance and effective delivery of the services by the mental health professionals has been ensured under the new policy.

The predominant goals of policy are; (a) to reduce distress, disability, exclusion morbidity and premature mortality associated with mental health problems across life-span of the person; (b) to enhance understanding of mental health in the country'; (c) to strengthen the leadership in the mental health sector at the national, state and district levels.[95] The core objectives of the policy, such as universal access to mental health care and increase access to and utilization of comprehensive mental health services including prevention services, treatment and care and support service by persons with mental health problem, translated into reality, the policy could bring revolutionary changes for the human rights of PWMD.

4.7 Mental Healthcare Act, 2017[96]

The MHA, 1987 *per se* failed to meet with any sense of complacency in terms of human right and regulatory approach which are markedly relevant to address relentless struggle of the PWMD. The demand for amendments to MHA, 1987 was strengthened by another fact that the related Act i.e., The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 awaited for the amendment of certain provisions which exposed inherent inability of the Act towards attaining the goals. Another compelling reason for MHA, 2017 is Convention on Rights of Persons with Disability and its Protocol, adopted on 13 December 2006 at United Nations Headquarters in New York and came into force on the 3 May 2008. Accordingly, as the Government of India has signed and ratified the Convention,[97] the legislative system of the country was to be designed in the line with Convention, Minister of Health and Family Welfare introduced the Mental Healthcare Bill (MHCB), 2013 to amend the existing MHA, 1987. On 19 August 2013, the MHCB was introduced by the central government with the cherished values relating to care and services of the mental health.[98] However, it could not be materialised by the legislature. After the acceptance of *Rajya Sabha* on 30 March, 2017 and *Lok Sabha* on 27 March, 2017, received the assent of the President on

95 *National Mental Health Policy*, 2014, para. 3.1.
96 No. 10 of 2017.
97 The Convention is signed and ratified by the Government of India on the 30 March 2007 and 1 October 2007 respectively.
98 *See the Preamble of the Mental Healthcare Act*, 2017 (hereinafter MHA, 2017).

the7 April, 2017. The following are the salient feature of the MHA, 2017.

4.8 Advance Directive[99]

Personal autonomy is the essential characteristic of MHA,2017. It has been ensured through advanced directives. The MHA, 2017 has ensured that every PWMD shall have the right to make an advance directive. The concept of advanced directives shows the gravity of the liberty attached to the PWMD and way of statutory protection given to it. This advance directive is intimately related to the fact that the PWMD could insist the way of treatment to be given and care to be taken by the hospitals. If the patient is completely unable to decide the way of care and treatment, he could nominate other person to decide the same. However, the advance directive is subjected to change and modification according to the will of the patient.

4.9 Rights of persons with Mental Illness[100]

Besides relying substantial reliance on the personal autonomy of the patient, the new MHA, 2017 clearly respects the basic rights of the PWMD. These rights are symbolically speaks about the essence of the human rights in the context of mental disability. Guarantee of right to equality, non-discrimination, community life, right against cruel and inhuman treatment, right to confidentiality, legal aid, privacy and personal contacts have intended to address the needs and desires of the PWMD on priority basis. The human right approach of the MHA, 2017 could play vital role in protecting these vulnerable section of the society against degradation and suffering. Though it is logical extension of the fundamental rights to the PWMD, the drafting of these rights in the backdrop of the need of PWMD, it could significantly ensure fair, just and reasonable conditions for this vulnerable section.

4.10 Central and State Mental Health Authority[101]

The MHA, 2017 has made specific provision on administrative authorities to regulate Mental Health Establishments (MHE).The Central Authority has the power to register all MHEs under the control of the Central Government and maintain a register of all MHEs in the country. This system is based on information provided by all State Mental Health Authorities of registered establishments. In similar way, the State Authorities have the power to register all MHEs in the State except those coming under Central Authorities and maintain and publish (including online on the internet) a register of such establishments.

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99 *Mental Health Act (MHA)*, 2017, Ch. III, Sec. 5-13.
100 *Id.* Ch. V, Sec. 18-28.
101 *Id., See*, Ch. VII, Sec. 33-44 and Ch. VIII, Sec. 45-56.

4.11 Mental Health Establishments[102]

Mental health establishments (MHE), being prime instrumentalities in transforming the life of PWMD are central part of the new scheme. These health establishments are to be registered with relevant Central or State Mental Authority. The standards of these health establishments will have to be scrutinised before permitting them. Central or State Mental Health Authority after inspecting the staff, their qualification and other infrastructure of the health establishments, can permit them to provide health services. On reading of the scheme of this chapter, it can thus be evident that the new MHA, 2017 compel compulsory registration of the MHE without which it would attract penal provisions of the MHA, 2017. It would be open to the Central or State Mental Authority specify different for different class of mental establishments. This part of the MHA, 2017 has been structured with a view to protect patient against unqualified, fake and bogus hospitals. Thus, the Central or State Mental Authority, as the case may be, have been statutorily authorised to ensure compliance of the compulsory registration of MHE.

4.12 Mental Health Review Boards[103]

Chapter XI of the MHA, 2017 deals with regulation of the Mental Health Review Boards. Each State government is under obligation to constitute Mental Health Review Boards for each district or groups of the districts within the State. It is a quasi-judicial authority and act as appellate authority against the decisions of the MHE. In case of violation of any rights of PWMD by the MHE, the aggrieved party can invoke jurisdiction of these authorities. These Boards can register, review, alter and modify the advance directive if same is sought by the PWMD. Any compliant relating to deficiency in service and violation of confidentiality of the information of patient can be dealt with by the Boards. The aggrieved party against the order of the Boards can approach High Court within 30 days from the date of the order of the Board.

4.13 Admission, Treatment and Discharge of PWML[104]

As pointed out in the previous part of the paper, it is needless to say that the autonomy of the patient is given utmost respect and regard as to the treatment under

[102] *Id.,* Ch. X, Sec. 65-72.
[103] *Id.,* Ch. XI, Sec. 73-84.
[104] *Id.,* Ch. XII, Sec. 85-99.

this Act. In addition to advance directives, the MHA, 2017 has carved out meticulous provisions relating to the objective intention of the patient. Accordingly, new Act has made very cautious effort to protect PWMD against the duress or compulsion of the relatives or family members which might be used during admission to health establishment. The major patient can directly approach medical officer or psychiatrist of the health establishment and get admitted for treatment. Similar liberty has been extended for the discharge from the mental establishment.

Every legal system has sacred obligation towards weaker section of the society. The legal regime should strive in the direction that to heal their wounds, to build their lives and to care of their wellbeing. The MHA, 2017 is a sustained effort of the government to decay the injustices and prejudices attached to PWMD that need to be confronted. After 30 years of the enactment of MHA,1987 the Parliamentarians seem to pledge boldly to meet subversiveness of PWMD and assimilate law relating to mental health. If the government of India wants to achieve spectacular success in strengthening health status of the country, the immediacy of conversion of scheme of the MHA, 2017 into implementation would be fundamental requirement.

5. Concluding Remarks

Social stigma is striking threat for the well-being of the PWMD.[105] The societal as well as family based stigma has not only limited the opportunities of this vulnerable section of the society, it has also defaced the efforts of the government to upgrade their status. In fact, this symptom has been condemned under large amount of policies and human rights instruments. However, we are continued with same stigma along severe degree and density. The support of the family is a very crucial resource for supporting persons with mental disability. Lack of family support and family exclusion to accessing mental health services are the serious challenges associated with considerable number of persons with mental disability. The families have to realize their role and take care of entire responsibility in availing benefits of the legal provision as it is very difficult for the mental patient.

In the area of delivering and maintaining mental health, some of the issues have widely been recognized and addressed under MHA, 2017. The current situation of the country undoubtedly acknowledge that the MHCA, 2017 has become necessary because the 1987 legislation is outdated and does not accord with the various human rights outlined in the above mentioned Human Rights instruments. The MHA, 2017

[105] For various theories relating to stigma of PWMD, *see* Stacy L. Overton and Sondra L. Medina, "The Stigma of Mental Illness." *Journal of Counseling and Development*, Vol. 86, Spring 2008, pp.143-151

which concentrates on Human Rights approach for person with mental ill-health can be an effective tool to promote access to the mental healthcare of mentally disabled. The provisions such as Mental Health Establishment and Mental Health Review Commission can promote and protect the wellbeing of the people with mental disorder by compensating the weaknesses of earlier system of mental health care delivery in the country. The MHA, 2017 ensures social inclusiveness by creating patient friendly conditions and situations to prevent discrimination in all its forms and offer equal opportunities to people with mental disorder. Therefore, the new MHA, 2017 would be the paramount panacea for the current situation as majorities of the defects of the existing legal system have adequately been addressed under the MHA, 2017. It is worthwhile to note concludingly that the new MHA, 2017 would be an expanding scope of the human right approach for persons with mental disabilities which can scant regard to basic rights of the PWMD. The right to dignity is the inherent right of the every person. The State, irrespective of the nature of the person, is under obligation to recognize and protect it. The MHCA shows a particular regard to the dignity of the PWMD by incorporating provisions relating to the dignity of him. The concept such as advanced directives has exemplified the liberty, bodily autonomy and self-determination of the PWMD. The conditions which blatantly deny their basic humanity of this section of the society is well taken by giving due consideration to the wishes and feelings of the PWMD.

It is an admiration to the judiciary that it has craftsmanly created novel situation which adhere to the basic rights of the persons with mental disabilities. It has triggered a bellicoseness of the government to bring into innovative programs and policies to encounter the grievances of this marginalized section of the society. The judiciary, in the days to come also, has to play an intensive role in articulating and interpreting rights of persons with mental disabilities as the concept of mental health and allied topics are so complex. In addition, NGOs play a critical role in addressing the issues of mental ill-health people by working with various stakeholders of the society. Their collaboration with likeminded institutions such as hospitals and research institutions in educating the public on mental health and supporting mental ill people in jails and homes is crucial so as to achieve the objectives of mental health policies. The role performed by these NGOs in some other countries tellingly revealed that the collaboration with NGOs is most illustrious and sensitive in addressing the issues of PWMD. The effort of the government in this regard has remained mistreated and the great strides are to be undertaken by the Central as well as State Government to elevate the situation.

Informed society is the pre-requisite for the success of any law and policy. The success of the MHA, 2017 strongly depends upon the information given to the PWMD. The newly enacted law is to be disseminated in an understandable and accessible language. This is possible through the mental health advocacy program. In fact the prime place has been given for the mental health advocacy in the prevention and treatment of the PWMD.[106] This mode can touches and asserts the rights of PWMD in effective manner. It plays its part role in helping the policy makers, health planners, persons with mental disability, their relatives, and non-governmental organization to understand their role in the prevention and treatment of the PWMD. In fact, in some of the countries the mental health advocacy is given statutory status.[107] However, the MHA, 2017 is inadequate in terms of the mental health advocacy.

The author would like to conclude the paper by emphasising the words of *Pollock* that "the law itself, though of crucial social importance, is only one element in the total human task. That task is to meet and master those frustrations that diminish man in his humanity and obstruct the realisation of his freedom and fulfilment with in human society. Those frustrations stem from ignorance, poverty, pain, disease and conflicts of interest both within in the person (the field of psychological medicine) and between persons (the territory of law). This manifold and interacting frustration cannot be met by any one discipline, but only by a co-ordinated attack upon the problem through enlightened political and administrative initiatives and by educational, medical, psychological and legal remedies."[108]

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106 *See generally* Michelle Funk et al., "Avocacy for Mental Health: Roles for Consumer and Family Organisation and Governments." *Health Promotion International*, Vol. 21, No. 1, 2005, pp.70-75.

107 For *e.g., see Mental Health (Care and Treatment) (Scotland) Act* 2003

108 Cited in; Krishan Iyer V.R., *Constitutional Miscellany.* Lucknow : Eastern Book Company, 2003, p. 213.

UNDERSTANDING THE ROLE OF POLITICAL PARTIES IN INDIAN DEMOCRACY

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1. Introduction

Indian Constitution does not carry any provision except anti-defection law regarding political parties but they have been playing multiple roles in the realm of its parliamentary democracy. The People's Representation Act, 1951 has spelled out their role in the electoral system which constitutes the bedrock of Indian democracy. Political parties have been making the democracy operational in India. For effective functioning and vibrancy of parliamentary democracy, the two-party system has always been considered desirable but it has also worked with one party system and one party dominant system. Parliamentary democracy in India had experimented with one-party dominant system till the 9th general elections (1989) and has been coping with the multi-party system that has been followed by the evolution of two coalition dispensations namely the United Progressive Alliance (UPA) and the National Democratic Alliance (NDA) led by the two national parties Indian National Congress (INC) and Bharitya Janata Party (BJP) respectively. Political parties formed the government when voted to power and provided the opposition when voted out of power. For quite long-time, Indian democracy was operated by the INC without the presence of recognized opposition party in the parliament but still there was opposition within the legislature that used to emerge from within the legislative wing of the INC during the Nehru era. A comparative analysis of India and Pakistan indicates that for the success and survival of liberal democracy in India, the INC had played vital role, whereas, the failure of parliamentary democracy in Pakistan at initial happened due to the absence of a political party or parties with all Pakistan character.

The INC played positive role to stabilise democracy at the initial stage whereas the regional parties have made Indian democracy more representative since the fourth general elections which were held in 1967. Notwithstanding this, the political parties have also been playing negative role which has adversely affected the functioning of Indian democracy. Both the national and regional political parties are responsible for undermining the very basis and spirit of parliamentary democracy because they have failed to evolve themselves as democratic organizations. Democracy within the party was present in the INC to a considerable extent during the Nehru era that got eroded

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and ultimately disappeared during Indira Gandhi's and Rajiv Gandhi's times. Dissent was killed in the name of discipline in the INC and the *Iron Law of Oligarchy* became the defining code of its functioning. This oligarchic tendency did not remain confined to INC but also percolated to other national and regional political parties. Consequent upon that the feudal political culture emerged in the functioning of almost all the political parties and the space for criticism, dissent and receptiveness to dissent were compromised. It turned out to be detrimental not only for the democratic functioning and growth of political parties but also for the functioning of Indian democracy. Organizational elections have become an exception whereas the culture of nomination has become a rule. Instead of becoming strong and vibrant democratic organizations having respect for dissent and debate, the political parties have become personality-centric, feudal fiefdoms of their top leadership having contempt for dissent. They have also been using political parties' as instruments to gain, sustain and perpetuate their power within the organizational structure of the party and the government as and when voted to power. These oligarchic tendencies have also been shaping the functioning of parliamentary democracy in India both at the micro and macro levels. Absence of within party democracy has also been reflected in the functioning of the legislative bodies both at the national and state levels because there is hardly any space for debate and dissent within legislative bodies. Numerical majority have been used to kill the dissent and debate in the legislative bodies, thereby the democracy has been reduced to the tyranny of majority. The discipline has been used an instrument to target the criticism and dissent within the organizational structure of political parties.

2. Institutionalization of Powers

India is a representative democracy within which people elects their representatives after every five years to govern themselves. Thereby the elected representatives are public trustee to exercise power for the well-being of the people at large. The skeleton of the electoral system has been provided in the part XV of Indian Constitution and its details have been spelled out in the People's Representation Act, 1951 that has been amended from time to time to make it contemporary and dynamic. Electoral system provides people with an opportunity to participate in the political process by electing their representatives whereas, it provides political parties with an opportunity to come into power by contesting elections and thereby provides the legitimate political regime to govern the society.

INC had made the Indian democracy operational both at the national and state level due to its all-India character and organizational presence throughout the country. It was INC that contested elections and formed government at the national and state levels;

therefore, there was no vacuum in the electoral arena. Aftermath of independence, the INC rose to power to carry out the project of nation-building and institution building through attempts at an imaginative construction of an all-India homogeneous national identity. It was an umbrella party representing a 'rainbow' social coalition, which continued to function more like a movement than the ruling party that it had become under the leadership of Indira Gandhi[1]. Nehru used the dialogical idiom of leadership within Congress as well as in the government wherein, he relied substantially on the support of regional leaders. Nehru and Kamaraj related to each other in ways that prevented center-periphery relations from being a zero-sum-game[2]. The INC succeeded in establishing its dominance and offsetting threats from other parties and groups by a progressive expansion of its social base, so that ever-new bases of recruitment and support were available to it[3]. The INC has been the most important political institution in the Post-Colonial India. Under the leadership of Nehru, INC reaped the handsome dividends because to its formidable role in the anti-colonial struggle. Due to that Congress got extraordinary majority in legislature in the first three general elections and it ruled every state except Kerala until 1967. Another factor responsible for the Congress's monopoly in the national and state politics was the large degree of autonomy which it provided to its provincial units. They were allowed to assert vis-a-vis the central party leadership which was denied after Indira Gandhi assumed the command of the Congress Party. Their recommendations for candidates for parliamentary or assembly seats of Chief Ministers were almost always accepted by the central leadership[4]. Further, the INC's idea of India was inclusive and nationalism was civic that helped the Indian democracy in a great deal to consolidate, however, this trend did not continue for long and got changed under the leadership of Indira Gandhi.

3. Personalization of Powers

Parliamentary democracy at the state level became more representative with emergence of regional political parties in the electoral arena in 1967 when almost half of the states of Indian Union voted in favour of the regional parties. Consequent upon that democracy became more participatory at the provincial levels and two-party system

1 Rajan Harshe, "Thinking about Democracy, Identity Politics and Development in India", Bhupinder Brar, Ashutosh Kumar and Ronki Ram, eds., *Globalization and the Politics of Identity*, New Delhi Pearson & Longman, 2008, p. 249.

2 Alfred Stepan, Juan J. Linz and Yogendra Yadav, *Crafting State-Nations: India and Other Multinational Democracies*, Baltimore: The John Hopkins University Press, 2011, p. 124.

3 Rajni Kothari, *Rethinking Democracy*, New Delhi: Orient Longman, 2005, p. 107.

4 Zoya Hasan, "Political Parties", Niraja Gopal Jayal & Pratap Bhanu Mehta, eds., *Oxford Companion to Politics in India,* New Delhi: Oxford University Press, 2014, p 242.

emerged in some of the states which have always been considered good for the health of democracy. The INC worked until it suffered split in 1969 which transformed the INC from ideological diverse and a plural organization to a populist party in which the supremacy of the national leadership was established. Further, within party democracy and understanding of national leadership with the regional leadership within the organizational structure of INC collapsed. Instead of operating as a vibrant organization, the INC was identified with charisma of Indira Gandhi who used it to perpetuate herself into power. In the process, this tendency turned to be a major set-back to the INC as an organization and to the parliamentary democracy wherein the legislature was used as a rubber-stamp to approve the decisions of the executive during her tenure. Undermining the party as an institution and the parliament as an institution in the informal and formal realm of Indian democracy continued unabated.

In the 1970s, INC led government under the leadership of Indira Gandhi had given a huge below to Indian democracy by imposing emergency. Absolute majority in the parliament was used to dwarf the institutions vis-a-vis charismatic leadership of Indira Gandhi. During her tenure, centralization of power happened within the INC and the parliamentary form of government. It was contrary to letter and spirit of democracy, which always requires decentralization and institutionalization of power. Instead of institutionalization and decentralization of powers, personalization and centralization of powers happened that undermined the fundamental ethos of Indian democracy. Parliamentary democracy was reduced to the Prime-Ministerial form of government, independence of judiciary was eroded and emergency was imposed by Indira Gandhi when her election was declared null and void by the Allahabad High Court. Further 42nd amendment was made to the constitution to alter the basic structures of Indian Constitution and to compromise the thrust of constitutionalism which has always been one of the pre-requisites of democracy. Instead of respecting the independence of judiciary which has been enshrined in the constitution, she argued for the committed judiciary not to the ideals of Indian democracy and constitution but to the party in power. The dissent within the INC was killed in the name discipline. However this tendency has not remained confined to the INC, the other political parties including that of regional parties followed the INC which culminated into a feudal political culture which has been undermining the functioning of liberal democracy and democratic politics in India. With the decline of the Congress System, the INC relied on the personal charisma of Indira Gandhi or Rajiv Gandhi, who by passing the party machinery, directly appealed to the people. Indicative of the institutional and

ideological decline within the INC, the electorate were mobilized to vote for the leader rather than for the party's programme or ideology[5].

4. Anti-Defection Law, Dissent and Democracy

During the 1970s and early 1980s, the political parties in India suffered from the problem of defection which turned out to be major problem to Indian democracy. To check that Anti-Defection Law was passed in the form of 52nd Amendment that inserted 10th Schedule to the Indian Constitution in 1985. Anti-defection law provided for disqualification of a member either House of Union or of a State Legislature found to have defected from the parent party to another while continuing as a member of the house. The principle behind anti-defection law was to ensure that an elected member of a legislature from the ticket of his/her parent party shall not defect to another party. The authority to decide a case of defection rested with the Speaker or Chairperson of the concerned House. In the Jagjit Singh vs. State of Haryana[6] case, the Supreme Court too upheld the validity of this principle**.** Although this law has checked the phenomenon of defection but it has bearing on the idea of representation because the disqualification for defection could be seen as a violation of the fundamental values and principles underlying parliamentary democracy by denying an elected representative his freedom of speech, right to dissent, and freedom of conscience[7]. However, 52nd Amendment Act, 1985 which deals with anti-defection succeeded in checking the evil of defection, but it has enormously increased the authority of party leadership and has curbed the within party democracy.

5. Political Parties and Democracy in Neo-liberal Era

In the 1989 general election, INC lost its dominance on the national politics. The new political parties and ideologies began to take centre-stage from the late 1980s onwards. The BJP emerged as a major force in Indian politics and replaced the INC as the single largest party in the Lok Sabha elections of 1996, 1998 and 1999. The BJP came to power denouncing Nehruvian secularism, advocating militant Hindu nationalism, and encouraging anti-Muslim rhetoric and action[8], which turned out to be a major challenge to democracy because secularism creates enabling environment for democracy in a multi-religious society like India. The decline of INC further witnessed the rise of

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5 Rajan Harshe, n. 1, p. 249.

6 Supreme Court of India Writ Petition (civil) 287 of 2004

7 B.L. Shankar & Valerian Rodrigues, *The Indian Parliament: A Democracy At Work*, New Delhi: Oxford University Press, 2014, p. 158.

8 Oliver Heath, "Anatomy of BJP's Rise to Power: Social, Regional and Political Expansion in the 1990s", *Economic and Political Weekly*, Vol. 34, No. 5, 1999, 2511-2517

several new political parties Samajwadi Party (SP), Rashtriya Janata Dal (RJD), Janata Dal (Secular) and Janata Dal United (JDU), which started invoking caste identities for electoral mileage. In this process, national parties were marginalized, or became adjuncts to the state parties in major states of the country[9]. One remarkable feature of political parties in India since 1990s has been their tendency to move away from ideological frameworks[10]**.** Emergence of these political parties in the electoral arena of Indian democracy has made the public domain fragmented because these parties started mobilizing the electorates on the basis of parochial considerations ranging from caste to religion and ethnicity to region. Consequent upon that politics of ideas has been replaced by the politics of identities which has made the public space more angular and fractured and thereby eroded the fundamental ethos of Indian democracy, which is always based on the greater common good for the benefit of the entire society, instead of promoting the particular goods of particular communities by putting them in the binary mode. Mandal, Market and Mandir issues had been used by the political parties to create their political fortune in the electoral arena of Indian democracy that has accentuated the phenomenon of politics of identities which turned out to be another set-back to liberal democracy in India.

Further, the absolute majority which BJP got in the 2014 general elections has again led to the personalization of power within the party as well as government. Absence of within party democracy has already been revealed by the senior leaders of BJP like Yashwant Sinha, Shatrugun Sinha and some other leaders. The state of affairs prevailing in BJP indicates that all is not well within its organization. It means that the BJP has witnessed the same tendency now which the INC has been suffering since long that is personalization of power within the party organization. To emerge as a vibrant organization, the BJP needs the institutionalization of power but the reverse has happened. Like INC, the decisions have also been taken at the top in the BJP by the top leadership and have been conveyed downwards. There is no space for dissent and debate within organization which are essential for the growth of BJP as an organization but also for the health of Indian democracy because now, it the BJP which has been operating the democracy at the national level and in many states of Indian Union wherever, they have formed government so far.

Absence of within party democracy has also been phenomenon in the regional political parties like DMK, AIADMK, TDP, AGP, SAD, NC, PDP, INLD etc. and other national political parties like BSP, SP, RJD because they have also been imitating the

[9] Zoya Hasan, n. 4, p. 244.
[10] *Ibid*, p. 246.

larger political parties. These political parties have also remained the personality-centric organizations. Instead of witnessing the tendency of institutionalization of power, they have been suffering from the tendency the personalization of power. Top leaders of the parties have become oligarchs of their respective organizations. Dissenting voices within the organization have been silenced by expelling those who raised it within the organization. The feudal culture has been prevalent in all the organizations ranging from national to regional parties. Incompetent junior level leaders are promoted and the competent leaders are snubbed within the party organizations and within the government because the latter has been having independent mind. Instead of promoting the competent leaders from within the party organizations, the top brass of regional and some national parties are promoting their kith and kin that has resulted into dynastic politics which has been a serious challenge to Indian democracy. Such a phenomenon has led to the emergence of democracy of dynasties and thereby the rule of few families. Due to that the democracy has failed to change the power equation between the elite and masses; rich and power, minority and majority and, male and female genders as well.

