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From the Editor's Desk

It is well known that the discipline of law guides and enriches the quality of various domains, drawing good practices from international jurisdictions, contemporary developments, and deep-rooted ethics and value system, prevalent in different societies and cultures. With the evolution of technology, internationalization, and emerging trends in various activities, it has become important to be aware of the legal implications of several day-to-day functions. For this purpose, promoting awareness of legal systems and legal studies have assumed priority. In this context, in line with its commitment to foster a knowledge society and to promote scholarly activities, Amity University Dubai is happy to bring out this Law Journal, which focuses on various contemporary issues that are of interest to scholars, practitioners, academicians, and students.

This first edition of Amity Law Journal from Amity University Dubai is a treasure trove of latest legal issues around the world, perspectives of legal luminaries, their approaches, resolutions and interpretations. This issue contains ten research papers, wherein authors have discussed a range of topics covering contemporary Chinese joint crime system, implications of Indian legal system on the health sector, corporate governance in insurance companies, commercial arbitration with an international focus, judicial review of legislative actions, balancing privacy and right to information, and issues relating to cyber space in the European Union.

The editorial committee extends its appreciation and gratitude to the authors from different countries, without whose dedication to research, this journal would not have been possible. The editorial committee also places its deep sense of gratitude to the reviewers for their valuable comments to the authors, which have been helpful in enhancing the quality of the papers and bringing out the journal in its present form.

It is the constant support, commitment and passion of the members of the editorial committee and their engagement with the editorial committee at various stages in the preparation of this issue has enabled to bring out this contemporary, scholarly compilation of research articles from authors around the world on various important issues.

We are confident that this Journal will prove to be valuable reference, and rich source of information to all researchers from academia, corporate, and those in practice.

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UNITARY JOINT CRIME SYSTEM: A PERSPECTIVE BASED ON THE ANALYSIS OF CHINESE JOINT CRIME SYSTEM

Dong Yan *

Abstract

This paper proposes a new perspective of understanding the nature of joint crime offenders in Chinese joint crime system specifically, focused to introduce the Chinese joint crime system in details, including the rations and some historical background information. Then, the analysis of the most controversial issue in Chinese joint crime system: the criminality of instigator generally depends on the target crimes and the means that the instigator applied and the harm that would done on the victims. A new perspective of elements for each joint crime offender in a unitary system was then proposed for the unitary joint crime system to combine the rations from distinguished joint crime system: as for mens reus, each offender not only has criminal intention but also taking advantage of other criminals' actus reus or other conditions, such as identities and so on, to directly or indirectly pursue the criminal consequence. As for the actus reus, they may appear in forms of arouse, participate, support or control in joint crime so as to individually or jointly fulfill the crime elements regulated in the specific part of criminal law. The principal of personal criminal liability is also clarified by reviewing the elements from this perspective and functions of an individual offender. Taking instigator as an example, boundaries to avoid overgeneralized criminal responsibility should be built up with the possibilities of the realization of criminal purpose, the possible harmfulness brought to the victim and the importance of the legal interest aims to protect.

Keywords *Theory of Joint Crime, Unitary and Distinguished Joint Crime System, Elements of Crime Constitution, Personal Criminal Liability, Understanding Joint Crime System of China*

I Introduction

The basic principle of modern criminal law, "*Nullum crimen sine lege, Nulla poena sine lege*" tries to eliminate penalty abuse by setting elements in the specific part and requiring that only when behaviors are in full compliance with those elements in crimes regulated in specific provisions in criminal code, there are corresponding punishments. Therefore, a fundamental joint crime theory occurs; when a joint crime perpetrator's behavior is not in full compliance with the elements of provisions in special part in criminal law, where the justification comes from for the punishment of co-perpetrator. Joint crime is a particular form of crime. The perpetrator's behavior is not necessarily in full compliance with the requirements of the provisions in criminal law. Consequently, in order to solve this problem, many countries, especially in continental law system, have their own theories to rationalize the system of joint crime, for instance, the distinguished system and unitary system. From an international perspective, Germany is one of the most typical representatives of the distinguished system; meanwhile, China has developed the unitary system with its own features.

