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EDITORIAL

As society is constantly evolving and becoming increasingly intricate, rules and regulations governing those relations cannot be held lagging. Any legal system that gets encaptivated within dormancy or stagnation, cripples the tranquility and leaves chaos behind. It can break the shackles of redundancy by revisiting and reexamining those legal principles which sit at the heart of that legal system or statutes. Take, for example, the advent of Artificial Intelligence (AI) has brought to the fore certain ethical considerations in the healthcare sector, which include privacy and surveillance, bias or discrimination, and potentially the philosophical challenge is the role of human judgment. Now, in the absence of well-defined promulgation, even the slightest error could have devastating consequences for the patient. This has called for the development of a normative framework in India, where moral dilemmas in the use of AI and the likely dangers could be addressed. Without any iota of doubt, these legal aspects rest upon thorough research which facilitates tackling those concerns and setting forth accountability. Thus, there is no substitute for research to make a meaningful contribution in the given realm. This in turn aids in reinvigorating jurisprudence, which in its widest sense means "knowledge of the law" or skill in law.

In light of the above, various manuscripts pointing out legal challenges under RLR Volume XI, July-December 2021, Number II have been painstakingly scrutinized and edited by its Editorial Team. They are being published by the Eastern Book Company (EBC). This endeavour resonates with a continual collaboration between Rajiv Gandhi National University of Law and EBC to publish quality paper in the RLR Journal. In the given issue, submissions touch upon various themes and legal issues such as a critical appraisal of prisonization in India, an analysis of freedom of speech, legal responsibilities of intermediary, use of drones and privacy concerns, examining constitutional principles through a comparative approach, harmonizing friction between privacy and cyber-space, understanding public policy concern in surrogacy, and evaluating principle of privacy in the digital age of data mining.

To build more upon the above-said proposition, the author in the opening submission titled "Open Prison System in India: The Hidden Gem" espouse the cause of Open Prisons, which are 'minimum security' correctional institutions for inmates to rehabilitate and reintegrate the prisoners back into society before

their final release. In the said submission, the author also critically apprises the current apathy of India's prisons and the urgent need for reforms. The submission concludes its argument by putting that the Open Prisons system can serve as an institutional gem in reducing the existing burden on the closed prisons and bringing in a structural change in the regime of a prison.

In the second submission titled "Media Laws, Democracy and Free Speech: An Analysis" the author evaluates the technological impact of the media on society collectively and discusses that such trends have their own problem as many complexities have cropped up in the Media Industry. With commercial interest at the zenith, India's media houses are prioritizing the presentation of such information which aligns with their business interest, maneuvering public perception and sentiments is a not-so-distant reality, and disinformation and fake news are other menaces which come up with increasing access to social media. To usher the freedom of media from the clutches of such vicious evils, the author, *inter-alia*, suggests the need to implement rules governing the regulation of digital media.

In the next submission titled "Revisiting Shreya Singhal Vs. Union of India in the Wake of Intermediary Rules, 2021- A Constitutional Perspective" the author initiates his articulation with the significant changes brought in the realm of Information and Communication Technologies (ICTs) due to innovation and advancement which have not just brought drastic changes in the way people lead and live their life, but has also called for a strong regulatory regime, hitherto could not be thought of by any legal system in the world. Thereafter, he examines the *Shreya Singhal* Case vis-à-vis Information Technology Act, 2000 through the prism of Constitutionalism and lists the reasonable restrictions on the freedom of speech. The author argues that niceties based on such reasonable restriction as embedded within Section 79 of the Information Technology Act, 2000 and the Intermediary Rules, 2021 are largely vague. Being heavily bent in favour of the executive, such laws and regulations will ensue into arbitrariness.

In the submission titled, "Drone Era - Invasion of Privacy and Law on Drone Trespass" the author argues how Drones or Unmanned Aerial Vehicles (UAVs) are one of the significant achievements in robotic technology but has also violated privacy. While mentioning various contours of Drones and UAVs, the author points out that it has led to numerous problems also such as data mining, invasion of privacy, unauthorized surveillance, etc. To curb these perils, the author calls for both legal as well as technological interventions.

Moving from the techno-legal sphere to comparative constitutional law, the submission titled "Rights and Duties Viz-A-Viz the Constitution of China and

Japan: Advisory for India" analyses the concept of Constitutional rights and duties with reference to the Constitution of the People's Republic of China and state of Japan. It envisages a comparative analysis of the constitutional principle of the aforesaid countries and then renders advice to India by juxtaposing such principles, based on their relevance in our legal system.

While accentuating the importance of privacy, in the submission titled "Balancing Right to Privacy in the Cyber World – An Analysis", the author contends that even if one is appropriating the technology in a rightful manner, still it may lead to the violation of the right to privacy of an individual by the reason of encroachment by a person without any lawful authorisation. This raises an eyebrow regarding the facets of privacy in the digital era. To sum up his arguments, the author put forth that not all monitoring, interception or surveillance would automatically be tantamount to infringement of privacy and certain legal understanding must be evolved in this regard.

In the submission titled "Public Policy Concerns in Relation to Surrogacy Agreements", the author highlights an important legal issue, i.e., whether the object or consideration of the surrogacy arrangement is unlawful, to be considered void. Courts in India may choose not to enforce a surrogacy agreement if it regards it as immoral or opposed to public policy. In the case of a surrogacy contract, there is no connection between surrogacy and injury to the public good or public interest. The nature of the surrogacy contract and the consideration involved also do not have any contrary effect on the public good or public interest as it involves two private parties. Also, the Courts and legislatures have acted with caution and with proper care to maintain a balance between individual interest and public interest. Hence, there is no justification to criticize surrogacy contracts as opposed to public policy.

In the final submission titled "Right to Privacy in the Digital Age of Data Mining", the author intends to explore the idea of privacy where some intellectuals refer to privacy as mental satisfaction or peace, a mental state of "being apart from others" or the situation in which the enjoyment of one's individual affairs is controlled. While reflecting upon these ideas, the author raises the legal implication arising from the right to privacy and data protection. While dealing with the need for regulating data protection and the mode of privacy protection, the author provides a comparative perspective by analysing EU Data Protection Directives and India's Law concerning the given theme. To sum up the arguments, the author suggests that any legislation concerning data protection and upholding privacy must be coordinated and established with all practicable means of sustaining good

moral and ethical principles in order to resolve the challenges presented by technological advances.

Dr. Kamaljit Kaur

Table of Contents

Articles

OPEN PRISON SYSTEM IN INDIA: THE HIDDEN GEM

—*Anmol Paniya*[*] *& Dr. Ruchi Sapahia*[**]

So long as the imprisonment lasts, a convict is only under an eclipse, and the moment this period expires, he has the right to come out of the clouds of ignominy and take his due place in the sphere of life which he chooses like any other member of the community. A duty therefore, caste on the government to see that prisoner when he is released, is not materially handicapped in any way and should be able to walk straight to his place in the social structure after paying the due price for his lapse.[1]

1. INTRODUCTION

Prisonization of criminals as a corrective mechanism has been practiced in India for centuries. The primary goal of prisonization and institutionalization of the criminals was to rehabilitate and reform the prisoner and create deterrence in the society. However, the idea of institutionalizing the prisoners in the four corners of the prisons has not proved to be very effective in fulfilling its purpose. On the contrary, it has an adverse psychological impact on the prisoners and the prison staff. Also, with the given rate of overcrowding, the problem of prison administration and maintenance of law and order gets multiplied. To ensure better treatment and provide better measures for protecting the rights and dignity of the prisoners and, focussing more on the therapeutic and rehabilitative purpose of the correctional treatment, the concept of Open Prisons came into the picture. Open Prisons are 'minimum security devices'[2] and play a dual purpose in eliminating the criminals from the society and rehabilitating them in the society after their final release.

2. CONCEPT OF OPEN PRISONS

In 1955, the first United Nations Congress on Prevention of Crimes and Treatment of Offenders was held in Geneva[3], which defined Open Prisons as,

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1 Justice Anand Narain Mulla quotes in Government of India, 'Report of All India Committee on Jail Reforms (Mulla Committee Report), 1983'.

2 N.V. Paranjapee, *Criminology, Penology and Victimology*, Central Law Publications, Prayagraj, 2019, pp. 556.

3 The Secretariat, 'First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955).'

> *An Open Institution is characterized by the absence of material and physical precautions against escape such as walls, locks, bars and, armed guards and by a system based on self-discipline and innate sense of responsibility towards the group in which he lives.*[4]

Thus Open Prisons are 'minimum security' correctional institutions for inmates to rehabilitate and reintegrate the prisoners back into society before their final release. In Witzwill, Switzerland, in the closing years of the Nineteenth Century, the first prison with minimum security was established. It started developing in the U.K. in the 1930s, in the United States in the 1940s, and, in the following years, it developed in many other countries. In England, Sir Alexander Paterson, the member Secretary of the Prison Commission of the U.K., made significant contributions to the development of Open Prisons. The philosophy behind these 'minimum security institutions', was based on the assumption that a person is sent to prison as a punishment, not for punishment.[5]

The main characteristics of Open Prisons are as follows:

i. It promotes the idea of informal and institutional living in small groups with minimum custodial measures.

ii. It offers ample opportunities for the prisoners to invest in agricultural and other skill-based occupations.

iii. It instils in the prisoners a sense of responsibility towards society.

iv. It allows the prisoners to stay connected with their families and relatives.

v. It provides an opportunity for the prisoners to avoid undue prolonged institutional detention.

vi. It provides an opportunity for the prisoners to pay attention to health and other recreational facilities for the inmates.

vii. It also provides financial assistance to inmates through bank loans.

viii. It provides an opportunity for the prisoners to get regular and paid work under expert supervision as the best method for reformation.

Thus, the purpose of Open Prison Institutions is that the prisoners do not relapse into crimes after their release into society. For this purpose, in the open prisons, they are given incentives to live free lives, work on the fields, carry out the occupation of their choice, and participate in games, sports, and other recreational facilities. These institutions also inculcate in the prisoners a sense of

[4] *Ibid.*

[5] Nrupathunga Patel, Dr. G.S. Venumadhava, "Resocialization of Prisoners : A Concept of Open Prison", Indian Journal of Applied Research, Vol. 4, April 2016, pp. 576-577.

self-discipline and social responsibility while simultaneously easing the burden of overcrowded prisons across the globe.

3. HISTORICAL DEVELOPMENT OF OPEN PRISONS IN INDIA

In ancient India, the eminent Hindu jurist Manu believed that unjust and harsh punishment makes the criminal more dangerous to society and brings disrepute to the law administrators. He firmly believed that the offenders should be placed in surroundings that can help them think and realize that what they did was neither good for them nor good for society as a whole. This sense of self–realization thus helps offenders become responsive to reformative treatment methods in prisons. The modern prison policy and techniques of handling criminals is also based on the same notion, which lays more emphasis on reforming of the offender rather than punishing him indiscriminately.[6]

In 1836, the first All India Jail Committee was appointed for suggesting reforms for prison administration in India. The said Committee also recommended for the development of Open Prisons in India. However, they did not favour daily employment of such prisoners in the Open Prison System for next twenty years in India.

In 1864, the second Committee on Jail Reforms was appointed and in 1877, the question for employment of prisoners in public works like digging canals or constructing dams was again recommended. This time, the said reform was accepted and prisoners were allowed to work on day to day working sites.

In 1919-20, this time the All India Jail Committee came up with another prison issue wherein the offenders should be treated in a humanely manner. Further in 1920-27, Governments appointed multiple Committee store view the administration and functioning of the Prison System in India.[7]

In 1952, U.N. Technical Expert, Sir Walter Reckless, visited India and submitted an excellent report on the prison administration in India. It was the first scientific effort to modernize prisons in India. As a result, an All India Jail Committe[8] was appointed, which recommended Prison Reforms in India. In all such recommendations, one of the important recommendations was of instituting the development of Open Prisons/ Jails in India for the betterment and rehabilitation of the prisoners. The Report, for the first time, suggested the development of Open Prisons across all states in India. In its Nineteenth Chapter, it talks about the setting up of Open Prisons. The Committee suggested that Open institutions should be set up for at least 20 percent of the total convicted prisoners sentenced

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6 *Supra* note 2.

7 *Ibid*.

8 Government of India, Report of All India Committee on Jail Reforms (Mulla Committee Report), 1983'.

to one or more years. Also, a chance should be given to improve themselves for better resocialization through community-based correctional programs. It further suggested that the work in Open institutions should be diversified to suit prisoners of various socio economic backgrounds since most open prisons engaged only in agricultural and allied work. The Committee also suggested that there should be proper training and institutionalization for prisoners, who are part of Open Institutions and Semi-Open facilities. This suggestion was specifically recommended for inmates, who were in a day-release system, so that they can work in a government establishment and Public Undertaking in a day release program.[9]

As Sir Andrew Patterson quotes,

> *The deterrent effect of the imprisonment lies primarily in the shame of being in prison and the fact of being in prison, with all that the fact in itself implies- complete loss of personal liberty, separation from home, family and friends, subjection to disciplinary control and forced labor, and deprivation of most of the ordinary amenities and intercourse of everyday life. An offender is sent to prison as a punishment and not for punishment.*

The significance of the Open Prisons in the post-independence era thus can be understood as one of the most spectacular ideas of modern penologists. The idea behind the Open Prison system was to emphasize self-discipline and self-help. These jails did not have any materials as well as physical precautions for prisoners to not escape. These jails functioned by inculcating in the inmates, the importance of freedom, responsibility and group work. It is essential to understand that the objectives of employment of prisoners in open conditions have vastly changed. Initially, the idea was to take prisoners' hard work under conditions that were not only dehumanizing but also humiliating. Whereas today, the primary goal of the prisons is to provide the prisoners with valuable and meaningful work, which helps them boost their self-respect and self-confidence.[10]

The Supreme Court also recommends the utility of Open Prisons in various judgments. Recently, the Supreme Court while, emphasizing the significance of Open Prisons in *Inhuman Conditions in 1382 Prisons, In re*[11], the court observed "Merely changing the nomenclature of prisons to "Correction Homes" will not resolve the problem. Some proactive steps are required to be taken by the eminent members of the society who should be included in the Board of Visitors. The Committee also suggested the setting up of "Open Jails" or "Open Prisons". The experiment in Shimla and the semi-open Prison in Delhi are equally successful experiments carried out in other States."[12]

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9 *Ibid*.
10 *Supra* note 2 at 564.
11 (2017) 10 SCC 658.
12 *Ibid*.

In the landmark case of *Dharambir* v. *State of U.P.*[13], the Hon'ble Supreme Court directed the Uttar Pradesh State government to send two accused offenders in an Open Prison facility on the ground that both the offenders were young and having their age in their early twenties. The Supreme Court was further pleased to observed, *"the young offenders have an advantage of living in the Open Prisons, as they are protected from some of the prison vices which usually take place in the conventional closed jails*."

In *Rama Murthy* v. *State of Karnataka*[14], the Court observed that open prisons play a significant role in the reformation of a prisoner. The Open Prison system is also an example of the most successful applications of the individualization of penalties in the case of social adjustment. It also stated that in terms of finance, the open institutions are far less costly than closed institutions. The government largely benefits from an open facility because there they can employ inmates for work, which can help the society at large, while the population of a closed prison remains unproductive.

The Court also observed that *"Though open – prisons create their own problems which are basically of management, we are sure that these problems are not such which cannot be sorted out and for the greater good of the society, which consists in seeing that the inmates of a jail come out, not as a hardened criminal but as a reformed person, nomanagerial problem is insurmountable. So, let more open prisons be opened, start with; this may be done at the headquarters of the country*."

The advantages of an Open Prison over closed prisons thus can be understood as follows:

i. They help in reducing the burden of overcrowding in jails.

ii. The operational cost of running open prisons is significantly less vis-a-vis closed prisons.

iii. The construction cost of open prisons is also significantly less than closed prisons.

iv. Open-air prisons engage the prisoners in productive work, reduce their idleness and keep them physically and mentally fit.

v. Open Prisons provide ample opportunities for self-improvement and resocialization to the inmates.

[13] (1979) 3 SCC 645.
[14] (1997) 2 SCC 642.

vi. Transferring prisoners from closed to open prisons not only widens the scope of the prisoners' rehabilitation process but also helps conserve natural resources and widens the rehabilitative process.[15]

4. STATUS OF OPEN PRISONS IN INDIA

There are presently 17 states having Open Prisons in the country.[16] Uttar Pradesh was the first state to have an open-air camp in 1949. Andhra Pradesh was the second state to have such Open Prison in 1954. In 1955, Maharashtra Government at Yerwada in Pune started its first Open Prison. The success of all these above Open Prisons encouraged other states to set-up Open Prison System. Currently there are 88 Open Prisons operating through out the territory of India.[17] However, our country still has no uniform law regarding these Open Prisons. These Open Prisons are Open Institutions wherein the states considers them a place of employment. While, others treat these open prisons as an integral part of the pre-release programs. These Open Prison Institutions are perceived as places where convicts who were victims of circumstances were given greater freedom and responsibility similar to the life of a common man, which helps them lead a normal life in the society post their release from the prison.[18] The working and eligibility criteria of different Open Prisons in the country are discussed as follows:

4.1. Uttar Pradesh

Uttar Pradesh was the first state to initiate steps to establish Open Prison Camps in the country.

4.1.1. Sampurnanand Camp, Chakiya

In 1952, the first Open Prison camp was established in Uttar Pradesh in Chakiya district. Sampurnanand Camp was established in the left bank of the river Chandraprabha in the Chandauli District. These Open Prisons inmates were given the job on the dam construction sites. The then Chief Minister of Uttar Pradesh, who inaugurated this camp, was so impressed by this idea of Dr. Sampurnanand that he announced that all the camps would be named Sampurnand Camps. The prisoners of this camp were not called prisoners and were paid wages for their labour done by them on the dam site. The lifestyle of the inmates was so modelled as to inculcate in them a sense of self-respect and self–reliance. This camp functioned for about one year and was closed in 1953 upon the completion of the dam's construction. Nearly 4200 prisoners were brought into this camp in

[15] *Supra* note 2 at 564-565.
[16] National Crime Records Bureau, Prison Statistics of India (2020).
[17] *Ibid*.
[18] *Supra* note 2 at 555.

a batch of 20 under a canopy. The results of this camp showed excellent results as out of 4200 prisoners, only 19 prisoners escaped during the whole period. The extraordinary achievements of the Chandraprabhu Open Air Camps further inspired the Uttar Pradesh Government to expand the scheme.[19]

4.1.2. Sitarganj Camp, Uttaranchal[20]

In 1960, this open prison started in the Tarai region in the Nainital District. It was one of the world's largest open prisons, spread across seven adjoin villages, namely Barn, Lalarkhas, Rudrapur, Kalyanpur, Merabarara, PrahladPulsiya, Lalarpatti, and Rudrapur. This camp was situated in the Sitarganj district, which was earlier a District Jail and was subsequently raised to the status of Central Jail. In the beginning, only long-term prisoners were brought to this camp and were paid daily wages. While most of the prisoners worked on agricultural farms, some were also engaged in cottage industries such as weaving, spinning, gur-making etc. The life of the inmates inside these camps was perfectly routine, and the inmates hardly thought of escaping since the greater emphasis was laid on character building so that they could become law-abiding citizens after they returned to society. Another significant feature of this camp was that all possible efforts were taken to keep the inmates away from the vices of incarceration. Also, the use of conventional terms such as "convict," "jailor," "warden," and "prison" was avoided to protect the inmates from the stigmatization of prison life. Instead of using the word "convicts" for the prisoners, the term "mazdoor" was used. Warden, head warden, deputy jailor, and jailor were replaced with supervisor, head supervisor, welfare officer, and chief welfare officer, respectively. The primary goal of this camp was to make the inmates forget about their past prison experiences and that they could return to normal life in the society. The inmates were called as 'shivir-niwasi' so that the stigma of being called as prisoners could be taken away.

4.2. Rajasthan

Currently, Rajasthan has the highest number of Open Prisons in the Country.

4.2.1. Sanganer

Sanganer Open Prison is one of the oldest and the largest open prisons of the state of Rajasthan. It can house nearly 400 prisoners along with their families. These prisons are self-governed by "Bandi Panchayat," wherein the five prisoners who Panchayat members manage the administration of the prisons.

[19] *Supra* note 2 at 566.
[20] *Supra* note 2 at 568.

Every day, they conduct a roll call of all the prisoners thrice a day and are also given to maintain the discipline in prison. The prisoners in this camp go out in the morning to work in the nearby areas. The work given to the prisoners is based on their skill set, such as electricians, plumbers, security guards, tailors, school teachers, and tutors. Some prisoners also work as daily wage labourers, construction workers and fruit and vegetable vendors.[21]

4.2.2. Durgapura Open Prison Camp

This Open Prison Camp was started in the year 1955. It was an agricultural colony about nine kilometres from Jaipur and spread across 1 acre. Initially, only a limited number of long-term prisoners were sent from Jaipur Jail to work in these farms without escorting or supervision. The inmates stayed in the farm with their families in the residential quarters provided to them and received wages for their daily work. This camp was so successful that only one escape was found in the first ten years of its working.[22]

4.3. Maharashtra

In 1955, an Open Prison was established in the Yerwada District. A similar camp was started in Swantrapur, in the Satara district of Maharashtra. The inmates of this Open Prison live with their families in the huts constructed and are put to farming on a cooperative basis.

4.4. Madhya Pradesh

In 2011, in the Hoshangabad District, an Open jail was started. This jail was built on an area of 17 acres of land at the cost of Rs 3.26 crores and it is a first-of -its kind prison in the state that presently houses 25 selected prisoners from all over the state of Madhya Pradesh.

In this state, the jail has facilities for providing educational facilities to the children of prisoners and helping them in leading an everyday life on the prison premises itself. Skill- based and employment oriented programs which help the inmates take a job are also provided in these jails.

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[21] Rajasthan State Legal Services Authority, '*The Open Prisons of Rajasthan: A detailed Study by Smita Chakraborty* (2017)'.

[22] *Supra* note 5 at 570.

4.5. Prisons and the Pandemic

According to World Prison Brief, India ranks fifth in the world prison population, 70% of India's prison population counts Under trials.[23] India Justice Report reveals that in India, 19 out of 36 States and Union Territories have a prison population rate of more than 100%. Shockingly, Uttar Pradesh and Delhi have an occupancy rate of 176% and 180% respective. The Report also highlights that in custody, the prisoners die due to unhygienic living conditions causing different types of illnesses like liver and kidney ailments, tuberculosis, including but not limited to even diseases like heart, lung and cancer. Around 1775 prisoners died due to the above mentioned ailments. There is a high risk of HIV, sexually transmitted infections, Hepatitis B and C, wherein these diseases are found to be 2 to 10 times higher in Indian Prisons than in Indian society.

Further, 40% staff vacancy was found in the medical posts, with a ratio of one medical personnel per 243 inmates across the prisons in our country.[24] These issues have a severe impact on the health and mental health of prisoners and the staff as well. This deteriorating status of the prisons especially got highlighted in the COVID 19 situation, when the prisoners and the staff who go through the prison premises every day were the worst affected in the pandemic situation.[25]

Various policies and measures were undertaken to prevent the spread of Covid-19 contagion in the prisons. However, the pandemic situation brought out the existing biases against the prisoners. While inside the prisons, various steps like hygiene measures, use of masks, and sanitizers were undertaken to prevent the virus outbreak. However, the population inside the prison premises was worst affected. 18157 cases were detected in prisons across India, which was duly substantiated by the online tracker on State as well as Union Territory Wise Prisons Response to Covid 19 Pandemic in India, managed by the Commonwealth Human Rights Initiative (CHRI).[26]

In order to prevent the spread of the Covid-19 virus inside the prisons, the prison authorities were of this opinion that inmates who had committed non-grievous offences The Supreme Court also took suo moto cognizance of the issue and asked the State Governments to form a High Powered Committee, which was chaired by the State Legal Services Authority for identification of prisoners who could be released.[27] The Committee was of this opinion that the prisoners who were arrested or convicted of offenses where the maximum sentence was less than seven years should be released, which was further issued a s a guideline

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[23] National Crime Records Bureau, Prison Statistics of India (2021)

[24] *Ibid*.

[25] Vijay Raghavan, "Prisons and the Pandemic: The Panoptican Plays Out", Journal of Social and Economic Development, Vol. 23, 2021, pp. 389-90.

[26] *Ibid*.

[27] *Inhuman Conditions in 1382 Prisons*, *In re,* (2017) 10 SCC 658.

by the Committee. Later the High Powered Committee of some states modified the categories for releasing the prisoners after the spread of the virus. However, the Committee was of this opinion that the eligibility criteria were based on the seriousness of the offense and not on the vulnerability of getting infected. The Committee did not take into consideration the offenses committed by the Offendors. Various offenses like organized crimes, economic crimes, terrorism, sexual crimes, and national security were excluded for temporary bail or emergency parole, irrespective of the offense or background. Thus, the prison authorities and Courts were willing to release the low risk (offense-wise) prisoners rather than from the perspective of view of risks to their probable health.[28]

5. CONCLUSION

In India, Open Prisons' development dates back to the 1950s and prove to be a very efficacious system. Open Prisons are almost self-financed and self-governed, and the cost is much less than that of closed prisons. However, the system of Open Prisons has not developed in many states. The number of open prisons also shows a very scattered and haphazard growth. Also, in most states, a prisoner must first spend a long term in closed prison and above that qualify too many conditions for being eligible to be transferred to the Open Prison. It ultimately leaves very few prisoners eligible to be finally transferred to the Open Prisons. The state of Rajasthan has the maximum number of Open Prisons, and more such open prisons should be set up in all the states to fulfil the goal of rehabilitation and reformation.

Open Prisons have certainly paved a new outlook in criminal jurisprudence by providing the offenders with better surroundings; thereby the prisoner gets reformed and can be rehabilitated back in the society. Our present Criminal jurisprudence is failing to maintain the basic dignity and human rights of prisoners and there is an emerging recognition for such lack of administration in the present Indian Criminal Justice System. The idea of creating softer prisons has nothing to do with the prison itself. It is essential to understand that rehabilitation and desistance play a vital role. Further, the prisons in our country are designed to be brutal, ugly, and inhumane, which views the prisoners as a mere liability on the State.