In the late 1960s, the emergence of regional political parties in the state politics has made the democracy inclusive and more representative at micro level by articulating issues pertaining to different regions in the democratic politics. It also articulated regional identity and made it dialogical with national identity. While articulating the issue of state autonomy, the DMK and SAD, had tried to make Indian democracy more democratic in the 1970s. They argued for the federalization of power which was essential for the consolidation of Indian democracy. But the role of regional parties in the Indian democracy had turned out to be negative because since the 1990s, they have been more concerned about the sharing of political power for the personal interests of the regional political elite rather than for the state autonomy. Era of coalition politics afforded an opportunity to regional political parties to argue for the federalization of power but the regional political elite has failed to do that. Regional parties like DMK, SAD, NC, RJD, AIDMK, AGP and TDP etc emerged important stakeholders in the UPA and NDA dispensations but have failed to bring any change in the structure of centre-state relations. When the regional parties got the opportunity to argue for the state rights, instead of arguing that they bargained either for the important berths in Union Council of Ministers or accommodation of their kith and kin in it. They were so eager to share the cake that they put their ideology aside and their quest for state rights was relegated to the background.

While generating political capital in their favour, the political parties have been mobilizing people on the basis of caste, religion, community, region, language which is

contrary to the spirit of democracy and constitutionalism. Electoral laws have failed to prevent the political parties from mobilizing people on the basis of parochial consideration for electoral mileage. Such a phenomenon has led to the emergence of divisive society that is characterised by the growing intolerance, sharpening religious and cultural angularities. In the post-colonial era, the democracy was expected to liberate the Indian society in general and people in particular from social stratification that enslaved them for the generations together. Political mobilization of people by the political parties on the basis of caste, creed, religion and ethnicity for electoral mileage has undermined the ethos of democracy which has always been to evolve as an egalitarian and tolerant society.

When voted to power, the political parties formed government but they continued to behave as political parties and pursue parties' agenda. Instead of acting as government that belongs to every citizen, the governments led like political parties continued to serve their partisan agenda. Political parties have been treating governments as their parties' fiefdoms rather than working for the welfare of people. Neither the people nor the governance has been on the agenda of governments formed by the different parties both at the centre as well as the state level. Instead they indulged into populist measures to enhance their electoral prospects. Electorates have been treated as commodity, to be purchased by the political parties during elections either by giving money or distributing liquor apart from seducing them through populist measures at the cost of tax payer's money. Middle class's political apathy has further enhanced the worth of the political capital of poor for the political parties for their electoral prospects. Poor people's participation in the elections has always been more than the middle class which are swayed by the populist measures, money, liquor etc.

The problems of Indian democracy got further compounded with the advent of globalization. Globalization advocated by all the political parties except left parties shook that unshakeable belief in the politics of ideas like inclusive nationalism, secularism and pluralism. Emergence of BJP as a single largest party in 1996 Lok Sabha elections by winning 161 seats polling 20.3 percent votes and again in 1998 Lok Sabha election by winning 182 seats and able to form government has changed the dynamics of Indian democracy. The NDA government led by BJP not only went on implementing the INC initiated 'economic reforms' but began to advocate a more vigorous liberalization of the domestic economy[11]. Although, the process of Liberalization, Privatization and Globalization (LPG) was started by the INC

[11] A. S. Narang, *India Political System, Process and Development*, New Delhi: Gitanjali Publishing House, 2015, p. 393.

government in 1991 but it was carried forward by all the governments formed subsequently by different parties including NDA governments. According to the constitutional mandate, Indian democracy is not only a political process but economic and social processes as well. For the success of political democracy, the economic space has to be inclusive apart from the inclusive character of the social space in India. The LPG reforms have made the economic space exclusive for the poor, peasants, farmers, tribals, semi-skilled and unskilled workers and thereby undermined economic thrust of liberal democracy in India. Neo-liberal economic reforms have created dichotomy between the thrust of political democracy which has been inclusive and the thrust of neo-liberal economy that has turned out to be exclusionary in nature.

By and large the political parties have been voted to power by the poor but after forming the government they have been serving themselves, corporate houses, political elites/class and protecting the criminals to whom they use to intimidate the voters during elections. The corporate funding of the political parties has transformed the process of politics from being a service to business in India. It has led to the emergence of nexus between the business houses and political parties. While funding the election of political parties, the corporate houses have been making investment in politics and when the political parties come into power, they have been reaping benefits of their investment in the electoral politics by shaping the policies of governments to their advantage. For corporate houses, the politics has become business. Leadership of most of the political parties has acquired stakes in business as they believed that the money is essential to win the election. They have owned transport, cable network, T.V. channels, factories, agencies of automobiles, cinemas etc and have huge stakes in the real estate sector apart from taking the big government contracts in the name of their relatives. They have been using the public mandate to multiply their wealth as and when their respective parties were voted to power. In this way, the politics has become business for the political elite as they venture into politics to amass public wealth by misusing the public mandate which has always been given for better service delivery, governance, law and order situation, employment, social security, health & education services and infrastructure.

6. Functioning of Political Parties: Iron Law of Oligarchy

Such a scenario indicates that Robert Michaels' idea of *Iron Law of Oligarchy* has been quite useful to explain the conduct of all the political parties in the Post-Colonial India. He articulated this thesis after conducting the study of political parties and trade unions in Germany. During the concluding observation of his study, he argued that the political parties and trade unions came into existence to promote democracy but they

had deviated from that agenda. Instead of democracy, the organizational needs have become more important for them. For instance coming and staying in power has become the top priority of the political parties. To grab power or share power by relegating the ideology to background has become a reality. The opportunities for the members to participate in the decision-making in the political parties are negligible. Instead of addressing its cadre, the political parties are directly addressing the electorates. The charisma of leadership has been celebrated instead of advocating democracy within party and thereby emphasising on their democratic functioning. The conversion of charisma into authoritarianism, carried out at an all-India level by Indira Gandhi, has been manifested by other Indian political leaders working in their own restricted spheres. Sheikh Abdullah, Bal Thackeray, Lalu Prasad Yadav and Mulayam Singh Yadav have all been the object of great adoration on the part of their followers; they have then used this personal charisma to gain total control over the apparatus of their respective parties[12]. Further, they have encouraged their followers to threaten and intimidate independent journalists, judges, officials and professionals. Further rather than allowing their successor to be chosen by the process of democratic election, they have anointed their close kin as their successor[13].

Another challenge faced by the Indian democracy has been the funding of the political parties. According to Section 29-B of People Representation Act, 1951, every political party may accept any amount of contribution voluntary offered to it by any person or company other than the government company[14]. Under this law, the donors of amount Rs. 20000 are allowed to be kept secret legally. In 2017 Union budget, the government announced an electoral bond scheme which was notified in January 2018; it allowed large scale anonymous donations. An electoral bond is a promissory note similar to a bank note and it can be purchased from the branches of the State Bank of India. Political Parties registered under Section 29A of the Representation of the People Act, 1951 and which secured not less than one percent of the votes polled in the last general elections of the Lok Sabha and of the State Legislative Assembly of the State, are eligible to enjoy the benefits of electoral bonds. These bonds can be encashed only through a bank account with the authorized bank[15]. Eligible parties can be allotted account by the Election Commission of India and the electoral bond transactions can be made through account only. These bonds are not required to bear the name of the

12 Ramachandra Guha, "Political Leadership", Niraja Gopal Jayal & Pratap Bhanu Mehta, eds., *Oxford Companion to Politics in India*, New Delhi: Oxford University Press, 2014, p. 297.

13 *Ibid.*

14 *Representation of the People Act 1951*, *www.legislative.gov.in*, accessed on March 18, 2019

15 Electoral Bond Scheme 2018, Press and Information Bureau, Ministry of Finance, Government of India, October 27, 2018, available at, *pib.nic.in* (Accessed on March 19, 2019).

donor, however, the donor and party details will be available to the bank. The purpose behind this move is to ensure that the donations made to the party will be accounted for the balance sheets without exposing the donor details to the public[16]. While addressing the press conference, Finance Minister clarified that "a donor will get a deduction and the recipient, or political party will get tax exemption, provided returns are filed by the political party"[17]. According to the available data 95% of the electoral bonds purchased in 2017-2018 went to the BJP[18]. Consequent upon that more than half of all the income of national parties in India is derived from unknown sources.

In the 1990s, the political parties shifted the discourse of Indian democracy from politics of ideas to that of identities. Political parties across the spectrum started openly invoking caste, religion and regional identities to generate political capital in their favour, notwithstanding the constitutional mandate and morality of Indian democracy. In the 1950s political elites were used to put the interests of the nation ahead of their regions and communities, members of the House now felt that it was quite legitimate to uphold the interests of their regions and communities. However, it has made Indian democracy more representative but it has made the public space more fragmented. In the 1950s, Indian democracy started its journey with the politics of ideas like liberty, equality and justice and ultimately landed in the politics of identities in the 1990s. This has happened due to the political mobilization of people on the basis of caste, religion, ethnicity, language and region.

With both Congress and BJP unable to win a majority in the Lok Sabha, various experiments of coalition formation took place in the 1990s, and the state parties played a crucial role in government formation from 1996 onwards. The state parties never had a uniform direction to their political choices and alliances[19]. Alongwith the rise of state parties the decade of the 1990s is also famous for the prominence of the caste factor and in particular the rise of backward class politics known as 'OBC politics'. This development needs to be taken into consideration here because of its close links with the phenomenon of state parties. Since the late 1980s, political mobilization among the backward caste took shape in many states of India[20].

16 Navmi Krishna, The Hindu Explains: What is an electoral bond and how do we get one?", The Hindu, November 4, 2018, available at *http://www.thehindu.com* (Accessed on March 19, 2019)

17 *Ibid.*

18 Rakesh Dubbudu, "It is Official: 95% of the Electoral Bonds Purchased in 2017-2018 went to BJP", November 30, 2018, available at *http://faculty.in* (Accessed on March 19, 2019)

19 Suhas Palshikar, "Regional and Caste Parties", Atul Kohli and Prerna Singh, eds., *Routledge Handbook of Indian Politics*, New York: Routledge, 2015, p. 96.

20 *Ibid*., p. 97.

7. Absence of Constructive Opposition

In Indian democracy, the political parties have not only been playing the role of ruling party but also that of opposition party/parties. Most of the governments formed by the political parties have also continued to behave as political parties and fiefdom of their top leaders. As opposition parties, the political parties have failed to play their due role as desired by the representative democracy in India. Instead of acting as responsible opposition parties, the political parties have also been playing the role of destructive opposition. Neither governance nor people have been on the agenda of opposition as well as the ruling parties In India. Agenda of political parties has been to grab power and stay in power whether they have been in government or in opposition.

8. Conclusion

To sum-up, it can be articulated that political parties have played vital role to make democracy operational, stable and representative in the Post-Colonial India. Institutionalization of power within the INC and the parliamentary democracy had happened during the Nehru period. It was followed by the personalization of powers within the INC as well as in the parliamentary form of government in the post Nehru India. Rise of regional parties in the state politics had made democracy more representative at micro-level but the centralization and personalization of powers within the INC emerged twin challenges to parliamentary democracy in India during the 1970s and 1980s. These tendencies have also emerged in the functioning of regional parties and other national parties as well. Feudal political culture developed within political parties has not allowed the parties to grow as democratic organizations. Instead political parties have evolved as oligarchic organizations which have jeopardised the working of parliamentary democracy in India. Since the late 1980s, the political parties have been openly playing the politics of identities to bright their electoral prospect which has made the public domain binary, angular and fragmented thereby adversely affected the functioning of Indian democracy. In the neo-liberal, political parties have promoted the market instead of state and collaborated with the corporate houses to serve their interests and also the interests of their leaders rather than serving the people who have voted them to power. During the last couple of decades, the political parties have been seeking the votes from the poor people by taking the populist measures and after coming into power they are serving the corporate houses by framing the policies favourable to them for quid-pro-quo. Due to that the democracy has failed to become substantive and people and governance have not been able to become the agenda of democracy in India.

WATER POLLUTION CONTROL LAWS IN INDIA: AN OVERVIEW

Dr. Shamsher Singh*

1. Introduction

Water, our most important but neglected natural resource is essential to development, agriculture, human communities and to our survival itself. Industrial effluents, household effluents, inadequate of sewerage and sewage treatment facilities, waste from agriculture practices etc are responsible factors for water pollution, which not only affects ecology but also sustainable development. *The report, released on the occasion of World Water Day by the UN Environment Programme (UNEP) in March 22, 2010, said* "one child under the age of five dies every 20 seconds from water-related diseases"[1].

According to ***United Nation World Water Development Report****, Water for People, Water for Life* "India ranks 120th among 122 selected nations in the world in terms of quality of water. The government data reveals a bleak picture of the water situation in India: Over 200 million people do not have access to safe drinking water; about 15,000 habitations are reported to be without any source of potable water, and about 200,000 villages are only partially covered by drinking water schemes"[2].

According to the ***World Health Organization*** *(WHO)* "4 billion cases of diarrhea each year in addition to millions of other cases of illness are associated with lack of access of water that is safe for human consumption. Per year 2.2 million people die as a result of diarrhea and most of them are children under the age of five. Human health is severely impacted by water-related diseases (water-borne, water-washed, water-based, and water-related vector-borne infections) as well as by chemical pollution discharged to water"[3].

In his article, "Sustainable Development and Water Security in India" Suresh. P. Prabhu insists that "In India major industrial thrust to steer the economy is only a

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1 Shashi Bhusan Kumar, "Water Management-Time to Cure Global Tide Sick Water", *Chronicle,* Vol. XX No. 6, May, 2010, p. 14.

2 Bibhu Prasad Tripathi, "Environment, Terribly Misjudged", *Combat Law,* Volume 5, Issue-5-December 2006.

3 Shashi Bhusan Kumar**,** "Clean Water a Human Right*", Chronicle*, Vol. XXI No. 10, September, 2010, p. 12.

matter of time. Industry needs water- fresh or recycled. It is estimated that 6.4 m ha of water will be needed by 2050 to sustain industrial activities in India. The pollution caused due to industrial effluents is a far more serious problem than the one due to domestic effluents because of their higher potential to damage the natural land water resource system. While access to drinking water in India has increased over the past decade, the tremendous adverse impact of unsafe water on health continues"[4].

2. Re-examination of the "*Water (Prevention and Control of Pollution) Act,* 1974"

2.1 Background

To prevent the pollution of water, it was necessary to discontinue the disposal of household and industrial wastes into the water bodies like rivers and streams without adequate treatment. To solve the above mentioned problem, *in 1962, a working group was established to set up a draft enactment for the preservation of pollution of water.* As per the recommendations of committee, Parliament in 1974 passed "*the Water (Prevention and Control of Pollution) Act"*. It is applicable throughout "India except the State of Jammu and Kashmir". Stockholm Declaration on Human Environment was one of the inspirational sources for the Act.

2.2 Objective of the Act

The main object of this Act is "*to maintain or restore the wholesomeness of water and to prevent control and abate water pollution".*

2.3 Summary of Provisions

"The Water (Prevention and Control of Pollution) Act, 1974*",* comprises eight chapters. It has been amended two times i.e. in 1978 and 1988. The Act deals with the definitions of relevant issues, the ambit of enforcement, the authorized body, their functions and powers, prosecution and the punishment of the opposed persons, company or the government department. The Act is, however, not all exclusive and is reinforced by other legislations. The Act defines "*pollution"* under **"Section 2 (e)"** as "Contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public

[4] Suresh. P. Prabhu, "Sustainable Development and Water Security in India*"*, in *Sustainability Tomorrow,* January-March, 2007, p. 11.

health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life and health of animals or plants or of aquatic organisms".

The Act deals with the "Constitution of Central Board"[5]. 'Section 3(1) and Section 4(1)' of the Act is "*for setting up of Central and State Boards for the prevention and control of water pollution"*. "Section 3(3)" of the Act makes it clears that "The Central Water Pollution Control Board shall be regarded as a body corporate having perpetual succession, and a common seal, right to sue or be sued like a company incorporated under the Companies Act, 1956".

Moreover, '*Sections 16 and 17'* of the Act, highlights the functions of the Boards, which are given as under:

- *Besides advising the Central Government on matters concerning prevention and control of water pollution, the Central Board also co-ordinates the activities of the State Boards and provides them with technical assistance and guidance.*
- *The Central Boards are supposed to inspect the various industrial plants,*
- *To see that effluents discharged are well within the permissible limits.*
- *Wherever the provisions of the Act are violated, they can prosecute the polluter.*

The Act empowers to "State Board or its authorized officer to take sample of water for analysis and specify the procedure after the sample has been taken for analysis"[6].

Water contamination also considered as recognized cause for spreading of various health diseases. For the preservation of public from these diseases, the State Board laid down that "*no person shall knowingly cause or permit any poisonous, noxious or polluting matter into any stream or well or sewer or on land except according to prescribed standard*"[7]. Moreover, for the protection of rivers in India, Water Act emphasized that: "a person who is discharging sewage or trade effluent as a result of process, operations or manufacturing activities before the commencement of the Water (Prevention & Control of pollution) Act, 1974, such person is required to obtain consent from the respective Board and for this purpose, the State Government may specify date by notification in official gazette"[8].

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5 Section 3 of *the Water (Prevention and Control of Pollution) Act,* 1974.
6 Section 21 of "*the Water (Prevention and Control of Pollution) Act,* 1974.
7 Section 24 (i) (a) *the Water (Prevention and Control of Pollution) Act,* 1974.
8 *See*. "Section 26 of *the Water (Prevention and Control of Pollution) Act,* 1974.

To prevent the country from water pollution, Act laid down punishments for those, 'who fail to comply with the provisions of the Act' and *in case of non-compliance with statutory provisions*; "court may publish the violator name, place of residence, offence & penalty, in any newspaper or in other means of media"[9]. But this provision could be invoked in case of second or subsequent conviction.

Further, Section 51 of the Act empowers the Union Government "*to establish a Central Water Laboratory by issuing notification in official gazette".* Central Government has power to "specify any laboratory or institute as a Central Water Laboratory" under this Act. Like the Central Government, "State Government has also power by notification in official gazette to establish a State Water Laboratory"[10].

2.4 Shortcoming of the Water Act and Suggested Improvements

Undoubtedly*, "Water (Prevention and Control of Pollution) Act, 1974"* is good mandate but still certain lacunas are prevalent in Statute, which may be cured.

- *Section 24* requires that "no person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards may be laid down by Board to enter whether directly or indirectly in any stream or well". Further, *Section 25 and 26* "impose a prohibition on a person to discharge sewage or trade effluent into a stream without the consent of the Board". *There is overlapping between Sections 24 on the one hand and Section 25 and 26 on the other, and it creates ambiguity.*
- Punishments provided under the Act have less deterrent effects, because a person is punished only, if he committed the offence 'knowingly'. That condition appears to be like farewell from the rule of strict liability, where intention of the polluter is immaterial. *It is submitted that effective implementation (for sustainable development) is possible only, when deterrent effect will increase with dual punishments i.e. one for knowingly created pollution and other for unknowingly created pollution.*
- Moreover, Act discourages public participation, because none of the provisions of the Act is regarding the public participation.
- Further, it is submitted that Act is silent regarding the standards of quality for the suppression of water pollution.

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9 Section 46 of *the Water (Prevention and Control of Pollution) Act,* 1974.

10 Section 52 of *the Water (Prevention and Control of Pollution) Act,* 1974.

- Another lacuna in the Act is procedural formality of "Section 197 of the Criminal Procedure Code" before the prosecution of public servants i.e. "prior sanction of the government is necessary for the trial of government servants". *Undoubtedly, that procedural requirement makes the board helpless, because departmental bias is inherent in the government departments. It appears to like that the lawmakers are working as protector for the law breakers.*
- As per "Section 33 of the Act*", "Board can approach to courts not lower to that of a Metropolitan Magistrate or a Judicial Magistrate First Class for restraining apprehended pollution of water in streams or wells".* But, 'onus of proof' is fixed with the Board. The result of that particular provision is not so good, because in number of cases, polluters have been given the benefit of doubt. *As water pollution is a serious offence, because it affects the society at large, therefore, it is submitted that water pollution must be added in the series of socio-economic offences and 'burden of proof' should fix with the polluter.*
- According to "Section 46 of the Act"**, "**for second or subsequent conviction of the offenders, court may publish name, place of residence in the newspaper". *It is recommended that a penalty given under Section 46 is inadequate. Because, these criminals are rich and cunning people and affects the whole society. Therefore, for creating a deterrent effect of Section 46, court must not wait for second or subsequent conviction.*

3. The Water (Prevention and Control of Pollution) Rules, 1975

The Rules specifies that, "there will be Central Water Laboratory, which shall cause to be analyzing any samples of water, sewage or trade effluent received by any officer authorized by the Central Board"[11].

4. The Water (Prevention and Control of Pollution) Cess Act, 1977

In the hope of enlarging the means regarding implementation of *Water Act, 1974*, another law i.e., "*Water (Prevention and Control of Pollution) Cess Act"* was passed in 1977. The Act required *"levying a cess on local authorities which are entrusted with the duty of supplying water under the law by or under which they are constituted and on certain specified industries".*

[11] Rule 27 of *the Water (Prevention and Control of Pollution) Rules,* 1975.

Moreover, *'Section 3' of the Act empowers the* "Central Government to impose cess on consumed water and enables the industries to earn a rebate on account of installing the plant for the treatment of sewage or trade effluents". The precise idea behind enactment of Section 7 of the Cess Act is that "the period during which rebate could be claimed is only that period during which the trade effluents get properly and satisfactorily treated".

5. "The Water (Prevention and Control of Pollution) Cess Rules, 1978"

The object behind the enact of "Cess Rules, 1980" is "to contain the standard definitions and indicate the kind of and location of meters that every consumer of water is required to affix".

6. Other Legislations

Besides above laws concerning protection of water pollution, there are other legislations also, which are playing effective role for the protection of society from water pollution. These are:

6.1 The Indian Fisheries Act, 1897

The Indian Fisheries Act, 1897[12] prohibited "polluting of water by poisoning with lime or noxious materials". *The idea was to protect fish and other river life*. "*The Act establishes two sets of penal offences whereby the government can sue any person who uses dynamite or other explosive substances in any way (whether coastal or inland) with intent to catch or destroy any fish or poisonous fish in order to kill"*[13].

6.2 The Rivers Boards Act, 1956

An Advisory River Board has been established under the Act to find out solutions of inter-state water issues.

6.3 "The Merchant Shipping Act, 1958"

Keeping in view the concept of sustainable development, Parliament of India enacted the Merchant Shipping Act, 1950. The Act enables the Central Government "to establish a National Shipping Board to provide for the registration of the Indian Ships and generally to amend and consolidate the law relating to merchant shipping". Moreover, "Part XIA of the Act, concerned with prevention and containment of pollution of the sea by oil".

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12 Act 4 of 1897.

13 Section 5(1) of *the Indian Fisheries Act,* 1897.

"The Act provides that "no oil or oily mixture shall be discharged from an Indian tanker anywhere into the sea or from a foreign tanker anywhere within the coastal waters of India"[14]. "The Act conferred powers upon the Central Government for making Rules for the purpose of preventing or reducing discharges of oil and oily mixture into sea and requiring the Indian ships to be fitted with such equipment and to comply with such other requirements as may be required"[15].

6.4 Coastal Regulation Zone Notification, 2011

Undoubtedly, developmental activities like construction of shopping malls, railways, roads, residential housing schemes and hotels has very serious impact on environment particularly on coastal zones. Therefore a positive attitude of legislature and public is necessary to deal with the issue. Keeping in view the new developments, the Central Government notified new Coastal Regulation Zone Notification, 2011 with the following objectives:

- *To ensure livelihood security to the fisher communities and other local communities living in the coastal areas.*
- *To conserve and protect coastal stretches.*
- *To promote development in coastal areas through sustainable manner based on Scientific Principles.*
- *To restrict industries dealt with manufacture or handling or storage or disposal of hazardous substances.*

7. Judicial Endeavours

For attaining water security and sustainability, the Indian Judiciary is doing well. The following decisions of Courts are evident of the said fact:

In *M.C. Mehta* v. *Union of India*[16], wherein river Ganga flowing through Kanpur was being polluted by sewage and trade effluents of tanneries through 17 nallahs, making the water toxic and hazards for health. Therefore, "time-bound directions were issued by the Apex Court to the administration for stopping the sewage effluent and installations of treatment plants". In that case court maintains the relation between health and sustainable development.