II The joint crime system in Chinese criminal law

To start with the joint crime system in Chinese criminal law, it is necessary to have a general understanding of liability requirements and theories of crime in Chinese criminal law system. Generally, there are four liability requirements to constitute a crime. The Chinese criminal law liability theories are composed of joint crime system and inchoate crime.

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According to “Yao Jian” to constitute a crime and to establish criminal liability: object of the crime which is called in Chinese term Fan Zui Ke Ti.

According to Fan Zui Ke Guan Fang Mian, both aspects of the crime (the person who commit the crime); and the criminal subjective aspects mens reus or guilty mind, (the persons’ direct intention, indirect intention, recklessness or negligence¹). If all those four requirements are satisfied, a persons’ action constitutes a crime, and the person is criminally liable.

Different from German criminal law liability requirements, Chinese crime constitution theory is not strictly focusing on distinguished steps², but pursuing the integration of subjectivity and objectivity (zhu ke guan xiang tong yi). This principle is known as an important guiding rule in identification of crime in Chinese criminal law system. In terms of inchoate crimes, the Chinese criminal code divides inchoate crimes into three parts: the crime preparation, attempt to commit a crime and discontinuation of a crime. According to the criminal code, when imposing criminal liability on someone prepared to commit a crime, the court should impose a lesser or mitigated punishment relative to the punishment for a completed crime or should exempt the actor entirely from the criminal liability.³ Attempt to commit a crime refers to a situation where an offender began to commit the crime but could not complete the crime because of the reasons beyond the offenders’ control. The punishment imposed on an offender who attempts to commit a crime is lighter or mitigated in comparison with one who accomplishes the crime.⁴ Discontinuous of a crime refers to a case where, during the process of committing a crime, the offender voluntarily terminates the criminal activity or voluntarily takes action to prevent the harmful consequence from occurring.

The Chinese criminal code does not impose criminal liability on an offender who successfully discontinues the criminal activity before causing any damage. However, the code does impose a mitigated punishment on an offender, if any damage resulted.⁵As another part of the criminal theory according to Chinese criminal law code, joint crime refers to an intentional crime committed by two or more persons jointly⁶. If a crime committed negligently by two or more persons jointly, the crime is not regarded as a joint crime. They should bear the criminal responsibility individually according to the crimes they have committed.⁷

Generally, joint crime in Chinese criminal law system requires:

- a. The crime committed (with different forms or same) by two or more persons;
- b. The harmful consequence, act or risk (objective aspects) must be the product of conspiracy of between two joint criminals;
- c. The participants must have common intentions (either direct or indirect intention) and criminal intention.

¹ Direct intention: a person clearly knows that his act will produce harmful consequence and desires that such Consequence will occur. Indirect intention: a person clearly knows that his act will produce harmful consequence let such consequence happened with acceptance. Recklessness: where the person foresaw the harmful consequence but believed that those consequences could be avoided. Negligence: where the person should have foreseen that his act might cause harmful consequence, but didn’t foreseen the results and made it happened.

² Kevin Heller and Markus D.Dubber. edited., *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011), 259.

³ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),11. Article 22.

⁴ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),12. Article 23.

⁵ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),12.Article 24.

⁶ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),13.Article 25.

⁷ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),13. Article 25(2).

Typology in Chinese joint crime system is mainly classified by the criminal's function. There are three types of joint crime offenders: principal offenders, accomplices and coerced offenders⁸. Whilst, another type of legislated criminal is the instigators, which is classified by division of labor⁹ among joint crime offenders. Other types of joint crime classified by division of labor in theory are: organizer (who organized the criminal group or played the role of organizing in a joint crime), perpetrator (who commits the crime by their own behavior to constitute the criminal requirements), and abettor (who offer help either mentally, physically or financially). But only instigator is specifically legislated as a specific type of joint crime offender. The instigator historically and continuously owns its independence status in Chinese joint crime system.