On the contrary, even though a prisoner starts reforming and shows humanely actions, making him fit to return back to the society and it challenges the cultural stereotype of what a prison is. Thus to move a step ahead, it is hard to stick to the view that prisoners deserve brutal conditions. In order for prisons to be a house of justice and reformation, the governments should follow a different approach towards its prison population and should treat prisoners as Hospital

[28] United Nations Office on Drugs and Crime, Position Paper Covid-19 Preparedness and Response in Prisons (March 2020).

would treat its patients and as an Education Institution would treat its students. This would be a significant change of thought for the victim as well as the offender. It is also essential to understand that the prison design seems to be a blind spot in our criminal justice system. It is prevalent in many European countries to include 'designing-architects' in the planning prison design to fulfill the aims of imprisonment.[29] A new approach to the prison architecture and design has been overdue for a long time, and the pandemic has allowed policymakers to undergo a paradigm shift in the very idea of the prison structure. Open Prison provides sufficient structure with defined spaces destined for residential purposes, work, and leisure. It thus explores the relationship between the prison staff, the prisoners, and their family members while fostering a dynamic contact with the community outside the prison. The Open Prisons system can serve as an institutional gem in reducing the existing burden on the closed prisons and bringing in a structural change in the regime of a prison as a correctional and rehabilitative institution.

[29] Yvonne Jewkes and Dominique Moran, "Prison Architecture and Design: Perspectives from Criminology and Carceral Geography", Chapter in book, *Oxford Handbook of Criminology*, Oxford University Press (2017), pp. 14-16.

MEDIA LAWS, DEMOCRACY AND FREE SPEECH: AN ANALYSIS

—*Saurabh Sinha*[*]

Perhaps among the myriad facets of technology that has regulated and taken control of all aspects of our lives, the role of media has assumed a special importance owing to its humungous presence and wider impact. The major difference being media's outreach, responsiveness and transcendence beyond boundaries, showcasing its prowess of global engagement.

Technological impact of the media therefore is larger affecting the whole society as a collective unit in contrast to other aspects where the result is seen and felt on an individual level. Media has the power to alter perceptions and change minds both in a positive and negative manner. Individual technological impact on the other hand has added a comfort of convenience to our lives and therefore has more positive outcome. All gadgets which are the result of modern technological innovation are making our day to day lives easier.

As technology is ever evolving and extremely fast paced, its impact on our lives is also equally quick. The exchange of information in this atmosphere of digital era assumes a special importance and the role of media to consume, filter and disseminate the same through technological tools comes loaded with responsibility.

In the era of printing press where the presence of media was only through newspapers and sharing of information was limited by time and geographical boundaries, the complexities relating to media impact were not felt so intensely. Globalization and liberalization have been a big game changer across all fields of human endeavours and also in media.

The Indian Media and Entertainment (M&E) sector reached INR 1.82 Trillion (US$ 25.7 billion), a growth rate of 9% over 2018. With its current trajectory, the M&E sector in India is expected to cross INR 2.4. Trillion (US$ 34 Billion) by 2022, at a CAGR of 10%.[1]

The modes and patterns of consuming information, spreading awareness and gathering knowledge has also witnessed a fluctuating trend during the past two decades. This *inter alia* depends on the changing societal structure, behavioural patterns and progression. In today's hectic life and busy schedules,

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[1] Media and entertainment industry in 2019 grew by almost 9% to reach INR 1.82 Trillion: EY-FICCI Report 2020 <https://www.ey.com/en_in/news/2020/03/media-and-entertainment-industry-in-2019-grew-by-almost-9-percent-to-reach-inr-1-82-trillion> accessed 18-3-2021.

the time people have or can devote to consume news and share information is constantly in competition with paucity of time. News on the move with has been the new norm and going into the nitty-gritty or details of the information or news received is hardly authenticated by human ingenuity. This trend has its own problems and will be discussed later. With technology moving at an astounding fast pace the media has been under a constant pressure to subsume it to keep pace. This, coupled with expanding modes and horizons of news and information platforms, many complexities have cropped up in the Media Industry.

1. THE PROBLEMS OF INDIAN MEDIA

The role that a newspaper plays is not confined to purveying of information but has diversified manifold to create awareness, enhance knowledge and bring about a meaningful change. The objectivity and fairness employed to embark upon the objectives mentioned in the above definition depends, inter-alia, upon the type of news sharing platform. The multitude of media platforms and viable and accessible technology has created a disequilibrium and chaos in presenting news for dissemination.

Further, it has shrunken and diminished the difference between news, information and non-fiction programmes.

The length of time devoted to any item of news or sharing of information depends upon the amount of business interests and volume of profit it can generate to further the commercial interests.

To begin with the most traditional form of news medium, the print media or the newspaper has the least dangerous trend in this respect. As the technology employed to spread news is not as fast and vulnerable as compared to the electronic and digital forms.

The only plausible misuse one can comprehend is the erroneous shaping of perceptions or misrepresentation of facts to achieve certain vested end results. Since information on print is devoid of any motion picture or clip or other audio-visual data, the impact on the consumer is not as great and deep compared to the other electronic forms. A well-read and well informed person can even exercise greater discretionary power to arrive at the conclusion to satisfy himself of the veracity of the information being read.

The electronic media on the other hand has the dubious disadvantage of employing all latest tools of technology to have a greater negative impact (conscious or unconscious) as compared to its print counterpart. The news reader can choose his own style of presentation (voluntary or directed) to design perceptions. The louder the voice of the presenter, the greater the impact on the vulnerable

consumer. The risk of amount of false information to be believed as true in this scenario may reach alarming proportions.

Further, the content and ownership of news a few decades ago was editor driven. The editor was in full control of publication of news. In the present times it has become owner driven. Most TV news channels are owned by big business entities or many times by politicians both of whom may have a vicious nexus to direct the way in which a news channel may run. The pressure, as a result on the style of presentation has increased to a considerable extent. The commercial interests and profits have overshadowed public interests and as a consequence the amount of genuine social issues to be raises has decreased.

Private TV channels both news and entertainment are also lucrative business ventures. Most media houses are owned by corporate entities and many times by prominent politicians. The airing of content in scenarios like these and especially in the present times has become a personal predilection of the owner of the media house. It thus becomes a very daunting task for the channel to balance between the competing interest of business and professionalism especially in the news category. The news to be completely free and independent needs to be free from these shackles. Crowd funding is a viable option to keep the news media independent. Though this has started in India, a lot more needs to be done to keep the press free in the truest sense. In a scenario like this it has become even difficult even for the press to maintain its freedom, a very important facet of Article 19 (1) (a) of the Constitution.

2. MEDIA: THE MODERN TREND

Since the past many decades print and electronic media have been the dominant source of news and information and consumption thereof was heavily dependent on the two mediums. But the advent of the internet in the early 1990's and its rapid progress coupled with the advancement in technology has changed the entire landscape. With each passing day consumption of news is being heavily shifted and internet has now become the dominant source of news for the consumers. Quality of content and its speed have won the trust of many consumers of news when they compare it with the other two mediums. The exponential rise of social media has changed the entire pattern of news consumption. Social media has become all pervasive and ubiquitous. The emerging trends and powerful impact it has in the modern times has captured the imaginations of every individual across the lengths and breadths of the globe. Its global outreach, usage and consumption level has a deep impact and bearing on the all sections of the society, and in such a scenario media cannot be on the back foot by not switching over to the latest.

The ease of convenience in the virtual/online world has in all aspects of life has made it the most dependent and reliable tool for every individual. The

element of anonymity through the use of various advanced tech tools has led to more frequent shedding of inhibitions coupled with boosting of confidence regarding undetected deviant behaviour. The penetration of smart phones has increased manifold during the last few years.

Online news media platforms provide instant and many times live news which is available before the consumer in the virtual world at the blink of an eye. While the speed of the information received cannot be doubted, its exactitude cannot be confirmed.

As news on the move has become the new norm with trending hash tags available through smart phones channelized through tweets and other social media platforms, the time for analysing and rationally thinking about any piece of news received has further decreased. The over exuberant citizenry has habitually and unconsciously become used to instant sharing and forwards of anything received on the smart phones and spread it like wild fire. What provides impetus to this tendency is the deeply ingrained biases in individuals that acts as a catalyst for purveying of disinformation otherwise perceived as genuine information. The moment a person receives any piece of information which confirms his believes and which to a large extent is able to succeed in hitting his behavioural impulses, the natural tendency is to forward it to like-minded persons (or even to those who are comparatively more rational), without verifying its authenticity.

The technical term for this phenomenon or selective exposure is *congeniality bias,* meaning picking up information on how compatible it is with our existing beliefs.[2]

3. SOCIAL MEDIA AND THE PHENOMENON OF FAKE NEWS

With the rise of and strengthening of social media platforms, blogs and micro blogging sites the problems have not only multiplied manifold, the behavioural patterns have further become degenerated as an indication of loss in humanity moral values.

There are also disadvantages of social media besides the advantages discussed earlier. Social media users have groups within their family, friends, relatives and other social circle and each member of the group have their own ideological thinking with respect to political and current events. Exchange of information within the social groups many times is therefore guided by the confirmation bias of the individual and thus proliferation of fake news cannot be ruled out. The gate keeping function of the traditional media is thus considerably weakened. Vested interests take advantage to further their agenda and thus achieve their target through human weaknesses.

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[2] Rob Brotherton, *Bad News: Why We Fall for Fake News* (1st Edn. 2020 Bloomsbury, UK) 169.

Every activity, incident or other happening occurring in the vicinity of one's surrounding becomes a national activity with each citizen armoured with his smart phone recording such incident.

Proliferation of social media platforms have further diminished the difference between news and information. Every word uttered by a person of eminence or holding a high position even in the course of normal conservation is shared as news in the form of live tweets or social media posts.

The use and employment of technological tools on social media platforms is the highest and hence the incidences of fake or false news are also the maximum proportionately. It follows the simple principle:

More technology = Greater False news

Less technology = lesser malpractices

The fake news phenomenon with respect to the social media has become a professionalized industry and, in a sense, a pernicious employment opportunity for the deluded youth. Fake images, videos, and posts are widely circulated to achieve various vested agendas, create social disharmony, paint an aura of misleading perceptions and polarize the society.

For many large organizations social media is a lucrative venture of profiteering. They have specialized IT cells with qualified professional adept in this vile art. The purpose behind such cells is to get an image makeover of a person otherwise not worthy of such credit or praise.

To tarnish or malign the image of others for certain vested purposes or fulfilling ulterior motives.

Today, the threats to those who use social media responsibly is more than those who misuse it. This is because responsibility ensues creating awareness, maintain harmony and peace, debunking falsehood and promoting truth. Media is the most important purveyor of all these avowed objectives.

The number of people using social media platforms for noble purposes are heavily outnumbered by those using it for causes just the opposite.

Even though the Supreme Court of India struck down section 66-A (Punishment for sending offensive messages through communication service, etc.) of the *Information Technology Act*, 2000 in *Shreya Singhal* v. *Union of India*[3] on account of its blatant misuse and being a threat to Article 19 (1) (a) (Freedom of speech and expression) of the Constitution, the threat perception has not reduced for those following the path of truth.

[3] (2015) 5 SCC 1: AIR 2015 SC 1523.

Those who want to polarise the society using devious means for various vested gains are emboldened by the support they receive from the corridors of powers.

Ironically, persons willing to create a positive impact through the media, face the wrath as intimidatory tactics are used against them including filing of false cases under various other provisions of law which serves as a tool for harassment.

Unless this is checked, a healthy trend for democracy cannot prevail.

4. PRIVACY IN THE TECHNOLOGICAL AGE

The issues related to privacy in general and in the era of technology in particular has been a constant bone of contention. The plethora of pronouncements of the Supreme Court of this inalienable right under Article 21 of the Constitution bears a testimony to the fact.

Privacy goes beyond the narrowly construed concept of leaving an individual in secluded spaces including his home as per his wishes. In a broader sense it also means and includes the power of making choices in various facets of life to the exclusion of intrusion of every other including the instrumentalities of the State.

When there is a breach of this intrusion restricting the individual's freedom and liberty of making choices, and also a violation of rights, it makes its way to the Courts for appropriate remedial action.

In the media and information industry, the use of technology in a negative connotation would mean and imply providing information and presenting views in a manner so twisted as to alter the perception of the individual erroneously for vested gains and interests which also includes the aim of changing his choices. This, employing various tools as mentioned.

Legally, this not only violates rights under Article 21, it also goes against the very ethics and tenets of social rules and conduct.

The dignity of the individual is a very important for the fullest realization of his potential. This can only be realized when he has complete control over the choices, he makes including the consumption and dissemination of information. Any illegal use through fake news or otherwise thus violates the most important right enshrined under Article 21. Therefore, while dissemination of information by the media industry in the information in mind the balance of competing interest with privacy should be kept in mind and followed.

5. MEDIA AND CORRUPTION

Closely associate with the phenomenon of fake news is corruption in media. In simple terms it is the use of unethical practices without the force of law to achieve certain undesirable ends for monetary gains. Corruption in media applies uniformly across all platforms viz print, electronic and social media. The degree and amount of corruption depends upon the type of news media and the size of the organization. Journalists are being paid to provide disinformation, distort facts, spread false news and create and illusory perception. This has rather become an alarming trend and even the regulators have not been able to keep a complete check on this practice.

6. MEDIA AND REGULATION

Laws regulate all spheres of human activity and legislations also exist for each set of social and economic activities. There are also laws governing the media in India which has its own set of problems.

Since an industry of the size of media and communications is a big venture and is channelized through various and different platforms, the laws and bodies for regulating i.e. media regulators have also been many and is increasing manifold. Different sets of laws and regulations govern different media platforms viz. print, electronic, radio, films etc. The main laws in this industry are:

1. The *Information Technology Act*, 2000
2. *Cable Television Networks (Regulation) Act*, 1995
3. *Cinematograph Act*, 1952
4. *Prasar Bharti, Broadcasting Corporation of India Act*, 1990
5. *Press Council of India Act*, 1978

All bodies regulating the media are governed by multiple acts some of which have been mentioned. Some independent self-regulatory bodies like the Broadcast Content Complaints Council setup under the aegis of Indian Broadcasting Foundation have also come up.

Each act has a separate set of rules that govern and regulate that particular set of media platform. Many times, they overlap which not only many times can be confusing for the complainant as regards the forum to be approached in case a cause for complaint has arisen.

The *Cable Television Networks (Regulation) Act*, 1995, for example, aims to regulate the operation of cable television networks and prohibits

transmission or re-transmission of such programmes not in conformity with the prescribed programme code under section 5. A similar prohibition applies to the advertisement code under section 6 which are not in conformity with the prescribed standards.

The Broadcast Content Complaints Council (BCCC) is also an independent council set up by the Indian Broadcasting Foundation with the objective of examining complaints about television programmes received from the viewers or any other sources, including NGO's RWA's, Ministry of Information and Broadcasting etc. and ensures that the programmes in conformity with the Self-Regulatory content guidelines.

The same could have been incorporated in the earlier legislation viz. The *Cable Television Networks (Regulation) Act*, 1995 by making the Act more comprehensive and expanding the scope of complaints with respect to the programmes. A separate chapter with respect to the same may have been incorporated.

Law making is an art and a good law on a particular subject visualizes all possible situations which may arise in the near future or the problems that may crop up in the implementation of the legislation, unless the problem is too remote for human visualization.

Every law is crafted with ingenuity through human efforts. But humans are not infallible, and no law made even with good intentions cannot be without its share of shortcomings and lacunas. However, these lacunas can be overcome through amendments.[4]

This way we may not only be able to deal with the problem of multiple forums for a particular subject, the problem of multiplicity of legislation may also be curbed to a certain extent.

Too many laws not only increase the cost of implementation, multiple legislations on a single subject creates an additional burden with respect to its enforcement and also a hurdle with regards to smooth governance.

Curbing multiplicity of legislation is also a way to reduce the number of laws besides repealing those which have become redundant with the passage of time.

The multiplicity of laws and different forums may create confusion in case of violation or infringement of any law or redressal of a grievance. Chances may be likely that a person may approach the wrong forum for a complaint to be addressed.

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[4] David G. Schrunk, *The End of Chaos: Quality Laws and the Ascendency of Democracy* (Quality Law Press, US, 2005) 22.

To set the reform process in motion, therefore, it is imperative that the entire media industry be governed by a single law to be called The *Indian Media (Regulation of Broadcast and Dissemination of Information Act*), which should take within its ambit all media platforms (Print, electronic, radio and online) including social media. A recent trend of watching and consuming content has emerged in the past few years which is popularly known as Over the Top (OTT) platforms. The content broadcast on these platforms is not through the Cable Television Network but directly through the Internet (Wi-Fi connection of the individual). Many complaints in the recent past have been made against these OTT platforms regarding the content they show. In the absence of censorship or any regulatory body, the content on these platforms is not subject to filtering and hence are lavishly obscene, excessively violent and using foul language, expletives and cuss words. These to a large extent seem true. Therefore, to regulate these OTT platforms they should also be brought under the proposed act mentioned above. Amongst the divergent views that are being aired after bringing into public domain Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, with many voices being raised against any type of regulation, I don't consider bringing the digital media under regulation as bad in law or even a bad policy. There need to be maintained a balance between free speech and reasonable restrictions. Any conduct unchecked would result in unabashed behaviour while excessive regulation would result in brazen abuse of power to silence the right of free expression. The freedom of speech has to be balanced with the reasonable restrictions under article 19 (2) on the weighing scales. There is no iota of doubt that the entertainment content broadcast through OTT platforms broadcast lavishly obscene content, coupled with excessive violence and the most abusive language and other expletives. They can be categorized as vulgar even by present day standards. They are being shown in programs which can otherwise be categorized as family content or where they are not required at all. Good content can also be broadcast without obscenity or abuses and a content or story of a programme does not lose its sheen only because of the absence of the above. Broadcasting them without any check as a defence to free expression cannot be justified in any manner. Unchecked undressing of decency and morality is creating a negative externality on the society. However, the government also needs to ensure that regulation does not become a tool for harassment and abuse according to its subjective interpretations. There should not be regulation of any content which does not fall in the above category but appears distasteful to the Government. As far as regulation of digital news is concerned, regulation or censorship should only be confined to cases where there is a factual error in reporting. Mere criticism of the Government or a critical analysis of any policy or airing of views which do not appeal to the Government is no ground for censorship. Any other media platform which might crop up due to technological advancement must not be governed by a separate act but must be incorporated in the same Act by way of amendment. The Act should be divided into separate chapters dealing with separate media platforms, the rules governing the same, the working conditions of journalists and the

regulators governing the industry. A single regulator with respect to the media industry, with sufficient manpower manning its different departments, to the extent possible is the plausible way out to deal with the problems of Media. This will go a long way in simplifying media laws in India.

7. THE PROCEDURE

Laws both civil and criminal are governed and channelized in Courts through The Code of Civil Procedure and the Code of Criminal Procedure respectively. Wading through the legal procedures provided in these voluminous codes is a herculean task in itself since these have been very meticulously drafted and many times prove too burdensome with respect to the degree of infraction or breach committed.

In India many acts are self-contained i.e., the Act itself contains provisions which dispenses with the need of following the provisions contained in the two codes thus not making it mandatory to follow these.

Section 19 of the Arbitration and Conciliation Act, 1996, for example, mandates the Arbitral Tribunal to not be bound by the Code of Civil Procedure, 1908 and The *Indian Evidence Act*, 1872 giving them a free choice to adopt their own procedure.

A similar provision exists under section 71 of the Food Safety and Standards Act, 2006 where the Food Safety and Appellate Tribunal is discharged from the burden of following the Code of Civil Procedure, 1908.

However, in absence of any clear guidelines or set of framed rules to be followed in case a departure from the procedural codes used in the codes is to be dispensed with all tribunals or other entities performing adjudicatory functions generally tend to follow the rules prescribed in these codes with only a slight degree of departure and variance.

Criminal sanctions need to be distinguished with Civil Pecuniary penalties. Prosecution under the criminal law inviting punishment should not be for regulatory offences where a penalty or fine would suffice. The purpose of penalties is to ensure compliance and regulate the behaviour of the offender to ensure better compliance in future.

Society's views of what conduct demands criminal punishment also change over time. Proportionality also favours gradations of sanctions. Regulatory regimes deal with a range of behaviour, from minor, technical breaches to grave intentional contraventions. If an enforcement body had only criminal sanctions

at its disposal, it would be prevented from taking a proportional approach to its enforcement activities.[5]

A sanction should:

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and the regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance; and
6. Aim to deter future non compliance[6]

8. MEDIA: THE FUTURE

Though too hypothetical and futuristic to assume, technology has been progressing at an astounding pace and taking a lead in governing all aspects of human life and activities.

Artificial Intelligence is the next level of technology that is taking the society by storm. Not only robots are replacing humans in all spheres of activities, it is also setting up an alarming and warning trend of loss of jobs, and natural human cognitive and instinctive faculties being replaced by machines. The day is not far when the reasons of unemployment will be more because of automation and less because of recession or economic slowdown. People from all sectors of the economy may earn less or not at all at the cost of those who are inventing such technologies.

Almost every other day we are able to see on our smart phones the videos of robots performing different tasks from playing badminton, carrying luggage, watering plants to even doing exercises physical exercises like push-ups or sit-ups. These are all physical tasks and their systems are attuned to perform these.

However, the problem becomes graver when technologists make them even more sophisticated to do even the white-collar jobs or interact with humans and also develop human cognitive abilities. The world's first humanoid

[5] Civil Pecuniary Penalties, Law Commission New Zealand, (2012, Wellington New Zealand, Issue Paper 33).

[6] Professor Richard B. Macrory, Regulatory Justice: Making Sanctions Effective (Report) (November 2006).

robot, Sophia, which was also granted the citizenship of a nation created flutters around the globe. Even before the discussion on it could die down, another humanoid robot Erica, surfaced, performing even better than the last one.

Since Artificial Intelligence (AI) is a booming market, the pace with which it is progressing is even faster than visualized.

With each passing day the sophistication, advancement and upgradation it is witnessing is causing consternation in many circles. We might soon see a day when humans in media industry are also replaced by artificial intelligence. Since they, to a considerable extent have been trained to interact with humans and answer their questions, the day is not far when robots might be seen reading news in television rooms, or working as correspondents across globe. This may be made possible by training them to understand aspects related to these with the help of algorithms.

As more skills are built into the machine, it controls more control over the work, and the worker's opportunity to engage in and develop deeper talents, such as those involved in interpretation and judgment dwindles. When automation reaches its highest level, when it takes command of the job, the worker, skill wise, has nowhere to go but down. The immediate product of the joint machine human labour, it's important to emphasize, may be superior, and according to measures of efficiency and even quality, but the human party's responsibility and agency are nonetheless curtailed.[7]

This will not only aggravate the problem mentioned above, it may also lead to other malpractices like manipulating news by feeding the robot to speak what one desires.

A new type of machine learning technique to produce fake videos has now been invented. It is known as *"generative adversarial network"* or a GAN. It was developed by Ian Good fellow a research scientist at Google. It can algorithmically generate new data sets from the existing one. For example, out of thousands of photographs of Barack Obama, GAN can replicate those photos and produce a new one without being an exact copy of any of those. It may thus come up with an entirely new portrait of the former US President that has not been created yet. GAN can be used as a multi-purpose technology and can be deployed to generate new audio or text from the existing one.[8]

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7 *Id.* at 112, 113.

8 Oscar Schwartz "You Thought Fake News was Bad? Deep Fakes are Where Truth Goes to Die", *The Guardian*, 12-11-2018 <https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth>.

Though the above scenario is only hypothetical as AI has not yet entered the domain of news and media industry, it might soon become a reality looking at the pace with which AI is progressing as mentioned above.

It is presently a bit difficult to visualize and contemplate the regulation and control through laws, the media industry governed by AI or even any other field of human endeavour or activity, since machines being regulated by laws has never been thought of, nonetheless a working solution has to be found out if AI penetrates to an extent as to outnumber humans and make their working redundant.

9. CONCLUSION

A free, fair and independent media is a sine qua non for a thriving democracy. In a society like India the role of the press becomes all the more important as a free press within the meaning of Article 19 (1a) of the Constitution as better freedom leads to better engagement with the society, better awareness and better transparency.

The media in India has been plaguing with several problems of biasness, paid news, fake news, controlled and regulated by lobbyists and other interest groups for vested purposes. Future technological challenges like AI and the threats that it may pose may also have to be given a serious consideration.

To usher in a vibrant democracy it is highly imperative to free the media from these vicious evils.

REVISITING SHREYA SINGHAL VS. UNION OF INDIA IN THE WAKE OF INTERMEDIARY RULES, 2021- A CONSTITUTIONAL PERSPECTIVE

—Dr. Ashok P. Wadje

1. PREFACE

The innovation and advancements in the field of Information and Communication Technologies (ICTs) have not just brought drastic changes in the way people lead and live their life, but has also called for a strong regulatory regime, hitherto could not be thought of by any legal system in the world. Changes (amendments) to the Indian Penal Code, 1860, and the *Indian Evidence Act*, 1872 was seldom done (as these were known for its meticulous drafting and the foresight). The conventional form of concept of *crime* and its *modality* had to be redefined and legislated. Further, the traditional form of *document, writing* and the *record keeping* had to be transformed and recognized by the legal system which ultimately enabled the people to transact and communicate electronically.

It is, the *Information Technology Act*, 2000[1] which has *recognized* the electronic nature of the document (writing & record keeping) and *regulated* the activities of the people which are detrimental to the society, driven by the digital era.