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14 Section 356-C of *the Merchant Shipping Act,* 1958.
15 Section 356-E of *the Merchant Shipping Act,* 1958.
16 (1987) 4 SCC 463.

7.1 Ganga Pollution by Tanneries Case[17]

In this case, Supreme Court held that:

> *to set up primary treatment plant is necessary for every industry. The court further held that just like where an industry which doesn't pay minimum wages to its workers can't be allowed to exist, an industry which fails to set up a primary treatment plant be not permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensure by the discharging of the trade effluents from the tanneries to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure*[18].

7.2 Management of Water Resources and NEERI Report

In the case of *"M.C. Mehta* v. *Union of India and others"*[19], "the National Environmental Engineering Research Institute (NEERI)" has opined in its report filed before the Supreme Court that:

> *"management of water resources in a manner that achieves the goal of sustainable development warrants legal intervention, based on the principle of Intergenerational equity, the Precautionary Principle, Conservation of natural resources and environmental protection. To protect ground water, the Supreme Court has issued orders invoking the Precautionary Principle. The Ground Water Authority was constituted as a result of this judgment".*

7.3 Prof. Nayudu's Case

"*A.P. Pollution Control Board II* v. *Prof. Nayudu's Case*"[20] "the present case revolved around the untiring, and at times devious efforts made by the respondent to establish its oil processing plant within a 10 km radius of major water reservoirs in Andhra Pradesh, the Osman Nagar and Himayat Nagar, which cater to the needs of the people of Hyderabad and Secunderabad. On 25-7-1997 the exemption order was stayed as the result of a public interest petition filed against it. Apex Court, keeping in view the facts and circumstances of the case, once again Court adopted the positive approach in context of sustainable development and the court gave precedence to the human need for drinking water over and above the possible economic advantage that could be generated by the industry for the State. Court further directed that State and the Board shall not permit any polluting industries within 10 km radius of the reservoirs".

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17 *M.C. Mehta* v. *Union of India,* AIR 1988 SC 1037.
18 *M.C. Mehta* v. *Union of India,* AIR 1988 SC 1037, Para 19.
19 (1997) 11 SCC 312.
20 (2001) 2 SCC 62, P. 87.

7.4 State is under Obligation to Preserve Underground Water

Again, the issues of deep subsoil and water came up in the case of *M.P. Rambabu* v. *Divisional Forest Officer*[21], where the AP High Court held that:

> *"deep underground soil and water belong to the State in the sense that the doctrine of public trust extends to them. Manifestly, their use is subject to the State regulation even in absence of specific law. The holder has the right of user for a purpose for which the superjacent land is held. If, he uses for a different purpose and causes pollution to underground water or soil, the State can interfere and prevent contamination".*

7.5 Discharge of Toxic Substances in Water Bodies is Hazardous

Moreover in the case of *"Vijay Singh Punia* v. *Rajasthan State Board of Pollution Control of Water Pollution"*[22] the Rajasthan High Court, while dealing with the issue, "directed industries and the State and its agencies to set up a common effluent treatment plant so that effluents were not discharged into the said water body". The decision of the court was highly inspired by sustainable development principles.

7.6 Noyyal River Pollution Vis-a-Vis Industrial Activities

In the case of "*Tirupur Dyeing Factory Owners Association* v. *Noyyal River Ayacutdars Protection Association and Others"*[23], Apex Court held that"

> *"development of industries, irrigation resources and power projects are necessary to improve employment opportunities and generation of revenue but balance has to maintained between development and preservation of natural resources so as to ensure that environment is not damaged irreparably, which may in turn cause irreparable damage to economic interests. Tirupur in State of Tamil Nadu is an industrial hub providing employment to 5 lakh persons. A large number of industries had indulged in dyeing and bleaching works at Tirupur area. Undoubtedly, there had been unabated pollution of Noyyal River by discharging the industrial effluents into the river".*

The Supreme Court further held that:

> *"such industries can't escape the responsibilities to meet out the expenses of reversing the ecology. They are held bound to meet the expenses of removing the sludge of river and also for cleaning the dam. Court further held that the principles of "polluter pays" and "precautionary principle" have to be read along with the doctrine of sustainable development".*

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21 AIR 2002 AP 256.
22 AIR 2003 Raj. 28.
23 (2009) 9 SCC 737.

8. Conclusion

From the above discussion, it is apparent that for achieving the concept of pollution free water for people, Parliament of India has done a commendable work and judicial efforts in context of water pollution are also very good. Undoubtedly, 'the Water Act' is backed by sustainable development principles because water is an important natural resource and its preservation is equally important for present and future generations. The researcher has submitted some suggestions based on the findings of the study, as per Indian requirements, which may be helpful towards evolving the future strategy and to suggest ways to prevent violations of water protection laws:

- For the control of water pollution, people participation is necessary. Today, throwing of dead bodies, disposal of poisonous wastes by industrialists in the streams and rivers is a common habit of the industrialists and people. In India, major rivers, such as *"Ganga, Yamuna, Godavari, Cauvery, Gomti, Kosi, Ravi, Sone, Chenab, Jhelum, Narmada, Mahi, Tapti and Krishna"* are said to be polluted in some form or the other. It is relevant to mention the comments of Justice Krishna Iyer. He rightly said that "*today a bath in Yumana and Ganga is a sin against bodily health, not on salvation for the soul so polluted and noxious is these holy waters now*[24] *".*
- It is submitted that, existing legislations sanctions are inadequate and some new provisions with deterrent effects must be inserted in the Act.
- Moreover, it is emphasized that government must frame such policies and programmes, which may educate the farmers, industrialists and household regarding the preservation of water.
- Citizens must be equally responsible for the pollution of water. So, the polluter pays principle should also be applicable on households for the pollution of water and air.
- Further, it is submitted that *"all renewable and nonrenewable resource projects in the coastal zone and ocean should also be subject to EIA"* (Environment Impact Assessment).

Moreover, it is emphasized that "government must frame such policies and programmes, which may educate the farmers, industrialists and household regarding the preservation of water and hence sustainable development".

[24] **V**.K. Krishna Iyer, *Environment Pollution and Law*, Vadpa Law House, Bhopal, p. 95.

SEXUAL HARASSMENT OF WOMEN: CAUSES, CONSEQUENCES AND PREVENTION

Dr. Babita Devi*

1. Introduction

It is not ironical that when Indian mythology places women on a very high pedestal and they are worshipped and honored Goddess of learning as Sarswati; of wealth as Luxmi; of power as Parvati – we adopt double standards insofar as her guaranteed rights are concerned.[1] There are a plethora of laws and constitutional promises, but the exploitation against women still remains continuous.[2] Sexual harassment violates the fundamental rights of a woman which are enshrined in the Constitution of India. It violates right to equality, life, dignity, liberty and freedom of a woman. Sexual harassment at workplace creates hostile and insecure work environment for women which hinders and prevents their active participation in work and it will have effect on their social and economic empowerment.[3]

Sexual harassment must be understood to exist on the continuum of sexual violence against women.[4] Sexual violence violates the rights of women, imposes threat to achieve their right to education. Because of sexual harassment women's physical, mental and sexual integrity always remain at the risk.[5] Many countries use the terms such as sexual bullying, sexual abuse and gender-based violence rather than using the terms sexual harassment.[6] The sexual harassment have been described as 'unwanted intimacy' in the Netherlands, 'sexual blackmail' in France and 'sexual molestation' in Italy and 'sexual solicitation' in the state of Canada.[7] Violence against women is treated as normal and they are socialized to expect violence in their everyday lives.

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1 Krishna Aggarwal, "Crime against Women – A Socio Legal Perspective", *Criminal Law Journal*, Vol. 1, 2012, p. 9.

2 K.C., "Universalization of Human Rights of Women: Supreme Court's Sets the Pace", *All India Reporter,* 2001, p. 59.

3 J. L. Kalyan, "Sexual Harassment Against Women in India: An Overview", *International Recognized Double-Blind Peer Reviewed Multidisciplinary Research Journal*, Volume – 2, Issue – 11, May 2015, p. 1.

4 Vandana, *Sexual Violence against Women: Penal Law and Human Rights Perspectives*, Lexis Nexis, Nagpur, 2009, p. 29.

5 Bharamgoudar Ratna, 59, "Protection of Women against Sexual Harassment at Workplace", *Indian Socio-Legal Journal*, Vol. XXXIX, 2013, p. 59.

6 Michele A. Paludi, "Feminism and Women's Rights Worldwide", *Praeger California Journal,* Volume I, 2010, pp. 187.

7 Alok Bhasin, *Law Relating to Sexual Harassment at Work*, Eastern Book Company, Lucknow, Ist ed., 2002, p. 3.

Violence is a tool for making a woman subordinate to man and sexual violence is a tool of committing oppression against woman. Those women who do not experience any direct form of sexual harassment, they experience fear of being the victims of sexual violence which invades nearly all aspects of their private and public lives.[8] Sometime woman is not directly harassed but she is a witness of such behavior which is an offensive in nature and affecting her mental and physical health.[9] Sexual harassment at workplace is rampant but most of cases are not reported due to fear of stigma, widespread blaming, loss of reputation etc.[10]

2. Sexual Harassment: A Human Right Issue

The United Nations and the other international organizations have recognized that violation of women's rights is the violation of human rights. Article 1 of the Universal Declaration of Human Rights, 1948, provide- "all human beings are born free and equal in dignity and rights and Article 2 provides-everyone is entitled to all the rights and freedoms set forth in this Declaration." The United Nation's Commission on the Status of Women, during the Vienna Conference of 1993 formally recognized women's rights as human rights.[11] Human rights and basic freedoms are recognized as the birth rights of all human beings. Equal rights of men and women are provided in the preamble to the Charter of the United Nations.[12] Violence against women is a violation of basic rights of women.[13] The United Nations General Recommendation 19 to the Convention on the Elimination of all Forms of Discrimination against Women defines sexual harassment of women to include:

> Such unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem, it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her

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8 Suman Gupta, "Sexual Harassment in Employment and Education: Causes, Consequences and Prevention", *Delhi Law Review*, Vol. XXVI, 2004, pp. 68-69.

9 Faisal Ali Khan, "The Law Related to Protection of Women from Sexual Harassment at Workplace", *Indian Bar Review*, Vol. XLIII (2), 2016, p. 188.

10 *http://www.borjournals.com/a/index.php/jbmssr/article/viewFile/1759/1101(assessed* on 18.03.2017).

11 G.B. Reddy, "Women and Law in India-Issues and Challenges", *All India Reporter*, Vol. 90, 2003, p. 331.

12 Krushna Chandra Jena, "Sexual Harassment of women in the workplaces- A Human Right Violation", *the Labour and Industrial Cases*, Vol. 1, 2006, p. 68.

13 Suman Gupta," Law Relating to Sexual Harassment of Women at Workplace: Problems and Strategies", *the Labour and Industrial Cases*, Vol. 3, 2006, p. 225.

> employment, including recruitment or promotion, or when it creates a hostile working environment.[14]

The Constitutional mandates as enshrined in the Preamble, Fundamental Rights and Directive Principles of State Policy aimed at establishing an egalitarian society in which women can enjoy the same dignity as men. Although the Indian Constitution guarantees to every citizen "the equality before the law or the equal protection of law," the true equality has not been achieved even after so many years of independence. The Constitution of India assures for all freedom and right to dignity but has been systematically denied to women. There is persistent and frequent commission of crimes committed against women in different size and shapes impairing their fundamental freedoms and basic rights and also outraging their modesty and dignity. In ***Lillu v. State of Haryana***[15] case, the court held that "the rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity."

Article 14 of the Constitution of India guarantees the general right of equality. In ***Shyam Narain v. State (NCT of Delhi)***,[16] the court held that equality and respect for woman is a sign of civilized society. Article 15 of the Constitution of India prohibits discrimination on the grounds of sex[17] and clause 3 of Article 15 enables State to make special provisions for providing protection to women. In ***Vijay Lakshmi v. Punjab University***[18] case the rules 5 and 8 of the Panjab University Calendar, Vol. III provided for the appointment of lady principal is an affirmative action which comes within the purview of Article 15(3) of the Constitution of India. Article 16 of the Constitution of India provides the equality of opportunity in the matter of employment under the Union or State. In ***Air India Cabin Crew Association v. Yeshaswubee Merchant***[19] case the Supreme Court of India held that both Articles 15 and 16 of the Constitution of India prohibit discrimination but not the preferential treatment to women.

Some provisions have been incorporated in the Indian Penal Code to protect women from sexual harassment. Section 509 prescribes "the punishment for outraging the modesty of women by uttering any word, making any gestures or doing any act with the intention of outraging a woman's modesty." The Accuser makes a socially

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14 Surinder Mediratta, "Crimes against Women and the Law", *Delhi Law House*, 2010, p. 63.
15 (2013)14 SCC 643.
16 AIR 2013 SC 2209.
17 Asha Bajpai, "Sexual Harassment in the Work Place and the Law", *lawyers Collective*, Vol. 12, October, 1997, p. 14.
18 AIR 2003 SC 3331.
19 AIR 2004 SC 187.

explicit and disapproved statement.[20] Section 294 prescribes "the punishment for committing any obscene acts or uttering or saying obscene." Similarly, Section 354 prescribes "punishment for use of assault or criminal force to a woman with the intention to outrage her modesty."

Criminal Law Amendment Act, 2013 which criminalized certain acts of sexual in nature such as Section 354A defines sexual harassment, Section 354B prescribes punishment for forcing woman to undress, Section 354 C prescribes punishment for watching or capturing images of a woman without her consent and under Section 354D prescribes punishment for stalking.

Sexual harassment of women at workplace has emerged as pressing problem which is recognized the most appalling offence.[21] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted and came into force on December 9, 2013. Our Apex Court has defined sexual harassment to include "such unwelcome sexually determined behavior (whether directly or by implication) as:[22]

(a) Physical contact and advances;
(b) Demand or request for sexual favours;
(c) Sexually-coloured remarks;
(d) Showing pornography;
(e) Any other unwelcome physical, verbal, non-verbal contact of sexual nature."

The Act expands the Vishakha Guidelines. It widened the definition of aggrieved women as it includes clients, customers and domestic workers also. It expands the meaning of workplace which also includes all kinds of organizations, non-traditional workplaces and places visited by employees for work.[23] It clearly defines the role, duties and responsibilities of employers to constitute Internal Committee and to ensure the safe and secure environment to every working woman.[24] In ***Vidya Akhave v. Union of India & Ors***.[25] case the Court ruled that the order passed by Internal

20 Madhu Balaji, "Sexual Harassment on Women in India: A Study", *International Journal of Correct Advanced Research*, Vol. 7, Issue 2(F), February 2018, p. 9981.

21 Manish Mishra, *Law on Protection against Sexual Harassment of Women at Workplace*, Orient Publishing Company, Allahabad, 1st ed., 2016, pp. 30-31.

22 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

23 Rouf Ahmad Bhat, "An Overview of Sexual Harassment of Women at Workplace in India: An Analytical Study", *International Journal of Innovative Research in Science, Engineering and Technology*, Vol. 6, Issue 7, July 2017 p. 14364.

24 Vijay Bhatt, "Analysis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013", *Indian Bar Review*, Vol. XLII (1), 2015, pp. 4-5.

25 MANU/MH/2037/2016.

Committee will not be interfered by judiciary unless the order is shocking disproportionate. The employer must comply with the duties imposed under this Act, to provide redressal mechanism, for conducting orientation programs for members of IC and for arranging programs for creating sensitization to understand accurately the other perspective and for increasing empathy for women.[26] As per Repealing and Amendment Act, 2016, the nomenclature of LCC was changed to Local Committee and similarly the nomenclature of ICC was changed to Internal Committee.[27] In ***Global Health Private Limited & Mr. Arvinder Bagga v. Local Complaint Committee, District Indore and Others***[28] case it was held that it is duty of employer to constitute IC to redress grievances pertaining to sexual harassment. Failure on the part of employer to constitute Internal Committee had led to imposition of fine. If there is repeated offence the fine gets doubled. If the employer was earlier convicted for non-observance of his duty, he shall be punished twice and there can be cancellation or non-renewal of license to run his organization. In ***Confidential v. Indian institute of Corporation Affairs***[29]case it was held that party has right to approach the IC and IC may pass interim order if it thinks fit. At the district level, the government is required to set up a local committee for unorganized sector or where the IC has not been constituted on the account of having less than 10 employees or any complaint against employer.

3. Causative Factors of Sexual Harassment

3.1 Patriarchal system

The sexual harassment existed in our society since time immemorial. There are many causative factors which are responsible to commit the incidents of sexual harassment. Sexual harassment happens due to weakness or wickedness of human mind.[30] In ***Charu Khurana and Others v. Union of India and Others,***[31] it was observed that "even the institutionalized discrimination has been formally removed, the mindset and the attitude of patriarchal in nature ingrained in the subconscious have not been removed." Woman is sexually harassed in our society for reason being considered as an object of pleasure only, followed by the patriarchal system prevalent in the society

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26 Schweinle and Roseman, "Sexual harassment Training Effectiveness: An Interdisciplinary Review and Call for Research", *Journal of Organizational Behaviour*, Vol. 39, No. 2, February 2019, p.134.

27 Repealing and Amendment Act, 2016. Amendment of Sections 6, 7, 24 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

28 W.P. No. 22314 and 22317 of 2017.

29 2018 SCC Del. 6801.

30 Sri A. Parthasarathy, "Sexual Violence Against Women-Issues and Challenges", *Criminal Law Journal*, 2015, p. 27.

31 AIR 2015 SC 839.

which only leads to low status of women in the society. Because of illiteracy and ignorance, she becomes an easy prey of tyranny or ill treatment. Triple talaq was a derogatory practice for considering Muslim woman inferior to man. However, in ***Shayara Bano v Union of India*** [32] case, the Supreme Court declared the practice of Instant Triple Talaq un-Islamic and against the dignity of Islamic woman.

3.2 Dressing

Sometime some people are of view that dressing of women is a common cause to attract sexual harassment. Dressing is not the problem there is a need to change the mentality of men which depicts that sexual harassment has nothing to do with the dressing of women rather the outlook of men is required to be changed.

3.3 Male Authority and Domination in the Workplace

The crimes against women are increasing. Increasing number of women in the workplace has greatly affected the interactions between men and women. Generally, Men occupied higher positions in the workplace and women employed in low status occupations in which women have to face male authority and domination.[33] Authority and domination are also the reasons for the sexual harassment against women. Men commit any form of sexual harassment against women to express their resentment and try to exercise control because they consider women as their economic competitor.[34] Some women experience non-verbal sexual harassment by their Bose (e.g. looking someone up and down in a sexual way) whereas some other experience oral sexual harassment (e.g. dirty jokes being sexual in nature, sexual comments etc.) and physical sexual harassment (e.g. pulling someone's clothing, inappropriate touching, kissing etc.). In ***Ruchika Singh Chhabra vs M/S. Air France India And Anr***.[35] the appellant alleged to being sexually harassed by her boss. She was forced to submit her reignition. She alleged that despite her repeated filing complaints to the IC, the IC was not set up as required by Sexual Harassment Act. The Court directed for the re-constituting of IC in strict compliance of the sexual Harassment Act within 30 days and also directed for conducting fresh inquiry. In ***Shital Prasad Sharma v. State of Rajasthan & Ors***.[36]case it was held that if for any reason it is not possible by an aggrieved woman to report to the employer about sexual harassment committed by any employee, the complaint could be filed directly

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32 (2017)9 SCC 1.
33 *Supra* Note 13 at 66. Vol.
34 Ritu Gupta, *Sexual Harassment at workplace*, Lexis Nexis, Gurgaon, 2014, p. 2.
35 C.M. APPL. 16802-03/2018.
36 2018 SCC Raj 1676.

to IC instead of submitting in person and it could be filed on the behalf of an aggrieved woman by any other person or even by media person.

3.4 Culture of Silence

Victim of sexual harassment suffers from the sense of self guilt, feels abandoned and traumatize and stigmatized. Sexual harassment often produces the feelings of revulsion, humiliation, disgust, abandoned, anger and helplessness. It harms the victim's health. It causes emotional pain and also much illness related to physical as well as mental stress.[37]She does not feel comfortable to discuss it with her family. Indian Woman suffered and is still suffering discrimination and violation in silence.[38] She remains silent and prefers not to speak about the incident because of fear that she will not be supported by her family to file a complaint against the harasser with the police. This shows that women in the present-day context are still victims of social taboos and will not come forward to bring the culprit behind the bars for the offence of sexual harassment. Many women suffer repeated abuse because of hostile work conditions and environment. A hostile work conditions and environment arise when a supervisor or co-worker, engaging in unwelcome and inappropriate sexually based behavior, renders the workplace atmosphere intimidating, offensive or hostile.[39]

4. Role of Judiciary in Interpretation of Laws in preventing Sexual Harassment

Indian legislature enacted so many legislations to provide protection to women against violence but they are still facing discrimination and are exploited by the male dominated society. We are living in the country where women are still fighting for preservation of their dignity. Male dominated society acts as a blockade against women empowerment. It is the responsibility of the government to adopt affirmative actions towards women's promotion and to ensure the access of women to social, economic and political empowerment. But when the law fails to protect the women then judiciary plays effective role for protecting women's rights by giving directions. The judiciary protected and is protecting rights of women by giving liberal interpretation to legislations. The Court has played positive role in granting the constitutional provisions for all women. The judiciary played effective role by giving

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37 P. Naresh Kumar, "Vicarious Liability of Employer in cases of Sexual Harassment at Workplace", *Labour Law Journal*, Vol. II, July, 2005, p. 32.

38 Sheetal Mishra, "Gender Justice: The Constitutional Perspectives and the Judicial Approach", *All India Reporter*, Vol. 93, 2006, p. 53.

39 R. Venkataraman, "Liability of Employer in cases of Sexual Harassment at Workplace", *Labour Law Journal,* Vol. II, 2005, 34.

directions to fill gap in Indian Legislation and extended helping hand when there was no law on dealing with the problem of sexual harassment at workplace. In ***Vishaka v. State of Rajashthan***[40] the Supreme Court of India while exercising its power under Article 142 of the Constitution of India laid emphasize on the need for such legislation to curb sexual harassment. The Court laid down guidelines amounting to judicial legislation. *In* ***Rupan Deol Bajaj***[41] case, the K.P.S. Gill was imposed with rigorous imprisonment and fine of Rs. 500 under Section 354 of Indian Penal Code and 2 months simple imprisonment and fine of Rs. 200 under Section 509 (both sentences to run concurrently). In ***Chairman Railway Board v. Chandrima Dass***[42]case the Supreme Court held that "where a Bangladesh woman has been gang raped, compensation can be granted under public law for violation of fundamental rights on the grounds of domestic jurisdiction based on constitutional provisions and human rights Jurisprudence." In ***Olga Tellis v. Bombay Municipal Corporation***[43] case the right to live and the right to work both are deemed as integrated and interdependent. In ***Valsama Paul v. Cochin University***[44]case the Supreme Court of India held that there cannot be denied the equality of opportunity to women in the matter of employment under the Union or the State. In ***Associate Banks Officers Association v. State Bank of India***[45]case the Supreme Court of India has held that women workers cannot be considered inferior to their male counterparts and they cannot be discriminated on the ground of sex. In ***Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors***.[46] *case* the IC recommends the employer to arrange counselling for male employees on gender sensitivity and also recommends to undertake gender sensitive programs and training. ***Additional District and Session Judge 'X' v. Registrar General, High Court of Madhya Pradesh and Others***[47] case it was held that evaluation of sexual harassment of women may sometime depend on the sensitivity of aggrieved woman. Even it is alleged woman is oversensitive, a man's act may amount to harassment. In ***Harinder Pal Singh Ishar v. State of Punjab and Others***[48]case the Court issued the writ of mandamus whereas direction was given to the States of Punjab, Haryana and union Territory, Chandigarh to take necessary steps to ensure the safety of women and girls to protect them from

40 AIR 1997 SC 3011.
41 AIR 1996 SC 309.
42 AIR 2000 SC 988.
43 (1985)3 SCC 545.
44 AIR 1996 SC 1011.
45 AIR 1996 SC 1685.
46 2015 SCC Del. 11026.
47 (2015) 4 SCC 91.
48 2004 Cr. L. J. 2648.

sexual harassment and eve teasing. In ***Ramkripal v. State of M.P.***[49]case the Court held "the act of pulling a woman, removing her saree, coupled with a request for sexual intercourse would be an outraged to the modesty of a woman, and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence." In ***Ajahar Ali v. State of West Bengal***[50]case the Court held the purpose of incorporating section 354 of Indian Penal Code is to safeguard decent behavior and public morality. If any person uses criminal force with intention to outrage the modesty of woman commits sexual harassment. In ***Mohan Kumar Singh v. Chief Manager (HRD) Central Bank of India***,[51] case the accused/petitioner was dismissed from job for repeatedly calling his female colleague on telephone, sending photograph and texting SMSs. The dismissal was challenged on the ground that he was exonerated of criminal charges filed against him under sections 323, 324, 354, 504, and 307 of IPC as prosecution was not able to examine any witness. The dismissal of petitioner was justified and it cannot be challenged as an illegal on the ground of his exoneration of criminal charges. The act of petitioner was found of gross misconduct and his petition was dismissed by the Supreme Court.