Since the dynasty of Han, there were accomplice regulations in criminal regulations, until Tang dynasty, the accomplice regulations had grown into a relatively complete system.¹⁰ According to the "Law of Tang" and its legal interpretator "Tang Lv Shu Yi", Regulations of joint crime system are as followed: "in terms of all joint criminals, the principal criminal is those who had the intention of crime (the instigator), the punishment of the others "followers" should be reduced to another level". 'Mindful of the criminals' role and function to classify joint criminal, as a matter of fact, is derived from ancient and contemporary China and deeply imbedded in Chinese legal systems. It is necessary to notice that the principal offender in Chinese criminal law system is not equal to the perpetrator conformed to the elements or requirements in a distinguished joint crime system.¹¹ There are two types of principal offender: those who organize or lead criminal groups (criminal syndicate) and those who play a principal role or function in a joint crime.¹² Article 26(2) of the criminal code defines the criminal syndicate as a relatively permanent and stable organization consisting of more than three persons who come together for the purpose of committing crimes.¹³

The ringleaders who organize and lead the criminal syndicate are liable for all the crimes committed by the criminal group.¹⁴ The term of "all the crimes committed by the criminal group" does not mean "all the crimes committed by the members of the criminal group". Criminal liability of crime offender depends on its integration of subjectivity and objectivity. Members who commit other crimes which are beyond the criminal groups' nature or intention would be only self-responsible.¹⁵ Other than the ringleaders, principal criminals are only responsible for their own behaviors of their specific crime participation, organizing or commanding behaviors.¹⁶ The accomplice in Chinese criminal law refers to persons who play a secondary or supplementary role in a joint crime.¹⁷ A lighter or mitigated or exempted punishment shall be given to an accomplice.¹⁸

⁸ The coerced criminal is a legislated type of criminal, however faced with some controversies for the inconsistency typology with principal offenders and accomplices. See below for more information about a general understanding of coerced crime in Chinese criminal law.

⁹ Different types of criminals are regulated in article 26-29 in Chinese criminal law.

¹⁰ Dai Yanhui, *A Chinese legal history* (Taipei: Sanmin Shuju, 1971), 73.

¹¹ Mingxiang Liu, "On Doubting the Tendency of Treating the Principal as Perpetrator," *Chinese Journal of Law* 5(2013): 114.

¹² Criminal Law of the P.R.C (Beijing: Law Press China, 2015), 14. Article 26(1).

¹³ *Ibid*, 26(2).

¹⁴ *Ibid*, 26(3).

¹⁵ Bingzhi Zhao and Yirong Chen, "On Understanding Joint Crime and its Applications." *Chinese Criminal Law* 38(1999): 11.

¹⁶ *Ibid*, 12.

¹⁷ Criminal Law of the P.R.C (Beijing: Law Press China, 2015), 15. Art. 27(1).

¹⁸ Criminal Law of the R.R.C (Beijing: Law Press China, 2015), 15. Art. 27(2).

Those who play a secondary role in a joint crime is an accomplice directly involved in the criminal activity, while an accomplice who plays a supplementary role is indirectly involved in a joint crime by abetting the principal offenders, such as by providing them with information, tools, or a hideout.¹⁹ Depending on the circumstances of the crime the offender commits, a mitigated or exempted punishment shall be given to the criminals who are coerced to participate in a crime. Both the coerced subjective aspects and the criminal circumstances shall be taken into consideration as factors for the punishment. Rather than a typical type of joint crime offender, coerced criminal is both a historical retention of a former criminal policy in 1945 and a product of humanism spirit in Chinese Criminal Law. The leniency policy on the coerced and deception criminals is legislated in Chinese criminal law in 1979.

While in both 1997 and current criminal law, only the coerced offenders were retained and granted the leniency policies. Instigators, according to Chinese criminal law, shall be punished according to the role he plays in a joint crime. While anyone who instigates a person under the age of 18 to commit a crime would be given to a heavier punishment.²⁰ While, if the instigated person didn't committed the instigated crime' the instigator may also shoulder a lighter or mitigated punishment.²¹ To sum up, the joint crime system in China is a typical unitary crime system,²² it conforms to all those following features: a) the persons that create conditions for committing joint crime are all co-offenders; b) the system does not focus on telling the different form of participation; c) it is necessary to discuss the criminal behavior individually in order to consider if the criminals have committed a crime; d) applying the same legal regulated penalty to each criminals; e) and then specific punishments were convicted according to their own degrees of participation of the crime.²³

In conclusion, the general rule for joint crime in Chinese criminal law is as followed:²⁴a. the behavior (including organizing, perpetrating, instigating and helping) of the joint crime offender had infringed the legal interest protected by criminal law; b. the participants have his criminal intention to commit those behaviors; c. when it comes to weighing their punishments, considering the function and the roles in the joint crime to decide if they are the principal criminals or the accomplices, and give them different degrees of punishments accordingly.