The passage of the *IT Act*, 2000 in the last 20 years of its enactment has not been found to be smooth when it comes to implementation and the *IT Act*, 2000 has seen many ups and downs. Leaving aside the issue of implementation, which is normally a problem faced by other legislations or laws in the society, its structure, drafting, and provisions of the Act of 2000 was criticized for lack of clarity. It is evident from the following pertinent facts:

a) The *IT Act*, 2000 did not focus much on the *criminal side* of the Information Technology and had codified handful of the cyber crimes. Neither Statement of Objects and Reasons of the Act nor Preamble of the Act has endorsed or talks about the concern or need for a strong regulatory regime for "cybercrimes";

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1 Hereinafter read as "IT Act, 2000".

b) In the year 2008/2009, the Legislature realized *omission* on their part to define or to lay down cybercrimes in the Act of 2000 in a more holistic manner and added some more cybercrimes into the scheme of cybercrimes by way of Information Technology (Amendment) Act, 2008[2];

c) In the year 2015, the Supreme Court of India, in *Shreya Singhal* v. *Union of India*[3] reviewed the constitutionality of some of the provisions of the *IT Act*, 2000, and then declared Section 66A which was inserted in the year 2008 by way of IT (Amendment) Act, 2008.

d) Even after the passing of a landmark judgment by the Supreme Court of India in *Shreya Singhal* v. *Union of India,*[4] Section 66A of the *IT Act*, 2000 became inoperative and was adjudged as ultra-vires and unconstitutional owing to its vagueness, the prosecution agencies[5] kept ***prosecuting the persons under Section 66A*** in various parts and States of India and that actually surprised and sought attention of the Supreme Court of India on a recent occasion.[6]

e) The controversial aspect of the deciding the cases where ***"Intermediaries"***[7] could be held liable and cases where they are exempted from the criminal liability. The scope and extent of "safe harbor" guaranteed under Section 79 of the *IT Act*, 2000 read with Intermediary Rules, 2011, to the Intermediaries is ever changing concept, with the change in the *nature* and *structure* of the Internet and Internet based services.

This kind of phase in the legal system of India, no legislation must have witnessed with so many ups and downs in the passage of just 20 years of its enactment.

In fact, the problem did not stop there and recently, Rules, namely, *Information Technology (Intermediary Guidelines and Digital Media Ethics Code), 2021*[8] laid down by the Ministry of Electronics and Information Technology (Meity), Government of India on 25th February, 2021, has raised concerns of the members of the civil society and has invited criticisms from across all the corners and has reminded the members of the legal fraternity, judicial pronouncement of Shreya Singhal case, which uphold the rights of the citizens, in a free and

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2 Hereinafter read as "IT (Amendment) Act, 2008".

3 (2015) 5 SCC 1: AIR 2015 SC 1523.

4 Hereinafter read as "Shreya Singhal Case".

5 Police Machinery.

6 Legal Correspondents, *"Shocked' that Section 66A is Still Being Used, SC Seeks Centre's Response*". *The Hindu,* available at: <https://www.thehindu.com/news/national/shocked-that-section-66a-is-still-being-used-sc-seeks-centres-response/article25931913.ece> (Last accessed on 30-9-2021).

7 "Intermediary" are those entities who make platform available for the "Originator" of information and the third party (addressee).

8 Hereinafter read as "Intermediary Rules, 2021".

democratic society, of speech and expression over the Internet as a medium of expression.

2. SCOPE OF THE PAPER

The present paper will trace the developments that took place since the passing of the judgment by the Supreme Court in *Shreya Singhal* v. *Union of India*, which created a scope to debate the constitutionality of not just arbitrary provisions but also vague concepts and provisions in the statute. The efficacy, legality or the constitutionality of the Intermediary Rules, 2021, needs to be tested thoroughly and holistically. The State may have been justified in formulating the exhaustive piece of Rules considering the past experience, passage of the *IT Act*, 2000 and change in the structure and volume of the Information Technology and the Internet. Moreover, the principle of "void for vagueness" needs to be discussed explicitly and thoroughly, the starting point of which had been the Shreya Singhal Case. Hence, the present research will undertake the same.

The Intermediary Rules, 2021 passed under *Information Technology Act*, 2000 by virtue of its very nature, structure, drafting and the contents thereof may cause a chilling effect, considering the past experience of the passage of the *IT Act*, 2000 and the Supreme Court ruling in Shreya Singhal Case and hence it may be challenged for its validity owing to "void for vagueness" principle.

Present research endeavor in the backdrop of the premise mentioned above, seeks to:

a) Understand and apply a principle of "constitutionalism" vis-à-vis *Information Technology Act*, 2000 and the Rules made there-under

b) Evaluate and study the nature and effect of Intermediary Rules, 2021 on touchstones of the Constitutionalism

c) Revisit the *Shreya Singhal* v. *Union of India* in understanding the jurisprudence of the "void for vagueness" vis-à-vis Intermediary Rules, 2021.

3. SHREYA SINGHAL CASE VIS-À-VIS *INFORMATION TECHNOLOGY ACT*, 2000 THROUGH THE PRISM OF CONSTITUTIONALISM

THE CONSTITUTION OF INDIA, 1950, is a basic document that governs not just the legal system but it governs the entire nation. All affairs of pertaining to the citizens and the State are provided in the Constitution of India, 1950. No citizen or no State[9] has any authority to disregard or transcend the boundaries

[9] As defined in Article 12 of the Constitution of India.

and the limitations set out by the Constitution of India, 1950. Even the State or Legislature[10] while making the Laws or formulating the policy pertaining to the same, have to be within the framework set out by the Constitution and as such *constitutionalism* serves as the cardinal principle that keeps a check on any arbitrary exercise of the power by the State and the States must not be allowed to bypass the principle. As has been rightly pointed by the Supreme Court in *S.R. Chaudhuri* v. *State of Punjab*[11]

> *constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency". We should not allow erosion of principles of constitutionalism.*

THE *INFORMATION TECHNOLOGY ACT*, 2000 in general and the provisions thereof, like any other law of the land, cannot breach the limitations set out by the Indian Constitution, that being the main concern in Shreya Singhal Case. Shreya Singhal Case has thrown a light on a new era of the Constitutional law of India and has revived the *constitutionalism* in guaranteeing the freedom of speech and expression over the medium of Internet and the content based services on the Internet. The Supreme Court of India had an occasion to discuss the constitutionality of Section 66A of the *Information Technology Act*, 2000, as the same was being misused for undue political gains and political motives by filing frivolous FIRs[12] to shut the mouth of the people over the medium of Internet in general and social media in particular. All cases, that were filed across the India were clubbed together to discuss about the constitutional validity of the said Section. Supreme Court of India in Shreya Singhal Case found Section 66A and its wordings as unnecessary and vague, leading to misuse of the same and an encroachment on the freedom of speech and expression of the citizens in the medium of Internet. This way, the Supreme Court in the country has silently gave rise to the application of principle of *"Void for Vagueness"* which had been used as a tool to upheld the protection guaranteed by the First Amendment to the US Constitution. But it is rare to see the Supreme Court of India directly applying the said principle at the same time deciding the constitutional validity of any law. Supreme Court in the present case, invalidated Section 66-A of the Information Technology Act, 2000, an Act to regulate electronic communication, on the grounds of not being covered by any of the eight grounds on which freedom of speech may be restricted. The court found the Section 67 having chilling effect on freedom of speech and expression by its over-breadth and vagueness.

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[10] Central or State or Union Territory.
[11] (2001) 7 SCC 126.
[12] First Information Report.

4. *SHREYA SINGHAL* V. *UNION OF INDIA*[13] A BRIEF NOTE

Shreya Singhal Case is a landmark judgment which was delivered in the year 2015 by the Supreme Court of India and was mainly concerned with the constitutionality of the following provisions of the *Information Technology Act*, 2000 and the Rules framed there-under.

1. Section 66A
2. Section 69A and
3. Section 79 and the rules framed there-under

Moreover, Supreme Court made it point to hear all similar cases filed under Section 66A at various place in the country and clubbed all the petitions together in the present case. One such incident of being a case of two girls from Mumbai who had published a post on Facebook regarding demise of the Shiv Sena Leader Balasaheb Thackeray, which voiced against the shutdown in Mumbai on the demise of the Shiv Sena leader. These two girls were arrested of the charges under Section 66A of the *Information Technology Act*, 2000, which created nation wide uproar on the social media platforms against the misuse of the provision of Section 66A.

The petitioners in the case contended that:

a) Section 66A violated the freedom guaranteed under Article 19 (1) (a) and is drafted in a vague manner;

b) Section 69A and the rules framed thereunder are unconstitutional for lack of procedural safeguards and

c) Section 79 being beyond reasonable restrictions under Article 19 (2).

It was noted by the Court that the Article 19 (1) (a) of the Indian Constitution guarantees *"freedom of speech and expression"* as has been guaranteed by the Supreme Court of the country on various occasions such as *Romesh Thappar* v. *State of Madras* (1950 SCR 594) etc. are also guaranteed over the social media platforms and is a basic right. Court also noted that the same could be curtailed only by imposing "*restrictions"* which must be *reasonable* in nature, to be imposed by passing law and having a nexus with any of the grounds mentioned in Article 19 (2) of the India Constitution. The grounds on which liberty guaranteed under Article 19 (1) (a) of the Constitution of India could be curtailed are as under:

1. Sovereignty and Integrity of India

[13] (2015) 5 SCC 1: AIR 2015 SC 1523.

2. Security of the State
3. Friendly relations with Foreign nations
4. Public Order
5. Decency and Morality
6. Contempt of Court
7. Defamation
8. Incitement to Offence

In this context it is pertinent to see, the controversial parts of the Section 66A of the *IT Act*, 2000 which sought attention of the Supreme Court in the case. The Section 66A prescribed the punishment for any act in the nature of sending offensive messages through communication by means of computer resource or communication device, especially, *any information* which is "grossly offensive" or has "menacing character" or any information which the wrong doer knows to be false but is for the purpose of causing "annoyance" or "inconvenience" to the victim. These expressions came to the scrutiny of the court in order to decide the constitutional validity of the Section 66A of the *IT Act*, 2000. The Supreme Court found these expression as "vague" in nature and therefore, "void" as it had a chilling effect on the "freedom of speech and expression" guaranteed under Article 19 (1) (a). Moreover, the Supreme Court also found that there exists no connection or proximity between the prohibited acts under Section 66A of the *IT Act*, 2000 with that of grounds mentioned in Article 19 (2) of the Indian Constitution. For a law to curtail freedom guaranteed under Article 19 (1) (a) of the Indian Constitution, it must have been passed in exercise of any of the grounds mentioned above under Article 19 (2). The Supreme Court in this case, examined following grounds in order to establish a proximity of prohibited acts under Section 66A of the *IT Act*, 2000 and Article 19 (2) of the Constitution of India:

a) Public Order
b) Law and Order
c) Security of the State
d) Decency and Morality

After having examined these factors, the court found that the Section has not satisfied any of the above in putting a limitation by defining prohibited acts under the said Section, on freedom of speech and expression over the medium of Internet.

Moving to Section 69A, which was also the contention of the petitioner that it is unconstitutional for the lack of procedural safeguards, Section 69A authorises a government *to block the transmission of information that is generated, transmitted, received, stored or hosted in any computer resource, including the blocking of websites, when it is necessary or expedient to do so, for among other reasons, the interest of sovereignty, and integrity of India, public order or for preventing incitement to the commission of any cognizable offence*. However, it was found by the Supreme Court that the Section requires the reason for such blocking to be recorded in writing and it provided a detailed procedure required to be followed by the relevant government agencies and officers for the purpose of blocking access to any content under section 69A and it endorsed that the Section has safeguards.

In the context of Section 79, the Supreme Court of India had taken a different stance and contrary to what it has done to Section 66A, it has read down the provisions made by Section 79 of the *IT Act*, 2000. Section 79 of the *IT Act*, 2000 grants an exemption to "Intermediaries".[14] The Central government formulated detailed rules in furtherance of the Section 79 of the *IT Act*, 2000 in order to give effect to the provisions of Section 79, in the form of Information Technology (Intermediary Guidelines) Rules, 2011. The combined effect of Section 79 and the rules framed therein is that

a) the Intermediary will not be held liable for the act of third party if it exercises *"due diligence"* but will be held liable on actual knowledge of the "unlawful acts" and fails to exercise the due diligence and

b) It can form or *exercise its own judgment* upon receiving actual knowledge that any information is being used to commit unlawful acts.

Following expressions came to the scrutiny by the Supreme Court of its constitutional validity with regard to the Section 79 of the *IT Act*, 2000 being vague in nature:

a) "Due diligence"

b) "exercise of its own judgment"

c) "unlawful acts"

[14] (S. 2(*w*) "Intermediary with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online-market places and cyber cafes) under certain circumstances for the third party acts on their *platform*.

However, the Supreme Court upheld the constitutional validity of Section 79 but subject to following modifications which are to be read in the light of combined reading of the section and the rules made there-under:

a) Requirement of a Court Order or a notification of the Central Government or its agency that unlawful acts are going to be committed for bringing it to the Notice of the Intermediary, in place of directly "exercise of its judgment" by the Intermediary upon received actual knowledge of the unlawful acts and

b) The Court order and/or the notification by the government or its agency must have a direct nexus with any of the grounds laid down under Article 19 (2) of the Indian Constitution.

Taken together, it is to be now read and understood that the "Intermediary" as explained above will be held liable only where an it has received actual knowledge from a court order or on being notified by government that unlawful acts related to Article 19 (2) are going to be committed and *that the intermediary had failed to expeditiously remove or disable access to such information*.

The judgment is historic in its own sense, as for the first time it has explicitly and it clearly upheld the freedom of speech and expression in the medium of internet and broadened the horizons of the *speech right*. The issue came in the limelight again in *Anuradha Bhasin* v. *Union of India,*[15] Supreme Court declared that "freedom of speech and expression" over the medium of Internet enjoys the constitutional protection under Article 19 (1) (1) and the resurrection upon such fundamental right should be in consonance with the mandate under Article 19 (2), inclusive of the test of proportionality.

5. VOID FOR VAGUENESS, SHREYA SINGHAL CASE AND LAWS GOVERNING INTERNET

The principle of Void for Vagueness is widely referred in the US legal system in order to test the constitutionality of the laws which encroaches upon the freedom guaranteed under the First Amendment to the US Constitution. US Courts have been actively engaging this princely for time and again in various cases to test the Federal or State Laws. The First Amendment to the US Constitution has widened the scope of the freedom of speech and expression. The principle of "void for vagueness" have been referred even in the context of the laws regulating the cyberspace. Cyber-crimes, its definition, nature, structure and implications thereof are always open for the scrutiny by the courts in US and this doctrine came to the protection of the US citizens on a number of occasions. Such laws, if found vague, are always read down to bring it in tune with the principles of

[15] (2020) 3 SCC 637: AIR 2020 SC 1308.

the US constitution. It requires the US courts to adopt a narrow interpretations of the statute in light of the void for vagueness. It has been mostly used in the context of the US legislation namely, Computer Fraud and Abuse Act, which is so broad that expansive or uncertain interpretations of the prohibited acts defined in the Act, will render it as unconstitutional.[16]

United States v. *Drew*,[17] is one such case wherein the question of interpretation of provisions of the Act came to the consideration of the court in US. In the present case a person was prosecuted under the act for the offence of 'unauthorized access' for creating a fake profile in violation of the terms of service of MySpace.com. The question which came for the consideration was 'whether 'Terms of Service' (of any website) can be considered as the process of authorizing access and if it is so, can the breach (whether trivial or serious in nature) of the same would amount to either unauthorized access or excess of authority'? It was the contention of the defense side that 'an interpretation of unauthorized access that included violating website's Terms of Service would render the statute void for vagueness and as a result statute had to be interpreted narrowly to exclude Terms of Service violation'. The court dismissed the contention of the prosecution that creation of fake profile violated to the terms of service of the website and as a result it renders the access to Myspace's computer either without authorization or in excess of authorization.

The second criminal prosecution under the said Act, was in the case of *United States* v. *Nosal* (2009, WL 981336 (N.D. Cal. Apr. 13, 2009) wherein the government had argued that an employee who accesses an employer's computer with illicit motives to hurt the employer accesses that computer without authorisation under the Act. However, the court rejected the theory by citing that the Statute would be unconstitutionally vague if it is to be construed like that, considering the fact that there are innumerable instances in which citizens cannot know whether their conduct amounts to an unauthorized access.

Moreover, such provisions would give government the ability to arrest anyone who regularly uses the Internet, especially cases like *US* v. *Nosal*, wherein broad agency theory if adopted, would turn millions of employees into criminals. Such remarkable broad statutes like Computer Fraud and Abuse Act of USA, will create unnecessary prosecutions and innocent users will be held liable for their innocent act for the want of knowledge as to the prohibited behavior or unlawful acts owing to lack of clarity.

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[16] Orin S. Kerr, "Vagueness Challenges to the Computer Fraud and Abuse Act (2010)", Minnesota Law Review, 508. Available at:<https://scholarship.law.umn.edu/mlr/508/?utm_source=scholarship.law.umn.edu%2Fmlr%2F508&utm_medium=PDF&utm_campaign=PDFCoverPages> (Last accessed on 31-8-2021.

[17] 259 FRD 449 (CD Cal. 2009).

In the context of the Indian jurisprudence it is seldom such principles are adopted like US courts that too in the cyber laws which are novel in nature and have not been matured for the want of its experience and judicial decisions on the same. Shreya Singhal Case has been no doubt a remarkable judgment that has for the first time gave a way to the *constitutionalism* in the context of the cyber jurisprudence i.e. the jurisprudence created by the *Information Technology Act*, 2000 and the rules made there-under on the touchstones of Article 19 (1) (a) and Article 19 (2). Further, number of "laws" and "executive actions" have been declared as unconstitutional, keeping in view Article 14 by the Supreme Court in various cases owing to the vagueness in law.[18]

6. CONSTITUTIONALISM IN THE INTERMEDIARY GUIDELINES, 2021: REVISITING THE SHREYA SINGHAL JURISPRUDENCE

INTERMEDIARY is a new concept under the *IT Act*, 2000 and they have been given a "safe harbor[19]" under the provision of Section 79 of the *IT Act*, 2000. Section 79 of the Act has given instances, in which they will be either held liable, even for the actions for the third party or may be exempted in certain cases. The crux of the same being, in case of any citizen is aggrieved by the (illegal) content over Internet posted by the originator,*person or entity* who is making the platform available will not be held liable for the actions of the originator. However, in certain cases, the such persons or entity, may be held accountable in certain cases. The procedure for the same, in the Act was found to be meaningless in many cases by the Indian Courts. Ever since the concept of "intermediary" has been given effect into the Act, in practice, stakeholders were facing a lot of trouble and great deal of difficulty owing to usages of some expressions and the procedure of prescribed in the Intermediary Rules, 2011.[20] Even these issues, *use of vague expressions* and *meaningless procedure* came to be discussed in Shreya Singhal Case, wherein the Supreme Court streamlined the procedure and encouraged the involvement of the judiciary in such cases of private complaints to or against the Intermediaries. This is another instance or area pertaining to the *IT Act*, 2000, wherein the judiciary had to intervene to make *IT Act*, 2000 free from vagueness. However, in the context of one provision, i.e. Section 69A which provides ample power on the part of State to block any site over the Internet or any web page, on the basis of some grounds given therein. Even in the context of Section 69A of the *IT Act*, 2000 citizens had grievance owing to extreme power and the vague wordings, however, Supreme Court did not intervene.

Now, THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE), RULES, 2021,

[18] M.P. Jain, *Indian Constitutional Law*, LexisNexis, 7th Edn. (2014) at 910.
[19] Legal protection in certain cases from being prosecuted for the act of third party.
[20] The Information Technology (Intermediaries Guidelines) Rules, 2011.

purportedly made under Section 87 (1) of the *IT Act*, 2000 recently came in limelight of the stakeholders and the members of the civil society, when the Ministry of Electronics and Information Technology (Meity), Government of India issued these Rules, in the month of February 2021 considering the

a) change in the structure & volume of the Internet giant Firms/ Companies/ Service providers and

b) new forms of entertainment medium such OTT[21] platforms and Online Content Curated Platforms.

It is being criticized[22] extensively by the civil society members and the legal fraternity for being unwanted and overreached nature of the regulation by the Government thereby compromising the *jurisprudence* created by the Shreya Singhal Case. Vague conditions, vague expressions, and overreach on the part of the legislature have once again called the attention of the legal fraternity and reminded of the principle of "void for vagueness" as applied in Shreya Singhal Case in 2015.

The Intermediary Guidelines, 2021, as notified by the Ministry of Electronics and Information Technology, Government of India deals primarily with

a) Revised guidelines for the Intermediaries as against the Intermediary Guidelines, 2011 and the judgment of Shreya Singhal Case and

b) Ethics Code for the Digital Media

In the context of the first one, revised guidelines entail *due diligence* to be exercised by the intermediary in relation to any prohibited contents or information on its computer resource and establishment of grievance redressal mechanism in order to dispose the complaints if any with respect to the prohibited contents.

Further, the Intermediary Guidelines, 2021 came in the limelight for the inclusion of news subject matters or the platforms which will be held responsible for the information that they host, such as 'publisher of online curated content,'[23] which basically includes the OTT[24] platforms and 'publisher of news and current affairs content'.[25] It is also been discussed for its addition of two more

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21 Over-the-top.

22 "Why the Wire Wants the New IT Rules Struck Down", *The Wire*, available at: <https://thewire.in/ media/why-the-wire-wants-the-new-it-rules-struck-down> (Last accessed on 29-8-2021).

23 R. 2(*u*).

24 Over-the-Top, which makes available Television and Film content over the Internet.

25 R. 2(*t*).

new terms namely, 'Social Media Intermediary[26]' and 'Significant Social Media Intermediary[27]' which are to be notified by the central government.

The Intermediaries, as part of their duty under these guidelines are required to follow the due diligence while discharging its duties[28]:

a) Publication of 'Rules and Regulations' 'Privacy Policy' and 'User Agreement' and

b) Published 'Rules and Regulations' 'Privacy Policy' and 'User Agreement' must inform its users of its computer resource to not host, display, upload, modify, publish, transmit, store, update or share certain information which is prohibited by the Rules of 2021 which is inclusive of the following:

1. Information belonging to another person;
2. Information which is defamatory, obscene, pornographic, breaches privacy of another, insulting, harassing etc. or anything which is contrary to the laws in force;
3. Information which is harmful to child;
4. Information that infringes Intellectual Property;
5. Information that violates any law in force
6. Information that deceives or misleads or patently false in nature
7. Information that impersonates another person;
8. Information that threatens the unity, sovereignty, or defense or integrity of India, or friendly relations with foreign state, etc.
9. Information that contains virus etc.
10. Information which is patently false or untrue for financial gain

The notable point being, the Intermediary Guidelines, 2021 has codified the law declared in Shreya Singhal Case by the Supreme Court with respect to complaint mechanism. An intermediary, on whose computer resource any information is stored, or hosted or published, upon receipt of actual knowledge of the same in the form of court order of court of competent jurisdiction or notified by the government or its agency, shall not host any unlawful information on the grounds

[26] R. 2(*w*).
[27] R. 2(*v*).
[28] R. 3(1).

specified above[29]. However, an intermediary is supposed to dispose the same or disable such information as early as possible but in no case later than thirty six hours from the receipt of the court order or on being notified by the government or its agency.

In addition to the revised "Notice and Take down" mechanism as evolved in Shreya Singhal Case and codified in the Rules, 2021, the Rules of 2021 puts an additional duty on the part of 'Significant Social Media Intermediary[30]' to exercise *additional due diligence* and entails the appointment of following persons for the smooth disposal of the grievances of the user, other compliances and coordination etc., shall have to appoint following persons-

1. Grievance Officer for disposing of grievances
2. Chief Compliance Officer for the compliances with the provisions of the Act of 2000 and the Rules framed there-under;
3. Nodal Contact Person to have 24×7 coordination with the law enforcement agencies to see towards the compliances mentioned above

The term "Significant Social Media Intermediary" is defined under Rule 2 (v) as *'a social media intermediary having number of registered users in India above such threshold as notified by the Central Government.'* Further, the term "Social Media Intermediary" as defined in Rule 2 (w) means *'an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.'* The kind of burden that Rules, 2021 has imposed on the such *Significant Social Media Intermediary* that it entail them to identify first originator of the information on its computer resource,[31] which shall be done on the basis of order passed by court of competent jurisdiction or competent authority under Information Technology (Procedure and Safeguards for Interception, monitoring and decryption of information) Rules, 2009, for the purpose of prevention, detection, investigation, prosecution or punishment of an offence related to following :

1. Sovereignty and integrity of India
2. The security of the State;
3. Friendly relations with foreign states
4. Public order

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[29] R. 3(*d*).
[30] R. 2(*v*).
[31] R. 4(2) .

5. Incitement to an offence related to above or in relation to rape, sexually explicit material or child sexual abuse material

It further entails to undertake technological measures such as in the nature of artificial intelligence to identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct on the computer resource of such intermediary.

Failure on the part of intermediary to observe the Rules so notified will entail a criminal prosecution under any law for the time being in force or provisions of the *IT Act*, 2000 and the Indian Penal Code.

The short passage of the new IT Rules, 2021 has not been normal and many social media giants are facing the trouble in complying with the Rules, 2021. Recently, an inordinate delay on the part of the Twitter India[32] had triggered a face off between Twitter and the Government on the appointment of the Nodal Officer and the timely failure on their part to appoint the same in order to comply with the IT Regulations, 2021[33] which ultimately resulted in appointment of 'Chief Compliance Officer, Resident Grievance Officer and Nodal Contact Officer in compliance with the IT Rules, 2021. For a month it even had lost its legal immunity granted in Section 79 of the *IT Act* for not being able to comply with the new IT Rules and was to be held liable for posting of any unlawful or prohibited content on its computer resource. It even had to face the backlash of the Delhi High Court for its apathy in appointing the above mentioned officers in compliance with the Rules of 2021.[34] Further, even WhatsApp[35] which is to be considered as 'Significant Social Media Intermediary' within the meaning Rule 2 (w) and (v), also expressed its concern over the *traceability* clause under Rule 4 (2) and accordingly a lawsuit was filed before the Delhi High Court in the Month of May, 2021 against the Government over this traceability clause owing to its voluminous ambit in the social media world, having close to 450 million users in India, the impact of this rule will definitely significant on the platforms like WhatsApp.[36]

It is being predicted that the interest of digital services providers serving the Indian Market and that of the Users is at stake for regulating the "intermediary" and "publishers" of online content (curated and news content)[37] New

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[32] Microblogging and Social Networking Service site.