5. Conclusion and Suggestions

Our society is traditions-based society. Violence reflects asymmetry in power relations between men and women and this imbalance perpetrates subordination which violates their basic rights and freedoms. Women experience crimes in their day to day life are sexual harassment, rape, eve teasing, molestation, stalking etc. There are many reasons which act as barriers faced by women while dealing with sexual harassment such as lack of awareness of laws protecting women from sexual harassment, laws are not properly implemented and there is lacking in the commitment of state agencies in enforcing or properly implementing these laws. Police's role is ineffective in curbing violence against women. The role of protective agencies is not satisfactory while dealing with crimes against women. There are not adequate numbers of women police personnel. The nature of crime against women requires reporting of incidents to women police personnel which if lacking will result in lesser number of complaints since it will be difficult for an aggrieved woman to reveal the information before male police personnel. Less deployment of women police personnel during night hours which can be a major cause of insecurity among women because if sexually harassed woman victim may not feel comfortable to report the matter to male police personnel and that too during night hours fearing

[49] (2007)11 SCC 265.
[50] 2014 Cr. L. J. 18 SC.
[51] 2017 SCC Pat 2483.

more harassment at the hands of male police personnel. The number of women cells /women police stations should be increased and should be given adequate powers, funds and staff. There is also need to Reforms in the police department often, the police are unaware of the police safeguards for women and the amendments to laws relating to such safeguards. Thus, reforms in the police department for quick action, immediate disposal of the case, non-consideration of influence and helping hand to the women victim must be made available. There should be the movement of police control room vehicles within and around the workplaces will create panic in the minds of doer of sexual harassment.

Since, sexual harassment has mainly been confined to females and their reluctance in discussing such incidents shows that there may be more incidence of sexual harassment than actually reported. The reluctance of women in discussing such incidents shows that they are still burdened with centuries old norms of remaining silent which has over a period of time encumbered their right to speech and expression even when their sexuality is violated. So, it is suggested that old traditions, beliefs and customs prevalent should not have place in our society. It is suggested that there should be sustained publicity campaigns in the mass media-both print and electronic to enlighten all people in the country about eternal truth about a woman that she is also an equal as a man.

In cases involving sexual harassment of women, generally the rate of conviction is very less and the rate of acquittal is very high. It means there is some procedural lacuna with which the women victims of sexual harassment face a lot of hardship while dealing with their cases in the courts which results in acquittal of the culprits and ultimately in the failure of justice. Witness to an act of sexual harassment is not willing to come forward to support victim because of lack of witness protection. So, there is need to incorporate protection mechanism to witness in laws relating to sexual harassment.

It is not that sexual offences have suddenly raised their head. Sexual offences are happening at every nook and corner of the national with regular periodicity. Many such ghastly incidents have happened at many places. Many of them went unreported. Many of them remained unresolved or undetected. It is necessary to appraise the situation and to discuss the ways and means to prevent such offences and to make India a safe place for the young girls and women. It is suggested that it should be the priority of employer or the State to create the appropriate conditions in respect of work and to provide safe and clean environment for women.

Indian society is patriarchal society and women are suffering from many social disability and handicaps. Education is the most effective tool for empowerment and human development. Women are empowered and their human rights are protected and promoted in India only if our society concentrates on educating the girl children who are often discriminated against and whose rights are relegated to background in comparison to those of the male children. Hence, it is suggested that education being the most powerful weapon to bring about equality and to prevent the menace of sexual harassment. The compulsory and free education should be given to girl children as fundamental right up to 12th standard. With better education Indian women will try to get all the benefits and come forward to object any objectionable and uncomfortable behavior of men without caring any social taboos. There must be notice boards/banners affixed at proper places in educational institutions highlighting types of sexual harassment and penal consequences for the same which will act as deterrence to sexual harassers or other persons likely to commit such an offence of sexual harassment. Students must learn about sexual violence, female equality, good communication skills, boundaries, and respect of gender differences. More female teachers and teacher's assistance should be hired for colleges, universities where most teachers are male. Colleges should develop, disseminate, and publicize effective sexual violence policies and procedures, as well as monitor their effectiveness. Teachers who sexually abuse a student of any age should be fired and referred to the police.

Inadequacy of Cyber Laws, the Indecent Representation of Women (Prohibition) Act, 1986 and the Information Technology Act, 2000 are inadequate to curb the hi-tech electronic sexual harassment. There is need of framing the National Media Policy as Mass Media like TV and films do not simply reflect but subtly and indirectly help in shaping social reality. The indecent representation of women in the media is a social evil, which corrupts the young minds and encourages violence against women. Hence, the media should prevent the commoditization of women. Media must highlight the ideas and thoughts relating to human values which develop a social change. The media should give more coverage to sexual harassment issues and should follow up the cases so that public can be informed about the successful conviction of the perpetrators.

It is also suggested that cases involving sexual harassment of women should be decided in a summarily manner and the courts should not follow the normal procedure of examining of victims/witnesses and evidences should be taken on affidavits mostly. This will reduce the time for deciding the cases and also the victims/witnesses will be saved from further mental and physical harassment arising

out of the lengthy and cumbersome court's procedures. To address sexual harassment at workplace employer should take prompt action once the complaint is filed which will act as deterrent.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 contains a provision for constituting IC by the employer but doesn't contain provision where should an aggrieved woman file a complaint or to whom the complaint is filed on failure of an employer to constitute IC. So, there is need to incorporate specific provision for filing complaint to the authority on failure of employer to constitute IC. The Government should also fix the responsibility of particular authority to keep check on the constitution of such committee. Section 10(1) of the Act regarding the conciliation which is contrary to nature and spirit of Vishaka's Guidelines so, it should be removed and stringent punishment should be imposed for committing sexual harassment. The Act fails to incorporate provision for woman who was an employee of the institution at the time of sexual harassment but was terminated due to any reason or left the job. Complaint redressal mechanism applicable to working woman should also be applied for a woman who was terminated or left the job for any reason. Sometime the relationship of a woman becomes sour with colleague and she may file false complaint. Under the Act there is no mechanism laid down to identity false complaint. So, there is need to incorporate a mechanism to identify the false complaint. The Act is very general the definition of workplace does not contain different nature of workplaces such as agricultural sector and residential area for domestic helps. So, there is need to include these natures of workplaces in the definition of workplace.

Last but not least there is need of an effective implementation of law to control and prevent the menace of sexual harassment.

THE LIABILITY FOR THE PARKING LOT THEFTS

Dr. Shipra Gupta*

1. Introduction

Dealing with the issue of vehicle thefts from the parking lots has presented a complex uneven judicial approach. Conventionally, in almost all the jurisdictions such issues have revolved around establishing different kinds of relationships, between the owner of the vehicle and the parking lot operator, as emerging from bailment, lease or licence for ascertaining the liability of the parking lot owner. In case a vehicle is parked as a licensee or a lessee, the person providing parking space does not owe any responsibility for the safety of the vehicle parked therein like the bailee. Therefore, it becomes extremely crucial to ascertain the nature of transaction; whether it amounts to a contract of bailment or simply a contract of license. Depending upon the characterisation of the relationship identified, different standard of care is to be imposed upon the parking lot operator.[1] In order to fix the liability of the commercially operated parking lot owner, primarily three things need to be ascertained: firstly, whether the transaction is a bailment, lease or licence? Secondly, the effect of 'exemption clause' printed on the ticket, disclaiming the liability from loss or theft. Thirdly, whether 'exemption clause' will exclude the liability for 'negligence'?

It becomes pertinent to understand the legal implications as well as legal basis of parking our vehicles, in the context of liability and loss, in different kind of parking lots under different circumstances. It becomes crucial to understand the extent to which the parking lot owner can be held liable for the loss or damage to the parked vehicle. The Contract law universally recognizes a special form of contract *i.e.,* bailment in which the rightful owner/possessor of specific movable property delivers 'goods' to another person for some purpose, after completion of which the property is to be returned or transferred as per the instructions of the owner.[2] The standard of care imposed on a bailee is that of an "ordinary prudent" person to take reasonable care of the goods in his possession.[3]

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1 *Roger H. McGlynn* v. *Parking Authority of City of Newark*, 86 N.J. 551 (1981): 432 A. 2nd 99, 103 (N.J. 1981).

2 *The Indian Contract Act, 1872*, Section 148- "A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the 'bailee'."

3 *The Indian Contract Act, 1872*, Section 151- "In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances take, of his own goods of the same bulk, quality and value as the goods bailed."

The manner of parking in establishing bailor-bailee relationship can be understood in terms of following situations – 1) car keys left in the car at attendant's direction 2) unmanned open space meant for parking without fee, keys with the owner 3) open space paid manned parking, keys with the owner 4) enclosed unpaid parking, key with owner, no check on exit 5) enclosed paid parking with ticket, key with owner, exit after showing ticket 6) free valet parking, no fee, liability for theft/loss/damage excluded, *e.g*., in malls, hotel parking, marriage palaces *etc*. 7) paid valet parking, liability for theft/loss/damage excluded *e.g*., mall, hotel parking.

Delivery of 'possession' signifying 'transfer of control' is crucial for establishing bailment. The 'degree of possession and control' in the variants stated above will determine the 'standard of care' expected in a given case. In cases where keys are surrendered with the operator of the parking lot, it may signify transfer of 'possession and control', whether it is a paid parking or not. While on the other hand where the keys are not surrendered by the owner of the vehicle with the parking attendant, it raises issues pertaining to 'delivery of possession and control' of the vehicle. A lot would depend upon the facts and circumstance of each case, the kind of parking lot as well as the services provided therein.

The bailee may exclude his liability for loss or damage to the goods bailed, by making a special contract, but that would be subject to the duty of care as prescribed for the bailee.[4] Thus he cannot absolve himself from his duty of care resulting from his negligence or misconduct. The most essential feature of bailment is "the delivery of possession" by one person to another.[5] While the term "possession" has not been defined in the Indian Contract Act, 1872; courts have developed its essence over the centuries. It continues to be a term of different meanings, depending on the context. To possess, that is to "control, occupy or be in use of", is probably a concept pre-dating rights and ownership.[6]

The present paper is an attempt to understand the judicial trend in fixing liability for vehicle thefts from the parking lots, both in India and other jurisdictions, for the purpose of analysis and comparison. The analysis of foreign judgements gives an insight into various crucial aspects of 'liability' for the loss of vehicle from the parking lots.

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4 *The Indian Contract Act, 1872,* Section 152- "The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151."

5 *New India Assurance Co Ltd v. Delhi Development Authority,* (1991) 2 PLR (Del Section) 82.

6 Akhileshwar Pathak, *Law relating to Special Contracts*, at 84, Lexis Nexis 2014.

2. Parking Issues in Other Jurisdictions

In majority of cases parking lot owners have been primarily seen as bailees if there was evidence of sufficient possession and control passing on to the parking operator. In practical situations the courts have been confronted with various 'not-so-simple' issues to be taken into account in suits against parking lot owners, where the manner of their transacting business has assumed relevance.[7] Bailment arises where the car keys are left in the car at the attendant's direction and the car owner is given a check which he must surrender when he returns for the car. But if the owner retains control, the relation is one of licensor-licensee or lessor-lessee.[8] In a the famous case of *Ashby* v. *Tolhurst,*[9] the Kings Bench held that for a contract of bailment to arise, there must be delivery of possession.[10] Payment of fee is not conclusive in creating any liability on the part of the parking lot operator. Even in cases where the customer retained the possession and control with himself, but paid a fee, parked the car at any space in the lot as per the availability and took away the keys with himself, many courts would not consider it to be bailment, lacking transfer of requisite 'possession and control'.[11]

The Supreme Court of North Carolina in *Freeman* v. *Myers Auto. Serv. Co*.,[12] while distinguishing a bailment from a license or lease clarified that to constitute a bailment, the assumption of custody and possession of the property for another was required; while if there was only permission granted, even for a reward, to park at any convenient place in the lot, "without any assumption of dominion over the property" or custody of it in any respect, the status created was a mere license. Theft of a car from a parking enclosure on payment of small fee, where the car was parked by the customer himself at the space available, after locking it and taking away the key, was not regarded as bailment but lease. Consequently, courts have termed such parking lot transaction as

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7 William F. Podesta, "The Liability of Parking Lot Owners", St. John's Law Review: Vol. 14 : No. 2, Article 8, at 371. Available at *https://scholarship.law.stjohns.edu/lawreview/vol14/iss2/8s* accessed on 28.02.2019.

8 *Sandler v. Commonwealth Station* Co., 30 N. E. 2nd 389.

9 (1937) 2 KB 242.

10 In this case, a car owner parked a car on a parking ground for which he had to pay a requisite charge and was issued a ticket. The owner was required to show the ticket while collecting the car. Another person pretended to be owner's friend and took the car away from the attendant. The ticket had mentioned that the car park was not responsible for any loss of the car. The question before the Court was to ascertain as to whether there existed a contract of bailment. Holding it to be a case of licence the Court brought out the point that contracts in such cases can be of two different scopes. It could either be a contract of licence to park on the land of the owner or it could be bailment.

11 *Freeman* v. *Myers Auto. Service Co*., 226 N.C. 736, 40 S.E.2d 365 (1946); *Burcham* v. *Coney Island*, 87 Ohio App. 352, 94 N.E.2d *280* ('949); *Giles* v. *Myers*, 62- Ohio L. Abs. 558, 107 N.E.2d 777 (C.P. 1952); *Wright* v. *Sterling Land Co*., 157 Pa. Super. 625, 43 A.2d.

12 226 N.C. 736, 40 S.E.2d 365 (1946).

"fee paid for the privilege of parking a car" rather than a bailment.[13] In such cases 'possession and control' are seen as central in deciding the nature of the transaction. In order to establish 'possession and control' it requires inquiry into various relevant facts, such as, whether the lot is enclosed, whether there is issuance of claim ticket, whether details of car are stated on the ticket or it mentions only date and time of ingress, whether parking is by attendant and whether the operator retains the keys. The standard of care would nevertheless vary where the car keys are handed over to the parking operator, signifying possession and control, requisite for constituting bailment. Performance of the "duty to exercise reasonable care" is relative and varies according to the kind of garage or parking lot. The degree of care required will be different where a person parks and locks his own car than another who entrusts his car and keys to an attendant, as happens in "valet parking". Due care may vary depending on whether the parking facility is an open/unfenced lot or an enclosed garage. Thus, each case must be evaluated and decided separately on its facts and circumstances, that entail a particular degree of care on the part of parking lot operator.[14] In such cases another issue of concern is regarding the 'duty of operator to take reasonable care' to prevent harm to the vehicle parked in the garage and to their contents, which largely depends upon "reasonable foreseeability of the risk of harm".[15]

Furthermore, the standard of care imposed upon the parking lot operator would relatively differ depending on how the relationship had been characterized.[16] If the relationship was seen as a bailment, it would create presumption of negligence in case of proof of damage to the bailed goods.[17] But no such presumption would be provided in case of 'license to park' or 'lease of space'. In case of lease or license to park, the duty to prove 'negligence of the operator' would fall on the customer. There would be no bailment when car owner parked and locked car in restaurant parking lot, neither paid

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13 *Lord* v. *Oklahoma State Fair Ass'n*, 95 Okla. 294, 219 Pac. 713 (1923); *see* also, *Suits* v. *Electric Park Amusement Co*., 213 Mo. App. 275, 249 S.W. 656 (1923) where admission fee for entry into an amusement park was paid, and parked the car in an enclosed area, as directed by the attendant in charge, locked his car, no claim check was given and no parking fee was charged, was not considered to be sufficient delivery to the Park operator, hence not a bailee.

14 See generally *Abercrombie* v. *Edwards*, 161 P. 1084, 1916 OK 1031, 62 Okla. 54, that refers to innkeeper Statute of Oklahoma, that provides that The provision of this statute that the innkeeper is liable for goods of his guests, "placed under his care," is declaratory of the common law, not restrictive thereof. Such a provision does not require the goods to be necessarily placed under special care of the innkeeper, and also does not require notice to be given of their arrival, so as to hold the innkeeper liable for their loss. In order to render the innkeeper liable it is sufficient if the goods are brought into the inn in the usual and ordinary course, and are not retained under the exclusive control of the owner/guest, but are otherwise under implied control of the innkeeper.

15 See *Hill* v. *Yaskin*, 75 N.J. 139, 143 (1977).

16 See *McGlynn* v. *Parking Authority of City of Newark*, 86 N.J.551 (1981).

17 See, e.g., *Bachman Chocolate Mfg. Co*. v. *Lehigh Warehouse & Transp. Co*., 1 N.J. 239, 242 (1949).

parking fee nor received a ticket and also retained the keys.[18] Presumption of negligence in a bailment case is "merely a procedural device which shifts the burden of first producing evidence".[19] The courts have extended the concept of bailment to provide the customer with the benefit of presumption where the car was parked in a seven story-park where the customer would not be delivered the car without the claim check; this reflected the intention, express or implied to the transaction.[20]

There has been incongruence in judicial approach in dealing with 'parking-lot-theft' cases as well as on the emphasis on the requirement of 'contractual feature' of the transaction establishing bailment.[21] In some cases the duty of care towards property of another has been attributed to 'element of lawful possession' in whatever way created, through a contract or otherwise. Thus the emphasis has shifted from the contractual feature of the transaction to the 'relationship between parties' at the time of transfer of possession of goods to another.[22] Courts have started preferring "adjustment of rights and duties of parties in the light of the realities of their relationship" instead of looking for the elements of bailment,[23] because of practical problems that have arisen due to "ill-suited labels" inappropriate to do justice in situations such as, where the operator of a self-service parking lot at the air-port could not be held liable for negligence because of nature of circumstances.[24]

McGlynn v. *Parking Authority of City of Newark*[25] of the Supreme Court of New Jersey is a leading case in this regard that concluded that the "realities" of relationship between parties have to be taken into consideration from where duty of reasonable care to be taken by the parking lot operators emanates. 'Bailment theory' has not found favour with some courts, owing to its intricacies, that have rather adopted a "new standard" of "reasonable care" under the circumstances whereby "foreseeability shall be a measure of liability".[26] Therefore, it is important to evaluate the "relevant circumstances" in totality in order to ascertain the degree of care to be exercised in each case. No straightjacket formula can be applied to fix the degree of care in such cases.

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18 *McFarland* v. *C.A.R. Corp*., 58 N.J. Super. 449, 452 (App.Div. 1959).

19 *Value-Rent-A-Car* v. *Collection Chevrolet*, 570 So.2d1376, 1378 (Fla 1990).

20 See *Palazo* v. *Katz Parking Systems Inc*., 64 Misc. 2d 720,721, 315 N.Y.S.2d 384, 385 (Civ. Ct. N.Y. 1970)

21 See e.g., *Roger H. McGlynn* v. *Parking Authority of City of Newark*, 86 N.J.551 (1981): *Michael A. Backer* v. *Parking Authority of City of Newark*, 432 A.2nd 99).

22 *Marsh* v. *American Locker Co*., 7 N.J. Super. 81, 84 (App.Div. 1950), aff'd o.b., 6 N.J. 81 (1950).

23 See *State* v. *Shack*, 58 N.J. 297, 307 (1971).

24 *Ellish* v. *Airport Parking Co*., *345 N.Y.S. 2d 650 (N.Y. Sup. Ct. App. Div., 2d Dept. 1973).*

25 86 N.J.551 (1981).

26 *E.g. McGlynn* v. *Parking Authority of City of Newark*, 86 N.J.551 (1981): 432 A.2nd 99, 103 (N.J. 1981); *Garlock* v. *Multiple Parking Services, Inc*., 103 Misc.2d 943, 955, 427 N.Y.S.2d 670, 678 (City Ct. 1980).

2.1 Doctrine of infra hospitium

Hotel and restaurant owners have been treated on a different footing in terms of liability for the vehicles of the guests who park their vehicles and keep the keys while maintaining control with themselves. Varied legal issues have emerged in respect of such open parking spaces provided by the hotel or restaurant owners in terms of their liability towards the safety of the vehicles. Common law regards the hotels to be insurers of automobiles placed under their control. The high degree of care on the part of hotels as bailees requires strict application of the law of bailment. Key control, valet services, employee involvement, control gates, and limited access areas have been used to determine if automobiles were *infra hospitium* at the time of damages.[27]

In an English case *Williams* v. *Linnitt*[28], the car was parked in an open lot provided free of charge to the visitors at the inn, and was stolen from there. The Court held the innkeeper strictly liable for the theft of the car as the complainant was a guest and that the parking lot was *infra hospitium*. The provision of free parking space provided by the inn keeper to the visitors, signified an invitation to the guest to park there and was regarded as sufficient to constitute the lot as within the *hospitium* of the inn. The Court further clarified that merely posting a notice to limit his liability in this regard would be of no avail. In such cases the rule for measuring the landlord's liability is different where the property is lost *infra hospitium* and creates a *prima facie* case against the innkeeper; than if it is lost or damaged outside the inn.[29]

In a case before Municipal Court of Appeals for the District of Columbia, *Hallman* v. *Federal Parking Services*[30] it was regarded as constituting bailment where the bellboy, with the authority of the hotel to deliver automobiles to the lot, took possession of the keys and the vehicle, both the vehicle and the contents of the automobile were accepted by the hotel into its custody. It had physical control and the intent to control the property; a bailment relationship was therefore created. In *Allen* v. *Hyatt Regency - Nashville Hotel*[31], the Court considered the nature and extent of the liability of the operator of a commercial parking garage for theft of a vehicle during the absence of the

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27 Wayne Quintomn "Liability for Automobole Parking in Hotels: The Tennessee Case Abstract", at 114, Research Notes, *University of Tennessee*.

28 [1951] 1 KB 565.

29 *See* also *Aria* v. *Bridge House Hotel (Staines) Ltd.* 137, L.T.R. (n.s.) 299 (K.B. 1927) While the guest was dining in the hotel, his car was stolen and the hotel was held liable for the theft of same. The Court noted that the law regarding innkeeper's liability had been established for more than hundred years for the safe custody of goods belonging to the guest, which come into his hands on his premises.

30 134 A.2d 382 (1957).

31 668 S.W.2d 286 (Tenn. Sup. Ct. 1984) available at *https://www.lexisnexis.com/lawschool/resources/p/casebrief-allen-v-hyatt-regency-hotel.aspx* accessed on 22.03.2019.

owner. The court regarded it as constituting bailment the moment the car was parked and locked by the owner of the vehicle in a "modern, indoor, multi-story garage" that operated in conjunction with a hotel. There was single entrance and single exit controlled by the attendant. In such a situation, these two factors, *i.e*., limited access and requirement of presenting ticket on exit, for all practical purposes, adequately signified assumption of control and custody.

One of the most crucial factors to decide the transfer of possession is to find out whether the control of the vehicle was with the owner of the vehicle or with the parking lot owner; which has direct link with the keys. When the keys of the vehicle are handed over by the owner of the vehicle to the parking lot operator, one may safely conclude that along with the physical custody of the car the possession has also been transferred and, hence there is bailment. In *Insurance Co. of North America v. Solari Parking Incorporation,* [32] the Court held that when the keys were delivered by the couple to the parking lot operator, there was delivery of possession and hence the Court considered it to be a contract of bailment holding the parking lot operator to be liable for the loss of the car. American Courts have routinely found a 'bailment' whenever a vehicle's keys were left with the parking lot operator.[33]

Therefore, in the concept of valet parking lots, the owner of the vehicle at the entrance surrenders the vehicle along with its keys to the attendant of parking lot who parks and later, returns the vehicle at the request of the owner. In such cases, it can be reasonably held that the parking lot operator is having absolute possession and control over the vehicle which leads to the conclusion that there is a contract of bailment.

3. Parking Lot Indian Cases

In India, the body of law in this field has majorly developed as consumer jurisprudence, bringing in such cases before the consumer forums as the cases of 'deficiency in service' owing to negligence on the part of parking operator for the auto thefts. In majority of

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[32] *Insurance Co. of North America v. Solari Parking, Inc,* 370 So. 2d 503 (La. 1979). In this case, a honeymoon couple left their vehicle and its keys with the parking lot operators. The parking lot attendant took the keys, and started the vehicle, with an intention to move it. However, he was called away and was asked to wait on another customer. The attendant left the car with its engine running. Meanwhile he was away, the vehicle was stolen.