III The criminality of instigator in unitary joint crime system

The most controversial issue among Chinese joint crime system is on article 29(2)²⁵, namely, to regard the instigator as a criminal even if those who are instigated don't commit the instigated crime. From this perspective of view, it reminds the fundamental question mentioned at the beginning: whether the criminality of each joint crime offender depends on its own criminality or affiliated to a perpetrator who conforms to the criminal elements. One of Chinese scholars had put forwarded that the instigator as a type of joint crime offender has a feature of duality.²⁶ It has both accessory features when there are perpetrators' behaviors, while on the other hand, the instigator has its own independent criminality nature even if the instigated person did not commit the instigated crime.

¹⁹ Kevin Heller and Markus D. Dubber. edited., *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011), 151.

²⁰ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),16. Art.29(1).

²¹ Criminal Law of the P.R.C (Beijing: Law Press China, 2015),16.Art.29(2).

²² Mingxiang Liu, "The Joint Crime System in Chinese Criminal Law," *Journal of Chinese Legal Studies* 6(2013):119.

²³ Norio Takahashi, *The theory of complicity* (Katori:Seibundo, 1988), 6.

²⁴ See appendix for a glimpse for the structure of the criminal liability system in Chinese criminal law.

²⁵ If the instigated person didn't commit the instigated crime, the instigator may also shoulder a lighter or mitigated punishment.

²⁶ Liucun Wu, "On the Duality Nature of Instigator," *Chinese Journal of Law* 1 (1982): 17.

The instigators' behavior is different from merely an expression of criminal intention. In a sense, the behavior of instigation had its own significance in affecting and inciting others to commit crime and consequently owns an independently harmfulness to the society. No matter if the instigated person had conducted the instigated crime; instigating others to commit crime would be regarded as a crime. The scholar had further argued that as soon as the instigating behavior had done, there is criminal liability for the instigator. Whilst the accessory nature of the instigator are deduced from Art.29(1) in Chinese criminal law, since the liability of instigator depends on the role it has played when he had committed the crime jointly with others.

Other scholar insisted that the independence nature of instigator may come to the first place. The instigator has its own function and its criminal liability does not affiliated to the perpetrator' behavior but rather depends on the role he played in the joint crime, even though there isn't a joint crime, there are also criminal liabilities for his own instigating behavior. Accordingly, the accessory nature for the instigator is neither in criminality nor in liability.²⁷ As a basic feature of unitary joint crime system, each offender has its own criminality, no exception for the instigator. Even in the most remote point from committing or constitute joint crime, namely, when the message of the instigator didn't reach the targets, the instigator itself has its own criminality. From a global perspective, not only unitary but also distinguished joint crime system have recognized of the criminality of instigating of a felony. For example, the German criminal law, as typical distinguished joint crime system, also explicitly states that: anyone who attempts to induce another to commit a felony or abet another to commit a felony shall be liable according to the provisions governing attempted felonies.²⁸

The behavior of instigating others to commit crime itself would create risks for the aimed protecting legal interests.²⁹ As for some crimes committed in forms of organization or gathering, the instigator, worked as a criminal intention sower and planter, or a controller by means of inciting others with slogans could also be regarded as a mandatory requirement to constitute a crime, while in some circumstances, it doesn't necessary for the instigated ones to commit a crime, the way they are gathering or the way mobs assembly together itself could be a crime.

On the other hand, instigation by different means, for example, in a private way or in a public way, taking form of threats or pressure as well as sollicitation,³⁰ and maybe implied as well as express,³¹ as well as the target crimes³² could weigh different social harm extents, and therefore left discretion for a judge to decriminalize or criminalize the instigator legally.³³ Another factor to take into account in defining the criminality of an instigator is the harm that he had done on the victims. Although the instigated person has not committed the instigated crime, a public instigation or an occasion that the instigator creates would make the victim involved in a detrimental situation or environment full of risk.