[33] India News, "Twitter Seemingly Complied with the New IT Rules: Govt in Delhi HC", Available at:<https://www.hindustantimes.com/india-news/twitter-seemingly-complied-with-new-it-rules-govt-in-hc-101628271723516.html> (Last accessed on 30-8-2021).

[34] *Ibid*.

[35] Messaging Mobile application.

[36] Shruti Dhapola, "Explained: WhatsApp's Arguments to Fight Traceability Clause in IT Rules, 2021", *The Indian Express*, available at <https://indianexpress.com/article/explained/whatsapp-india-it-rules-traceability-clause-case-explained-7331039/> (Last accessed on 30-8-2021).

[37] Malvika Raghavan, "India's New Intermediary and Digital Media Rules: Expanding the boundaries of executive power in digital regulation, Future of Privacy Forum", available at:<https://

class of intermediaries, additional due diligence traceability of the originator of the information, automated content screening are some of the issues which will not just open the debate of Shreya Singhal Case on the touchstones of Article 19 (1) (a) but also of Article 19 (1) (g) as was raised in the case of *Anuradha Bhasin* v. *Union of India*[38] and only the time will tell the fate of the Intermediary Rules, 2021. It will not be surprising to see series of case challenging the constitutionality of the same by not just Users but also by digital services providers. The doctrine of *void for vagueness* may see a revival in the context of the potential challenge to the Intermediary Rules, 2000.

Another area, where Intermediary Rules, 2021 is criticized, lies in the fact that content to be published by the 'publishers of news and current affairs content', through the means of digital news is controlled by the Rules, 2021 by imposing a "ethics code" on the digital news portal platforms. The contention being, regulation of this affair is beyond the domain of the subordinate legislation and is overreach for the following two reasons:

a) The parent Act i.e. *IT Act*, 2000 nowhere governs the news portal content and

b) The *Press Council Act*, 1978 is a statute with express provisions to regulate newspapers and without any governmental interference.[39]

7. CONCLUSION

In the backdrop of the above mentioned, it is evident that there has been a constant problem pertaining to the nature, structure, drafting and the interpretation of the whether it is about the provisions of the Parent Act i.e. *IT Act*, 2000 or Rules made there-under. The *issue of the constitutionality of the Intermediary Rules, 2021* in the milieu of the jurisprudence developed by the Supreme Court of India in Shreya Singhal Case based on the principle of *"Void for Vagueness",* and the principle of *"constitutionalism"* becomes critical in the wake of *vagueness* and the *arbitrariness* that Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 carrying with in order to regulate the domain of intermediary and digital media over the internet medium.

The *IT Act*, 2000 as has been pointed out by the Supreme Court in Shreya Singhal Case is passed in exercise of the power granted to the State under Article 19 (2) of the Indian Constitution and Shreya Singhal Case and Anuradha Bhasin Cases have made it clear that in order an act or conduct in cyberspace is to be prohibited or any information or content in electronic form is to be adjudged as

fpf.org/blog/indias-new-intermediary-digital-media-rules-expanding-the-boundaries-of-executive-power-in-digital-regulation/> (Last accessed on 30-8-2021).

[38] *Supra* note 16.

[39] *Supra* note 23.

unlawful, it must fall in any of the categories given in Article 19 (2) or there must be some connection or proximity in the conduct regulated and the ground mentioned Article 19 (2. Basically, the law so passed or provisions or rules so made there-under must fall in any of the category of regulations on Freedom of Speech and Expression under Article 19 (2).

The cases and issues as discussed above and the potential abuse of the power by the executive action this will keep on increasing as IT Rules, 2021 is nothing but an old wine in new bottle. It has been released very recently and uproar in the social media industry and in the legal fraternity has started taking place. It may result filing of number of petitions challenging the constitutional validity of the executive action used for the purpose of notifying these Rules.

DRONE ERA - INVASION OF PRIVACY AND LAW ON DRONE TRESPASS

—Accharpreet Bhardwaj[*]

1. INTRODUCTION

Everything that can be invented has been invented.[1]

This statement quoted in the 19th century has been proved wrong by the human race with the new advancements presented before the world in the 21st century. The rigorous efforts of man have made the lives comforting and feasible today as to what he imagined once, has been invented today. The invention of Artificial Intelligence, the Internet, robotic technology, etc., has aided humans to break physical barriers and bring them closer. These technological advancements have raised man's dependency on the technology even for daily chores of his day-to-day life, making it handy for him, but at the same time increased the issues concerning the breach of the right to privacy as well. One of such inventions is drones. Drones or Unmanned Aerial Vehicles[2] are one of the significant achievements in robotic technology. Many perceive that it is of recent origin; however, it is not so, its footprints can be traced back to 1896, when the First pilotless steam-powered aircraft registered powered flight lasting over a minute.[3] Drones vary in their shape, size, and range of traveling through heights and distances. The growing popularity of unmanned aircrafts has made the human population anxious as to their privacy rights.

2. MEANING OF DRONES

Drones are also known as Unmanned Aerial Vehicles/Systems (UAVs/UAS) or Remotely Piloted Aircrafts (RPAs).[4] As the name suggests, human operator is not required to control these aerial vehicles from inside.[5] Unlike

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1 Retrieved from <http://patentlyo.com/patent/2011/01/tracing-the-quoteeverything-that-can-be-invented-has-been-invented.html> on 25-7-2021.

2 Unmanned Aerial Vehicles or Remotely Piloted Aircrafts will be called and used as "UAVs" or "RPAs" hereinafter in the article.

3 Retrieved from <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385448> on 25-7-2021.

4 Aishath Alsan Sadiq, "The Doom of Drones: An Exploration of Policy Gaps in India", Journal of Legal Studies and Research, Vol. 4, Issue 4, 2018: 1-13.

5 Retrieved from <www.nishithdesai.com> "Unravelling the Future Game of Drones – Can they be Legitimized?" on 25-7-2021.

aircrafts, drones are those aerial vehicles that fly without a pilot, even at lower altitudes, while capturing data like computer devices. According to aviation and space related phraseology, a drone means *"any vehicle that can operate on multiple surfaces and/or in the air without a human being on board to control it"*.[6]

The International Civil Aviation Organization Circular on UAVs explicated an RPA as '*a set of configurable elements consisting of a remotely-piloted aircraft, its associated remote pilot station(s), the required command and control links and any other system elements as may be required, at any point during flight operation'*.[7]

3. APPLICATION AND BENEFITS OF DRONES

Drones were originally invented for military purposes. The fundamental use of drones was to carry the missiles while being controlled remotely, however, advancements in technology brought rapid growth and made it easy for the drones to break to consumer electronics. It is correct to say that drones have found multiple applications of usage for ordinary people including –

a. delivering goods,

b. monitoring climate change,

c. rescue operations,

d. surveying,

e. mining and construction,

f. space travel for space exploration and innovation,

g. wildlife & historical conservation,

h. inspection of bridges, dams, and railways,

i. filming and photography,

j. recreational purposes and

k. agricultural use, etc.[8]

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[6] Retrieved from <https://www.priv.gc.ca/information/research-recherche/2013/ drones_201303_e.asp#ftnref5> on 25-7-2021.

[7] Retrieved from ICAO (International Civil Aviation Organization, Canada) Circular 328-AN/190 on 25-7-2021.

[8] R.P. Rajagopalan and R. Krishna, "India's Drone Policy: Domestic and Global Imperatives", ICAO Scientific Review: Analytics and Management Research, 2019: 53-68. Retrieved from <http://isr.icao.int/amr/Volume01/v1p053-068Rajagopalan5144.pdf>.

The variety of application of drone technology has been viewed in different arenas:

a. In the past few years, Drones have been used in large amounts to carry out targeted assassinations by the USA in the Middle East, particularly in Iraq and Syria as well as to protect oneself from an assassination, for instance, in one incident, Iranian General QasemSoleimani was killed in drone attack by the USA and in other, Venezuelan President Nicolas Maduro survived an assassination attempt involving drones rigged with explosives in 2018.[9]

b. In India, Indian Railways is planning the bidding process for 3-D video mapping of the entire dedicated freight corridor network of 3,360 kilometers (roughly 2,000 miles) using drone technology.[10]

c. The state-owned Power Grid Corporation of India has obtained approval from a committee representing the Ministries of Defence, Home Affairs, and Power to use drones for monitoring project development to render the monitoring of projects in hilly terrains which can be particularly cheap and efficient.[11]

d. One of India's leading power transmission companies recently sealed a deal with a global player to use large-scale, long-distance drone flights to inspect utility assets.[12] In a country with a power transmission network of more than a million circuit kilometers witnessing annual double-digit growth, drones can potentially help to avoid grid blackouts.[13]

e. The National Disaster Management Authority (NDMA) has already been relying on the delivery and tracking capabilities of drones to handle disaster relief and rescue in India.[14]

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[9] Retrieved From <https://indianexpress.com/article/explained/explained-can-drone-attack-be-prevented-7379857/> on 23-7-2021.

[10] Shantanu Nandan Sharma, "How Various Ministries are Exploring the Use of Drones for Effective Infrastructure Creation," *Economic Times*, 26-6-2016, Retrieved from <http://economictimes.indiatimes.com/news/science/how-various-ministries-are-exploringthe-use-of-drones-for-effective-infrastructure-creation/articleshow/52919438.cms>.

[11] Jai Shreya, "Eye in the Sky: Drones to Monitor Power Projects," *Business Standard*, 20-1-2016, Retrieved from <http://www.business-standard.com/article/economy-policy/eye-inthe-sky-drones-to-monitor-power-projects-116012000482_1.html>.

[12] "Sterlite Power to Use Drones (Unmanned Aerial Vehicles or UAVs) for Power-Line Monitoring in India," *EnergyInfraPost*, 8-8-2016, Retrieved from <http://energyinfrapost.com/sterlite-power-sharper-shape-use-drones-power-line-monitoring-india/>.

[13] *Ibid*.

[14] Neha Sethi, "Drones Scan Flood-Hit Uttarakhand," *Livemint*, 24-6-2013, retrieved from <http://www.livemint.com/Politics/ZDib5YWR1G2Mcuth1kbwyO/Drones-scan-floodhit-Uttarakhand.html>.

f. The Mumbai Police used drones for surveillance of processions during a major festival held within the city to ensure safety and control.[15]

g. Similarly, the Karnataka Police became one of the first police departments in India to acquire their own fleet of high-definition recordings and night vision-equipped RPAs as they purchased 12 South Korean-manufactured drones to curb illegal mining activity in the state.[16]

h. In 2015, Amazon delivered its products to consumers by drone delivery.[17]

i. The western railways in Mumbai set out a plan in 2017 to deploy small unmanned aerial vehicles to monitor the railway tracks in cases of deaths due to trespassing and reduce the same as CCTV cameras are not possible on all tracks outside railway stations.[18]

j. The Agra Police announced their intention to buy "drone killers" to deactivate illegal drones flying over the Taj Mahal as the illegal usage of drones had already resulted in multiple security breaches at the tourist attraction.[19]

k. In Lucknow, the Uttar Pradesh Police announced their intention to use killer drones to improve security around the State Legislative Assembly.[20]

4. PROBLEMS FACED WITH DRONES

The concerns acknowledged with the use of drones are rising rapidly with the growing awareness and usage of drones by private individuals and

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[15] S. Patel, "This Ganeshotsav, Drones to Monitor Immersion", *The Hindu*, September 2016 Retrieved from: <https://www.thehindu.com/todays-paper/tp-national/tp-mumbai/This-Ganeshotsav-drones-tomonitorimmersion /article14616665.ece> quoted in R.P. Rajagopalan and R. Krishna, "India's Drone Policy: Domestic and Global Imperatives", ICAO Scientific Review: Analytics and Management Research, 2019*:* 53-68.

[16] "Eye in the Sky: Indian Police Gets First Fleet of Drones", Sputnik News, (10-5-2016), Retrieved from <https://sputniknews.com/asia/201605101039388548-india-drones-police/#ixzz495kR3mez> quoted in R.P. Rajagopalan and R. Krishna, "India's Drone Policy: Domestic and Global Imperatives", ICAO Scientific Review: Analytics and Management Research, 2019*:* 53-68.

[17] Retrieved from <https://www.gotocourt.com.au/legal-news/drones-privacy-rights/> on 23-7-2021.

[18] Retrieved from <https://www.thehindu.com/news/national/Drones-on-track-to-boost-safety/article 17083580.ece> on 23-7-2021.

[19] A. Sharma, "Agra Police to use Drone Killers to Tackle Illegal Unmanned Aerial Vehicles Flying over Taj Mahal", *India Today*, (25-4-2018), Retrieved from: <https://www.indiatoday.in/india/story/agra-police-to-usedrone-killers-to-tackle-illegal-unmanned-aerial-vehicles-flying-over-taj-mahal-1220305-2018-04-25>.

[20] "UP Police to buy "Killer Drones" for State Assembly", *The Times of India*, 28-3-2018, Retrieved from <https://timesofindia.indiatimes.com/city/lucknow/up-police-to-buy-killer-drones-for-state-assembly / article show / 63505507.cms>.

corporations. The governments have been facing significant issues regarding unauthorized surveillance, data mining, and invasion of privacy.

a. Unauthorized Surveillance

Governments use drones for mass surveillance in the name of national security and terrorism. The drones used in such surveillance mechanisms are often equipped with fake towers that break the Wi-Fi codes and intercept the messages and conversations of people from their cell phones without their knowledge.[21] Such unwarranted surveillance aids in the generation of vast fortunes by government and private corporations by collecting, using, and selling personal data.[22] It even raises the apprehension concerning activities such as blackmailing, extortion, etc.

b. Data Mining

Data mining/aggregation refers to the technique of matching different data sets to draw inferences to learn new things and make predictions about the data subjects.[23] A lot of data is collected through drones and is later aggregated with other personal information such as bank accounts, telephone number, biometrics, etc., which entails privacy infringement affecting the privacy rights of mass individuals.[24]

c. Invasion of privacy

In India, the right to privacy has been recognized as a constitutional right and invasion of privacy by drones has been highlighted by the Supreme Court of India wherein sanctuary (protection from intrusive observation) was named as one of the key facets of the right to privacy along with repose (freedom from unwanted stimuli) as well as intimate decision (autonomy to make personal life decisions).[25] Even the Director General Civil Aviation (DGCA) has taken an article 12.21 from General Data Protection Regulation (GDPR) issued by the European Union which states that "*RPA operator/remote pilot shall be liable to ensure that*

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[21] Retrieved from <www.nishithdesai.com> "Unravelling the Future Game of Drones – Can they be Legitimized?" on 25-7-2021.

[22] *Ibid*.

[23] *Ibid*.

[24] *Ibid*.

[25] Vrinda Bhandari, AmbaKak, Smriti Parsheera, and Faiza Rahman, "An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict", 2017, Retrieved from <indrastra.com/2017/11/An-Analysis-of-Puttaswamy-Supreme-Court-s-Privacy-Verdict-003-11-2017-0004.html> quoted in R.P. Rajagopalan and R. Krishna, "India's Drone Policy: Domestic and Global Imperatives", ICAO Scientific Review: Analytics and Management Research, 2019*:* 53-68.

privacy norms of any entity are not compromised in any manner".[26] At the same time, drones hovering in the airspace continually take the imagery during their flight and proving operator's bad intention to take those images or videos in the court of law is a difficult task in practicality, therefore, different nations are trying to bring various regulations to curtail the misuse of drones especially concerning breach of the right of privacy, in one such example, the Information Commissioner's Office in the United Kingdom in an advisory on drones called on operators to obtain consent from individuals who are likely to be captured on video during operation.[27]

d. Terror Attacks

In the past few years, drones have been misused by terrorist organizations to smuggle arms, ammunition, and explosives for future terrorist attacks. For instance, in September 2019, a consignment of arms, ammunitions, explosives, and fake Indian Currency notes was smuggled into the Indian territory via drones originating from across the border in Pakistan.[28] Another drone-dropped arms consignment was seized in Punjab's Gurdaspur in June 2020, and in the same month, the Border Security Force (BSF) shot down a drone in the Hira Nagar sector Jammu recovering the US-made M4 rifles.[29] Again in December 2020, Indian police recovered AK-47 rifle and ammunition airdropped by drones in Wazirpur village originating from Pakistan soil.[30] Overall, in the pandemic hit 2020, there were 77 sightings of drones from Pakistan.[31] These are some recent facts and figures, but drone sightings and actions involving terror attacks have been taking place for many years. For instance, in 2013, Al-Qaeda attempted a terror attack using multiple drones in Pakistan in 2013 without success.[32] In 2019, European Union Security Commissioner Julian King warned that terror groups could target European cities using drones.[33] In recent times, the most high-profile incident

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[26] R.P. Rajagopalan and R. Krishna, "India's Drone Policy: Domestic and Global Imperatives", ICAO Scientific Review: Analytics and Management Research, 2019*:* 53-68, Retrieved from <http://isr.icao.int/amr/Volume01/v1p053-068Rajagopalan5144.pdf>.

[27] *Ibid*.

[28] Retrieved from <https://www.insightsonindia.com/2021/06/29/insights-into-editorial-countrys-anti-drone-capability-still-in-nascent-stage/> on 29-6-2021.

[29] *Ibid*.

[30] Retrieved from <https://timesofindia.indiatimes.com/city/chandigarh/more-arms-ammunition-recovered-from-border-area/articleshow/79887121.cms> on 9-9-2022.

[31] Retrieved from <https://www.thehindu.com/news/national/drones-favoured-tool-of-pakistan-based-terror-outfits/article35001883.ece> on 10-9-2022.

[32] Robert J. Bunker, "Terrorist and Insurgent Unmanned Aerial Vehicles: Use, Potentials, and Military Implications", *Carlisle, PA: Strategic Studies Institute, U.S. Army War College*, 2019.

[33] Retrieved from <https://www.forbes.com/sites/zakdoffman/2019/08/04/europes-security-chief-issues-dire-warning-on-terrorist-threat-from-drones/?sh=99caac7ae41f> on 9-9-2022.

involving a drone was the targeted bombing of two key oil facilities inside Saudi Arabia by Yemen's Houthi rebels in 2019.[34]

Recently, the Jammu and Kashmir Administration banned the use of drones in the capital of Srinagar owing to the drone blast incidents in Jammu stating high risk of injury to the life and damage to property, especially in social and cultural gatherings apart from concerns of breach of privacy, nuisance, and trespass in the state.[35]

Apart from these above-stated problems, other issues rising in no time can be hacking of drones by terrorist organizations and gaining access to live feeds, hacking of national security departments through drones leading to leakage of private & confidential information, illegal smuggling of drugs, arms & ammunition, terror attacks, etc., rise in extortion and blackmailing cases on the pretext of misuse of private images and information of individuals, accidents may rise on account of the collision of drones with aircrafts, battery failure, loss of navigational control, etc.[36]

Another uprising issue to prevent drone attacks is the 'radar system' deployed at borders or lines of control easily targets the more oversized objects such as helicopters, or airplanes but the unmanned aerial vehicles are pretty small in size which is 2 feet or 60 cm and tend not to get caught in the radar systems.

5. DEVELOPMENT OF DRONE TECHNOLOGY IN INDIA

In India, Drones have emerged as the most feasible, cost-effective, and more capable form of technology that has full support from the government. Currently, India accounts for the highest percentage of World's UAV imports (for defense purposes) at 22.5%.[37] To be noted here, India is making tremendous efforts to become the largest manufacturer for drones in its 'Make in India' and 'Digital India' program. Also, the Bureau of Indian Standards (BIS) Research, a global market intelligence predicted that by 2021, India's drone market will be worth approximately $885 million and that the worldwide market will reach around $21

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[34] Retrieved from <https://indianexpress.com/article/explained/explained-can-drone-attack-be-prevented-7379857/> on 23-7-2021.

[35] Peerzada Ashiq, "Drones, Unmanned Vehicles Banned in Srinagar", *The Hindu*, 4-7-2021 Retrieved from <https://www.thehindu.com/news/national/other-states/drones-unmanned-vehicles-banned-in-srinagar/article35131188.ece> on 23-7- 2021.

[36] Retrieved from <www.nishithdesai.com> "Unravelling the Future Game of Drones – Can They Be Legitimized?" on 25-7-2021.

[37] *Ibid.*

billion.[38] Analysts predicted that agriculture and infrastructure will be the significant sectors to witness the immense growth in India and the global level soon.[39]

6. REGULATIONS ON DRONE USAGE IN INDIA

Until 2014, drones were free for all as the Government of India issued practically no laws or regulations. However, the government issued regulations in August 2018 and December 2018 putting the blanket ban on usage, manufacturing, and import of drones, and since then, in the past couple of years, the government has issued various regulations concerning the use of drones. The most recent regulations were issued in March 2021. As a result, the government lifted many bans, which was considered a positive step by the manufacturers, importers, and users.

It has not been even a month since the drone attack on Jammu Air Force Station on 27 June 2021[40] that the government came up with new revised regulations namely '**Draft Drone Rules 2021**' in July 2021, the document related to these rules has been uploaded on the website of Ministry of Civil Aviation (MOCA) for suggestions. These draft rules issued by DGCA will replace the UAS rules 2021. These regulations are intended to liberalize drone policy even after the recent drone attack. Many of the approvals previously required, such as Unique Authorisation Number, Unique Prototype Identification number, Certificate of Conformance, Certificate of Maintenance, Import Clearance, Operator Permit, Authorisation of Research & Development Organisation, and Student Remote Pilot License, have been abolished. The rules also propose to reduce the fees to minimal irrespective of the size of the drones apart from no pilot license requirement for Micro Drones, Nano drones, and Research & Development organizations. Also, the yellow zone has been reduced from 45 kilometers to 12 Kilometers from the Airport perimeter. Furthermore, no flight permission will be required for operation up to 400 feet above the ground level in the green zone and up to 200 feet in the area between 8-12 kilometers from an airport perimeter.[41]

Despite the attack, these rules framed by the government show the government's intention to make India more favorable in terms of developing and promoting the drone industry. However, to avoid such incidents like Jammu Airforce Station, the government is focusing on developing counter drone technology to address the threat and menace posed by rogue drones.

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[38] R.P. Rajagopalan and R. Krishna, "India's Drone Policy: Domestic and Global Imperatives", *ICAO Scientific Review: Analytics and Management Research,* 2019*:* 53-68. Retrieved from <http://isr.icao.int/amr/Volume01/v1p053-068Rajagopalan5144.pdf>.

[39] *Ibid*.

[40] Retrieved from <https://www.indiatoday.in/india/story/air-force-station-jammu-blast-drone-attack-suspected-1819895-2021-06-27> on 29-6-2021.

[41] Draft Drones Rules, 2021 Retrieved from <https://www.civilaviation.gov.in /sites /default /files / Draft_Drones_Rules_14_Jul_2021.pdf> on 21-7-2021.

7. LEGAL PROTECTION AGAINST BREACH OF PRIVACY BY DRONES

The Government of India is at a nascent stage when it comes to the enactment of laws against the intrusion of privacy by drones. Time and again, it is striving to develop amended and updated rules and regulations about the manufacturing, buying, selling, and usage of drones. Still, it has not succeeded in criminalizing and framing a comprehensive legislation in such regard. However, legal protection can be provided against drone attacks or breach of privacy by drones if action is sought under the trespass doctrine.

7.1. The Doctrine of Trespass and Drones

Trespass, as we know, is the interference or breach in the personal space without the permission of another. For instance, breaching the gate and entering one's property without the consent of the owner of property amounts to trespass irrespective of any damage caused which is a punishable offence in the eyes of the law.[42] In the same way, if someone sends a remotely controlled unmanned aerial vehicle over one's land without taking the prior consent of the property owner is equally considered as trespass as the person entering himself. To establish the case of trespass, it is essential to prove the following:

a. **Exclusive Possession** over the land which means one has a lawful right to stop the other from entering, and

b. **Interference** should be direct and unreasonable, interrupting the personal enjoyment of the person, and

c. **The land** here also talks about the area above and below the ground and if any drone flying around the land can be a trespass, and

d. **Intentional or Negligent interference** be present to constitute trespass.[43]

Defences – As in the case of traditional trespass, drone trespass would likely have the same defences such as:

- If the operator of the drone has already attained consent to the intrusion.
- In the case of "Implied Consent", there may be situations where the consent is applied such as while delivering the goods by drone on the order of the property owner.

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[42] Ronnie R. Gipson Jr., "The Rise of Drones and the Erosion of Privacy and the Trespass Laws", The Air & Space Lawyer, Vol. 33, November 2020: 1-5.

[43] Retrieved from<https://www.gotocourt.com.au/legal-news/drones-privacy-rights/> on 23-7-2021.

- "Lawful Authority" – Police or other Government Agencies having authority or power under some laws may be able to use drones for surveillance or other purposes. Although, it may not be irrelevant to mention here that no law gives authority to any agency to surveillance the bedroom or bathroom of any person.

The common-law trespass cases can be divided into two sub-doctrines: traditional physical trespass doctrine and the new technological trespass doctrine.[44] Now the conventional trespass wherein a person enters into the property of another without the permission of the other person is well defined, however new trespass based on technological advancement is not yet explained in any enactment. From different sources, it can be attained that a person who owns a property also has the right over the airspace to a limited extent. However, due to not being defined, that area makes the situation debatable if any drone enters into the airspace in the immediate vicinity of someone's property. The airspace higher than the roof of the house is not an area that is protected as established in the *United States* v. *Causby*[45], where it was held,

> *We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land….Thus, the landowners own the usable airspace above their property up to 500 feet, subject to intrusion by lawful air flight*.[46]

Drones hovering in the low altitude for e.g., below or within the walls or boundary of someone's backyard, may be considered trespass. In addition, the information that could not have been obtained unless entering the premises, like taking interior images or getting the exact map or blueprint of a property, will be considered trespass if obtained by the unmanned aerial vehicles. Therefore, anything that cannot be obtained without being physically present but received by the drones should be considered trespass.

7.2. Application of the doctrine of Trespass in the cases of invasion of privacy by drones in India

In India, the Information Technology (Amendment) Act of 2008 prohibits the capture of images of the private areas of a person. Similarly, other acts

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[44] S. Alex Spelman, "Drone: Updating the Fourth Amendment and the Technological Trespass Doctrine", Nevada Law Journal, Vol. 16, 2016:374-418.