[33] *See*, *Aetna Cas. & Sur. Co. v. Pappagallo Restaurant Inc.*, 547 So. 2d 243 (Fla. Dist. Ct. App. 1989); *Davidson v. Ramsby*, 210 S.E.2d 245 (Ga. Ct. App. 1974); *System Auto Parks & Garages, Inc., v. American Econ. Ins. Co*., 411 N.E.2d 163 (Ind. Ct. App. 1980); *Garlock v. Multiple Parking Servs. Inc*., 427 N.Y.S.2d 670 (Buffalo City Ct. 1980); *Stephens v. Katz Parking Sys., Inc*., 348 N.Y.S.2d 492 (N.Y. City Civ. Ct. 1973); *Dispeker v. New S. Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963); *Allright, Inc. v. Schroeder*, 551 S.W.2d 745 (Tex. Civ. App. 1977,); *Allright, Inc. v. Elledge*, 508 S.W.2d 864 (Tex. Civ. App. 1974,).

cases the position of owner of vehicle, as 'consumer' has been disputed especially in cases where no parking fee was charged for provision of parking space. In determining the nature of transaction, the consumer forums have taken into consideration various factors, such as, the kind of parking, whether valet, regulated at entry and exit, or open manned parking spaces; the amount of fees paid; the purpose of the transaction *i.e.*, regulation of haphazard parking, or providing space only for parking for the convenience *etc*.

There have been very limited judgements on this theme in India. While exploring the concept of parking the National Consumer Dispute Redressal Commission in *Commissioner, Corporation of Madras* v. *S. Alagaraj,*[34] opined that where the parking facility had been provided mainly for ensuring "orderly parking" for smooth flow of the traffic for which nominal fee was charged for the same, it did not amount to bailment. This simply means that the person who is providing the facility of parking space is collecting nominal parking fees for the said service and he is not undertaking to ensure the safety of the vehicle. In *Rohini Group of Theatres* v. *V. Gopalakrishnan,*[35] the National Consumer Dispute Redressal Commission again reiterated its earlier view that the attendant in the parking lot who collects nominal fee for parking of vehicle in the parking space for orderly parking, cannot be said to be a bailee by any stretch of imagination. It further noted that the delivery of bicycle had not been made for any purpose, which is a requisite of bailment.

While in another case where a car was stolen from the car park of Delhi Airport, the National Consumer Dispute Redressal Commission in *Mahesh Enterprises* v. *Arun Kumar Gumber*[36], held it to be bailment, taking into account the fact that the contractor managing the car park had charged Rs. 10 and the park had one entry and an exit. The basis for this decision was that the contractor was under an agreement with the Airport Authority of India, under which he was supposed to ensure safety of the parked vehicles.

In *Bombay Brazeerie v. Mulchand Agarwal & Anr.*[37] the National Commission granted damages for the mental tension, harassment and inconvenience to the owner of the car as 'consumer' by considering the aspect of "consumer component or consumer factor", but did not allow him the price of the car in view of the exemption clause in the contract.

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34 *Commissioner, Corporation of Madras* v. *S. Alagaraj*, *National Consumer Dispute Redressal Commission*, 30th October 1995. In this case, a person parked his scooter alongside the road, in a space earmarked by the corporation for parking, and paid Rs. 1 to an attendant. His scooter was lost.

35 *Rohini Group of Theatres* v. *V. Gopalakrishnan, National Consumer Dispute Redressal Commission, 6th May 1996.* In this case, a cinema viewer parked his cycle in the parking of the theatre.

36 *Mahesh Enterprises* v. *Arun Kumar Gumber*, (2001) CPJ 1 (NC).

37 (2003) CPJ 4 (NC).

The employee of the hotel took the key of the car and issued a token at the gate to the visitor, and was under duty to return the car and the key to him against the token. Allowing an unauthorised person to take away the car without presentation of token amounted to breach of duty on the part of the hotel employee. Such negligence amounted to "deficiency in service". The Commission regarded the 'payment for the food' consumed in the hotel as 'consideration' for providing the facility of (free) parking, thus creating bailment relationship.[38] The owner of the car had also recovered the insurance amount from the insurance company.

In a similar case in *Hotel Hyatt Regency* v. *Atul Virmani III,*[39] the issue involved was regarding the responsibility of the Five Star Hotel to compensate for the loss of car stolen from the valet parking where the keys of the car were handed over by the customer to the uniformed valet of the hotel without any extra charge. The hotel was held liable for the theft of vehicle from the parking, even though no separate charge was taken for valet parking facilities. The case was one of "deficiency in service" under *Consumer Protection Act*, 1986 as he had paid for other services rendered by the hotel at a very high rate.

A serious note was taken of the negligence on the part of the hotel staff in allowing the car to be stolen and taken away by a person who was not authorized, and for which an entry had been made in their register. Referring to the disclaimer printed on the docket, another practical aspect was taken into consideration that after the car keys are handed over to the valet, the consumer does not have enough time to read docket conditions written on the reverse of the docket as there would be a number of cars entering and exiting from the hotel. The Commission was of the firm view that "such professional valet service exudes confidence", and the management of a Five Star Hotel could not escape responsibility of the safety of the car parked in their premises.

In another similar case of car theft from the valet parking of Taj Hotel, in *Taj Mahal Hotel* v. *United India Insurance Co.*[40], it is for the first time that the National Consumer Disputes Redressal Commission in dealing with such a case of theft of vehicle from the hotel, has relied on the Common Law concept of *infra hospitium*, a Latin term meaning "within the Hotel" that holds the hotel/restaurant and innkeepers liable for the loss of the guest's property if the property and the guest were within the premises of the Hotel.

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38 See also *B. Dutta* v. *Management of State*, (2009) 4 CPJ 191. However, this view has been considered to be wrong, see *infra* note 45.

39 (2008) CPJ 281 (NC).

40 National Consumer Disputes Redressal Commission, First Appeal No. 440 of 2016 in Complaint No. 198/1999, decided on 5.2.2018 available at *https://indiankanoon.org/doc/43640250/* accessed on 28.02.2019.

The Commission considered a case of parking without payment of any parking fees, where the keys of the car were handed over to the attendant in the porch, the customer received the parking slip and went inside the restaurant. Various issues that came before the Commission for consideration were: *firstly*, whether any parking fees was charged and whether there was any "jural relationship" between the owner of the car and the hotel; *secondly*, whether the customer was the 'consumer' as he had consumed food at the restaurant and had availed services of parking at the hotel; *thirdly*, whether the hotel can be held liable for the loss of vehicle, as they had given tag to the car owner excluding liability for loss, theft or damage of the hotel management and provided only the facility to park the car and not to hold it in safe custody, and *lastly*, whether the insurance company had the *locus standi* in the present case?

"Price paid for the food consumed" was treated as the consideration for parking facility. The Commission noted that free car parking and valet service is not only for the convenience of the guests but the hotel indirectly benefits from providing such facilities. Offering such facility amounts to an "invitation to park" the car which is sufficient to constitute the valet parking as within the *hospitium*. Mere printing of 'owner's risk' on the parking tag does not absolve the Hotel of its liability when the loss of vehicle from its parking space is construed as 'negligence'. Parking Tag issued in the name of the Hotel, creates reasonable expectation on the part of 'car owner' of 'duty of care' and custody of the Hotel.

Taking note of the disclaimer of the hotel management against liability for loss, theft or damage, the Commission declined to give any relief under bailment but considered it to be a case of deficiency of service bringing out two aspects- (i) claim for the amount of actual loss and (ii) damages for inconvenience, harassment and mental tension. The latter one is referred as "consumer factor" or "consumer component" or "consumer surplus" which was found to be present in the case. It was considered a case of bailment on passing on of "possession and control of the car" in which the implicit "duty of due care" had been violated. The disclaimer printed on the parking tag will not be considered to relieve the Service Provider of his normal duties.

An appeal was preferred in the Supreme Court in *Taj Mahal Hotel* v. *United India Insurance Co. Ltd.*[41] against the above stated decision of the National Consumer Disputes Redressal Commission and was dismissed. The liability of the Appellant hotel was confirmed as affixed by the Commission, due to want of requisite care towards the car bailed to it. The Hon'ble Court summed up the position of law by holding that the

[41] (2020) 2 SCC 224.

'strict liability'[42] cannot be imposed on hotel owners for the loss of or damage to vehicles of their guests in view of the changing socio-economic conditions leading to diversified hospitality ventures. Instead, the rule of '*prima facie* negligence' should be adopted in such cases that brings the interests of the hotel owners and the visitors in tandem without placing undue burden on either of the parties. The Court inclined towards adopting a relatively 'moderate' approach by taking note of the fact that the guests are already protected by virtue of insurance of their vehicles.[43] This rule of *prima facie* liability is premised on the existence of a bailment relationship in respect of the vehicle so bailed to the hotel.[44] In the present case the court found 'bailment relationship' to be existing between the hotel and the owner of vehicle.[45] It is now clearly established that in case of theft of a vehicle given for valet parking, the hotel cannot contract out of liability for its negligence or that of its servants, under any circumstance. Even in case there is a general or specific exemption clause, *prima facie* burden of proof still remains with the hotel to explain the absence of negligence or absence of want of care as contemplated by Sections 151-152 of the Indian Contract Act, 1872. Such exemption clause can come into force only after this burden of proof is discharged. With this recent decision a pace has been set to fix the liability of the parking lot owners for the car thefts from the parking lots.

4. Liability for theft under Insurance Contract- Position of Insurer

Since it is common to get the vehicle insured on its purchase, it would be imperative to understand the implication of insurance contracts on the issue of liability in theft cases. What would be the position of insurer in case of theft of vehicle? Can the insurer sue the operator of the parking lot for theft of vehicle? In this regard the Constitution Bench of the Hon'ble Supreme Court in *Economic Transport Organisation* v. *Charan Spng. Mills*[46] has clarified the position of the insurer. The Court opined that the insurer cannot file a consumer complaint in his own name but a complaint filed by the insurer in the capacity of the subrogee would be maintainable if it is filed by:

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42 Common Law concept of *infra hospitium* signifies strict liability.

43 *Supra* note 41 at 240.

44 The Appellant (hotel) could not explain that its failure to return the vehicle to the owner was not on account of its fault or negligence.

45 The Court noted that in view of Section 148 of the *Indian Contract Act*, 1872 the contract of bailment may be gratuitous. In valet parking this relationship is created the moment possession of vehicle is 'purposefully' handed over to the hotel irrespective of payment of any separate fee to park the car in the parking lot. The Court finds the decision in *Bombay Brazzerie* case to be wrong to the extent that restricts laws of bailment to be applicable only when the customer made a separate payment to park the car in the parking lot forming consideration for same.

46 (2010) 4 SCC 114.

i. the insurer in the name of the assured, wherein the insurer acts as the attorney-holder of the assured; or
ii. the insurer and the insured are co-complainants.

Relying on *Economic Transport Organisation* case the Hon'ble court in *Taj Mahal Hotel*[47] found both the above stated conditions squarely applicable to the case as the actual consumer/assured, *i.e.*, the owner of the car had executed a Power of Attorney and a letter of subrogation in favour of the car insurer. Thereafter, both of them approached the State Commission by filing a complaint against the hotel seeking payment of the value of the car and compensation for the deficiency of service. Therefore the insurer had the *locus standi* to file the complaint and it was maintainable.

To this extent the judgement of the Hon'ble Supreme Court in *Oberoi Forwarding Agency v. New India Assurance Co.,*[48] stands overruled by *Economic Transport Organisation* wherein the insurer acting as a subrogee was not deemed qualified as "consumer" to have the *locus standi* to file a complaint. In *Bombay Brazeerie* case[49] the insurance company had also joined as complainant. But the Commission did not allow the complainant to file complaint for the benefit of the insurance company in their claim to be reimbursed, since they had already paid the amount towards the insurance to the insured. The Commission was of the view that if insurance company lays fault with the hotel, it was free to initiate civil action against the hotel. In *New India Assurance Co. Ltd.* v. *DDA*[50] the insurer had filed a civil suit (as subrogee) to recover damages on account of theft of a truck from the parking facility maintained by the DDA (defendant-authority).[51]

5. Conclusion and Suggestions

The review of various judgements of foreign jurisdictions, especially American and English, may lead to the conclusion that the issue of "parking lot auto theft" cases are not as simple as they might appear in fixing the liability for the loss of vehicle. There are fine intricacies involved in every case based on its unique facts. In majority of foreign cases the contractual element of "possession and control" has been emphasised. These cases have primarily revolved around establishing bailment for holding the parking lot operator liable for the theft of the vehicle. There is a large body of cases where special

47 (2020) 2 SCC 224.
48 (2000) 2 SCC 407.
49 (2003) CPJ 4 (NC).
50 AIR 1991 Del 298.
51 In view of the facts of the case the Delhi High Court found it to be a case of 'bailment' distinguishing it from 'licence to park' where the authority was under an obligation to look after the safety of the parked vehicles.

contracts have excluded the liability in bailment relationship. However, gradual transition towards more practical approach can be evidenced in the later judgements that reflect more realistic approach in fixing liability of the parking operator. This has been accomplished by resorting to "adjustment of rights and duties of parties in the light of the realities of their relationship".

It is noticeable that in India such parking lot theft cases have been dealt with by the consumer forums under the Consumer Protection law. Liability of the parking lot operator much depends upon the kind of service provided and the legal relationship thus created between the parties. The recent trend of our consumer commission is evidently to hold the parking operator liable not as a 'bailee' but as a 'consumer' for 'deficiency in service'. In the earlier cases involving theft of bicycle and scooter, the respective decisions of the consumer commission considered the cases based on the "purpose" of parking on payment of nominal charge. Where the purpose was just to regulate the orderly parking, there was no liability of the parking operator in case of theft. The later cases of car thefts, have been dealt with from the perspective of "consumer" and "deficiency of service" rather than delving into establishing jural relationship between the car owner and the parking lot owner. However, the later judgements do recognise bailment due to the very nature of transaction, *i.e.*, in case of valet parking. The trend after 2000 has been of giving relief to the car owners, despite "exemption clauses" in bailment contracts. It is a positive trend that consumer forums are inclined to protect the interest of the owners of cars by resorting to liberal interpretation.

Recent three cases[52] in line have settled the position of law with regard to valet parking, whether it is paid or not. Valet parking creates bailment relationship and any kind of exemption clause would not exclude the liability of the hotel offering such service, unless it can be proved that the theft was not on account of negligence or want of reasonable care on the part of parking operator. Theft of vehicle from valet parking would be attributed to breach of duty to take reasonable care and would be considered as "deficiency in service". Such practical approach towards these cases is appreciable, as ignoring the negligent conduct of the parking operator in giving effect to the disclaimers or exemption clauses for fixing liability would be counter-productive.

As per the data available the crime rate of auto theft cases in India was 16.8 during 2016.[53] Given the fact that there are just a handful of cases before the consumer forums

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52 *Bombay Brazeerie v. Mulchand Agarwal & Anr.,* (2003) CPJ 4 (NC); *Hotel Hyatt Regency* v. *Atul Virmani III,* (2008) CPJ 281 (NC) and *Taj Mahal Hotel* v. *United India Insurance Co.,* (2020) 2 SCC 224.

53 Available at *https://community.data.gov.in/top-10-states-uts-in-terms-of-crime-rate-of-auto-theft-in-india-during-2016/* accessed on 5.3.2019

for auto theft from the parking lots, one may safely infer that parking lots are still safer place to park vehicles. It is indeed very debatable as to whether the parking lot owner in every situation should be or should not be held liable for the loss of vehicle. It defeats the very purpose if parking lot owner is not held liable for the loss of vehicle especially in case of paid parking. There remains an obvious expectation of 'duty of care' and safety of the vehicle in paid parking. However, legally speaking there is no rule of general application, holding the parking lot owner responsible for the loss/theft of vehicle from the parking and would vary depending upon the nature of juridical relation shared between the parties. Technically, if the transaction satisfies the essentials of bailment, then of course, the parking lot owner can be held responsible for the loss of vehicle, that too subject to the exemption from liability clause, otherwise not.

Parking has become a serious issue especially in cities. If anyone is providing the facility to park automobiles, for the convenience of the customers visiting any marketplace or mall or any other amusement park, supervised by the attendant, liability should be fastened on the basis of "implied contract" rather than insisting on the "evidence of technical delivery".[54] It is desirable in the larger public interest that if one chooses to park in an enclosed paid parking, supervised by the attendant; there should be the duty of reasonable care on the part of parking operator, irrespective of bailment.

Nowadays, it has rather become necessity of day to day life that people need such services to be provided. However, such service would be futile if one has to compromise on the safety of one's vehicle. The Courts should take the lead to clear the uncertainty surrounding this issue and should hold the parking lot owners responsible to take reasonable care of the vehicles parked in their parking lots. This may be done by the courts/consumer forums primarily by adopting the mischief rule of interpretation while dealing with such cases keeping in mind the mischief sought to be avoided, *i.e.,* to provide protection to the vehicle owners against any loss. Only then the motor vehicle owners can reasonable provided with an assurance of safety and security in the parking lots.

[54] William F. Podesta, "The Liability of Parking Lot Owners", St. John's Law Review: Vol. 14 : No. 2, Article 8, at 373, available at *https://scholarship.law.stjohns.edu/lawreview/vol14/iss2/8* accessed on 28.02.2019

THE STATUS OF ELDERLY WOMEN IN CHANDIGARH: AN EMPIRICAL STUDY

Dr. Neelam Batra*

1. Introduction

Feminization of ageing is a worldwide phenomenon. There are more older women worldwide than older men as women tend to live longer than men. In 2012, there were 84 men for every 100 women aged 60. The proportion of women rises more with age. There are only 61 men for every 100 women aged 80 or over worldwide. The feminization of ageing has imperative implications for policy. Women and men vary on a number of issues that are relevant for ageing policies. They have diverse health and morbidity patterns and women generally have lower income but larger and better family support networks.[1]

According to Population Census 2011, there are nearly 104 million elderly persons in India; 53 million females and 51 million males. It is interesting to note that up to Population Census 1991, the number of elderly males exceeded the number of females. In the last two decades, however, the trend has been reversed and the elderly females outnumbered the elderly males. This is also a major concern for policy makers as elderly women are more vulnerable on all fronts compared to elderly men. As regards rural and urban areas, more than 73 million persons i.e. 71 per cent of elderly population reside in rural areas while 31 million or 29 per cent of elderly population are in urban areas. [2]

2. Objective of the Study

- To focus on the concerns evolving due to the weakening of family ties and the fast feminisation of ageing in India.
- To evaluate the effectiveness of legislation, social protection measures and programmes in improving the quality of life of elderly women.

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1 Ageing in the Twenty-First Century: A Celebration and A Challenge UNFPA report 2012 available at: *www.unfpa.org/publications/ageing-twenty-first-century* (last visited on 15 May 2017).

2 *Ibid.*

- To suggest various means of ensuring that the necessities of the elderly women are met.

3. Methodology and Sample Design

The present research work required empirical study. The empirical work comprised of questionnaire designed to ascertain different aspects relating to elderly women. To collect empirical data for the analysis, a comprehensive *empirical survey was conducted in the year 2018.* The study is based on the representative sample of 150 elderly women in the Union Territory of Chandigarh with age ranging from 60 to 95 years of age.The sample units were selected based on random sampling. More than half of the respondents were of age 60-79 years and 43 respondents were from the age group of 80-99 years. The whole data has been analysed by applying the Statistical Package for Social Sciences (SPSS) software.

4 Profile of the Respondents

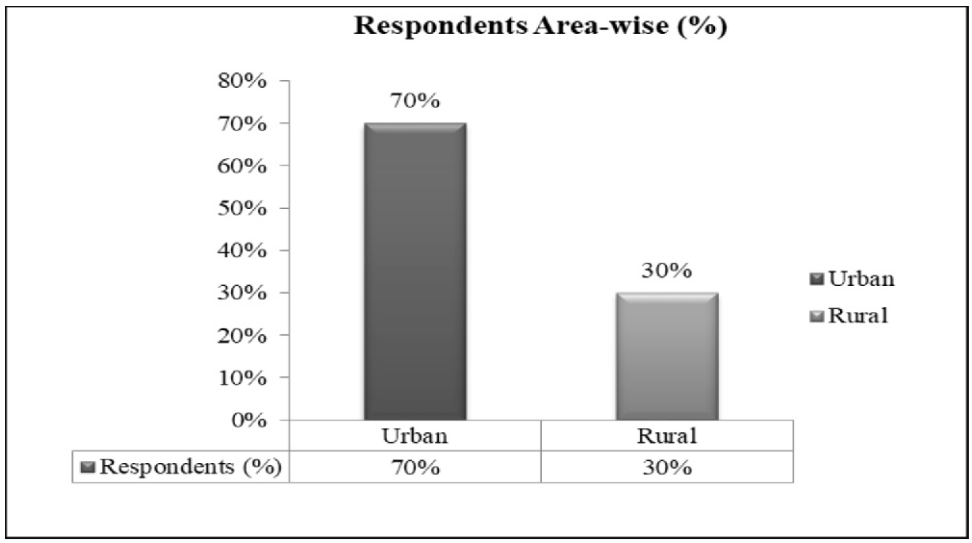
The proportion of senior citizens people is ever increasing since 1951 and has reached 8.6 per cent in 2011. Proportion of aged population (aged 60+) in total population in Chandigarh is 6.4%. The total population of senior citizens (60 & above) in Chandigarh is 67,000 out of which 1,000 live in rural areas and 66,000 live in urban areas. The total numbers of males are 35,000 and total numbers of females are 32,000.[3] This research paper puts forth the socio-demographic profile of the elderly women, along with insights on their living arrangement, dependency for a variety of necessities, general perceptions towards the senior citizens. It also presents findings pertaining to the social security schemes and support systems available to them.

4.1. Area Distribution of Respondents

Residence-wise segregation of the respondents clearly shows that 70% respondents are from urban areas, while 30% respondents are from rural areas. (Figure 1.1)

[3] Population Census 2011, cited in Government of India, 'Elderly in India, 2016'. Central Statistics Office, (Ministry of Statistics and Programme Implementation), available at: *http:// mospi.nic.in/.../publication_reports/ElderlyinIndia_2016.pdf* (last visited on June 2, 2017).

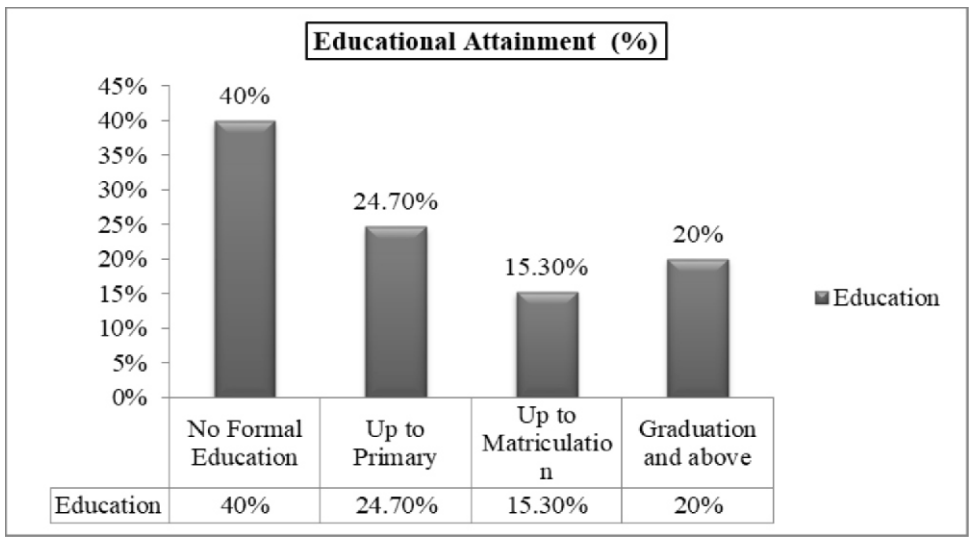
Figure 1.1: Total Number of Respondents (area-wise)



4.2. Educational attainment of the Respondents

Figure 1.2 represents the educational attainment of the respondents. 40% of the respondents are illiterate. Only about 20% are graduated or studied beyond the graduation level.