[45] 1946 SCC OnLine US SC 93: 90 L Ed 1206: 328 US 256, 263–65 (1946).

[46] 1946 SCC OnLine US SC 93: 90 L Ed 1206: 328 US 256, 263–65 (1946) quoted in S. Alex Spelman, "Drone: Updating the Fourth Amendment and the Technological Trespass Doctrine", Nevada Law Journal, Vol. 16, 2016:374-418.

like Indian Penal Code (IPC) or tort also punishes the breacher of the right to privacy, however, in the case of drones they hover in the airspace and thereby applying the same laws or provisions in cases of breach of the right of privacy by drones may become difficult without the definition of Private Airspace. Earlier, the term 'private airspace' was not defined anywhere exclusively as to what constitutes the horizontal and vertical limits above the ground level, but the new rules as stated above put forth that the Central Government would publish an airspace map laying down the division of airspace of India into red, yellow and green zones, with a horizontal resolution equal or finer than 10 metre.[47] Somehow, although not squarely but obliquely, this notion corresponds to the principle laid in *United States* v. *Causby*[48] whereby the airspace limit was defined to construe trespassing by drones and the limit was set as '500 feet above the land' to be considered as trespassing by drones.

8. CONCLUSION

> *Drones overall will be more impactful than I think people recognize, in positive ways to help society.*[49]

Bill Gates once quoted these words, which are proving otherwise in the present times. Today, many nations face the issue of breach of the right of privacy by hovering drones. To deal with the same, on numerous occasions, rules and regulations have been framed and implemented by the governments along with the generation of new technologies to counter drone threats. Some of the possible resolutions to combat the new eyes in the air can be:

a. Deployment of 'Anti-Drone Systems'

New technology may provide increased convenience or security at the expense of privacy, and many people may find the trade-off worthwhile even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.[50] Nevertheless, efforts are being made to prevent and bring down the misuse of drones in the coming future. One such solution is the development of 'Anti-Drone Systems' to counter hostile drones. Many nations like Israel, the United States of

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[47] Draft Drones Rules, 2021 Retrieved from <https://www.civilaviation.gov.in /sites /default /files / Draft_Drones_Rules_14_Jul_2021.pdf> on 21-7-2021.

[48] 1946 SCC OnLine US SC 93: 90 L Ed 1206: 328 US 256, 263–65 (1946) quoted in S. Alex Spelman, "Drone: Updating the Fourth Amendment and the Technological Trespass Doctrine", *Nevada Law Journal*, Vol. 16, 2016:374-418.

[49] Bill Gates Said These Words, Quoted in Aishath Alsan Sadiq, "The Doom of Drones: An Exploration of Policy Gaps in India", Journal of Legal Studies and Research, Vol. 4, Issue 4, 2018: 1-13.

[50] S. Alex Spelman, "Drone: Updating the Fourth Amendment and the Technological Trespass Doctrine", Nevada Law Journal, Vol. 16, 2016:374-418.

America, China, and Australia have developed 'Anti-Drone Systems' to counter the drone threat using existing technologies such as radars, frequency jammers, optic and thermal sensors, etc.[51] For instance, Rafael, defence company of Israel came up with 'Drone Dome' which works under all-weather conditions and even at night time is highly efficient at identifying and intercepting incoming missiles & drones as well as capable of jamming the commands being sent to a hostile drone and blocking visuals, if any, that are being transmitted back to the drone operator.[52] Similarly, the United States of America-based Fortem Technologies operates its 'Drone Hunter'. Also, 'Drone Shield', an Australian publicly listed company, also offers a portable solution in the form of a drone gun that can be used to point and 'shoot'.[53]

As stated earlier, in India, the Defence Research and Development Organisation (DRDO) has advanced an 'Anti Drone System' to combat attacks by drones and was deployed during the visit of the former President of the United States of America, Donald Trump to India in 2020 as part of the security arrangements and also, near the Red Fort on the occasion of Prime Minister Narendra Modi's Independence Day address the same year.[54]

b. Law on 'Aerial Trespass'

With the easement of policies and availability of the remote-controlled devices, the number of cases involving hovering of drones over one's property has increased drastically as the drones are equipped with high-definition cameras which can breach the privacy of anyone without their knowledge, therefore, on one hand, drones serve valuable purposes and on the other hand, are used with ill intent by hampering the privacy of another for extortion, blackmail, terrorism, etc., causing trespass.

To date, no nation has enacted comprehensive legislation to tackle drone activities which will be an effective solution in the near future. Drone attacks should be severely penalized as acts of drone trespass under comprehensive legislation on 'aerial trespass' as the existing law would not protect landowners and would fail to define the acceptable conduct of drone operators. Hence, the law on aerial trespass defining the airspace limits mentioned above would give a clear picture of what amounts to 'interference/intrusion' by drones on one's property. As

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51 Retrieved from <https://indianexpress.com/article/explained/explained-can-drone-attack-be-prevented-7379857/> on 23-7-2021.

52 Retrieved from <https://eurasiantimes.com/drone-dome-blinding-burning-turkish-uavs-meet-israeli-greece/> on 10-9-2022.

53 Retrieved from <https://www.newsshooter.com/2018/01/08/droneshield-drone-detection-and-prevention/> on 9-9-2022.

54 Ankit Kumar, "Drone Proliferation and Security Threats: A Critical Analysis", Indian Journal of Asian Affairs, Vol. 33, 2020: 43-62, Retrieved from < https://www.jstor.org/stable/27003434> on 10-9-2022.

far as 'per se aerial trespass' is concerned, a person operating an unmanned aerial vehicle can be held liable by a landowner for per se trespass when he, without consent, intentionally causes the unmanned aerial vehicle to enter below the defined airspace limit on the land of another.[55]

Reviewing the recent incidents of drone trespassing, attacks, hacking of data using drones, etc., the legislature can adopt the aggravated forms of aerial trespass on similar lines of aggravated forms of trespass laid down under sections 441 to 460 of the Indian Penal Code along with the establishment of proper authorities, special courts and other rules & regulations to monitor drone operations in the country while giving power to states and local governments to ensure law enforcement with regard to land use, zoning, privacy, etc.[56]

[55] Retrieved from <https://unmanned-aerial.com/drone-industry-responds-to-draft-tort-law-on-aerial-trespass1> on 23-7-2021.

[56] *Ibid*.

RIGHTS AND DUTIES VIZ-À-VIZ THE CONSTITUTION OF CHINA AND JAPAN: ADVISORY FOR INDIA

—Homa Bansal[*]

1. INTRODUCTION

According to Greek philosopher and father of political science, Aristotle, "Man is a social animal". This social nature of human beings leads them to the formation of civil society firstly and political society which we call a state, eventually. In this way the establishment of a political society or state is the best human invention as far as the anthropological study of human living is concerned. With the passage of time, out of the loose term of state; from big empires or kingdoms the concept of nation states emerged and political boundaries made the current map of the world. Today, these politically arranged societies are functioning more systematically under the specified system of governance prescribed by their constitution. If we analyse critically the governmental structure of different countries, we can say that the importance of their constitutions in formation of their political culture cannot be negated.[1] To define the constitution it is rightly said that it is a framework, a body of rules and a principle guideline to run the state affairs. It is actually the guarantor of preservation of rights of individuals and safeguard of sovereignty of a state. It contains the thoughts of their people, ideology of their leaders and it is the mouthpiece of their national objectives. It provides security to its people and gives importance to every individual being a part of the whole nation. Specifically, if we analyse the concept of Constitutional rights and duties with reference to the People's Republic of China and state of Japan we see their constitutions have special views about it. The security of fundamental human rights is ensured by almost every modern state through constitutional support. Even the international law also supports it but some countries like China and Japan also stress on duties along with rights.

2. POLITICAL SYSTEM OF PEOPLE'S REPUBLIC OF CHINA

The political and constitutional history of China speaks volume of its revolutionary change from monarchy to people's Republic on the wings of

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[1] Randall Peerenboom, "Law and Development of Constitutional Democracy: Is China a Problem Case?" (2006) 603 The Annals of the American Academy of Political and Social Science 192.

communist ideology under the leadership of Mao-Tse-Tung. China has a very rich history. The yellow river civilization of China is one of the ancient inhabited civilizations. By the end of the 19th century China was under the foreign influence and no more than a tool in the hands of the European powers.[2] The Chinese wealth was being drained by those foreign forces. People believed that they had to root out their influence to save China. Till the start of the 20th century the Han dynasty was ruling in China and there was absolute monarchy in practice and also it was feudal society. The political philosophy of communism spread in the northern neighbourhood of China and the ideology of Karl Marx and Friedrich Engles was widely read by the people and people were very much inspired by those writings. Under the effect of that ideology in 1911 a revolution came in China and the feudal monarchy was abolished and it gave birth to the Republic of China. Later on, in 1949 another revolution was seen in China and the Communist party of China claimed power over the People's Republic of China. In the same manner, the Cultural Revolution in China in 1964 also helped to shape the political culture of China. At present, China is a unitary state where democratic centralism is practiced. There is a single party system and communist party of China is dominant over the political system of China. The communism un in China preaches five loves; love for the motherland, love for people, love for work, love for knowledge and love for public property.[3]

3. CONSTITUTIONAL RIGHTS AND DUTIES IN CHINA

Firstly, if we ponder over the constitutional structure of People's Republic of China keeping in view the constitutional and political history of China it is not wrong to say that the present constitution of china is a product of revolutionary thoughts in china. The present constitution of China was adopted in 1982 and it was the fourth time that Chinese people framed their constitution. The first Constitution of the People's Republic of China was promulgated in 1954 under Mao's leadership. After that two constitutions were adopted in 1975 and 1978 and now the present constitution 1982 is working in China. China has a written constitution, unlike the British constitution, comprising 138 articles with four chapters. Though it is not lengthy as the constitution of India and not as brief as that of America. However, chapter 2 of Constitution of China 1982 contains the idea of fundamental rights and duties of the citizens. Normally, in the constitutions of all the democratic states of the world only the fundamental rights have been guaranteed by the constitution, but in China, as the constitution of the Russian federation, the constitution prescribes the duties as well. The state demands the fulfilment of certain duties in return it guarantees the rights of individuals. From Article-33

[2] Mo Jihong, 'The Constitutional Law of the People's Republic of China and its Development" (2009) 23 Columbia Journal of Asian Law 137.

[3] Albert H.Y. Chen, "Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations" (2010) 8 International Journal of Constitutional Law 849.

to 51 in Chinese Constitution 1982 the fundamental rights are written and from Article-52 to 56 the fundamental duties are mentioned. Rights are granted to the people by the state and duties are rights of the state that must be followed by the citizens.[4]

Among the fundamental rights the first is "equality before law". Article-33 ensures that the citizens of the People's Republic of China are equal before law. It means no one is above that law, law is same for all and sundry. Article-34 grants "right to vote" to all citizens who have attained the age of 18 can exercise their political right and participate in formation of their government. In the same manner Article-35 states that the citizens of China can enjoy "freedom of speech", "freedom of press", "freedom of assembly", "freedom of association" and "freedom of procession and demonstration". It is said that democracy in China is centralized by the state authority but at the same time the constitution of China also ensures the following liberties. Article-36 gives the "freedom of religious beliefs" and Article-37 is about "freedom of person". Like the trend of secular states in China there is religious liberty. The critics may find contrast in theory and practice but this religious freedom is prescribed in the Chinese Constitution. Article-39 and 40 guarantee the "privacy of correspondence", "freedom of residence and of change of residence". Likewise, the Constitution of the People's Republic of China also ensures the "right to education" of all citizens and also talks about "women rights" in the political and economic sphere. Education is thought to be the basic right of every individual that can enlighten the mind and soul of an individual and has the potential to change the future of a nation as a whole.[5] Owing to the importance of education the Chinese authorities consider the fundamental right of their citizens to get education. On the other hand, Article-52 to 56 speak about some of the important duties of the citizens of China. It is the prime duty of every citizen "to pay taxes according to law". The taxes paid by the people help to run the affairs of government. It is considered the sacred obligation of every citizen "to defend the motherland and perform Military services'' (Article-56). For this purpose military training is given to the people in China. The communist party came into power by force also. That is why they give much importance to military training. Another duty of every citizen is "to safeguard the unity of the country, security and honour of the motherland". Though communism discarded every religious doctrine, the ethical philosophy of Confucius is still followed in China. People give importance to moral and ethical aspects.[6]

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[4] Yu Xingzhong, "Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005" *Building Constitutionalism in China* (Palgrave Macmillan, 2009).

[5] Chongyi Feng, "The Rights Defence Movement, Rights Defence Lawyers and Prospects for Constitutional Democracy in China" (2009) 1 Cosmopolitan Civil Societies: An Interdisciplinary Journal 150.

[6] Randall Peerenboom, "Rights, Interests, and the Interest in Rights in China" (1995) 31 Stanford Journal of International Law 359.

4. POLITICAL SYSTEM OF JAPAN

On the other hand, the analysis of the Japanese political system unmasks the fact that Japan is a constitutional monarchy like Great Britain. It is attributed as the oldest monarchy of the world which is alive in practice. The Imperial dynasty is still the world's oldest Royal line in Japan. Japan has been a great power. It was among the major parties in global politics during world wars. In the second World War it had to face disastrous effects.[7] However, it has re-gained her power and now again is among the prosperous nations of the globe. The observation of the structure of political system of japan revealed that Japan is a constitutional monarchy, with a parliamentary system of government which is based on the separation of powers. The Emperor in Japan is the symbol of the state authority like the British Monarch and does not hold political functions. He only performs ceremonial duties like every head of state of the parliamentary system. He can neither exercise political functions nor diplomatic functions.

5. CONSTITUTIONAL RIGHTS AND DUTIES WITH REFERENCE TO JAPAN

Secondly, the same concept as above of Constitutional rights and duties is seen in the constitution of **Japan** which was adopted on May 3, 1947 also Japan's postwar constitution and "peace constitution". It was largely prepared by the supreme Allied Commander Douglas MacArthur after World War-2. It consists of a preamble, 103 articles which are grouped into 11 chapters. Japan is a Constitutional Monarchy like Britain and the position of emperor is mentioned in its constitution clearly. The present constitution of Japan provides for a parliamentary system of government and guarantees certain fundamental rights. In contrast to the Meiji Constitution; the previous constitution of Japan which was the first Western style constitution in Asia that invested the Emperor of Japan with supreme political power, under the new constitution in post war era the Emperor was reduced to "the symbol of the State and of the unity of the people" and exercises only a ceremonial powers, like British monarch and any head of state of parliamentary system, acting under the sovereignty of the people. The current constitution consists of principles of Pacifism, popular sovereignty and respect for basic human rights. Chapter 3 of the Japanese constitution, from Article-10 to 40, deals with the fundamental rights and duties of Japanese citizens. It also explains the relationship of citizens versus state in Japan. Thirty-one of the total 103 articles of the Japanese constitution are devoted to describing fundamental rights and duties in detail, reflecting the commitment of the Japanese state to "respect for the fundamental human rights". It means the framers of the constitution in Japan gave

[7] Francois Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Brill, 2021).

importance to individual's rights even in the war torn Japan as we see the present constitution was framed just after the Second World War.[8]

The constitution of Japan guarantees "personal freedom" under Article-13. "Equality before the law" is also ensured by Article-14. It also outlaws discrimination against Japanese citizens based on "political, economic or social relations" or "race, creed, sex, social status or family origin". It means all the citizens of Japan are independent and equal before law. There shall be no discrimination on the basis of gender family, race or any other level. Article-15 provides the Japanese "right to democratic elections". The Japanese citizens are granted the political right to participate in making and remaking their government. Article-18 guarantees "Prohibition of slavery". The "freedom of assembly, association, speech, and secrecy of communications" all are guaranteed without discrimination of qualification by Article-21. In the same manner work is declared both a right and obligation by Article 27 which also states that "standards for wages, hours, rest and other working conditions shall be fixed by law" and also forbids exploitation of children. Children are the productive and potential future of a nation. The exploitation of children means the exploitation of the whole nation. The Japanese constitution abolishes this kind of exploration and guarantees the rights of children.[9] Workers also have the right to participate in a trade union under Article-28. Article-31 provides "right to due process of law" that no one can be punished "except according to procedure established by law". Like Britain, in Japan there is rule of law. All are under the law and there is no one above the law.[10] The unlawful detention is also prohibited by the constitution and the right to a fair trial is secured by Article-37. There is no random exercise of authority and no rule of might is right. The law enforcement agencies are also under the law. Every person has their legal rights secured by the Constitution of japan. Academic freedom, Prohibition of child marriage and right to education are granted in articles 23, 24 and 24 respectively. Therefore, the concept of performing duties is also mentioned in the Japanese constitution as well. People have to perform their duties as obligations in order to enjoy their fundamental rights. The performance of the duties by the citizens is the passport of the security of their fundamental rights. They have to "pay taxes to the state". They all are "abide by law", no one has the right to work anything unlawful. Obedience to law is considered the moral duty of the Japanese. All the people should love and respect the sovereignty and integrity of the state and state laws. The three most important duties written in the constitution of Japan are "people should work". It means all the people have to perform their role It is an obligation for every Japanese child "to get education". All the people in Japan should make sure that they are paying taxes to the state. All these fundamental rights and

[8] Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70* (University of Washington Press, 1996).

[9] Shigenori Matsui, "Fundamental human rights and 'Traditional Japanese Values': Constitutional Amendment and Vision of the Japanese Society" (2018) 13 Asian Journal of Comparative Law 59.

[10] John M. Maki, 'The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights' (1990) 53 Law and Contemporary Problems 73.

duties in the constitution of Japan and China are secured by the system of judiciary as well as these people make the psychological orientation of their public to obey the laws as obligations. That is why between these two states, China is the second largest economy of the world as well as the other, Japan is fourth largest economy. Along with other factors, this principle feature of their constitution, the emphasis on fundamental rights and duties is also contributing to the success of these people as a nation.

6. COMPARATIVE ANALYSIS OF FUNDAMENTAL RIGHTS IN OTHER POLITICAL SYSTEMS

The concept of fundamental rights is present in almost every constitution of the world other than emergency conditions which cannot be suspended. The international law also based on protection of fundamental human rights. United Nations promotes the "universal declaration of Human rights". The provision of fundamental rights is the basic duty of the state and the very aim of the formation of state. According to social contract theory of formation of state prescribed by Thomas Hobbes, John Lock and Jean Jacquous Rousseau the reason for formation of state is protection, security and preservation of people's will and liberty.[11] So the state has to provide these essentials to the inhabitants of that state. At the same time where rights of citizens are the duties of state citizens also have some duties that should be performed as rights of state. This philosophy claims that it is a reciprocal relationship between state and individual. Individuals perform duties to the state for its integrity and prosperity in return the state protects the rights of individuals. Usually, in the constitution of most of the countries there is mention of fundamental rights only but very few have description about rights and duties both in which the examples of China, Japan, Russia and India are worth mentioning. In the United Kingdom and the United States of America there is more focus on fundamental rights under the democratic rules.[12] It seems to give more importance to the individual than the state. For the state is not an end but a means to an end. Individual's liberty, security and integrity is more valued. On the other hand there are states which are worst to fundamental human rights. In these states the state is considered an end and an individual's liberty is not valued. There are some states where autocratic rules are exercised. There are the worst conditions of human rights there. In Myanmar, under military coup human rights are being violated. In North Korea, where everything is state centric, human rights are not valued. People are forcefully controlled by the state isolated from the other world and only have rights granted by the state. On the other hand in China and Japan, like Russia and India, there is a balanced view of fundamental rights as well as the integrity of sovereign states. Their constitution gives the idea of fundamental rights and

[11] Pablo Gilabert, *Human Dignity and Human Rights* (Oxford University Press, 2019).

[12] Zachary Browning, "A Comparative Analysis: Legal and Historical Analysis of Protecting Indigenous Cultural Rights Involving Land Disputes in Japan, New Zealand, and Hawaii" (2019) 28 Washington International Law Journal 207.

duties. This mutual relationship of state and individual is inculcating in people the spirit of nationalism on the one hand and sense of security on the other.[13]

7. ADVISORY FOR INDIA

India is a land of God and Goddesses. Where since past people have been taught to live and die for others. The concepts of 'Dharma' and 'Karma' hold the major portion of ancient Indian literature. Honesty, truthfulness and selflessness were the greatest lessons taught by Indian 'Gurus' to their disciples. The freedom fighters of India have given up their lives in order to free their motherland from the hands of British. Therefore, when India got Independence, the framers of the Constitution of India wanted to ensure that each citizen lives a life of respect, honor and dignity so that they are no more exploited and harassed. Their complete focus shifted upon protecting and guarding the rights of individuals and therefore added a separate chapter on fundamental rights of the Citizens of India. On the other hand, the framers of the Indian Constitution never felt the need of protecting or even expressly incorporating the duties of citizens of India in the Constitution as they were of the view that performance of duties is an integral part of Indian Culture. Therefore, the Constitution of India when framed had express provisions of fundamental rights under Part III (Article 12 –Article 35), which if infringed were to be justiciable in court of law. However, there were no provisions on fundamental duties in the Original Constitution of India.

However, after Independence, the scenario changed. People ignored their own culture and started following the western world. They started harping upon their rights and forgot that they owe corresponding duties towards their nation. It was by 42nd Amendment, 1976, that a separate Part i.e. Part IV-A was added to the Constitution to remind people that they cannot claim their rights without performing their duties. Ironically, though these duties were added to the Constitution of India, the non - observance of the same was still not made enforceable.

The Indian judiciary has time and again reminded the citizens of India that it is fallacy to think that the Constitution of India just focuses on rights and ignores the duties. In *Chandra Bhavan Boarding and Lodging* v. *State of Mysore*,[14] the Supreme Court has declared that only if citizens understand the importance of rights and duties, the States can run in an efficient manner. The Court declared that there is no conflict between part III and Part IV-A of the Indian Constitution and they both are complimentary and supplementary to each other. The Court reiterated the above opinion again in *AIIMS Students' Union* v. *AIIMS*.[15] Highlighting the importance of fundamental duties, the court stated that fundamental duties as mentioned under Article 51A of the Constitution of India are not

[13] Rosalind Dixon, "Constitutional Rights as Bribes" (2018) 50 Connecticut Law Review 767.
[14] (1969) 3 SCC 84: AIR 1970 SC 2042.
[15] (2002) 1 SCC 428, para 58.

made enforceable by writ of Court but that does not mean that they hold a subordinate position in comparison to fundamental rights. The duties are 'affixed' by the term 'fundamental' which clearly shows that though not enforceable by a writ of the court yet provide a valuable guide and aid to interpretation of Constitutional and legal issues. Therefore, the fundamental duties should be considered no less than fundamental rights.

The Constitution of India emphasises upon the fundamental rights of citizens under Part III in detail. However, there is a scope of improvement in the provisions of fundamental duties listed under Part IV-A of the Indian Constitution.[16] India can borrow some of the duties which have been beautifully incorporated by China and Japan. The following changes and amendments in the chapter are suggested under Part IV-A of the Constitution of India.

- Firstly, the fundamental duties should be made enforceable.
- Secondly, there is a need to educate people about importance of theses duties. Till the time citizens are not sensitized regarding importance of these duties, they will not perform them. No change can be made by mere enacting a law till citizens accept those laws consciously.
- There is add certain duties under the list mention under Article 51-A:-
    - Duty to pay tax
    - Duty to caste vote
    - Duty to work
    - Duty to rest.
    - Duty to family planning.
    - Duty not to indulge in corrupt practices.
- There is a need to educate not only ordinary citizens but also to hold regular trainings and workshops for continuous education of judges, to bring their attention on the provisions of fundamental duties and other important but neglected Constitutional provisions.

8. CONCLUSION

To sum up the whole discussion about the constitutional rights and duties of the above mentioned states of People's Republic of China and Japan it is right to say that this trait is a little bit different to other political systems of the world where much emphasis is given to fundamental rights and less to duties. Here people of these states have to perform their duties to ensure their rights. Without performing their duties people cannot claim for their rights. This concept helps these countries to shape their people's mind and to promote the spirit of

nationalism in them. They perform the duties to the state as their obligations which is a sign of their national pride. It also makes these people the most disciplined nation in the world. It helps to reshape their destiny in the global village too when we see these countries more prosperous in terms of economic growth. It seems that they get a sense of security when they receive surety of fundamental human rights and a sense of responsibility when they must have to perform their duties to the state. These traits are so far essential for the healthy growth of a nation. The People's Republic of China and Japan are following these traits with constitutional coverage.

BALANCING RIGHT TO PRIVACY IN THE CYBER WORLD - AN ANALYSIS

—Vishal Mahalwar[*]

1. INTRODUCTION

In the present scenario, everything pertaining to administration, commerce, communication etc. depends upon the efficient working of information technology. Like any other mechanism, Information technology is also not really exhaustive in nature. We are under obligation to analyse minutely if we really want to provide a safe and secure information technology. Being a consumer of information technology, creators of such technologies are morally bound to provide secured system from every aspect. Some of us say that it is a boon since it qualifies different persons to keep the check over the whole system for cyber security purpose. From legal point of view, prosecution, investigation etc have become more simplified just because of our foot print over information technological system. We may find many cases which are the befitted illustration to consider this system as a boon for legal system. Misappropriation of such system sometimes converts into vulnerable situation which leads to bane. Information technology is the one of the manmade disasters which encroaches into the rights of individual. To be very specific, right to privacy is one of the concerns which has been affecting the lives of people by virtue of either appropriation or misappropriation of information technology. Even if, you are appropriating the technology in rightful manner, still it may lead to the violation of right to privacy of individual by the reason of encroachment by a person without any lawful authorisation.

2. PRIVACY AND INFORMATION TECHNOLOGY

No system is comprehensive enough to be flawless. Privacy concerns make cyberspace more unreliable as compared to non-virtual world system. Whatever is flowing over the cyberspace is a subject matter to be accessed by the world at large. Cookies, Web bugs, hacking, Spamming, Data mining etc are the few components which are responsible to cause an effect on the right to privacy. Basically, every infringement of right to privacy is the result of unauthorised access of the information, data or message over the cyberspace. Along with the Cyber law, it is required to have data protection laws in order to bring the information technology system in consonance with right to privacy. As far as Indian

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norms are concerned, Indian Constitution doesn't provide the privacy protection in the straight way.[1] In fact, the elaboration of Article 21 of the Constitution has been made in a very wider manner which includes right to privacy. In the year of 1994, that was the first time when Supreme Court discussed right to privacy in the context of freedom of the press. In addition to this case, there are enormous judicial pronouncements which talks about the concept of liberty which is nothing in the absence of discussion of privacy concerns. If we talk about other nations, we may find that European countries are much ahead as compared to Asian countries with reference to right to privacy. OECD[2] guidelines are good example of protection of personal data and privacy. Indian legislature has attempted to make the system more secure, safe and efficient. Physically, there are so many things help the system to keep it secure. For instance, fire wall, antivirus software and many more things which help the system to work in secured manner. In India, *Information Technology Act* 2000 has been enforced with the intention to comply with international obligation which was International Trade Law's Model law on Electronic Commerce.[3] To comply with Model law *on Electronic Commerce, Information Technology Act* 2000 was enacted with addition of concepts like Digital Signature and Electronic signature, Electronic governance, Cyber offences etc. In the name of privacy right, some provisions have been inculcated within current statutes to save privacy.[4] It is a matter of interpretation that how you figure out the meaning of a provision in the context of privacy protection. Apart from it, there are few provisions within the *Information Technology Act* which are contrary to right to privacy & curtail the privacy right. Without taking prior permission from the authorised person, any agency of appropriate government may direct intrusion in the privacy of any individual, but this type of encroachment is really not exhaustive in nature. Such agencies are supposed to observe the reasons to be recorded in writing before encroaching into the privacy of any individual.

3. INTERNATIONAL OBLIGATIONS AND PRIVACY

As far the sanction to the privacy as Human Right at the international level is concerned, we have various international instruments mentioned as under:

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1 See; *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1; *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295; *Govind* v. *State of Maharashtra*, (1975) 2 SCC 148: AIR 1975 SC 1378; *M.P. Sharma* v. *Satish Chandra,* AIR 1954 SC 300*; People's Union for Civil Liberties* v. *Union of India,* (1997) 1 SCC 301: AIR 1997 SC 568*; R. Rajagopal* v. *State of T.N.,* (1994) 6 SCC 632 :AIR 1995 SC 264.

2 The Organisation for Economic Co-operation and Development (OECD) is an international organisation that works to build better policies for better lives

3 The UNCITRAL Model Law on Electronic Commerce was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 12th June 1996 to promote the commerce conducted using electronic means.

4 The Information Technology Act, 2000, Ss. 43(*b*), (*d*), 43-A, 66-E, 72 and 72-A.

Article 12 of Universal Declaration of Human Rights (1948)[5] states that

> *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks.*

Article 17 of International Covenant of Civil and Political Rights[6] states

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation*

Article 8 of European Convention on Human Rights[7] states

> *Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others*

4. EXCEPTIONS TO PRIVACY RIGHT AND CYBERSPACE

In the cyberspace, when we send a message from one place to another place then we have apprehension our mind with reference to breach of confidentiality of the information, message or data. Such type of apprehension of breach of information may be considered genuine one. Even though we have so many security systems like cryptography technique to keep the information intact, still it may be considered as breached. The Act provides provision for punishment of breach of confidentiality of data or information.[8] Under the Act, appropriate au-

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[5] The Universal Declaration of Human Rights (UDHR) is an international document adopted by the United Nations General Assembly that enshrines the rights and freedoms of all human beings. For detail See at <https://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights.

[6] The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty that commits states parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. For detail See at <https://en.wikipedia.org/wiki/International_Covenant_on_ Civil_and_Political_Rights>.

[7] The European Convention on Human Rights (ECHR; formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international convention to protect human rights and political freedoms in Europe. For detail See at <https://en.wikipedia.org/wiki/European_ Convention_on_Human_Rights>.

[8] The Information Technology Act, 2000, S. 72.

thority has a power to interception or monitoring or decryption of any information through computer resource.[9] Secondly appropriate authority has a power to issue directions for blocking for public access of any information through any computer resource.[10] Thirdly, appropriate authority has a power to authorise to monitor and collect traffic data or information through any computer resource for cyber security.[11] Above mentioned few provisions are an exception to the general privacy. In order to exercise all the power, appropriate authorities need to observe all elements mentioned within these sections. More specifically, anything which goes against the interest of the sovereignty or integrity of India, defence of India, security of the state, friendly relations with foreign states or pubic order, such powers may be exercised. All the provisions which are contrary to privacy right may be exercised in due course of certain situations. Each and every word mentioned in the provisions is the subject matter to be understood minutely.

4.1. Interception

Indian Information Technology doesn't define the term "interception". As far as interception meaning is concerned, it may be understood as an impediment or hurdle in due course of transmission. Sender has a right to send the information in intact manner. Despite of this fact information may be interfered in due course of transmission in certain circumstances as per the provisions. Creation of impediments or hurdles or cut off or seize or stop in transit would lead towards interception. With the help of modern technology, interception has become easier & more convenient. In fact, now a days, just because of interception, many confidential information are being stolen which is against the natural right of any individual. Interception may be permissible as per the law. Whenever appropriate authorities exercise interception then they have to ensure that they are considering all the elements which set them free to exercise such right. *IT Act* has given a provision to pay damages by way of compensation to the person so affected in case of disruption, denial of access, download, copies or extracts any data etc.[12] In the nutshell, we may say that anything which goes against the interest of the sovereignty or integrity of India, defence of India, security of the state, friendly relations with foreign states or pubic order, make them eligible to have check over the cyberspace. Computer, computer system and computer network have become the subject matter to be checked or interception in exclusive situations as mentioned in *Information Technology Act*. Appropriations of Interception are supposed to be in ideal manner and for ideal purpose i.e., as mentioned in *Information Technology Act*.[13] For instance any conversation, information, message or data which is being sent from the sender to recipient which may cause effect on the sovereignty or

[9] The Information Technology Act, 2000, S. 69.
[10] The Information Technology Act, 2000, S. 69-A.
[11] The Information Technology Act, 2000, S. 69-B.
[12] The Information Technology Act, 2000, S. 43.
[13] The Information Technology Act, 2000, S. 69(1).

integrity of India can be intercepted in the interest of the Nation. No one can make an objection on the ground of infringement of right to privacy. Provision of interception has been kept in the offences chapter[14] but if you perform the interception in accordance of mentioned limitations, it would not constitute an offence. In fact, interception is a power which has been given to appropriate authority to issue direction for interception. To provide the mechanism for interception "Interception Rules" have been framed by the Central Government. In fact, these rules i.e. The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 provide a very wider definition of interception. According to the Rules, intercept means

> *the aural or other acquisition of the contents of any information through the use of any means, including an interception device, so as to make some or all of the contents of an information available to a person other than the sender or recipient or intended recipient of that communication, and includes—*
>
> *(a) monitoring of any such information by means of a monitoring device;*
>
> *(b) viewing, examination or inspection of the contents of any direct or indirect information; and*
>
> *(c) diversion of any direct or indirect information from its intended destination to any other destination to any other destination;"*[15]

After the perusal of above-mentioned definition of intercept, we may conclude that interception is very wider term as compared to monitoring. According to provision mentioned under *Information Technology Act*, subscribers and intermediaries or any person in-charge of the computer resources are also bound to assist in interception as per the law. If any entity fails to provide assistance as per law, punishment may be granted.[16] Interception may be performed in the prescribed manner.

4.2. Monitoring

Having understood the definition of interception, it can be firmly said that monitoring is the part of interception.[17] Like interception, no specific

[14] The Information Technology Act, 2000, Ch. XI, S. 69.

[15] The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, R. 2(l).

[16] The Information Technology Act, 2000, S. 69(4).

[17] See The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, R. 2(l).

definition of monitoring has been given within the statute. But Rules define the meaning of monitor as under:

> *monitor" with its grammatical variations and cognate expressions, includes to view or to inspect or listen to or record information by means of a monitoring device.*[18]

Monitoring can be performed after keeping the limitation into the consideration as mentioned in the Act. In the layman's language, we can say that monitoring is just an observation over the subject matter which has been flowing over the cyberspace with the help of monitoring devices. If someone either monitors without any justification mentioned under the Act or without any authorisation then it will lead to cyber crime and it would be considered as a violation of privacy. In certain exceptional cases, information, message or data may be monitored. Similarly, some stake holders who are concerned towards cyberspaces like subscribers and intermediaries or any person in-charge of the computer resources are also bound to assist to monitor the computer, computer system and computer network with the help of monitoring devices. If we keep an eye on the computer resource without any justification then it will take us to the cybercrime regime. If any appropriate authority monitors the computer resource for the sake of interest of the sovereignty or integrity of India, defence of India, security of the state, friendly relations with foreign states or pubic order then it will make authority exempted from any kind of wrong. Cyber security may be the reason to monitor. In order to maintain the cyber security in cyberspace, monitoring over computer resource would be the appropriate way to enhance cyber security and prevention of intrusion or spread of computer containment in the country.

4.3. Decryption

In order to enhance the security system over the cyberspace, in the modern age we have started appropriation of Cryptography which includes encryption and decryption. Basically, whenever we send a message from one place to another, message gets encrypted in an unintelligible form which cannot be understood. Conversion of message into unreadable form is called encryption. The basic advantage is that no other person can understand the message or information or data. Encryption ensures the integrity of the message. In due course of transmission, there is no apprehension of misappropriation of message or data. This system works with the help of public key and private key. On the other hand, with the help of keys, encrypted form may be turn into decrypted form which is a readable form of unintelligible form. If someone tries to convert the message or information in the intelligible form without authorisation then it will lead to violation of privacy. The Act provides the provision under which Power to issue

[18] The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, R. 2(*o*).

directions for decryption of any information, provided that all the limitations have been observed. Whenever it is required decryption key holder may be directed to disclose the information relating to Key. Decryption key holder is bound to disclose the information pertaining to key and other assistance pertaining to decryption.[19] Integrity, Authenticity and Non-Repudiation are the key factors to convert the matter into encryption form. Decryption means

> *the process of conversion of information in non-intelligible form to an intelligible form via a mathematical formula, code, password or algorithm or a combination thereof*[20]

As already mentioned, without authorisation or permission of decryption will lead to violation of privacy provided that you have observed all the limitations. In case of failure of providing assistance with reference to direction given in this section shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to a fine. In nutshell, it can be firmly concluded that keeping surveillance by the means of interception, monitoring or decryption will not lead to violation of privacy right, if limitations[21] have been adhered to.

5. INTERMEDIARIES LIABILITIES

Most important question usually raised is what would be the liabilities of intermediaries in the context of interception, monitoring and decryption. Intermediaries' liabilities have been fixed by section 79 of *Information Technology Act*. Intermediaries are bound to perform certain functions which must be in compliance of section 79 of Information Technology Act. There shall be no liability of intermediaries if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hasted. Secondly, the intermediary does not initiate the transmission, thirdly, select the receiver of the transmission, and fourthly, the intermediary does not select or modify the information contained in the transmission. Apart from it, most importantly, intermediaries must observe due diligence while discharging their duties under this Act and observe all guidelines as mentioned by central government.[22] Intermediary may be held liable if intermediary has conspired or abetted or aided or induced whether by threats

[19] The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, R. 17.

[20] The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, R. 2(F).

[21] Interest of the sovereignty or integrity of India, defence of India, security of the state, friendly relations with foreign states or pubic order are supposed to keep into consideration as a limitation.

[22] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R. 3.

or promise or otherwise in the commission of the unlawful act. Secondly, Intermediary may be held liable if upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. It is abundantly clear that intermediary can be liable for non-performance of his obligation. When any specific intermediary doesn't observe due diligence even after receiving the actual knowledge or notification then it makes intermediary liable for any act or omission. Section 79 discusses about the situations of exemption from the liabilities of intermediaries. We may find many instances where intermediaries can attract contributory liability rather than direct liability. Just because of the presence of section 79, intermediaries can be held directly liable for any wrong which is in contradiction to section 79. Probability of infringing the right of privacy by intermediaries or person in charge of computer resource are much higher as compared to any other entity. Violation pertaining to maintenance of secrecy and confidentiality of information or unauthorised encroachment into another's account will lead intermediaries towards the liability of infringement of right to privacy. Apart from it, intermediaries are bound to follow the directions of agencies with reference to interception, monitoring or decryption.

6. COLLECTION OF TRAFFIC DATA

To enhance cyber security, central government may delegate the power to specified agency to collect traffic data or information generated, transmitted, received or stored in any computer resource.[23] One cannot raise an objection with reference to collection of traffic data since it is a matter of cyber security. Over the cyberspace, so many data have been flowing which requires monitoring. Apart from collection of data or information, we may find some data or information which gets downloaded without any authorisation is called caching. Legality of caching has not been clarified till now. Caching is all about incidental storage which doesn't take prior permission before download of data or information. Under Copyright Law, incidental storage would lead to fair dealing.[24] Caching is an exception to infringement of right to reproduction. Sometimes caching can also be utilised to collect data or information. Further, it may be utilised to do data mining. On the basis of nature and character of the data, one can infer the final result. In nutshell, we can say that right to privacy may be infringed in many ways but appropriation of the data or information for cyber security without any prior authorisation will not lead to violation of privacy.

[23] The Information Technology Act, 2000, S. 69-B.

[24] The Copyright Act, 1957, S. 52(1)(*c*).

7. RIGHT TO PRIVACY & ITS FACETS

Even though, right to privacy has already been declared as a fundamental right but in the *Puttaswamy*[25] case, new perspective of right to privacy has been evolved by nine judges' bench of the Supreme Court of India. Supreme Court has declared that no right is absolute and any incursion of State or non-state entity must satisfy the following triple test. This triple test i.e. Legality, Necessity & Balancing applies to figure out the privacy violation. This test may be applicable over the present *Information Technology Act* to analyse & assess the privacy violation. First of all, Legality is the test to assess the justification behind the privacy encroachment. Any legislation, more specifically *Information Technology Act* & related Rules & Regulations, which have been passed in accordance with the Constitution and in fulfilment of all the requirement of Article 13 would not lead to any question of legality over the legislation. Similarly, if someone, in compliance with the *Information Technology Act*, performs a specific act or encroachment in the privacy would not lead to infringement of right to Privacy. Second test is Necessity or we may say objectivity. Behind any restriction or any restraint there must me a legitimate objective. In another words, we may say that there must be legal, legitimate and valid reasons or objectives. There are many provisions which encroaches in to the right of privacy but their Constitutionality & validity is beyond questions just because of the second test i.e., Necessity & legitimate aim or valid objectives. According to the third test, Balancing, restrictions are supposed to be proportional to the need and requirement of interference. In fact, balance should be ensured between right to information and right to privacy.

8. EPILOGUE

Above discussion leads to conclude that no right is comprehensive enough. Any appropriate authority may encroach in to the privacy of any individual after observing the limitation as mentioned under the provisions of *Information Technology Act*. Interception, monitoring and decryption are the key component of cyberspace's security. Collection of data, extraction of the data, download of the data will lead to violation of right to privacy since unauthorised access can be considered as a violation of the law. Interest of the nation is supreme as compared to interest of any individual. That's the reason why the permission or power of interception, monitoring, and decryption have been provided by the virtue of *Information Technology Act*. Those components i.e. computer, computer system and computer network which we use for our convenience are being misappropriated. For instance, caching is one of the ways to cause an impact over privacy right. With help of leaked, disclosed information by unauthorised way, a concrete result may be figured out through which we can figure out the mental state or intention of any individual. Technology has created so many technical facilities

[25] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

which have become a reason of worry. Even though no special law has been enacted for data protection but still we have some basic and fundamental principles which are quite indispensable to comply with basic fundamental right of privacy. In the present age, like hacking, Phishing, Spamming, data mining, web bugs and many more evils are emerging day by day. Unauthorised exercise of the power of interception, monitoring and decryption would be unlawful. Further, appropriate authority may collect the traffic data in the interest of nation or cyber security. In order to maintain cyber security traffic data can be collected but the principle relating to data collection cannot be overlooked. To be precise any monitoring over the cyberspace, or Computer, computer system or computer network done in national interest would not lead to violation of privacy.

PUBLIC POLICY CONCERNS IN RELATION TO SURROGACY AGREEMENTS

—Isha Saluja[*]

1. INTRODUCTION

In India, agreements are enforceable and valid only if they have lawful consideration and lawful object in accordance with Section 23 of the Indian Contract Act ("ICA"). The consideration or object of the agreement is unlawful if the Court regards it as immoral or opposed to public policy. Therefore, the surrogacy agreements are enforceable and valid in India if they have lawful consideration and lawful object. If the object or consideration of the surrogacy arrangement is unlawful then it is void. Courts in India may choose not to enforce a surrogacy agreement if it regards it as immoral or opposed to public policy.

This is mainly concerned with whether surrogates should be permitted to enter into surrogacy agreements for the conception of a child. The major criticism of surrogacy agreements has been that it leads to commodification of surrogates and in general commodification of womanhood and motherhood. Some legal scholars look at surrogacy agreements as a contract for a womb or even as similar to sell one's body as a prostitute. Thus, they argue that the surrogacy agreements should not be enforced and held void as they are immoral and also violate public policy. They provide theories of commodification as being against human flourishing and personhood. Conversely, there are also contentions that surrogacy agreements should be enforced but with the caution that such agreements should provide protection to the surrogates under the complex situations which surrogacy arrangements can create. This makes it important to examine the moral and public policy concerns raised with regard to the surrogacy agreements.

This paper will proceed in three parts and will mainly draw upon public policy concern and feminist theory of commodification for proposing a change in statutory framework of Commercial Surrogacy and International Surrogacy Agreements ("ISA") under Surrogacy Regulation Act, 2021 in India. First part will deal with whether surrogacy agreements are immoral or against public policy under ICA. The main argument against surrogacy agreements, that they involve commodification of surrogates and therefore are against public policy, will be discussed in second part along with theories of commodification. In the

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third part, a justification for regulated system for surrogacy agreements in India is provided which is based on the theory of mixed commodification provided by Pamela Laufer-Ukeles.[1]

2. IMMORALITY OF AGAINST PUBLIC POLICY UNDER ICA

Section 23 of the ICA talks about consideration and objects which are lawful and which are unlawful. It says that the consideration or object is unlawful if the Court regards it as immoral or opposed to public policy. Such agreements are void. Section 23 reads as under:

> *The consideration or object of an agreement is lawful, unless - it is forbidden by law; or is of such nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*

This part will analyze that whether surrogacy agreements are immoral or against public policy under ICA. It will be analyzed that whether these agreements are enforceable or not on the ground that they are similar to prostitution. This leads to further debate whether surrogates are commodified. This will be discussed in next part. There is no legal precedent in India which has directly dealt with the issue of surrogacy agreements being against public policy or being immoral. This issue is still pending in *Jan Balaz*[2] case. Hon'ble Supreme Court of India by its Order[3] has listed one of the following issues to be decided in case of *Jan Balaz*[4]*:*

> *…6. Whether commercial surrogacy is immoral and is opposed to public policy and therefore void u/s 23 of the Contract Act…*

Therefore, it becomes important to analyze these issues.

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1 Pamela Laufer-Ukeles, Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption, 8 Ind. L.J. 1223 (2013).

2 Civil Appeal No. 8714 of 2010 and SLP (C) No. 31639 of 2009. Writ Petition 95/2015 – *Jayashree Wad* v. *Union of India*.

3 Order dated 14.10.2015.

4 Civil Appeal No.8714 of 2010 and SLP (C) No. 31639 of 2009. Writ Petition 95/2015 – *Jayashree Wad* v. *UOI*.

A. Immoral

Surrogacy agreements have been criticized on the ground that they are immoral and therefore should be void and unenforceable. Immoral has not been defined under ICA. In this context it becomes necessary to examine the meaning of the term immoral and which agreements have been held immoral by the Courts in India. What is immoral has been dependent upon the standards of morality prevailing at a particular time and as approved by courts from time to time. But certain acts like dealing with prostitutes have always been regarded as immoral and perhaps will always be so regarded in the future. However, certain acts like help given or promised to a dancing girl have not been tainted with immorality. In *Gherulal Parakh* v. *Mahadeodas Maiya*[5] Supreme Court confined the concept of immorality to sexual immorality. It stated

> *The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of encubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.*

The Court further stated that the word "immoral" is a "very comprehensive word and it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society."

In *Associate Builders* v. *DDA*[6] Supreme Court clarified that morality is confined to 'sexual morality' and if it is to go beyond sexual morality an agreement would have to be against prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.

In surrogacy contracts there is no sexual activity between the surrogate woman and intended parent/parents and hence a surrogacy contract should not generally be said to be immoral in India. In accordance with the legal precedents, Indian Courts would only hold surrogacy contracts as immoral if it shocks the courts conscience. However, there is no any such element present in the surrogacy agreements which could shock the courts conscience.

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5 AIR 1959 SC 781.

6 (2015) 3 SCC 49.

B Public Policy

An agreement may also be unlawful and void if the Court regards it as opposed to public policy. Public Policy or opposed to public policy has not been defined under ICA and does not have any precise definition. However, the term public policy in its broadest sense means "principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good".[7] Thus, it can be said that public policy is the principle under which no person can do anything which is injurious for the public welfare or for the interest of the society.

It puts a restriction on the freedom of contract for the good of the community. While dealing with the concept of public policy, Supreme Court clarified in *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly*[8] that the principles governing public policy means some matter concerning public good and public interest, which can be further expanded or modified by the Courts in consonance with public conscience and public good. Supreme Court also clarified what public policy means in following words:

> *…It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. The principles governing public policy must be and are capable on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become abnoxious and oppressive to public conscience. There is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declares such practice to be opposed to public policy…*

In *Rattan Chand Hira Chand* v. *Askar Nawaz Jung*[9] it was held that term "public policy" means that court will on consideration of public interest refuse to enforce a contract. In words of the Supreme Court:

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7 Bryan A. Garner, *Black's Law Dictionary,* Thomson Reuters, USA 1041 (5th Edn. 1979).
8 (1986) 3 SCC 156: AIR 1986 SC 1571.
9 (1991) 3 SCC 67: (1991) 1 SCR 327.

> *It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. It is contrary to the concept of public policy to contend that it is immutable, since it must vary with the varying needs of the society. What those needs are would depend upon the consensus value-judgments of the enlightened section of the society…*

In the case of surrogacy contract there is no connection between surrogacy and injury to public good or public interest. The nature of surrogacy contract and the consideration involved also do not have any contrary effect on the public good or public interest as it involves two private parties. Also the Courts and legislatures have acted with caution and with proper care to maintain a balance between individual interest and public interest. Hence, there is no justification to criticize surrogacy contracts as opposed to public policy. They should be considered legal and enforceable.

Even if we look at different jurisdictions, there have been two important cases in US which have dealt with the issue of surrogacy contracts being against public policy. *Baby M., In re,*[10] it was held that surrogacy contracts are against public policy while in *Johnson* v. *Calvert*[11] it was held that they are not against public policy. However, it should be noted that *In re Baby M*[12] Courts was dealing with case of traditional surrogacy while in *Johnson* v. *Calvert*[13] it was the case of gestational surrogacy. In India, it is gestational surrogacy which is practiced in majority of cases and traditional surrogacy has almost extinguished.

The facts of *Johnson* v. *Calvert*[14] are that Mr. and Mrs. Calvert hired a gestational surrogate, Mrs. Johnson, and agreed to pay $10,000 in installments as cash and a life insurance policy of $200,000. This was in return of her relinquishing all parental rights. However, the relationship deteriorated between the parties as Mr. Calverts learned that Mrs. Johnson had not disclosed her previous miscarriages and stillbirths. Mrs. Calmert became frustrated and demanded all her payments or she will not give up the child and retain custody. One of the issues to be decided by the court was that are surrogacy agreements barred by public policy. The court disapproved that surrogacy agreements are against public policy in the following words:

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[10] Baby M., *In re*, 537 A 2d 1227 (NJ 1988).
[11] 851 P 2d 776 (Cal. 1993) (*en banc*).
[12] Baby M., *In re,* 537 A 2d 1227 (NJ 1988).
[13] 851 P 2d 776 (Cal. 1993) (*en banc*).
[14] 851 P 2d 776 (Cal. 1993) (*en banc*).

> *We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.*

Therefore, it can be said that Court in US was not convinced about surrogacy agreements being against public policy on basis of exploitation or commodifying women. The Courts reasoning also recognized that women who choose to be surrogates do so willingly. As a society, we recognize the right to make a livelihood. To deny surrogates this right is dehumanizing to women because it suggests that women are incapable of making intelligent decisions.

This decision of *Johnson* v. *Calvert*[15] is relevant and should be followed in India also.

3. COMMODIFICATION OF WOMEN

In light of Section 23 of the ICA, many scholars still argue that Commercial Surrogacy arrangements are immoral and against public policy as they involve commodification of women's body and therefore should be void and unenforceable. Their argument is based on basic principle that as there are no market transactions allowed in human organs, prostitution and the sale of children because of the social harm involved. Similarly, Commercial Surrogacy should also be banned. Further, they argue that Commercial Surrogacy effectively amounts to market transaction of reproductive labor which is questionable in terms of its legality and objective of a valid legal contract under the existing contract law.

However, *Noel P. Keane* commented that surrogate mothers should be offered meaningful compensation for their services. Pregnancy and childbirth are hazardous, time-consuming, painful conditions which few women can be expected to experience for the sake of someone else unless they receive meaningful compensation.[16] Also society's fear that reliance on the 'cash nexus' will extinguish altruism and foster anomie and other alleged ills of the capitalist system is

[15] 851 P 2d 776 (Cal. 1993) (*en banc*).