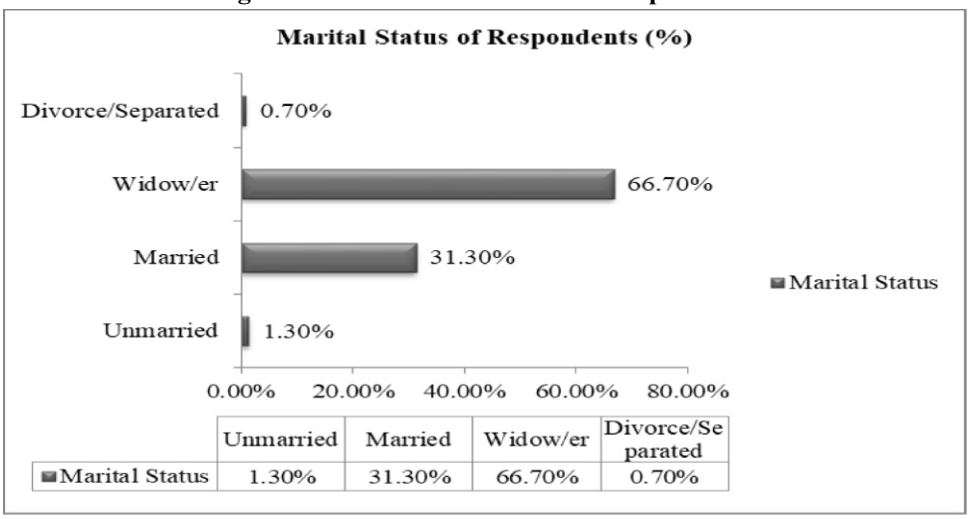
Figure 1.2: Total Number of Respondents (distribution by education wise)



4.3. Marital Status of the Respondents

Figure 1.3 provides the marital status of the respondents. 31.3% of the respondents are currently married, while 66.7% are widows. 1.3% are unmarried.

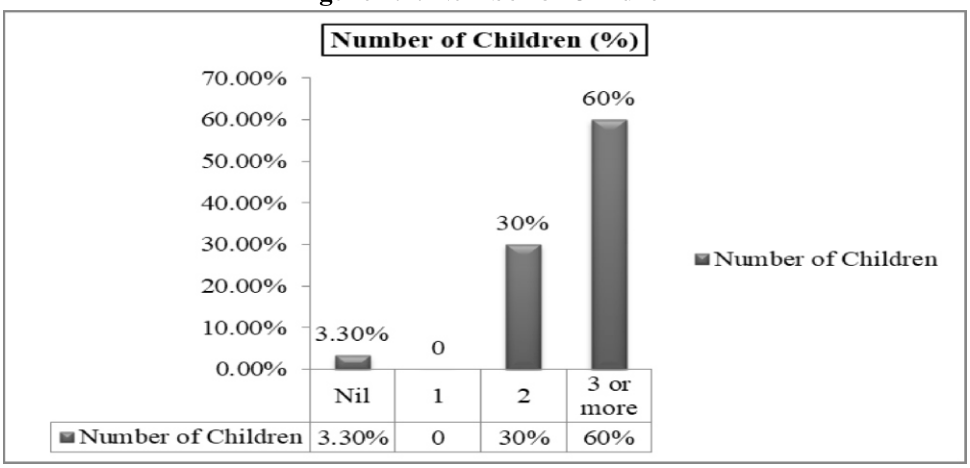
Figure 1.3: Marital Status of the Respondents



4.4. Number of children of the Respondents

Figure 1.4 presents the number of the children of the respondents. 60% of the respondents have three or more children whereas 30% of the respondents have two children. Very few (3.3%) have no children at all.

Figure 1.4: Number of Children



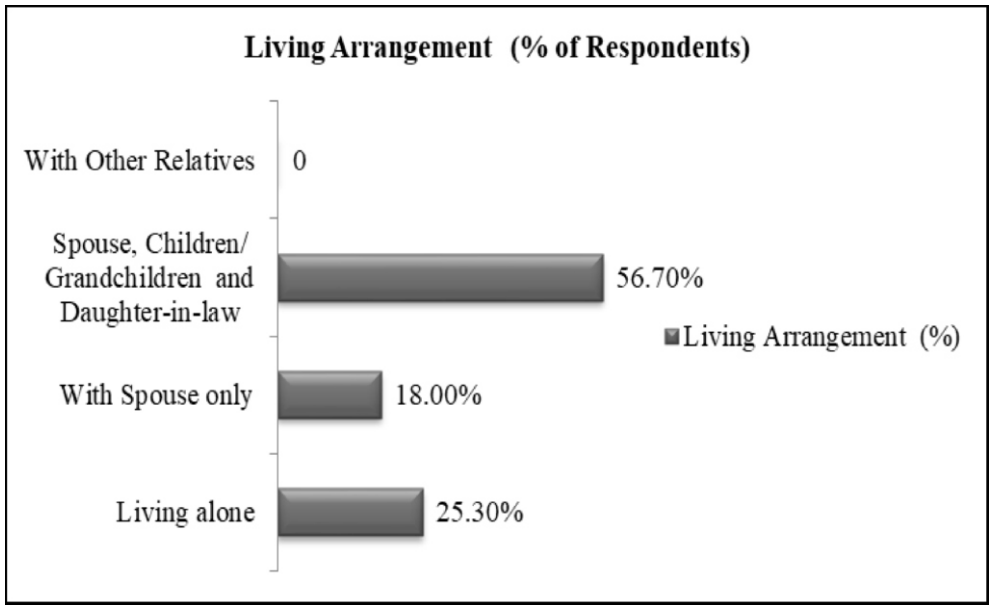
5. Results And Discussion

Numbers and percentages of the respondents giving responses in various 'response categories' were calculated with the help of SPSS format. Some issues facing elderly women in Chandigarh, item-wise results and their discussions are given in the following paragraph:

5.1 Type of Living Arrangement of Respondents in Chandigarh

The respondents were asked about their current living status Figure 1.5 shows that 56.7% of the respondents stay with their spouse, children/grandchildren and daughters-in-law. 25.3% are living alone and 18.0% of the respondents are living with the spouse only.

Figure 1.5: Living Arrangement of Respondents

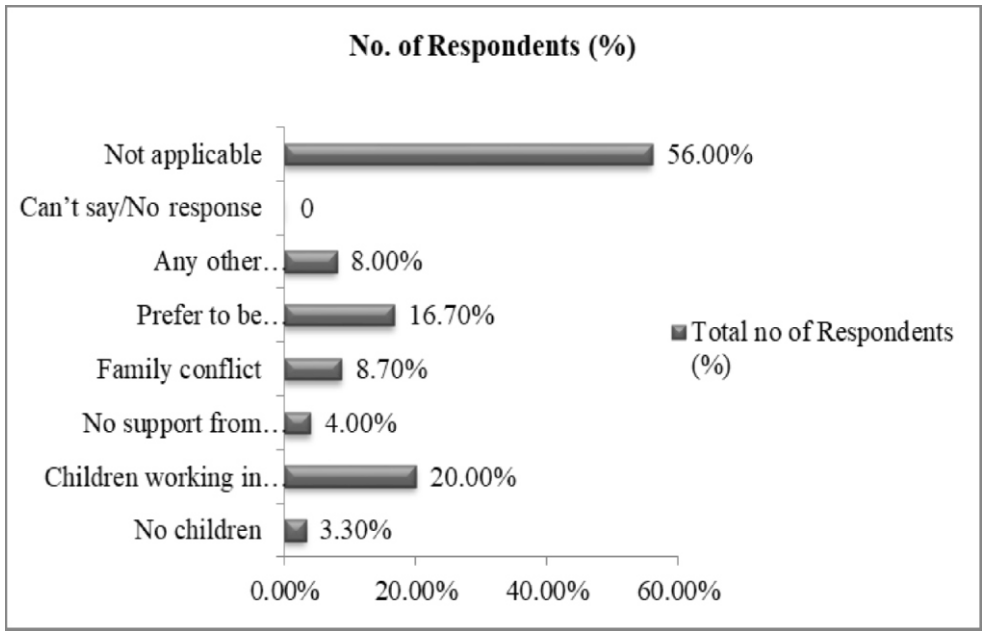


India has always maintained the traditional system of joint families with several generations living together under one roof. However, this joint family system is gradually changing to the nuclear family system due to rapid urbanization, industrialisation, changing family values etc. As more than half of the respondents are living in their families with spouse, children daughters-in law etc., it clearly implies that Chandigarh is still preserving the traditional joint family system where parents prefer to live with their children and grandchildren. It is important to stress

that living alone or just with a spouse in developed countries could be an indicator of economic independence, while in developing countries it could also be a source of insecurity and vulnerability.

5.2 Main reason for Respondents living alone or with spouse only

Figure 1.6: Reason for living alone or with spouse only

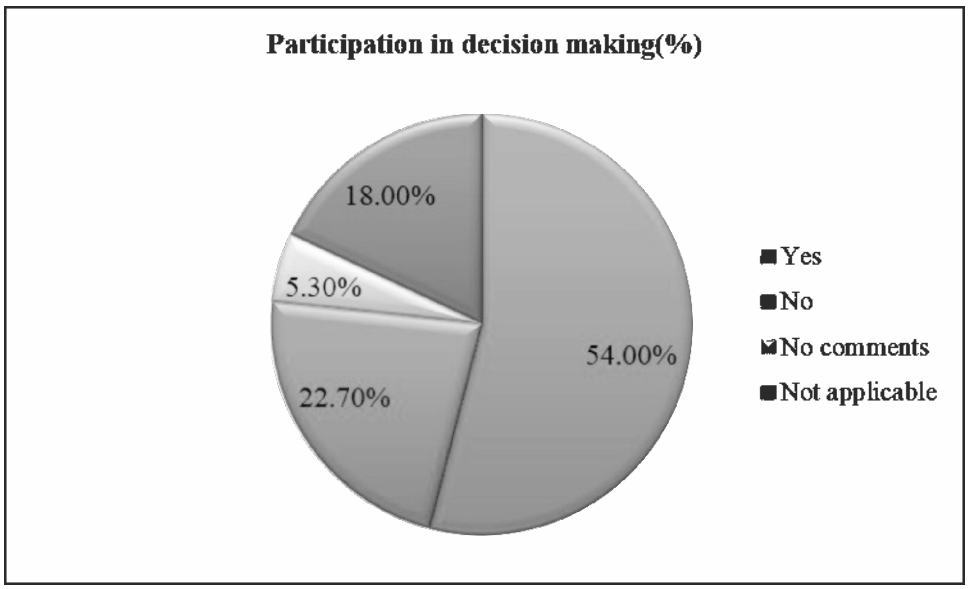


Total adds to more than 100 because of multiple responses

In the present study, those amongst the respondents reported as living alone or with spouse only were further asked the reasons for doing so. In both rural and urban areas, the main reasons given are that the children are working in another place or due to family conflict or they prefer to be independent (Figure 1.6). 20% indicated children working in another place as the main reason for living alone and 16.70% prefer to be independent. 8.70% respondents cited family conflict as the main reason whereas 3.30% of respondents indicated having no children. 4% cited no support from the children as another reason for living alone. 8% respondents though mentioned 'any other reason' but they did not disclose the exact reason for living alone.

5.3 Participation of the Respondents in decision making in the household

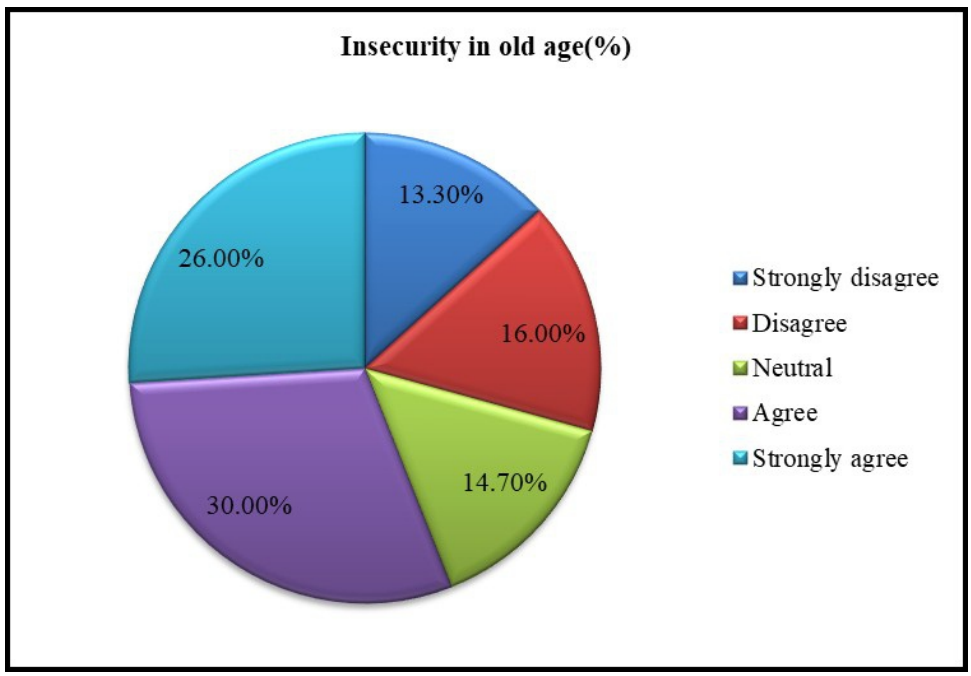
Figure 1.7 Participation in decision making in the household



The way in which the senior citizens are treated within the four walls of their home may not essentially coincide with the manner the society may perhaps treat them. More than half (54%) of the respondents answered the question in affirmative whereby they agreed that decision of the elderly is valued in important matters. Whereas 22.70% respondents answered in negative as they agreed that the senior citizens are completely ignored when the vital decisions are taken in the household. They pointed out that they are not even respected in their families. 5.30% were not able to give their clear opinion regarding decision making of the senior citizens and they rather remained silent on this matter. (Figure 1.7).

5.4 Perceptions of respondents on sense of insecurity in old age felt by them

Figure 1.8 depicts the perceptions on sense of insecurity felt by elderly women. 14.70% respondents expressed their inability to understand sense of insecurity in old age. 13.30% respondents strongly disagree that senior citizen have any sense of insecurity and 16% disagree that elderly have a sense of insecurity. 30.0% respondents reportedly said that there is a sense of insecurity in old age due to various reasons and 26% respondents strongly agree with the fact that senior citizens have misplaced sense of insecurity.

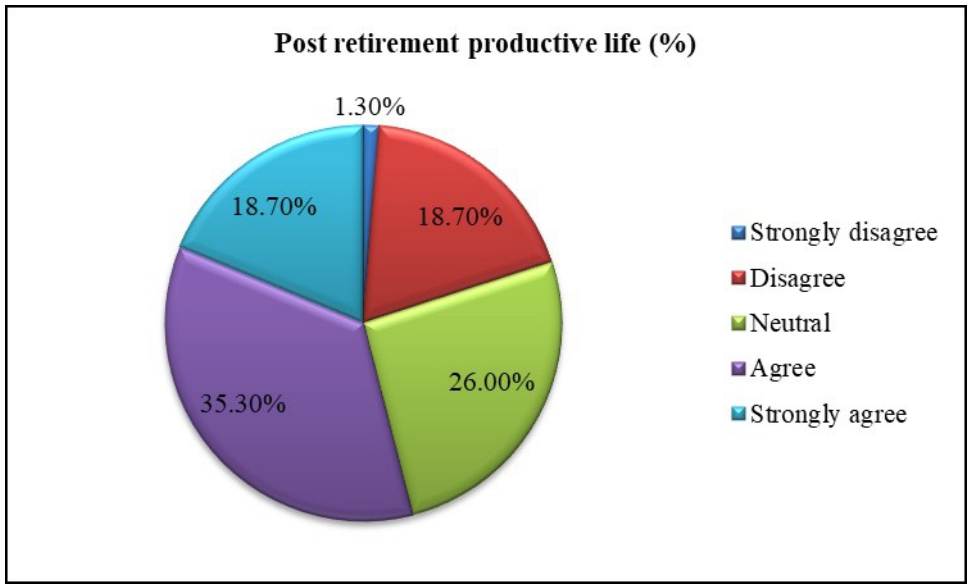


It seems that the advent of technology, urbanization, industrialization, fast paced lives, wide generation gap and fading cultural values are the various factors leading to cracks in the societal framework with long-lasting imprints. The senior citizens have their own desires and expectations from their family, relatives and family. However, a sense of insecurity takes roots when these expectations are not fulfilled. This insecurity may take different forms but, nevertheless, it subsists.

This issue pertaining to senior citizens must be addressed with paramount care and caution as India still has family as primary care giver to elderly people though withering of joint family system has contributed to the challenges faced by elderly people. There needs to be developed such supportive system for the whole society itself which in turn would rejuvenate and strengthen the joint family ties so that the senior citizens are able to get the much needed care and protection and at the same time, they do not feel insecure. Unfortunately the moral aspect in the society, which should rather be considered a priority at any cost, is going on back footing day by day and individualistic tendencies are taking the front seat. The demand of the time is to awaken the systems prevalent in historic times with respect to family setups. A massive programme of re-socialisation of both the younger generation and older generation is required.

5.5. Perceptions of respondents on Post Retirement Productive Life in Old Age

Figure 1.9: Perceptions on Post Retirement Productive Life in Old Age



As per data collected during the empirical survey (Figure 1.9), it is found that 35.3% respondents agree and 18.7% of the respondents strongly agree that senior citizens are productive even after their retirement. Only a miniscule percentage of respondents genuinely believe that elderly may not be productive after retirement. Only 18.7% respondents disagree and 1.3% of the respondents strongly disagree with the view that elderly are productive post retirement.

The fact that 35.3% of the respondents agree and 18.7% of the respondents strongly agree that senior citizens/elderly are productive even after retirement actually shows the general frame of mind of society and its people. Their perception justifies the debate that the senior citizens should be given the job opportunities according to their skills and capabilities. It also highlights that retirement is unnecessary and discriminatory at times. Such kind of the restriction purely on the basis of age should be non-existent in the society. Due to the higher life expectancy, they should rather be provided with more and more opportunities so as to earn their livelihoods and to live with social security and dignity. The senior citizens, with their passionate mind, wisdom and experience, could prove very beneficial for the future generation. The elderly generation of today is keen to work and ready to go in the second innings of their life. There is a need for providing

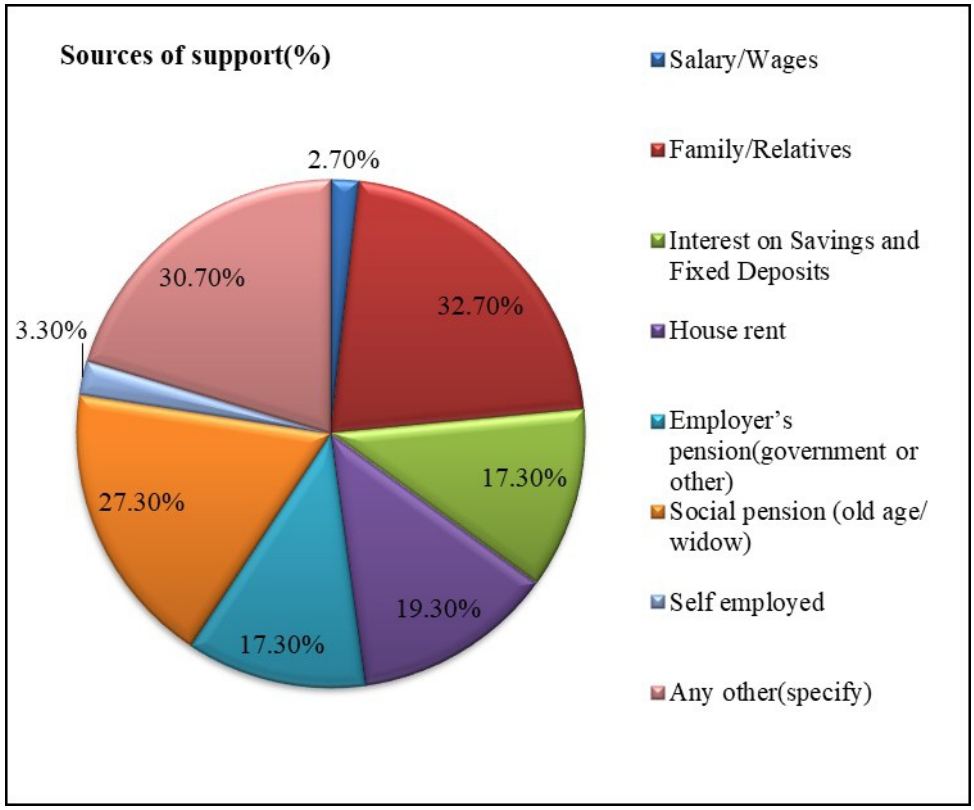
suitable opportunities for gainful employment taking into consideration various aspects relating to ageing. These opportunities are not only required to make the senior citizens more independent economically but emotionally as well as including the ingredient of self-reliance helping inculcating self-respect for being able to present oneself as a strong person in the society.

In order to achieve this goal, it is necessary that the ageing policies, whether existing or the new policies, must have various features to improve the condition of the elderly. For instance, senior citizens should be allowed to continue with income generating work for so long as they desire and for as long as they are capable of doing it efficiently and productively. There is a need to raise the employment opportunities for this purpose. Besides, this may also require that the mandatory retirement age should be increased or such a system should be eliminated.

5.6. Sources of economic support of elderly/senior citizen

The economic well-being of the senior citizens is usually a serious problem. The financial condition of the senior citizens is closely related to his past and present work status and the level of their education. The analysis in Figure 1.10 highlights the means of survival of the senior citizens. The elderly respondents were asked about the source of their income. 32.7% cited children to be the source of economic support, while 27.3% receive social pension (old age/ widow). Further, income could also ensue from house rent, or from savings in a bank or post office. 17.3% of elderly women cited interest on savings and fixed deposits as a source of income whereas 3.3% are self-employed. The income from house rent is also a source of income for 19.3% of the senior citizens. The proportions of the respondents having other sources of income are 30.7% and majority of the respondents cited husband's pension in this category. Only 2.7% of the respondents are still into the work force and are getting the salary or the wages. Moreover, the level of participation in work declines with the increase in age. It seems that 2.7% continue to be still working due to the economic necessities or other reasons. The health of a person also plays a major role in their ability to work. Vulnerability among the elderly women can be measured by ascertaining their economic dependency and as shown in Figure 1.10, 32.7% of the respondents are dependent on their families especially on their sons as reported by majority of the respondents. So there is a need that these 32.7% of the elderly who are dependent on their family members should be taken care by the government by providing them some financial assistance either in the form of pension or the suitable employment opportunities so that they can lead a dignified life and age gracefully.

Figure 1.10: Sources of economic support of Respondents



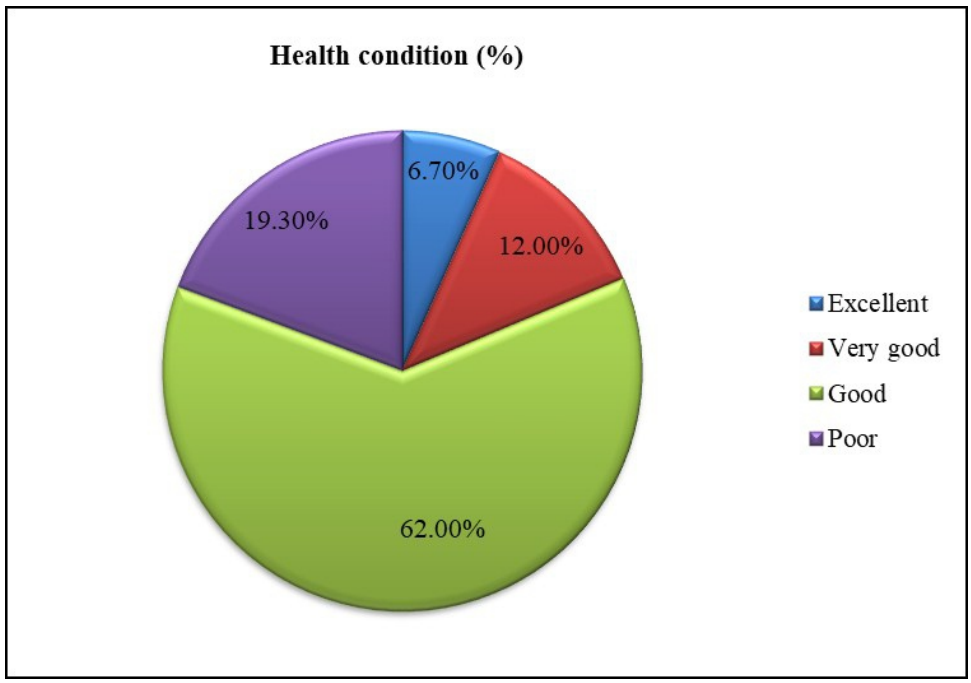
Total adds to more than 100 because of multiple responses

5.7. Self-rated Health condition of Respondents

The self-rated health seems to be a strong analyst to know the health condition of the respondents. The self-rated health was weighed in the study on a 4 -point scale (i) excellent, (ii) very good, (iii) good, and (iv) poor. Figure 1.11 presents the percentage distribution of the respondents by self-rated health status.

The survey found that around 6.7 per cent of the respondents rated the current health as excellent, 12.0 per cent rated it as very good and 62 per cent as good. However, around 19.3 per cent considered the current health as poor. It seems that there is a need to focus on this aspect of the elderly women and better facilities and regular check-ups should me made mandatory for all of them.