[16] Noel Keane, *The Baby M Decision: Facts and Fictions, Before and Beyond*, 18 Seton Hall L. Rev. 839 (1988).

misplaced. He contends that enforcing surrogacy agreements will not have any significant effect on the underlying norms and attitudes in our society.[17]

Feminists are also positioned on both sides of the larger debate regarding commodification. Anti-commodification arguments have been based on the premise that there are parts of human life that should not be subjected to the rhetoric of economic exchange because such exposure would be against our deepest understanding of what it is to be human.[18] For feminists, these particularly included issues central to women's lives, such as sex, reproduction, housework and care for family members. Applying contract law to promises related to these issues runs the risk of commodification of women because of the introduction of economic discourse to non-economic activities and the offering of economic solutions to non-economic problems. Accordingly, legalizing paid surrogacy would not only degrade surrogates but also impoverish the unique nonmonetary meaning of pregnancies.[19]

However, Liberal feminist gives argument that by equating the concept of paid surrogacy with commodification of women's bodies, anti-surrogacy feminists suggest that women's reproductive activity has no economic value. As one liberal feminist scholar comments:

> *Woman as conscious, moral, social and political being is also woman as economic being. We cannot separate ourselves from our economic existence or ignore the value of our reproductive powers. The failure to acknowledge the economic value of female reproductive labor is blind folly for those who wish for equity in women's social situation*.[20]

Some feminists have also insisted that the feminist commodification critique is only appealing in the abstract or as an ideal. But it should not stand in the way of recognizing the economic value of women's contributions. Although what women do in the intimate sphere is often a result, and an expression, of love and care, their actions should not be deemed monetarily worthless as market value and other values are not mutually exclusive.[21] In the context of gestational surrogacy, for example, it has been empirically demonstrated that women carry other people's babies out of a combination of benevolent and economic motives.[22]

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17 *Ibid*.

18 Margaret Jane Radin, "Market-Inalienability", 100 Harv. L. Rev. 1849 (1987).

19 *Id*. at 1928–1936 (discussing the problem of commodification in the context of surrogacy agreements and recommending a market-inalienability regime); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 Phil. & Pub. Aff.71 (1990).

20 Carmel Shalev, "Birth Power: The Case for Surrogacy" 160 (1989).

21 Katharine Silbaugh, "Commodification and Women's Household Labor", 9 Yale J. L. Feminism 81 (1997).

22 Hillary Lisa Berk, "The Legalization of Emotion: Risk, Gender, and the Management of Feeling" *in Contracts for Surrogate Labor* 62 (Spring 2013) (reporting interviews with women interested

Moreover, in a world dominated by capitalism that commodifies everything else, leaving labor done in intimate contexts uncompensated has a disparate impact on women's lives in a manner that, contrary to feminist goals, enhances gender inequality. And at times commodification is simply inevitable, and resisting it may lead to unintended consequences that themselves conflict with feminist values.[23]

Therefore, the question that arises is whether certain attributes or resources should lie wholly or partially beyond the exchange process because to allow full commodification would be inconsistent with theories of personhood or human flourishing. There is also criticism of law and economics approach by feminists that they view the aim of society only in terms of welfare maximization rather than human flourishing.[24] Therefore, the scope of the market and kind of things to be permitted to be commodified, either completely or subject to various legal constraints needs to be decided. This raises a bigger question that whether surrogacy should be the subject of free-market exchange and whether permitting Commercial Surrogacy will undermine values of human self-fulfillment or human flourishing.

This part will try to answer these questions by firstly discussing the theory of commodification and then whether surrogacy leads to commodification of women's body.

A. Theory of Commodification

The concept of commodification is related to commercialization. The concept theorizes that there is some kind of strong distinction, ethically, culturally, or morally between donative system and profit/exchange system. In donative system, things are given whereas in profit and exchange system there is economic exchange and profit. It is often argued that certain human attributes or resources should lie wholly or partly beyond this profit and exchange system because to allow their commodification would be inconsistent with personhood or human flourishing. Therefore, the objection to commodification is primarily objection to giving market status to some object that is important to human beings. These objects are usually things close to personhood and things we think of maybe as internal to personhood or as constitutive of personhood, rather than things that can be thought of as external. Therefore, articulating a principled line

in paid surrogate contracts for a combination of reasons), available at <http://digitalassets.lib.berkeley.edu/etd/ucb/text/Berk_berkeley_0028E_13203.pdf>.

[23] See, e.g., Maneesha Deckha, "Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legislation and Public Funding", 61 MCGILL L. J. 31 (2015).

[24] Margaret Jane Radin, "From Baby-selling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market", 54 Osgoode Hall L. J. 339 (2016-2017).

between what can and what cannot permissibly be exchanged has been the goal of the commodification debate.[25]

Michael Sandel pointed out that there are basically two objections to the commodification of certain transactions i.e. coercion and corruption. He says that there are very few things that money cannot buy because today the market has reached its extension in all spheres of life. This development is bad and is resisted because of two objections of coercion and corruption. The first objection of coercion argues about the unfairness that arises when certain goods are bought and sold in the market under circumstances of severe inequality or economic needs. According to this objection, every exchange that happens in market is not essentially voluntary as is suggested by market supporters. An example of this condition can be when a person has to sell his kidney or cornea in order to feed his starved family. In this case the agreement is not truly voluntary as this person is coerced by the condition of economic necessities.

However, this argument of coercion relies on the notion of consent provided under fair or unfair background conditions. It is an only an objection to markets that function against severe background of inequality and create coercive bargaining conditions. But it is not an objection to the markets itself as it does not provide grounds for objecting to the commodification of goods in a society where background conditions are fair. Therefore, this coercion argument misses the point that there is scope of life, which lies beyond the concept of consent, in the moral goods which are not respected in markets.[26]

The second objection as *Michael Sandel* points out is an argument from corruption which deals with the degrading effect of market valuation and exchange on certain goods. According to this argument of corruption, if we buy and sell certain moral and civic goods for money in market, their value gets diminished or corrupted. Only assurance of fair bargaining conditions is not enough to counter the argument from corruption. An example can be the sale of human body parts being inherently degrading and violation of the sacredness of the human body. In this case the sale of any human body part like kidney would be wrong for both rich and poor alike. The objection would hold good even without the coercive effect of poverty.[27] Therefore, this argument from corruption is dissimilar from argument of coercion.

Corruption argument pleas for the morality of the goods, which should not be degraded by market valuation and exchange. The essentiality of argument from corruption is that it cannot be met by fixing the background conditions

[25] Margaret Jane Radin, "Cloning and Commodification", 53 Hastings L.J. 1123 (2002).

[26] Michael J. Sandel, "What Money Can't Buy: The Moral Limits of Markets", in *The Tanner Lectures On Human Values* 87, 94–95 (Grethe B. Peterson ed., 2000).

[27] Michael J. Sandel, "What Money Can't Buy: The Moral Limits of Markets", in *The Tanner Lectures On Human Values* 87, 94–95 (Grethe B. Peterson ed., 2000).

within which market exchanges take place. It applies in same way whether there is equality or inequality. Therefore, this second objection of corruption is more fundamental than the objection of coercion. There should be certain things that should not be bought and sold in a society even without unjust differences of power and wealth.[28]

It is accordingly suggested that there are numerous spheres of valuation for the goods. An exchange becomes corrupt when the differences between these spheres of valuation are ignored and all goods are valued in the same way. For example money and children belong to different spheres of valuation and exchanging children for money corrupts the value of children. Also it should be noted that these spheres of valuation are not only different but they also have higher and lower modes of valuation. It is corruption when something with a higher mode of valuation is exchanged for a lower mode of valuation as in this case they both are treated as equals.[29]

Feminists have also been greatly concerned with commodification of certain transactions. There are feminist concerns that exchange personal services by women in the market alienate them from their bodies. Any contract that authorizes a man to use women's body in exchange for money may make a woman feel that her body is separate from herself.[30]

Elizabeth S. Anderson, a feminist philosopher also stated that there are many objects whose worth is more than of just using them as they have a higher mode of valuation. These objects should not be viewed as only commodities because they have superior intrinsic worth and appreciative value. There are principles which stipulate how certain things should be valued and these principles are sustained by notion of human flourishing. To fail to value things appropriately is to embody in one's life an inferior conception of human flourishing.[31]

Margaret Jane Radin, a feminist, developed an extensive theory of commodification. Margaret Radin in her essay on "Market-Inalienability" defines market-inalienability as something which should not be sold and traded in the market even with full consent. She says that inalienability expresses an aspiration for non-commodification and market trading is not allowed for non-commodified things. She is of view that law and economic analysis and traditional liberal pluralism don't properly recognize market inalienability. She developed an extensive critique of universal commodification in which some people are willing to sell anything and others are willing to buy that is subject of free market exchange.[32]

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[28] *Ibid.*

[29] *Ibid.*

[30] Gillian K. Hadfield, "The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract", 33 Osgoode Hall L. J. 337 (1995).

[31] Elizabeth S. Anderson, "Is Women's Labour a Commodity", 19 Philosophy & Public Affairs 71 (1990).

[32] *Supra note* 18.

Universal commodification is criticized by universal non-commodifiers on the basis that it brings about an inferior form of life. Radin claims that universal commodification damages the personal identity by regarding personal attributes, relationships and moral commitments in monetary terms and as self-alienable. Also the problem for universal non-commodification is the problem of transforming i.e. how society can be transformed from its current degree of commodification to the more desired degree of commodification?[33]

However, Market pluralisms can provide different intermediary positions. Under market pluralism, a narrow realm of commodification can be permitted to be existent with one or more nonmarket realms along with a justification between things that should and that shouldn't be commodified. Radin, a market pluralist, evaluates inalienabilities in association with considering the concept of *human flourishing. Personhood and human flourishing* would identify some resources and attributes that should not be subject to commodification at all, or atleast not to unconstrained commodification. Radin argues that some property which is personal and self-defining is essential to personhood and should not be bought and sold while some property which is fungible can be bought and sold without harm to personhood. She views that market-inalienability is based on non-commodification of things which are important to personhood.[34] She further states that in an ideal world it is not necessary that markets should be abolished but it is the concept of market-inalienability that would safeguard the things essential to personhood. However, she adds, we do not live in an ideal world. We actually live in the non-ideal world and in this world it is sometimes better to commodify incompletely than not to commodify at all.[35]

Sonia M. Suter has added that problem of commodification depends upon the degree the commodity is integral to the self. To evaluate how integral something is to the self, factors such as the possibility of severability and separation, intentions and actions regarding the commodified item, that is, whether we want to separate from it or whether we see it as integral to us can be considered.[36]

B. Surrogacy Agreements and Commodification

Radin's theory of personhood, as discussed in above paragraphs, leads her to raise questions as to whether Commercial Surrogacy should be allowed or prohibited. In deciding whether to prohibit commodification or instead to permit commodification subject to substantial legal constraints, Radin worries about the problem of transition in moving from present non-ideal world to the ideal

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33 *Ibid*.
34 *Ibid*.
35 *Ibid*.
36 Sonia M. Suter, "Giving in to Baby Markets: Regulation without Prohibition", 16 Mich. J. Gender & L. 217 (2009).

world. This problem of transition raises in turn the problem of what she calls the "double bind". Double bind means that if market-inalienability is chosen, a class of poor and already oppressed people will be deprived of the prospect of having more money by which they can buy sufficient food, shelter, and health care in the market and hence at disadvantage of a chance to lead a humane life.[37]

The problem of double bind also arises because prohibiting commodification, without large-scale redistribution of social wealth and power, may make the plight of some individuals actually worse. She gives an example of Commercial Surrogacy contracts, stating that, as morally offensive as these may be to many people, ban on them may eliminate one of the few income-earning options available to poor women and thus exacerbate their plight and that of their families. Conversely, counter-balancing the double-bind effect may be the domino effect. By this Radin means that permitting transactions such as these may change and pervert the terms of discourse in which members of the community engage with one another about their personal and social relations. She seeks to balance the double-bind effect against the domino effect.[38]

Accordingly, Radin recommended incomplete commodification[39] for some markets like prostitution. These markets can be regulated without a ban. She has pragmatically suggested incomplete commodification in the context of prostitution because a market for prostitution will continue to exist despite its ban. But a ban can hurt sex workers. However, weighing both the double bind effect and domino effect, in general, she wants to prohibit commercialization of surrogacy but would permit voluntary surrogacy arrangements. Radin vacillates between an "incomplete commodification" and a "market-inalienable" approach to surrogacy, balancing the destructive effects of paid surrogacy against the benefits, under the non-ideal circumstances of this world, for womens empowerment.[40]

Some other feminists have also given the view that the applying commercial and market norms to women's reproductive labor reduce the worth of respect for surrogate mothers to objects of mere use. When women's labor is considered as a commodity, the women who perform it are degraded as it affects peoples regard for them. Therefore, it is important to resist encroachment of the market upon the sphere of reproductive labor.[41]

Adeline A. Allen adds to the theory of surrogacy being against human flourishing. She states that commodification of the womb is the commodification of woman's body and is exact contrary to human flourishing. Surrogacy

[37] *Supra note* 18.

[38] *Ibid*.

[39] By Incomplete commodification Margaret Radin meant that some commodities can be monetized, but not entirely.

[40] *Supra note* 18.

[41] Elizabeth S. Anderson, "Is Women's Labour a Commodity", 19 Philosophy & Public Affairs 71 (1990).

underestimates the most powerful bond between the mother and the child as it considers the womb as an artifice. It also makes motherhood transactional and alienable. So when surrogates sell their bodies they actually sell their souls.[42]

Further, under surrogacy, surrogates are treated like raw materials thereby reducing them from whole beings to a commodity. Commodification coarsens and dehumanizes them. It denies them to flourish as humans by design as it strips them of their dignity. It leads to a society which is exactly the opposite of what makes us human. Surrogacy contracts are adverse for the betterment of surrogates and thus adverse to the common good and human flourishing.[43]

In short, it can be said that it is argued that there is a cost to society if we permit the sale and purchase of humans or their body organs. Humans consider themselves as more than mere commodities. Permitting humans and body organs to be traded in market for money forces us to recognize ourselves in terms of monetary worth. Thus, surrogates might also view themselves and their bodies simply in terms of their saleable worth and not as essential value for part of humanity.

However, it can also be argued that although surrogacy leads to commodification and hence is morally objectionable but yet it should not be banned as it carries practical costs that outweigh the good of preventing the practice. Still moral status of opposed commodity can be one of the considerations in determining its legal permissibility. To understand which goods should be allowed to be exchanged in market it is important to know what mode of valuation suitable for that certain good or social practice. This should be differentiated from how much the good is worth as it needs a qualitative judgment and not just quantitative judgment. *Michael J. Sandel* suggests that one way of proceeding is to argue by analogy i.e. to begin with moral intuitions we have about certain practices, and to see whether or not the practices in question are relevantly similar. He gives an example of whether Commercial Surrogacy was more like baby-selling or more like sperm-selling can give us the answer.[44] Surrogates intention under surrogacy agreement with respect to the surrogate child is commonly of sever ability and separation. Therefore, the interest of the surrogate is less than that of the parents who have intention to establish a life-long relationship as parents of the child. Thus, the harm of commodification is less in this case.[45]

Some liberal theorists have also urged that paid surrogacy is legitimate forms of economic opportunity. To prohibit them is to deprive women of opportunities that might be of value to them. Liberal feminists are also of view that by equating the concept of paid surrogacy with commodification of women's

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[42] Adeline A. Allen, "Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human", 41 Harv. J. L. & Pub. Pol'y 753 (2018).

[43] *Ibid*.

[44] *Supra note* 26.

[45] *Supra note* 36.

bodies, anti-surrogacy feminists suggest that women's reproductive activity has no economic value. This theory strips women of their right to be active economic agents in contemporary society. As one liberal feminist scholar comments:

> *Woman as conscious, moral, social and political being is also woman as economic being. We cannot separate ourselves from our economic existence or ignore the value of our reproductive powers. The failure to acknowledge the economic value of female reproductive labor is blind folly for those who wish for equity in women's social situation.*[46]

Also the argument that payment to the surrogate diminishes the personhood of the birth mother, banning payment may also entail other objections. The objection is that by removing the activity of reproductive labor to be uncompensated, it is supposed to be the duty borne by the women. It does not economically recognize their reproductive labor. Failure to compensate women for reproductive labor is itself a form of moralized exploitation.[47]

There can be other cross-arguments as well for the notion that motherhood should not be traded in the market economy as it is sacred. Motherhood is already part of trade in the market in certain cases that are generally not questioned. Nannies, for example, who do the traditional gendered work of raising children are already part of the market. The only difference between surrogates and such nannies is that nannies pay check is thin. Even if it is argued that surrogates and nannies operate in different markets, because of the reproductive labor involved in surrogacy, it would be like disregarding that nanny is also intensely physically and emotionally engaged with the child. The difference that stigmatizes one form of motherhood but rationalizes the other is only because of the ephemeral notion of sacredness for the surrogacy. This notion of sacredness removes reproductive labor like surrogacy from the marketplace and more importantly brings down the market value of all gendered labor. This is doing a disservice to the work of all women who seek a fair wage.[48]

The paradigm of promoting motherhood above the market will also undermine the market value of other gendered work done in the home such as home healthcare or domestic work. However, the fact is that the market already allots monetary value to childcare, housework and other gendered labor. It is a traditional social prejudice to expect only on moral grounds that mothers commit to raise children as their ultimate life project, that they treasure motherhood over all other competing values and that they perform the labor of motherhood out of pure altruism. Infact, the decision of the surrogate to bring forth the conditions

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46 *Supra note* 20.

47 Michael J. Trebilcock, *The Limits of Freedom of Contract*, 50 (1997).

48 Deborah Zalesne, "The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art", 51 U. Rich. L. Rev. 419 (2017).

for prosperous parenthood for an infertile sister will protect the dignity of both women.[49]

The harms of commodification as stated in context of Commercial Surrogacy are vague and have been overstated when compared to the real financial and procreative benefits involved in it. Even in extreme case, if we assume that it is wrong to commodify motherhood on moral grounds as stated above, it does not follow that surrogacy agreements should not be enforced and surrogacy should be prohibited. Moral grounds should not be the basis for condemning the practice of surrogacy itself but rather it should be the basis for condemning society's reaction and spreading awareness about surrogacy. Moreover, such moral objections are difficult to counter, because they focus on a type of harm that is challenging to sharply define. As *Elizabeth Scott* notes that to some extent the harms of commodification are abstract and not subject to empirical validation. It is difficult to determine whether surrogacy has changed the way that women's reproductive capacity is valued.[50] It is difficult to proffer data about how surrogacy has changed society's values to understand human reproduction.

Therefore, Commercial Surrogacy should not be prohibited but regulated as risk-benefit calculus allows markets to exist but with careful and serious regulation of such markets. It is a non-ideal world and pragmatic approach accepts a non-ideal solution that nevertheless tries to bring us closer to our ideals.

C. Theory of Mixed Commodification

Pamela Laufer-Ukeles has tried relaxing the tension between ethical and moral concerns of commodification regarding surrogacy and the practical benefits of Commercial Surrogacy for surrogates. She recognizes the complex nature of the controversial transaction of surrogacy through lens of mixed commodification. She acknowledges that Commercial Surrogacy is not only deeply intimate but is also a market transaction of which compensation is an essential part. Compensation under the surrogacy transaction provides due payment to the surrogate for her extremely hard work and also creates satisfied relationship between the intending couples and surrogate mothers. Therefore, the perspective of mixed commodification can best reflect upon and explain the complexity of surrogate motherhood.

Laufer-Ukeles progresses from theory of mixed commodification to its practice and argues for regulating Commercial Surrogacy. Surrogacy should be allowed to exist in the market so that there are valid labor choices for surrogates.[51]

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[49] *Ibid*.

[50] Elizabeth S. Scott, "Surrogacy and the Politics of Commodification", 72 Law & Contemp. Probs. 109 (2009).

[51] Pamela Laufer-Ukeles, "Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption", 8 Ind. L.J. 1223 (2013).

Laufer-Ukeles when developing the theory of mixed commodification, moves a bit away from Margaret Radin's incomplete commodification approach. Radin pragmatically accepted incomplete commodification in the context of prostitution, so that the reality that a market for prostitution will continue to exist can be dealt with, but fears the commodification of surrogacy. However, *Laufer-Ukeles*argues for mixed commodification of Commercial Surrogacy by regulating it.[52]

Laufer-Ukeles has relied on Viviana Zelizer's concept of mixed commodification[53] in which her basic proposition is that "in all social settings, intimate and impersonal alike, social ties and economic transactions mingle, as human beings perform relational work by matching their personal ties and economic activity." Zelizer's basic assertion is that intimate relations cannot be completely alienated from the market nor can they be mixed with pure market transactions. Intimate relations should be partly marketable and partly unmarketable.

Laufer-Ukeles has pushed Zelizer's arguments in context of surrogacy. Many transactions like Commercial Surrogacy comprise elements of both commercialization and intimacy. In other words, money can be accepted for arrangements that are partially motivated by a sense of altruism and for performing the contract in a caring and selfless manner. This perspective gives recognition to certain endeavors which can have both the market and caring/selfless motivation, and are not necessarily mutually exclusive.

*Laufer-Ukeles*looks at Commercial Surrogacy as a classical example of the mixed commodification because surrogates themselves describe elements of both monetary and altruistic motivation for engaging in surrogacy agreements. Mixed commodification permits to accepting that there can multiple recognizable purposes for the actions of a person and therefore altruistic motives do not necessarily cancel or violate upon monetary motives. Thus, the relationship between the surrogate and the intending couple can be accepted without differing upon the commercial nature of the transaction.

*Laufer-Ukeles*has pushed Zelizer's descriptive theory into the realm of prescriptive. She argues that as certain transactions can consist of bothelements, intimacy and economics, they *should be regulated.* Regulation for such transactions should take into account the intimacy and along with the economic elements involved. Such transactions should not be prohibited as markets in intimacy, like surrogacy, will continue to grow and develop. Such transactions can also be particularly advantageous for participants and to society as a whole. However, as significant amount of intimacy is involved in such transactions, these markets should be regulated so that the plural nature of such markets can be recognized.[54]

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52 *Ibid*.

53 She relies on Viviana A. Zelizer, *The Purchase of Intimacy* (2005).

54 Pamela Laufer-Ukeles, "Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption", 8 *Ind. L.J.* 1223 (2013).

*Laufer-Ukeles*attempts to answer what constitutes of sufficient intimacy to necessitate regulations. There are many broad groups of transactions which may involve some degree of intimacy such as any sale of labor services or the sale of property. But she says that such categories involve less intimacy than surrogate motherhood because they are "*more separable from the self*". She recognizes only three broad categories of transactions, the sale of body parts, the sale of bodily functions and the sale of love,that are as intimate as surrogacy and are significantly tied up with the self. Therefore these three requires regulations for protecting and recognizing their intimacy.

She argues from a pragmatic and context-specific approach in which intimacy is taken seriously, mainly when the intimacy is so predominant that it overwhelms the transaction. She differentiates her viewpoint from an anti-commodification viewpoint as she believes that within these categories of intimacy a market can flourish in an ethical and legal manner. Therefore, a market which is regulated is appropriate for surrogacy as it can identify its commercial and intimate aspects.[55]

Regulation is the appropriate response to acknowledge the plural meanings as it can provides an intermediate position between a ban and full marketization. The reason to turn to mixed commodification along with creating the regulation for surrogacy is that it better allows for its benefits along with eradicating or atleast minimizing the potential harms. Regulations for surrogacy can be drafted cautiously to deal with the high levels of intimacy as well as with the positive benefits that marketization provides.[56]

Regulation is the appropriate response to acknowledge the plural meanings as it can provides an intermediate position between a ban and full marketization. The reason to turn to mixed commodification along with creating the regulation for surrogacy is that it better allows for its benefits along with eradicating or atleast minimizing the potential harms. Regulations for surrogacy can be drafted cautiously to deal with the high levels of intimacy as well as with the positive benefits that marketization provides.[57]

Although, *Laufer-Ukeles* has applied above stated theory of mixed commodification to domestic surrogacy in USA, it is contended that this theory of mixed commodification can be argued for Commercial Surrogacy and ISA in Indian context as well. When applied in Indian context, this theory will argue for regulation rather than prohibition on moral and ethical basis. Recognition of Commercial Surrogacy with regulations would protect the surrogates from loosing their dignity and protect them from any harm. Along with retaining the

[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*.

commercial aspect of the surrogacy transaction, it would promote the humanity of surrogate mother and recognize honors, values, and intimacy of surrogacy.

*Laufer-Ukeles*has also provided the primary regulation that reflects the mixed commodification perspectives on Commercial Surrogacy. She is of view that regulations should provide surrogates an option for post-birth contact with the surrogate baby. This right of the surrogate should be legally enforceable in the rare conditions under which a surrogate stresses upon on-going contact with the baby. She recommends an arrangement under which surrogate can be provided occasional but ongoing visitation to surrogate baby. This will help the surrogate mother in slowly disconnecting from the surrogate baby.[58]

In rare cases, when surrogates in India wish to maintain the relationship with the baby and the intending parents, this primary right should be available to them also. But if surrogate is not interested in having any such right, it should be waived-off after a cooling-off period of 2-3 months. This would give them respect and dignity that they deserve and they will not be look down upon society as doing any work for monetary purposes only. As *Laufer-Ukeles*puts it correctly that this right can provide surrogates a legally recognizable status. Surrogates will be considered as more than just a contract worker by recognizing the intimate relationship the surrogate shares with the baby and the intending parents.

4. CONCLUSION

Surrogacy agreements don't harm public good or public interest. They do not have any adverse effect also. Therefore, surrogacy agreements should not be held void and should be legal and enforceable under ICA. Ethical and moral concerns of commodification of the surrogates in India can be minimized through the lens of mixed commodification. Mixed Commodification recognizes the intimate nature of the surrogacy transaction along with the recognition that money is an essential part of it as it provides due compensation to the surrogates. Lens of mixed commodification provides justification for regulating Commercial Surrogacy and ISA in India. Therefore, contemporary pragmatic approach should be to regulate Commercial surrogacy and ISA on the basis of mixed commodification theory in India. Of course, there will be criticism to this approach but it is clear that well-designed regulation can remove most of the harms involved in Commercial Surrogacy and ISA. This regulatory approach seems to be the appropriate approach in a society in which no societal consensus exists on surrogacy.