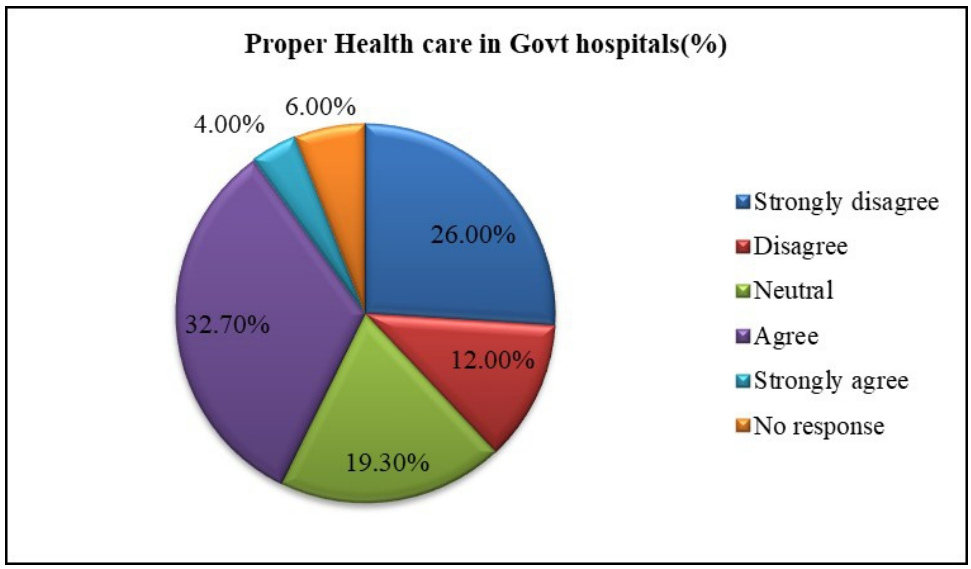
Figure 1.11: Self-rated Health condition of Respondents



5.8. Perceptions on the Quality of Health Care in Government Hospitals or hospitals funded by the Government in old age?

Figure 1.12 shows that 32.7% respondents agreed and 4% respondents strongly agreed that proper health care is provided in old age in the Government hospitals or hospitals funded by the Government. These respondents are of the view that no difficulty as such is faced by them to undergo the treatment at governmental hospitals rather the treatment is not much expensive as compared to the private hospitals. However 26% respondents strongly disagreed and 12% respondents simply disagreed that proper treatment is provided in the government hospitals. They really have to face difficulty in the hospitals. They pointed out that no special geriatric wards and specialized doctors have been there in those hospitals. They are of the opinion that the treatment is very expensive and the medicines are very costly. As seen above, large numbers of respondents have pointed out that proper health care is not provided in the Government hospitals. Therefore, the responsibility of the government is no less as to create an environment for the well-being of the senior citizens.. The governmental institutions need to catch up on the issues on the health front on priority basis.

Figure 1.12: Perceptions on the Quality of Health Care in Government Hospitals



5.9. Forms of Elder Abuse faced by the Respondents

Elder Abuse is a mounting alarm for the ageing population. Senior citizens are running the risk of various kinds of abuse such as neglect, disrespect and verbal abuse. There is a decline in the ability to cure owing to the process of ageing. These victims of abuse are usually not able to recover completely from the mental or physical trauma suffered. More and more senior citizens are being subjected to abuse by their own sons and daughters-in-law. The horrible face of Chandigarh was mirrored in the National Crime Record Bureau (NCRB) report for 2016. The city beautiful ranked first among all states and union territories in terms of crime against senior citizens (people aged above 60). In 2015, there were 26 crime cases, whereas 2016 saw 48 cases of crimes against senior citizens in the UT.[4]

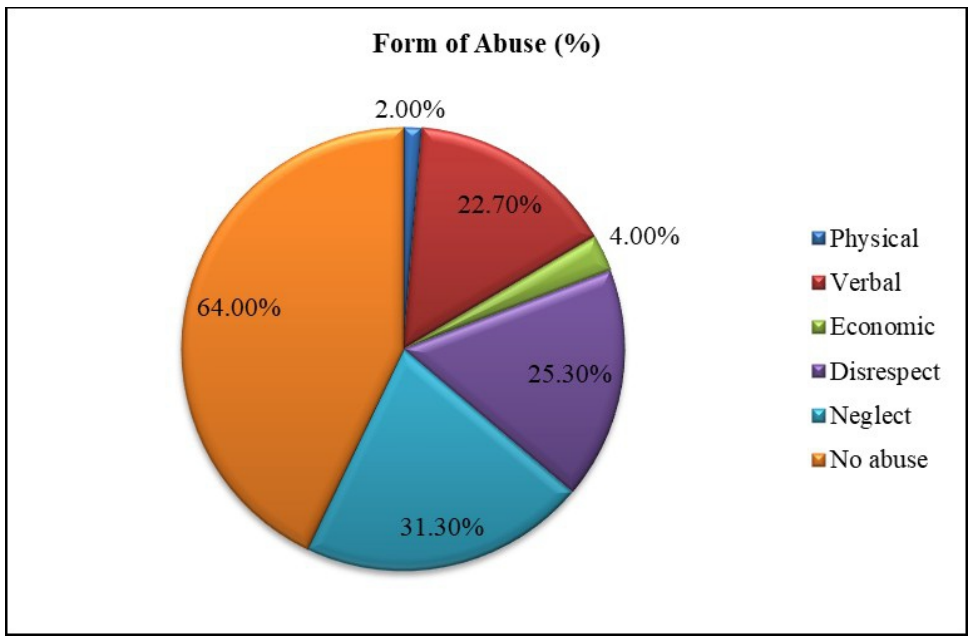
In the present survey, the respondents were asked whether they have ever faced abuse. Multiple responses were given by the respondents. As Figure 1.13 indicates, approximately 36% of the respondents have experienced some kind of abuse after

[4] "Chandigarh worst in India in crime against elderly", Hindustan Times, Chandigarh, Dec 01, 2017, available at: http*://www.hindustantimes.com/punjab/chandigarh-worst-in-india-in-crime-against-elderly-ncrb/story-32x1LShF2WiZ2ANDM9DaOL.html*, (last visited on December 5, 2017).

turning 60 .The survey has tried to find out the various forms of abuse faced by the respondents. On being asked to qualify the abuse they had faced, the respondents reportedly cited various types of abuse. 'Neglect' (31.3%) was reported to be the most common form followed by disrespect (25.3%), Verbal abuse (22.7%), economic abuse (4%) and physical abuse (2.0%). The majority of them (64%) reported that they had faced no abuse in their old age.

There are various provisions incorporated in the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 for the protection of senior citizens and the parents. But there is no such provision in the Act which specifically provide punishment in case of the various kinds of abuses. Though Section 24 provides punishment for abandonment of senior citizens, but no punishment is provided for various kinds of other abuse as above-mentioned. Looking at the alarming situation of increasing elder abuse, there is an urgent need that these provisions should be specifically incorporated in the Act of 2007 which is dealing specifically with the senior citizens so that a speedy relief could be made available to the senior citizens against the perpetrators of crime. Stern punishment should be provided keeping into mind the age factor and helplessness of the senior citizens to deal with such situations.

Figure 1.13: Forms of Elder Abuse faced by the Respondents



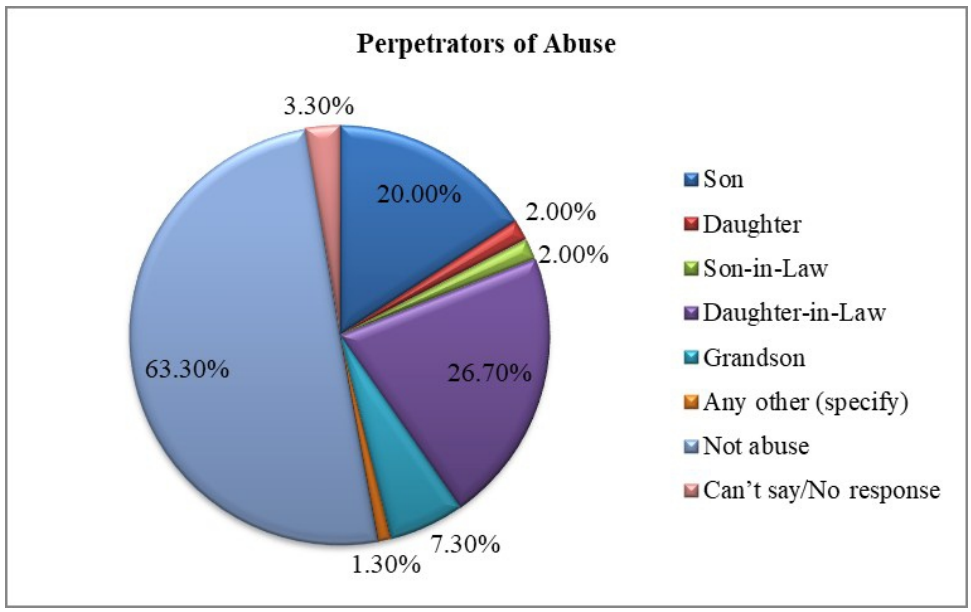
Total adds to more than 100 because of multiple responses

5.10. Main perpetrators of abuse

In order to further investigate the perpetrators of elder abuse, the respondents across Chandigarh were asked about the perpetrators of elder abuse within their family. The daughters -in-laws emerged as the major abuser, as reported by 26.7% of the respondents. The second main perpetrators of abuse among elderly women are sons (20%) as indicated by the respondents. According to 7.3% respondents, grandsons are the abusers and, daughter was reported as the abuser by 2% respondents. 2% respondents cited sons-in-law as the main abusers.(Figure 1.14).

The incidence of crime against elderly women is increasing. It is noticed that most of times perpetrators are from their own family. Police and public order being the State subject, it is predominantly the responsibility of the State Government/U.T. Administration to take action for control and prevention of crime including crime against senior citizens. The Police should be sensitized on the problems relating to senior citizens and a broad action plan should be devised regarding safety and security of senior citizens. Police Department should take all possible steps to ensure safety of life and property of senior citizens and instil in them a sense of security.

Figure 1.14: Main perpetrators of abuse



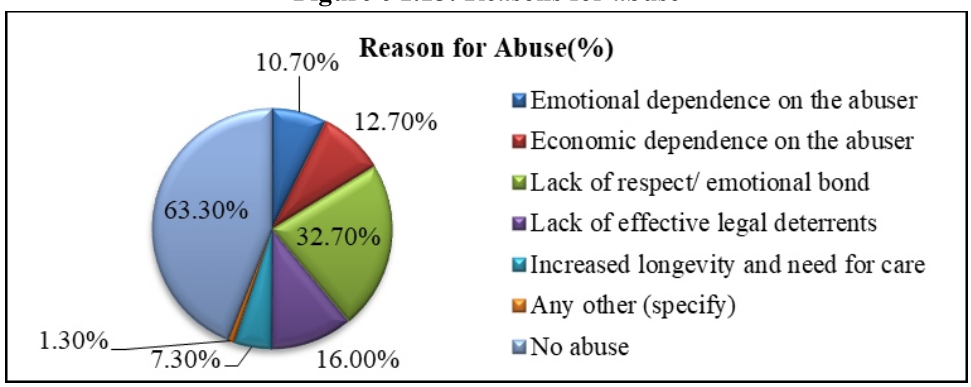
Total adds to more than 100 because of multiple responses

5.11. Reasons for elder abuse

Recent research by Help Age India, a leading charity dedicated to the care of seniors, reveals that every second senior citizen (defined as someone above 60 years of age) in India suffers abuse within their own family, a malaise that has been found to infect all social strata and all regions of the country. The 12-city study, 'State of the Elderly in India 2014', found that one in five elderly persons encounters physical and emotional abuse almost daily, a third around once a week, and a fifth every month. A common reason for the abuse is senior citizens' economic dependence on their progeny.[5]

Lack of respect/ emotional bond is the major reason for the elderly women being abused. 32.7% of the respondents reported that they are being abused because of lack of respect/ emotional bond. 16% indicated that senior citizens are clearly facing abuse due to lack of effective legal deterrents society. Emotional dependence on the abuser (10.7%) and Economic dependence on the abuser (12.7%) are also amongst the other reasons for senior citizens being abused. (Figure 1.15). 1.3% respondents cited various reasons in the category 'any other'. The main reasons cited in this category are the difference in thinking between the younger and older generation, children frustrated due to unemployment and the children wanted to grab parent's property. In short, elder abuse is a growing area of concern as different kinds of abuse are being faced by the senior citizens in Chandigarh. There is a requirement of instantaneous consideration of this matter by the government. Nonetheless, the society can also play a major role to curb this abuse.

Figure e 1.15: Reasons for abuse



Total adds to more than 100 because of multiple responses

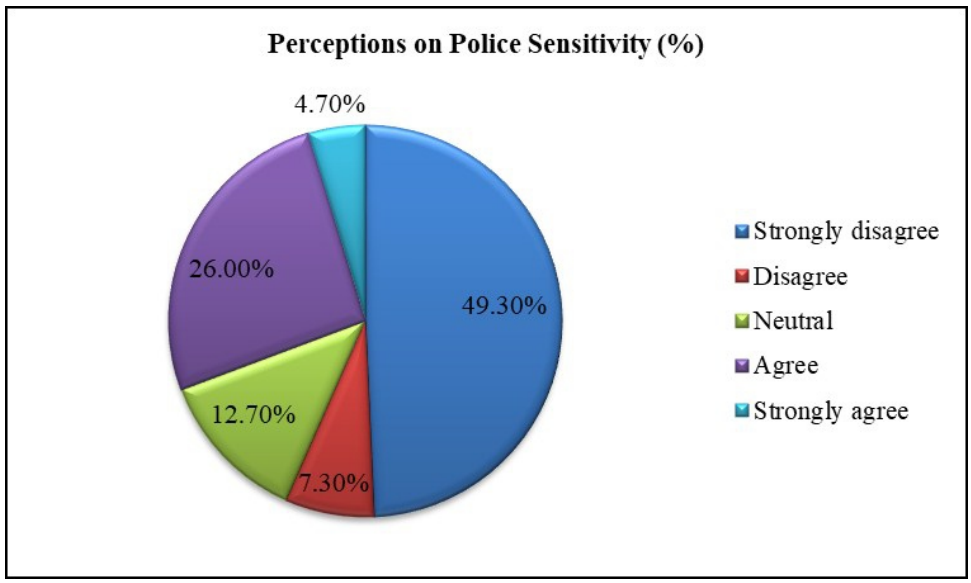
[5] Neeta Lal, "No Rest for the Elderly in India", April 3, 2015, available at: *http://www.ipsnews.net/2015/04/no-rest-for-the-elderly-in-india/* (last visited on November 19, 2017).

5.12. Perceptions on police sensitivity towards Senior Citizens

Figure 1.16 depicts the perceptions on police sensitivity towards senior citizens. 49.3% respondents strongly disagreed and another 7.3 % of the respondents apparently disclosed their disagreement with police sensitivity towards the senior citizens. They were not at all satisfied with the role of local police so far as the issues concerning the senior citizens are concerned. However, only 26% of the respondents agreed and 4% strongly disagreed that the local police is sensitive towards the elderly. It was also found that 127 % respondents remained neutral when asked about the local police.

The general perception of the respondents regarding police sensitivity towards senior citizens as well as the issues concerning the senior citizens is not favourable. A lot is required to be done to make sure that the senior citizens can safely turn to the police if there is a violation of any of their rights. There is a need to sensitize and train the police staff to tackle the problems of the senior citizens.

Figure 1.16: Perceptions on police sensitivity towards Senior Citizens



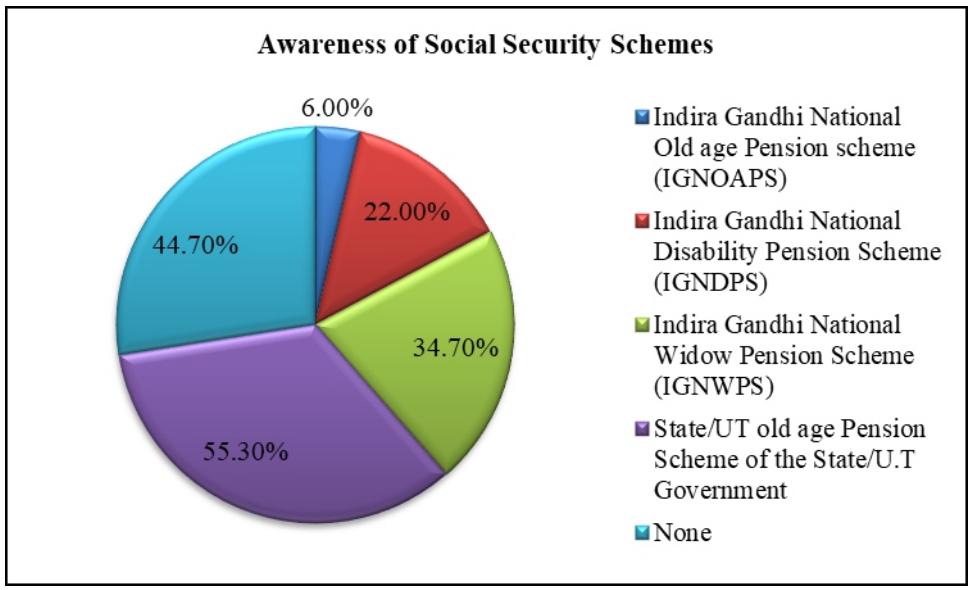
5.13. Awareness and Utilisation of Social Security Schemes

Numerous social security schemes are operational in Chandigarh, initiated either by the Central Government or the U.T. Government in order to target various sections of deprived population. These schemes focus on a number of issues like health care,

nutrition, employment issues etc. These schemes are mainly implemented by the U.T. Administration though the financial contribution for operating the schemes substantially differ which either comes from the U.T. or the Central government.

The respondents were asked about four important social security schemes to inquire about the extent of their awareness level regarding the schemes. Figure 1.17 depicts a higher level of awareness regarding State/UT old age Pension Scheme in comparison to Indira Gandhi National Widow Pension Scheme, the Indira Gandhi National Disability Pension Scheme, IGNOAPS. While 55.3% of respondents are aware of UT old age Pension Scheme and 34.7% respondents are aware of IGNWPS, the level of awareness regarding IGNDPS is 22% and IGNOAPS is low at 6%. 44.7% of the respondents were not aware of any of the schemes.

Figure 1.17: Awareness of Social Security Schemes



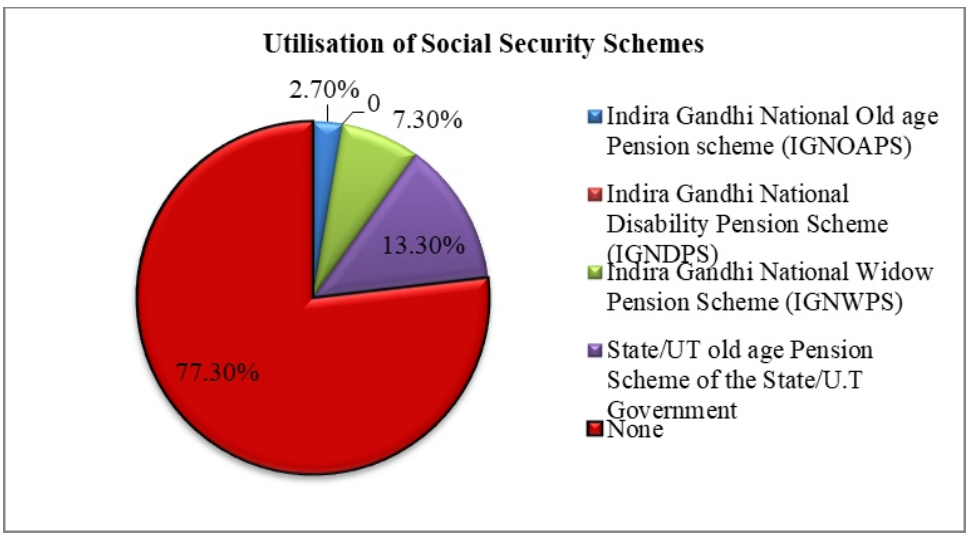
Total adds to more than 100 because of multiple responses

Having scrutinized the levels of awareness as regards the social security schemes, it is crucial to understand the utilisation or coverage of the schemes in order to find out how far the schemes are reaching the senior citizens. It can be seen in Figure 1.18 that the coverage of the schemes has been limited. The utilisation of UT old age Pension Scheme is the highest with 13.3% of the respondents availing the benefits, followed by about 7.3 per cent of respondents under IGNWPS.

Rs.1000/- per month is being given as old age pension to the eligible senior citizens in U.T. Chandigarh, whose minimum age is 60 in case of both male and female.[6] Earlier the Chandigarh administration was providing widow and old-age pension of Rs 500 per month to those whose family income was up to Rs 1,20,000 per annum. The Chandigarh Administration took this decision in the month of February, 2016 to raise the amount of widow and old-age pension from Rs 500 to Rs 1,000 per month from the next financial year. It had also decided to raise the family income criteria to Rs 1.50 lakh annually. The change in the family income criteria was expected to cover more persons under the scheme. When this decision was taken, 10,300 persons were receiving old-age pension while 6,400 were the beneficiary of pension for widows.[7]

The present study reveals that utilisation of IGNOAPS was very low at 2.7 per cent. Surprisingly, it was found that a utilisation of IGNDPS was nil. 77.3% of the senior citizens are not utilising any of the scheme. The findings clearly indicate that the utilisation level is low and identifying the beneficiaries seems to be a matter of concern. U.T. Old age pension scheme continues to be a source of support for a substantial section of the senior citizens in Chandigarh.

Figure 1.18 Utilisation of National Social Security Schemes



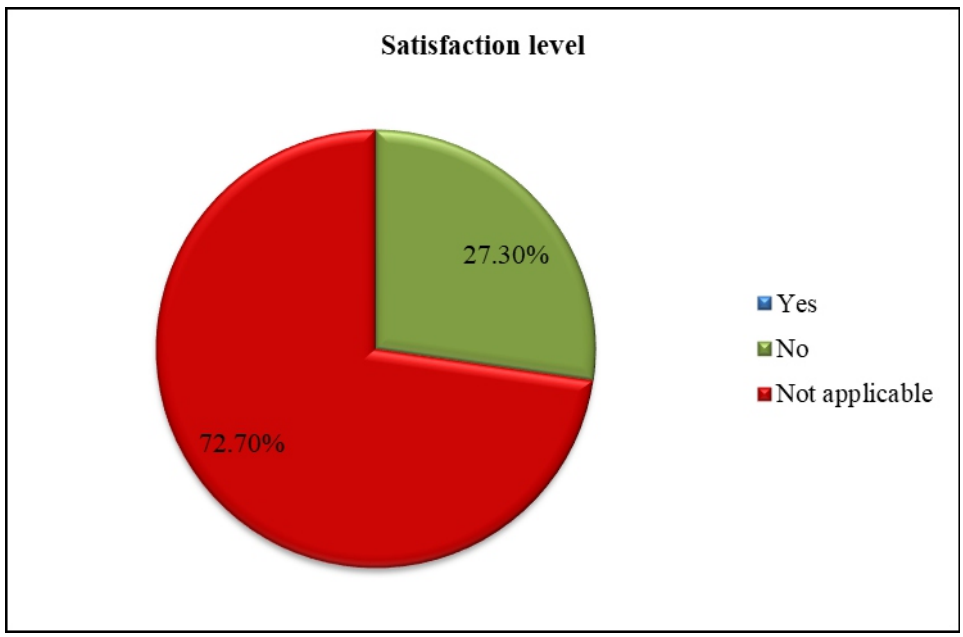
6 Available at *http://chandigarh.gov.in/dept_social.htm,* (last visited on December 10, 2017).

7 'UT increases old age, widow pensions', The Tribune, Feb 4, 2016, available at: *http://www.tribuneindia.com/news/chandigarh/community/ut-increases-old-age-widow-pensions/191735.html*, dated Feb 4, 2016, (last visited on March 15, 2016)

5.14. Satisfaction level in respect of Social Security Schemes

The respondents were asked about their satisfaction with the Social Security Schemes specially the old age pension as well as the widow pension scheme. 27.3% of the respondents are dissatisfied with the schemes. (Figure 1.19). So there is need to bring the required changes in the social security structure otherwise these schemes would not fulfil the intended purpose.

Figure 1.19: Satisfaction level in respect of Social Security Schemes



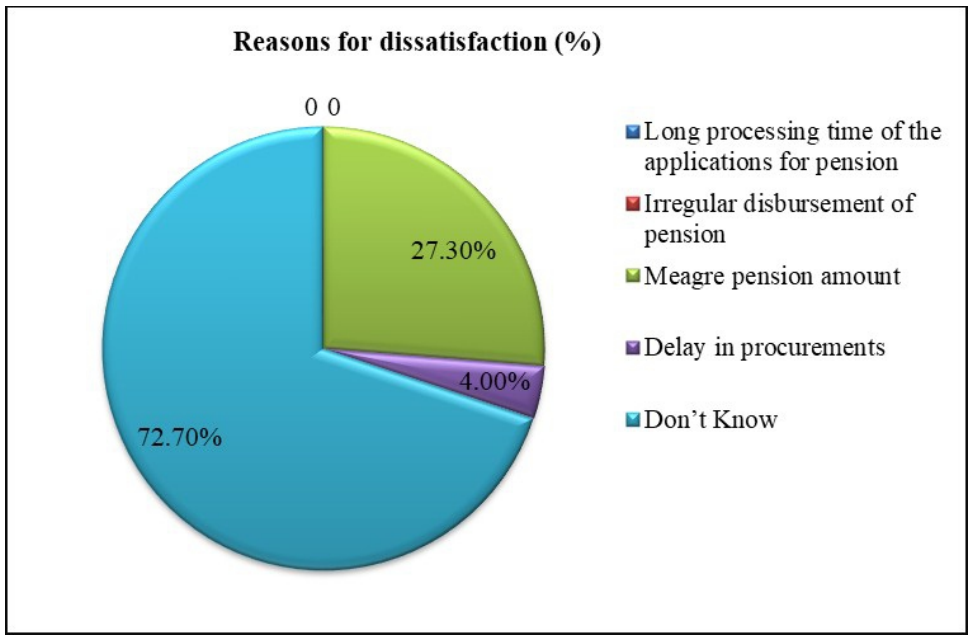
5.15 Reasons for dissatisfaction with the Social Security Schemes

The respondents who were not satisfied with the schemes were further asked about the reasons for their dissatisfaction with the schemes. They cited meagre pension amount as the major reason for their dissatisfaction. Other reason mainly cited is delay in procurements. 27.3% respondents cited meagre pension amount as the main reason. (Figure 1.20).

This implies that there is a huge gap between the requirements and problems of the destitute senior citizens and the schemes and programmes designed to improve their conditions. It also depicts a gloomy picture of the future when the number and proportion of elderly will increase. The insufficient coverage of the schemes as well as the inadequate pension amount will further worsen the state of affairs unless

certain severe measures are put in place so as to make certain the well-being and empowerment of the elderly women.

Figure 1.20: Reasons for dissatisfaction with the Social Security Schemes



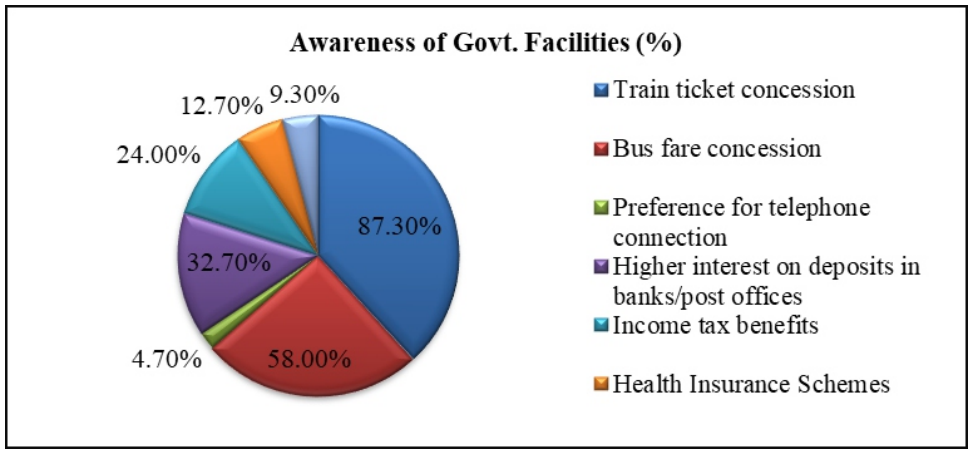
Total adds to more than 100 because of multiple responses

5.16. Awareness and Utilisation of Special Government Facilities/Schemes available for the elderly/senior citizens?

The survey also collected data on the awareness and utilisation of six other special facilities/schemes designed for improving the quality of life of senior citizens. These schemes are concession in train travel, bus fare concession, facilities in getting telephone connection, higher interest rates for deposits in banks and post offices, income tax benefits, and Health Insurance Schemes. Figure 1.21 provides information on awareness of these schemes among respondents.

87.3% of the respondents reported being aware of concession given to senior citizens in train travel and 58% of the respondents are aware of the bus seat reservation. 32.7% respondents are aware of the higher interest on deposits in banks/post offices whereas 24% are aware of income tax benefits. The respondents are hardly aware of health insurance schemes (12.7%) and preference for telephone connection (4.7%).

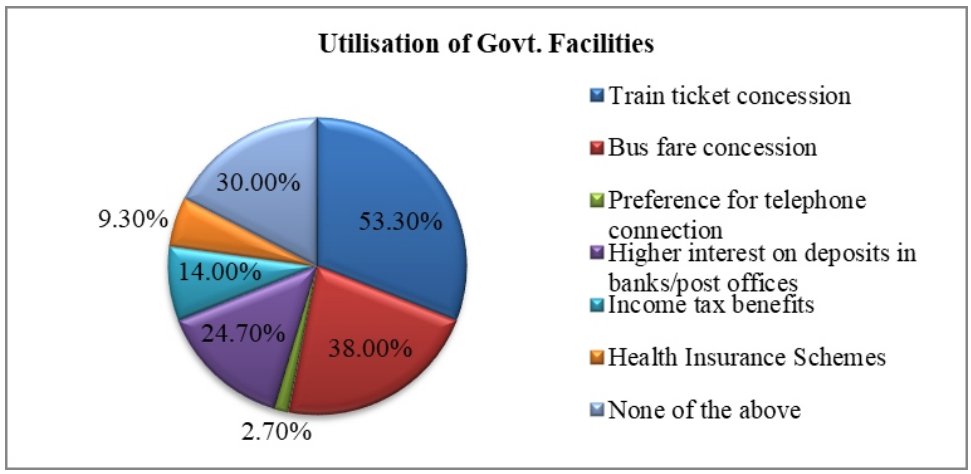
Figure 1.21: Awareness of Special Government Facilities/Schemes



Total adds to more than 100 because of multiple responses

The respondents were also asked about the utilisation of these schemes. Though a number of respondents are aware of some of facilities/schemes, the level of utilization is found to be abysmally low amongst the respondents with about 53.3% of the respondents availing train ticket concessions and 38% are using bus fare concession. 24.7% are utilising higher interest on deposits in banks/post offices and 14% are making use of income tax benefits. It is evident from Figure 1.22 that very few are utilising health insurance schemes (9.3%).

Figure 1.22: Utilisation of Special Government Facilities/Schemes



Total adds to more than 100 because of multiple responses

5.17. Awareness about redressal mechanisms/judicial remedies for elderly/senior citizens

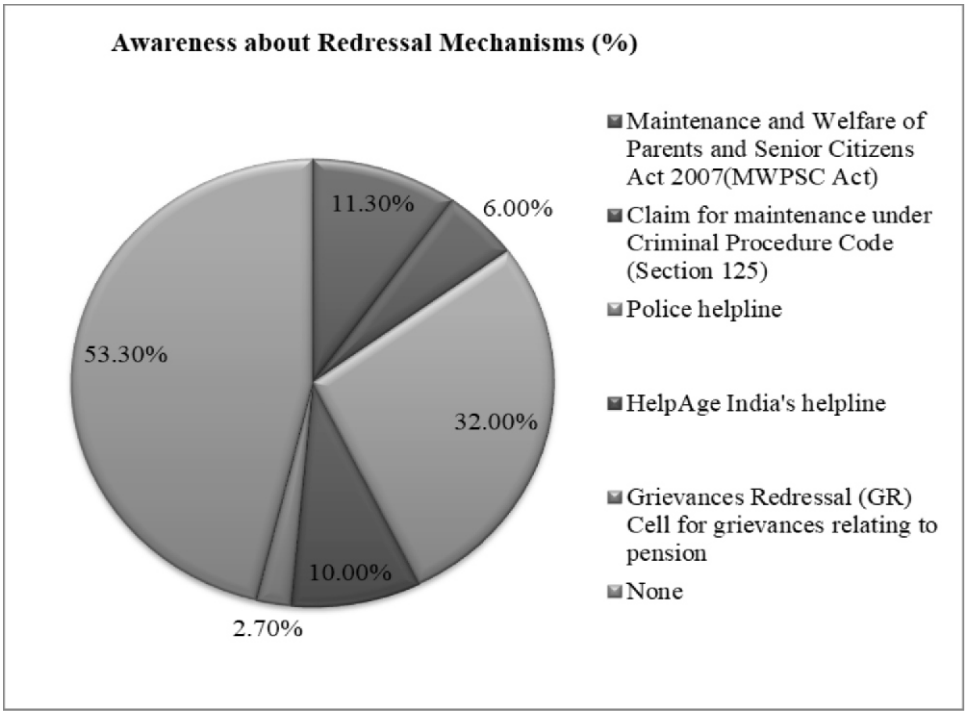
The government has initiated many redressal mechanisms/judicial remedies for the needy and destitute parents/senior citizens. Various judicial remedies are available with the parents and the senior citizens such as right to claim maintenance under section 20 of the Hindu Adoption and Maintenance Act, 1956 and Section 125 of the Criminal Procedure Code. In order to support the parents and the senior citizens, the Government of India has also enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. This Act has also been adopted by the Chandigarh Administration and is a source of significant support for the senior citizens all over the country. Earlier, there was no such legislation, which was particularly dealing with the issues of senior citizens. However, various provisions relating to support of parents were in existence when this Act came into force. This Act imposed a legal obligation on the children and relatives to provide maintenance to the needy parents and childless senior citizens. Various Maintenance Tribunals have been constituted in Chandigarh under the Act to entertain the applications relating to maintenance. In Chandigarh, the Deputy Commissioner's office receives a complaint by a senior citizen every second day under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. In 2015, the DC office had received only 60 complaints by parents against their children under this Act. The number of complaints increased to 175 in 2016. There are complaints by parents concerning maltreatment by their sons and daughters-in-law or they complain of being deprived of their essential needs. In some cases, the parents even complain about their children abusing and shouting at them.[8]

The researcher attempted to find out the awareness level of the respondents regarding various redressal mechanisms/judicial remedies. However, for various reasons, the respondents are not aware of these interventions. (Figure 1.23). Awareness regarding Police Helplines is maximum while very few respondents are aware of the landmark legislation, Maintenance and Welfare of Parents and Senior Citizens Act, 2007 which is a potentially effective tool against vulnerability and destitution. The awareness regarding Police Helplines is 32.0%, whereas 11.3% are aware of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. 6% respondents are aware of the provision contained in the Criminal Procedure Code (Section 125) for their

[8] Chandigarh: From 60 in 2015, parents' complaints against children went up to 175 last year', Indian Express, March 6, 2017, available at: *http://indianexpress.com/article/cities/chandigarh/chandigarh-from-60-in-2015-parents-complaints-against-children-went-up-to-175-last-year/* , (last visited on December 20, 2017).

protection. Only 10% respondents are aware of the HelpAge India Elder Helplines. According to 53.3% respondents, they have no idea or never heard about any of the redressal mechanism.

Figure 1.23: Awareness about redressal mechanisms

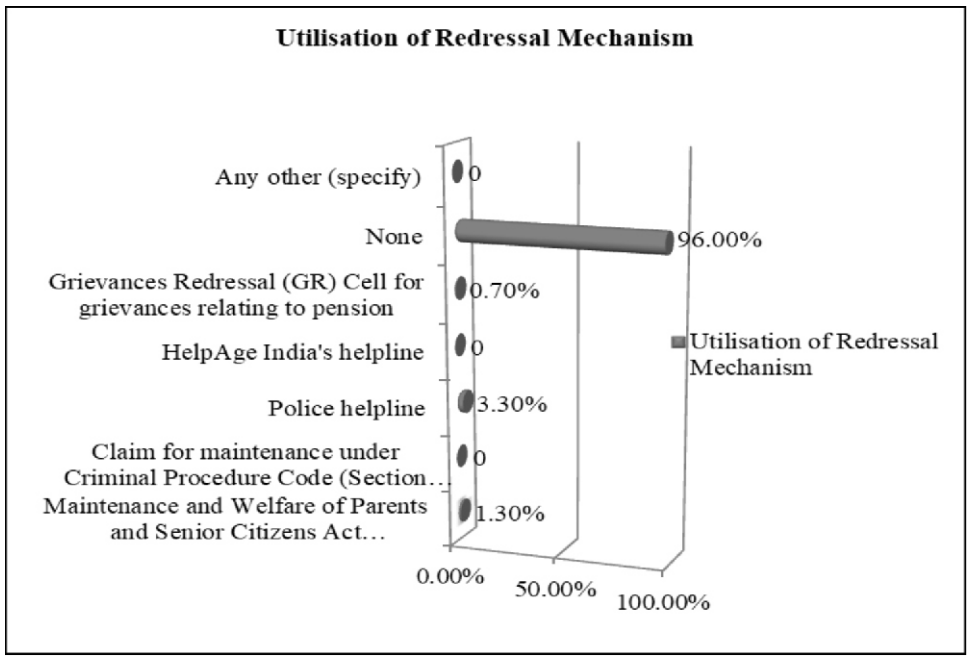


Figures given in percentages do not add up to 100 due to multiple responses

5.18. Utilisation of judicial remedies/ redressal mechanisms in case of need

The utilization of these schemes is very poor almost negligible. 96% respondents have not utilized any of the judicial remedies. Moreover, if the people are not aware of these remedies, there is no question of asking them about the utilisation. Only 1.3% of respondents have made use of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and 3.3% respondents took the help of police helpline. In order to improve their condition, the first and the foremost requirement is to make them understand each and every provision of these laws. They are completely unaware about the existence of the Maintenance Tribunals. There is really a need to sensitize them about the various authorities under various laws to whom they have to approach as well as the proper procedure to be followed by them. (Figure 1.24)

Figure 1.24: Utilisation of judicial remedies/ redressal mechanisms

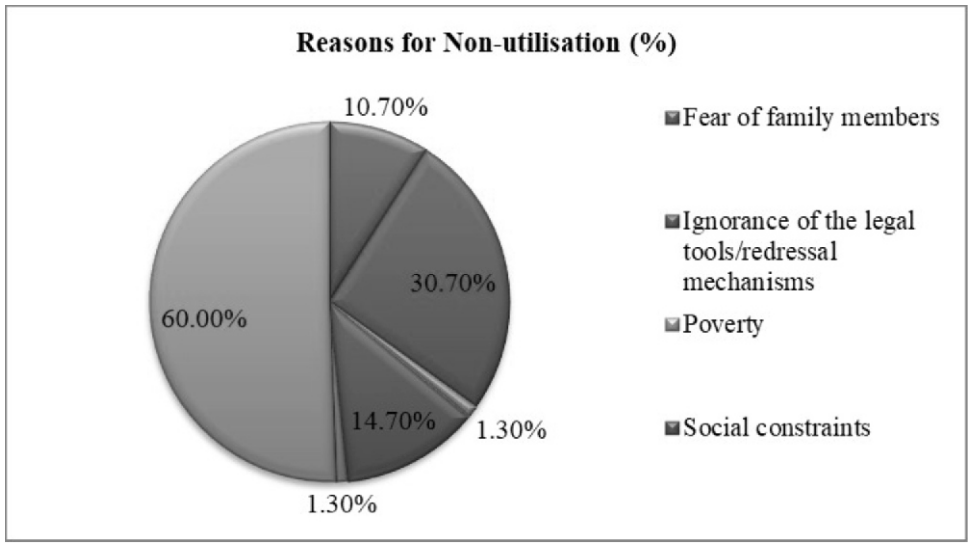


Figures given in percentages do not add up to 100 due to multiple responses

5.19. Reason for non-utilisation of the judicial remedies/redressal mechanisms

Various reasons were given by the respondents for not utilising the judicial remedies/redressal mechanisms. (Figure 1.25) Large numbers of respondents are ignorant of the legal tools available to them. Social constraints, poverty and fear of family members are also cited as the reasons for not making use of these tools. 14.7% of the respondents cited social constraints as the main reason and 1.3% cited poverty as reason for not making use of the redressal mechanisms. 10.7% of the respondents agreed fear of family members as the reason for not utilizing these remedies. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is a significant Act- which has been enacted for the twin purposes i.e. for providing maintenance as well as for the welfare of the senior citizens. But one of the main reasons for non-utilisation seems to be unawareness about the Act. Only 11.3% people are aware about the Act and 1.3% people are making use of the Act as per Figure 1.24. There is need to give proper publicity to the Act. It should also be kept in mind that the people who are illiterate or are less educated are completely ignorant about the Act. Proper awareness campaigns need to be organised for this purpose.

Figure 1.25: Reason for non-utilisation of the judicial remedies/redressal mechanisms



6. Major Findings of the Study

Population of elderly women in India is expanding fast but elder-friendly atmosphere is barely seen in the country. As a result, most of these women are restricted to stay marginalized, secluded and ignored. On the basis of this analytical evaluation, various findings of the researcher are as under:

1. As more than half of the elderly women are living in their families -it clearly implies that Chandigarh is still preserving the traditional joint family system.
2. However it seems that the advent of technology, urbanization, industrialization, fast paced lives, wide generation gap and fading cultural values are the various factors leading to cracks in the societal framework with long-lasting imprints. The elderly women have their own desires and expectations from their family, relatives and family. However, a sense of insecurity takes roots when these expectations are not fulfilled. This insecurity may take different forms but, nevertheless, it subsists.
3. Only a miniscule percentage of respondents genuinely believe that elderly may not be productive after retirement.
4. Vulnerability among the elderly women can be measured by ascertaining the economic dependency of the senior citizens. 21.30% of the elderly women have no source of income.

5. A majority of the elderly women in Chandigarh has reported their current health as 'Good'. It seems that there is a need to focus on this aspect of the elderly women.
6. . Large number of respondents have pointed out that proper health care is not provided in the Government hospitals. The governmental institutions need to catch up on the issues on the health front on priority basis.
7. Awareness about various social security schemes as well as utilisation is considerably low.
8. A huge gap between the requirements of the destitute elderly women and the schemes and programmes designed to improve their conditions.
9. The insufficient coverage of the schemes as well as the inadequate pension amount will further worsen the state of affairs unless certain severe measures are put in place so as to make certain the well-being and empowerment of the elderly women.
10. 66.70% of the total respondents were widows. A universal pension scheme is at least urgently required to be initiated.
11. Elder Abuse is a mounting alarm for the ageing population. Stern punishment should be provided. Police and public order being the State subject, it is predominantly the responsibility of the State Government/U.T. Administration to take action for control and prevention of crime including crime against senior citizens.
12. The general perception of the respondents regarding police sensitivity towards senior citizens as well as the issues concerning the senior citizens is not favourable.
13. To make sure that the elderly women can safely turn to the police if there is a violation of any of their rights.
14. To sensitize and train the police staff to tackle the problems of the senior citizens.
15. Awareness level of the respondents regarding various redressal mechanisms/judicial remedies is very low due to which they would not be able to assert their rights.

7. Conclusion and Suggestions

Population ageing presents challenge for society and governments, but should not be seen as a misfortune. It should be systematically planned in order to convert these challenges into opportunities. Failure to deal with this emergency situation will have inconsiderate consequences for the worldwide wealth and social arrangement, besides the population of the country and individual societies. With the below mentioned suggestions, the researcher concludes by making a plea to all the

stakeholders to be committed to contribute constructively towards the welfare of senior citizen specially the women rather than simply thinking and discussing the issue pertaining to senior citizens.

7.1 Family Support

Indian society places great significance on providing care and protection to senior citizens. The issues pertaining to senior citizens specially the women must be addressed with paramount care and caution as India still has family as primary care giver to elderly people though withering of joint family system has contributed to the challenges faced by elderly people. There needs to be developed such supportive system for the whole society itself which in turn would rejuvenate and strengthen the joint family ties so that the senior citizens are able to get the much needed care and protection. A massive programme of re-socialisation of both the younger generation and older generation is required. The need of the hour is to provide counselling services not only to the family members but also the senior citizens of the society with respect to the reciprocal duties.

7.2 Awareness Campaigns

There are various services, facilities and redressal mechanisms for senior citizens which are already in existence in order to minimise the problems of senior citizens but the awareness level of most of these schemes and mechanisms is almost negligible. All the schemes need to be implemented more enthusiastically by spreading mass awareness and by making the procedures for getting the pension simpler so that a bigger number of elderly persons are able to avail the benefits from it. However there are few popular schemes like the Old age pension scheme where the awareness level is quite high but large gap exists between awareness and utilisation of these social security schemes among the aged. There is an urgent to increase the coverage and utilisation of social security schemes and most importantly, these schemes have to be properly targeted so that the benefits appropriately reach to those people for whom these schemes are meant.

7.3 Protection of Life and Property of Senior Citizens

Another crucial aspect is safety of elderly women essentially when living single or couple living alone as they become victims of various crimes in the society. The incidence of crime against senior citizens is increasing. Many times perpetrators are from senior citizen's own family. The Police should be sensitized on the problems relating to senior citizens and a broad action plan should be devised regarding safety and security of senior citizens. Police Department should take all possible steps to

ensure safety of life and property of senior citizens and instil in them a sense of security. Elder Abuse cannot be completely eradicated by efforts through legislation and law enforcement agencies. There is a requirement of social awakening and transformation in the outlook of the people so that due respect and alike status can be given to the senior citizens.

7.4 Health Care during Old Age

It is the responsibility of individuals, irrespective of the age, to maintain a healthy life style. However, the responsibility of the government is no less as to create an environment for the well being of the eldely women. Both the informal and formal support systems are required for the long-term care. The governmental institutions need to catch up on the issues on the health front on priority basis. The first and the foremost priority should be to make arrangements for availability of adequate nutritious food facilities for the senior citizens especially for the ones below the poverty line. Health education should be provided to the public and the non-governmental organizations can play a major role in it.

Moreover, government or government aided hospitals have not taken any concrete steps for the provision of geriatric care units as well as other facilities stated in the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. Senior citizens are more prone to age related health problems. Indigent senior citizens may be provided free treatment at all Government hospitals, dispensaries etc. Generic medicines may be made available in all government hospitals and dispensaries.. In the medical colleges, gerontology should be made a compulsory subject and should be included in their curriculum. Where there is a serious aliment and in the cases of prolonged aliments, there should be provisions of free medicines if possible or at least at minimum rates to facilitate proper treatment. The staff at such places should be more caring and polite to cater this section of the society at fag end of their life.

7.5 Employment Opportunities

There is, however, an urgent need for the financial aspect to be looked into. Besides the need for counselling services, there is also a need for providing suitable opportunities for gainful employment taking into consideration various aspects relating to ageing. These opportunities are not only required to make the elderly women more independent economically but emotionally as well as including the ingredient of self reliance helping inculcating self respect for being able to present oneself as a strong person in the society.

7.6 Role of Non-Governmental Organizations

The non government organizations have to play a considerable role in rural as well as urban areas principally in the effective implementation of various policies and legislative provisions. These organizations can offer diverse services like day care centres fulfilling multiple requirements, extending health care by mobilizing private facilities including medical practitioners, providing nutrition and health education, supplying aids and appliances, bridging gaps between the younger and older generation, organizing training courses for the people as well as the associations engaged in the care of senior citizens, creating awareness in the communities about the needs of the elderly, raising funds for arranging facilities for the needy and the destitute elderly etc.

7.7 Universal Old Age Pension System

It is particularly indispensable that India establish a Universal Old Age Pension System without delay. This should fundamentally incorporate some elements. All the elderly who are 60 years or above should be made eligible for the old age pension and on attaining the eligibility age for universal old age pension, one should not be compelled to compulsorily retire from work. It is very important that the competent authorities pay special attention whilst assigning monetary resources for the wellbeing of the senior citizens. Government of India should consider enhancement of Old Age Pension in case due to financial constraint, a proposal of Universal Old Age System cannot be soon executed. Failure on the part of the Government of India to suitably revise upward Old Age Pension under IGNOAPS amounts to negation and violation of human right of senior citizens below poverty line to live a life of economic security and dignity. It is therefore recommended to Government of India to revise Old Age Pension. Moreover the amount of State Old Age Pension provided by the State Government is too meagre in few States to provide economic security to senior citizens and thus the violation of their human rights.

7.8 Role of Media

A constructive outlook of ageing is an essential feature of the International Plan of Action on Ageing, 2002. The media can play a significant role in portraying the elderly beyond stereotypes. The Madrid Plan of Action on Ageing expresses the hope that media can be a guiding factor in nurturing the position of senior citizens in developing strategies. There is a need to support the mass media to endorse images that emphasizes the contributions, strengths, wisdom and creativity of senior citizens. There is a further need that educators should include in their curriculum, in the formative years of students' careers, the contributions made by these elderly.

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