[58] *Ibid.*

RIGHT TO PRIVACY IN THE DIGITAL AGE OF DATA MINING

—Kush Kalra[*]

1. INTRODUCTION

Privacy, as any layman recognize refers to one's individual space. But the thought of privacy for well-known personalities vary according to their field of studies. There is no abstract clarity on the concept of privacy. Some refer privacy as a form of power, "the control we have over information about ourselves".[1] While some intellectuals refer privacy as mental satisfaction or peace, a mental state of "being-apart-from-others"[2] or the situation in which the enjoyment of one's individual affairs is controlled.[3] Thus, it is not incorrect to assume that literature from different streams have dissimilar views on privacy.

Privacy when examined revolves around the theory of natural rights. When the original information and communication technologies enter into the picture, the right to privacy becomes further significant. The earliest official declaration of the privacy right can be traced back to an piece of writing by lawyer Samuel D. Warren and Louis Brandeis published in the United in the Harvard Law Review issue of December 15, 1890, entitled "The Right to Privacy". The article was focused on "protecting individuals and the authors wrote that privacy is the right to be left". The article referred to current technological advances of the period, such as photography and sensational journalism.

Based on his opinion that he established in 1890 article "The Right to Privacy," Brandeis presented his opinion where he didn't agree with other judges *Olmstead* v. *United States,*[4] in which wiretapping by U.S. government federal agents was in doubt in relation to the privacy of an individual. In his dissenting opinion, Louis suggested "constitutional law shall be applicable on privacy issues, going so far as to suggest the government [was] established ... as a possible invader of privacy." Louis further opined that "Discovery and innovation have allowed the government to obtain disclosure in court of what is whispered in the closet, by way of far more powerful means than stretching on the rack."

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1 Ruth Gavison, "Privacy and limits of Law", 425 Yale Law Journal 89 (1980).

2 Michael A Weinstein, "The Uses of Privacy in the Good Life", 94 NOMOS, XIII (1971).

3 Gross, "The Concept of Privacy", 42 NYUL Review 34, 35-37 (1967).

4 *Olmstead* v. *United States*, 1928 SCC OnLine US SC 131 :72 L Ed 944: 277 US 438 (1928).

For the entire global list for human rights, privacy is possibly the hardest to describe.[5] It may be thought of in its narrowest sense as little more than a privilege for the rich in developing countries. It can imply the last chance for the unprivileged and not so rich human beings to protect themselves against the ever-increasing forces of power structures in their communities, which are forever stretching the limits beyond which these particular individuals can still take refuge, and eventually be themselves.[6]

Writers and jurists from different fields have tried to define privacy in reference to their respective fields, yet there are only a few clear and precise definitions of "right to privacy" available. In India, the right to privacy was first explained in the case of *Kharak Singh* v. *State of U.P.*[7], by 2 Judges in a five Judges bench of the SC, as

> …the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.

William Prosser, an American legal scholar, discussed privacy in his treatise, Prosser on Torts, published in 1941[8] and in order to formulate a consistent definition, he sought to find similarities between major cases of privacy in the trial courts. But he was unable to do so and failed.

Another attempt to describe the right to privacy explicitly and correctly was made in 2015 by students at the Haifa Law & Technology Center. Their argument was that privacy doesn't require separate legislation for its protection and in their opinion, the present legal remedies are sufficient to establish right to privacy. In 2015, Haifa Center for Law and Technology students, in their attempt to ascertain explicitly and reliably the true essence of right to privacy, and in their opinion right to privacy indeed is not separate from what common law guarantees already and that the existing laws are sufficient to define the right to privacy.

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5 James Michael, *Privacy and Human Rights* (UNESCO, Manchester Univ. Press, 1973) p. I.

6 See generally, Robertson, *A.H. Privacy and Human Rights* (UNESCO, Manchester Univ. Press 1973).

7 AIR 1963 SC 1295.

8 William L. Prosser, *Handbook of the Law of Torts*, by William L. Prosser. West Publishing Co., St. Paul, 1941, pp. (*xiii*), 1309; Daniel J. Solove & Neil M. Richards, "Prosser's Privacy Law: A Mixed Legacy", 98 Cal. L. Rev. 1887 (2010).

2. RIGHT TO PRIVACY AND DATA PROTECTION: LEGAL IMPLICATION

In this era of artificial intelligence, in many fields of human activity information technology has successfully taken over and has substituted for some or in some cases all of the functions performed by the humans. Humans have now employed machines and artificial intelligence to do tasks which once were unimaginable. This substitution has proven both effective and efficient, but it brings unconventional threats at our doorsteps. In the era of convergence of technologies accessing any data present on the internet is possible regardless of the jurisdiction in cyberspace.

With the advancement in the information technology, crimes have also made their way to the virtual world. Committing a crime is now as simple as a single click; computer geniuses with corrupt minds can get secured information with very few or no effort at all. With digitalization, information serves important role in our lives, and the lust for this information acts as a catalyst in the growth of cyber-crimes.

Databases carry a wide variety of information and for most part are easy to create, the problem arises when question of security and integrity of these databases is raised. "The focus of every stakeholder in the field of data protection is to discover perfect method for data protection. Therefore, the challenge for business houses, financial institutions and the governmental bodies to protect their huge databases is growing day by day. The risk of privacy breach or data loss is also increasing day by day in the absence of any particular stringent law relating to data protection as miscreants are growing stronger by gaining expertise in their work"

Introduction of the information technologies were aimed at simplifying our lives but it left certain anomalies in procurement of its objects which has inevitably resulted in data thefts and involuntary data disclosures. Unlike India, many countries has tried to reduce the amount of data losses and data thefts by incorporating data protection law as separate discipline. Their laws are well framed, farsighted and exclusively for data protection.

When we talk about surveillance, this is known internationally that wiretapping and electronic surveillance are a particularly invasive method of interrogation and can only be used under restricted and rare circumstances. Thus, nearly all International agreements on human rights protect the right to privacy of individuals. Unwarranted invasive surveillance is not appreciated in any part of the world.

2.1. Need for Regulation of Data Protection

There is no doubt in the statement that developments in the field of information technology is the foundation of the concerns about security, respect of fundamental rights and privacy and at the same time it has immensely contributed in both globalization and virtualization of society. These developments have revolutionized the way humans interact with each other and for the most part technology has taken place of the human beings. Maintaining huge information has never been easier than it is today. But the very nature of these technologies has also allowed data theft and infringement of privacy in an unprecedented way. One such example of threat to the individual privacy is reflected in the number of unidentified and unsolicited emails received by consumers today by number of organizations and businesses who are trying to make profit by selling their product or service through these calls and emails to the consumers based on the data collected by them or other organizations which is not disclosed to the consumers. Thus, an effective measure to protect the privacy of individuals and businesses is required and awareness amongst people is utmost important.

In respect of data protection law, the problem lies in ascertaining which regulations will actually benefit citizens and how will the regulations safeguard their interests. Further, the data protection laws must take into account the conflicting interests that of individuals, organizations and the government.

3. MODES OF PRIVACY PROTECTION

There are four major models for privacy protection. Such models can be complimentary or contradictory depending on their use. Several versions are used concurrently in most of the countries analyzed in the study. In countries that protect privacy most effectively, all models are used together to ensure the protection of privacy.

Comprehensive Laws: "Most of the nations around the globe use common laws to govern collection, use and protect personal information of their citizens by both the public and private organizations. To ensure the compliance of the provisions of such common laws, usually an authority or an oversight body is entrusted with this duty. Such models can be complimentary or contradictory depending on their use. Several versions are used concurrently in most of the countries analyzed in the study. In countries that protect privacy most effectively, all models are used together to ensure the protection of privacy".

Sectoral Laws: "This model uses separate specific sectoral laws used for governing instead of comprehensive laws. A variety of mechanisms is used to ensure enforcement. But this mode of protection has a major drawback as it requires specific legislation for every new technological development, rendering

protection to lag behind. This drawback is evident from the fact that there is a lack of legal protection to individual's privacy in the US. Thus, this mode of protection alone is not sufficient and hence, it is used to complement the comprehensive legislation by eliminating technical limitation of comprehensive laws and by providing more detailed protection for specific categories of information"

Self-Regulation: "Theoretically, protection can be achieved via self-regulations as well. Under this approach, organizations are supposed to make use of codes of practice and engage in self-policing. But statistical data disagrees with this theory as many countries which used this method of protection, including the US, failed to fulfill the aim of privacy protection. Adequacy and compliance are the key issues with these methods. Industry codes have appeared to have only poor security and lack of compliance in many countries"

Technologies of Privacy: "With the latest development in the information technologies, the individual privacy protection has also moved into the hands of the individual users. Development of sophisticated computer programs and computer systems has allowed the users of the internet to choose between various degrees of protection and security for their communications. These include encryption, anonymous remailers, proxy servers and digital cash. Users should be mindful that not all tools are successful at preserving privacy. Many are improperly designed, although some may be designed to encourage access to law enforcement".

4. DATA PROTECTION AND INTERNATIONAL LEGAL PERSPECTIVE

4.1. European Union Data Protection Directives

European Union enacted the Data Protection Directives in the year 1995. These directives aim at harmonizing states' laws within the European Union and to ensure equal levels of protection is ensured to the citizens. These directives set a baseline, which introduce common level of privacy to the citizens along with a range of certain other privacy rights. It targets the processing of personal information in both manual and digital form. European Union directives work on the 'enforceability' model of data protection. Citizens of European Union are vested with various privacy rights which are ensured by the European union by appointing data commissioner or agency that look after the enforcement of these directives. The countries which intend to do trade with Europe must provide a similar degree of oversight. The basic principles set out in the Directive are: the right to know where the data originated; the right to correct incorrect data; the right to redress in the case to improper processing; and the right to withhold permission to use the data under such circumstances.

The 1995 Directive places an obligation on member states to ensure that when exported to and processed in countries outside the European Union, personal information relating to European citizens has the same degree of protection. This necessity has led to an increasing demand outside Europe to pass the laws on privacy. "Those countries that refuse · to enact adequate laws on privacy can find themselves unable to conduct certain types of information flows with Europe, particularly if sensitive data are involved. In 1997 the European Union supplemented the 1995 Directive by adopting the Guideline on Privacy in Telecommunications.[9] This guideline laid down unique guidelines covering telephone, digital television, mobile networks and other telecommunication systems. It placed specific requirements on carriers and service providers to protect the privacy of communications between users, including Internet-related activities. It protected regions that had been slipping between the cracks in data security law until then. As was the marketing operation, access to billing data was heavily limited. Caller ID technology needed to add an option to block number transmission per-line. Data obtained when a contact was transmitted was expected to be purged once the call had been completed".

The Committee on Civil Liberties (LIBE Committee) has expressed itself in support of tight control of access to citizens' personal data by law enforcement agencies, such as email traffic and location data. This decision is important because in this way the EP is blocking the continuing attempts of European Union states in the Council, following the Echelon model, to put their people under systematic and omnipresent surveillance.

"On 25 June 2002 the Council of the European Union adopted the Directive on Privacy and Electronic Communications, as agreed in Parliament.[10] Under the terms of the new Directive, Member States can now pass laws requiring that traffic and location data be maintained for all communications on cell phones, SMS, landline telephones, faxes, e-mails, chat rooms, the Internet or any other electronic communication devices. These standards may be enforced for reasons ranging from national security to criminal crime prevention, investigation, and prosecution".

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[9] Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 on the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector (Directive), Available at <http:// eurlex. europa. eu/smartapi/ cgi/sgadoc ?smartapi % 21 celexapi% 21prod%21 CELEXnurndoc&lg=EN&numdoc=3 1997L0066&model=guichett>.

[10] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), available at <http:// eurlex.europa. eu/ LexUriServ!LexUriServ.do?uri=CELEX:32002L0058:EN:NOT>.

4.2. Data Protection and Indian Legal Perspective

India is viewed as one of the major nations in terms of information technology. The growth in the information technology is reflected by the rapid increase in the number of technology related crimes in India. Data protection or information privacy protection is a major concern in this nation, where right to privacy doesn't hold any place in the Constitution of India, rather it is recognized as part of Article 21 of the constitution. But the interpretation of Article 21 is not sufficient to tackle the modern issue of data protection. However, in the year 2000, Indian legislatures made an attempt to deal with the newly introduced cyber-crimes by introducing *Information Technology Act*, 2000. The said act aims at providing certain provisions for protection of stored data, but it doesn't provide with any provisions for crucial aspects of data protection which weakens the effectiveness of this act towards data protection.

The Indian *Information Technology Act*, 2000 under section 2 clause 'o' defines data as:

> data means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer[11]

***The Credit Information Companies (Regulation) Act*, 2005** includes some provisions that ensure data security but its scope is limited. It only imposes duties on credit information providers, financial institutions and users listed during the processing of financial data.

This Act provides for rules relating to the accuracy and protection of credit information, includes a concept of intent restriction, provides for a duration of preservation of credit information, a right of access and a right of rectification. It does not, however, include rules guaranteeing an overall right to information. In addition, no clear authority has been formed under this Act to ensure compliance with those provisions".

In the year 2006, the Indian legislature introduced 'The personal Data Protection Bill, 2006' to protect the personal information of persons which is not explicitly protected by the *Information Technology Act*, 2000.

11 Information Technology Act, 2000, S. 2(*o*).

5. INFORMATION TECHNOLOGY ACT, 2000: SOME REFLECTIONS

This act is India's first safety measure against the cyber-crimes and contains various provision for the same and also provides provision for penalties where the standard measures are violated. The act under section 43[12] provides protection against the unauthorized access of the computer by miscreants and it also imposes hefty fine of 1cr violation of this provision. The scope of this provision extended to cover within its ambit the unauthorized downloading, extraction and copying of data. Claus (c) of the same section prohibits introduction of computer viruses or contaminants in a computer without the knowledge of the owner and imposes fine for such unauthorized introduction of viruses or contaminants. Assisting the unauthorized access also attracts penalties under this section.

Section 65 of the act deals with the head of 'Tampering with computer source documents' and states:

> Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.[13]

This particular provision is aimed at providing protection to the computer source documents against tampering.

Section 66 under this act provides protection against 'Hacking'. The section 66 reads as follows:

> **S. 66 Hacking with computer system.**
>
> (1) "Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hack:

[12] Information Technology Act, 2000, S. 43.
[13] Information Technology Act, 2000, S. 65.

> (2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend upto two lakh rupees, or with both".[14]

The key term used in this provision is 'intention or knowledge to cause wrongful loss or damage to any person' by altering or misappropriating the information or data residing in a computer source. Hacking is a serious crime under this act.

The act also has provisions for protection of data stored in protected systems. Section 70 states:

> **S. 70. Protected system.**
>
> (1) "The appropriate Government may, by notification in the Official Gazette, declare that any computer, computer system or computer network to be a protected system.
>
> (2) The appropriate Government may, by order in writing, authorise the persons who are authorised to access protected systems notified under sub-section (1)".

Protected systems are ascertained by the appropriate government by issuing gazette information in the official gazette. Any person who contravenes with this provision and gains access or attempts to gain access to a protected system would be liable for appropriate punishment and fine under this act.

The *IT Act*, 2000 introduced some form of regulation over the use of encryption for communications in India.[15] The Act takes into account the 'key-pair encryption' scheme used to store and authenticate digital signatures. The Act explicitly provides for the deposit of the public key with a certifying authority. This issue is resolved under section 69 of the *Information Technology Act*, 2000.

Section 69 *IT Act*, 2000 provides the power to intercept any transmission to the Controller of Certifying Authorities if certain conditions are met. One of these requirements is National security, and questions about the nation's sovereignty and dignity. In such a situation, the user has an obligation for the authority to decrypt the content. However, the feasibility of that clause remains uncertain. The section specifies that any recipient can be called upon by the controller to decrypt a message in case of need.

It can be seen that the controller has full power to decide if there has been a situation under which a transmission may be intercepted in the interests of

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[14] Information Technology Act, 2000, S. 66.

[15] See, Chs. III, IV and V of The IT Act, 2000.

national security. The right to encrypted communication can be seen as an integral part of the right to privacy that derives from Article 21 of the Constitution. In such a case, the right can only be curbed by a "law-setting process." It is now well-resolved that such a process must be accurate, only fair and logical to be legitimate.

Upon a clear reading of section 69, it can be inferred that "the procedure is not satisfactory because it leaves the controller's full discretion. The act resembles the Telegraph Act, 1885, which was in question in *PUCL Case*.[16] In that case, if one follows the decision, it can be assumed that insufficient procedural protections will make this section inapplicable".

However, given that the provision often provides for penalties in the event of non-compliance, it is important to implement more stringent protections into the framework. Therefore, the issue as to what constitutes a threat to security or whether the friendly relationships are being threatened should not be left to the controller's sole discretion, but must come from the legislature. Instead, the controller should formulate specific regulations under Section 89, defining strict requirements for when the nation's protection is under threat and the like. Under the absence of these steps, the clause under Section 69 could be treated as a violation of the right to privacy in the light of Article 21 and, accordingly, as unlawful and void ab initio.[17]

As with any problem concerning constitutional rights, the validity or, instead, the invalidity of limits on cryptography and encryption practice remains pure conjecture. True, the right to privacy is acknowledged as being inherent in Article 21's right to life with dignity, and Article 19's right to freedom of speech and expression. None of these can and should be permitted to serve as an obstacle in curbing practices which are harmful to national security and interests. Not unexpectedly, when they can be stripped both of these rights include express requirements.[18] At the same time, it is difficult to allow the balance to till entirely to one side, in order to negate the fundamental freedoms, even if not absolutely necessary. The only way out is for the two sides to agree. Although the constraints on cryptography and encryption can be abused for some unlawful reasons, the right can even be misused for anti-national operation.

The technology which encryption uses may be a potential solution to the problem. It's got to look at the problem, at a double stage. At one hand, the issue is encryption and cryptography as a free speech mode, and at the other, cryptography as an integral part of the right to privacy is the most relevant thing. Whereas the former may be subject to fair limitations, the latter can only be limited by law-setting procedure. With regard to the question of freedom of speech,

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[16] *People's Union for Civil Liberties* v. *Union of India*, (1997) 1 SCC 301: AIR 1997 SC 568.

[17] Nandan Kamath; Law Relating to Computers, Internet and E-Commerce-A Guide to Cyber Law, Universal Pub. Delhi (Reprint, 2005) p. 391.

[18] *Ibid*.

following the principle adopted by the courts in allowing limitations on certain modes of expression would be only fair.

6. CONCLUSION

Right to privacy is an intimate right to protect "private space", a person may control the flow of information of his personal affairs or may even keep such information to himself. Key ingredient of Right to privacy is individual autonomy. Mathew J. in *Gobind* v. *State of M.P.* observed "right to privacy" is not an absolute right, but includes within its ambit the 'right to be let alone'. He while referring to the famous article, "The Right to Privacy", written by lawyer Samuel D. Warren and future U.S. Supreme Court Justice, Louis Brandeis, explained that privacy, and right to be let alone, is an independent right, a person may exercise this right independent of his efforts to protect other interests. Blackmun J. further explained the "right to be let alone" in Bowers, Attorney General of *Georgia* v. *Hardwick et a* stating that this right shall not be considered a negative right to acquire space free from intervention of authorities, rather it is a right to live life and make personal choices and fundamental decisions in life without the penalization.

Technological advances in modems, and particularly the so-called convergence of computer and information communication technology, have created an environment in which personal information is readily available. It is not only important for the security of individual privacy but also a threat to personal safety, i.e. personal safety. Accordingly, designing a comprehensive policy that can establish an enabling environment for overall privacy security and find an acceptable balance between privacy and other competing interests is vitally necessary.

Today, customer electronic information is obtained, stored, and sold; all done without fair protections. Increasingly, customers rely on the Web and other digital platforms for a broad variety of transactions and platforms, many of which include their most sensitive issues, including health, political, and other personal matters. Around the same time, several firms now participate in behavioural ads, which includes surreptitious market monitoring and targeting. Click-by-click, the internet habits of users – the searches they make, the web pages they access, the ads they post, the videos they stream and their other experiences with social networking sites, the email ads they submit and receive, how they spend money internet, their actual locations via mobile computer apps and other details – are logged into an expanding profile and analyzed in order to target them with more "relevant" advertising.

It is distinct from the "targeting" that is used in contextual advertising, where advertisements are created by a search that someone is performing, or a website that the person is browsing at the time. Behavioral monitoring and targeting will merge web-wide online activity history with offline-derived data to

create much more accurate profiles. In certain cases, the data obtained by behavioral surveillance may disclose the person's identity, but even where it does not, the surveillance of people and the sharing of personal or behavioral data pose many questions.

A developing nation like India must therefore seek to maintain a balance between the provisions of internationally applicable laws and the Indian legal framework relating to technology convergence focused mainly on IT applications i.e. Electronic- Network Telegraph. Cable, Cable, and Internet broadcasting.

Ability to emerging technologies (i.e. incorporation of technologies) is of utmost importance for achieving desired social and economic goals. Also needed with the development of the international communication landscape is the availability of an accessible and efficient communication medium for people with due vision of Information Protection and security care. The formulation of potential corrective and cooperative measures in terms of control and regulation is the need in a straightforward way for the globally challenged computer and internet environment.

With the advent of the Internet, the discovery, manipulation and collection of private and confidential information of individuals as well as state parties has now become quite simple. What was scattered, unimportant, small bits of data have now become a powerful broad collection of data that unauthorized individuals and anti-social elements can collect and misuse. In view of these remarkable changes several countries have introduced and implemented legislation on privacy protection and enforcement.

Privacy has no fixed boundaries and different individuals have different definitions. This is an individual or group's right to monitor the flow of personal information about them, and to keep their lives and personal problems out of public domain. There are already huge concerns regarding the security of personal data and information, especially in relation to one's right to privacy.

7. SUGGESTIONS

Considering the effect, the following recommendations for improving the IT legal framework and its effects on multiple aspects of privacy are advanced:

1. "Even more needs to be done in India to understand and protect privacy by statute. As a matter of fact, this idea is in the nascent stage of its development but with the advent of information technology its advancement is expected to have a profound impact on the life of the human. Therefore, it is recommended that the 'Right to Privacy' should be recognized as

a separate constitutional right with clear rules on this delicate privacy issue.

2. An individual's right to protect his or her personal information is a fundamental civil right, and is accepted worldwide as such. Thus, with respect to data and personal privacy, India should enact laws to protect individuals' personal data and to ensure that data collected for a specific purpose is not used for unwarranted purposes.

3. Current *IT Act* of India is not comprehensive when it comes to curb cyber-crimes. Therefore, there is a need for more stringent provisions in the *IT Act*. Cyber-crimes require specialized knowledge, thus the need of the hour is trained professional for investigating and prosecution purposes, this will allow the state to overcome the technical hurdles faced during trial of cyber-crimes.

4. The balance must be struck in terms of the scope of regulatory provisions and changes by consensus in the standard format of paper-based transactions, so that flexibility in IT-based transactions, i.e. electronic transactions, can be retained. As applicable in common legal terms, this will be subject to fairness and reasonableness checking".

5. Given the inherent technological challenges and drastic improvements in technology implementation, it is high time to rethink cyber laws and provide users with security by improving the techno-legal system and maximize more innovative side or advantages of information communication technologies. In short, everyone should be aware of and actively engaged in the prevention and resolution of the disruptive side of information communication technology, with an acceptable balance between legislation and self-regulation, subject to various forms of cyberspace activities.

Last but not least, the legislation must be coordinated and established with all practicable means of upholding good moral and ethical principles in order to resolve the challenges presented by technological advances. In order to protect privacy and confidentiality in this age-driven database, the uniformity in law and the standardized codification of Internet law must be established by the world community.

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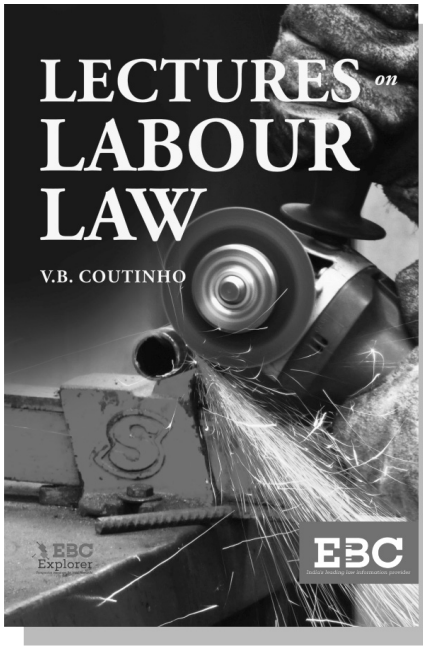

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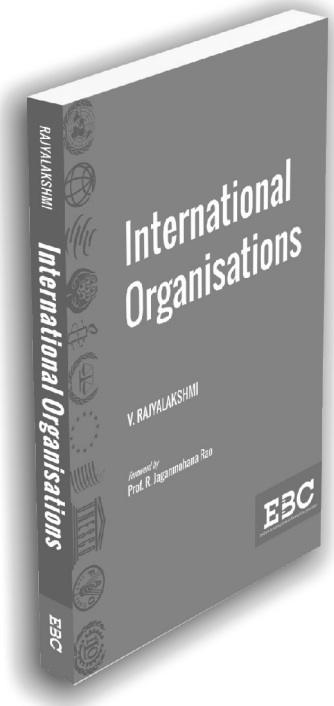

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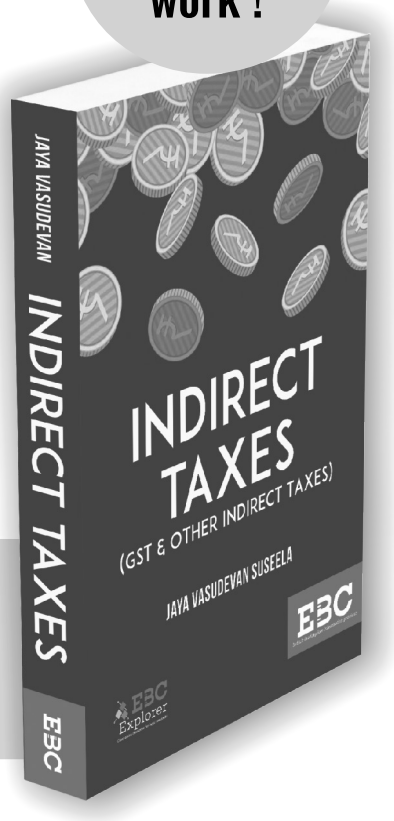

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