²⁷ Kechang Ma, *On the General Theory of Crime* (Wuhan: Wuhan University Press, 1999), 556.

²⁸ Michael Bohlander, trans., *German Criminal Code Article 30(1)* (Saarbrücken: juris Ltd., 2010), 9.

²⁹ Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch Des Strafrechts Allgemeiner Teil*, trans. Jiusheng Xu (Beijing: China Legal Publishing House, 2001), 850-851.

³⁰ David Ormerod QC and Karl Laird, *Smith and Hogan's Criminal Law* (Oxford: Oxford University Press, 2015), 533.

³¹ *In people(Attorney General)v. Capaldi*, n.186, where the defendant suggested to a doctor that something "be done for" a pregnant girl, adding that he had adequate funds to pay the doctor's fees, it was held that the specific request coupled with the financial incentive was sufficient to constitute incitement.

³² The criminality could also depend on the crime the instigator intends to incite.

³³ Article 13 of Chinese Criminal Law, in the part of "however, if the circumstances are obviously minor and the harm done is not serious, the act shall not be considered as a crime." This part is known as "Dan Shu" if literally translated directly by Chinese.

The most fundamental principal for a unitary joint crime system is the criminality for each participant. Whilst, comparing to the distinguished system, there are pros and cons. When a unitary system follows this criminalization mode of the offender, the stereotype function in the specific part of criminal law is not well remained in a unitary joint crime system. However, taking the role and function of each participant in a joint crime into consideration as for penalties would be the most targeted idea to realize the principle of commensuration.

From another perspective, those two different joint crime systems may share common ideas for they apply substantial legal interpretations. For example, many German scholars tend to suggest a substantial criterion: perpetrators are those who “dominate” the commission of the offense, in other words, those who control over whether and how the offense is carried out³⁴. While this rule is what a unitary system used as one of the standards to distinguish the principal offenders and accomplice. Come to this point, this article would also like to propose a new perspective to strength the stereotype function for the unitary system and take the situation of instigator as an example to mitigate the potential hazards of “subjectivism criminal law”.

IV A new perspective of understanding unitary joint crime system

The nature and elements of each joint crime offender

There are “theory of common crime”³⁵, “theory of common behavior”³⁶ and “theory of common intention body”³⁷ developed in the distinguished system to answer the question of what the joint crime offender “shared jointly” so as they are defined as a joint crime. The “theory of common crime” has some points of advantages that focusing on using criminal constitution requirements as a tool to stabilize the behaviors and have a positive meaning on defining the common criminal part. However, this theory can’t explain the situations that when there is no one fulfilled all elements of an offense. For example, A forcefully restrains the victim while B takes the victims’ wallet out his jacket. Neither A nor B applies force and takes away the victim’s wallet to complete robbery³⁸, but if they are regarded as a whole, they both should be liable for robbery.

The “theory of common behavior” also has a flaw. In case the common part, the fact, is beyond the criminal elements, it might be over broaden for it will grow into a theory that it only relies on the subjective parts to criminalize the wrongdoers. The “theory of common intention body” was created to apply criminal liability to the conspirator that didn’t commit crime.

³⁴ Kevin Heller and Markus D. Dubber, edited., *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011), 266.

³⁵ The “theory of common crime” can be separated as “total common crime theory” and “partly common crime theory”. The former one disagree with that different crime with different constitution part cannot be regarded as joint crime, while the later one insists that if part of the constitution requirement overlaps, they are partly joint crime. For example, A and B commit robbery together, while A intentional wants to commit snatch while B’s behavior is out of robbery. Because the constitution requirement is partly overlapped, so they are partly joint crime for snatch. The partially common crime theory has also been used as an explanatory method among some Chinese scholars.

³⁶ The “theory of common behavior” regards the joint crime is a process that multiple persons shown their common maliciousness. So the cooperators can constitute different crimes while they commit crime in a sense of sharing common facts.

³⁷ The “theory of common intention body” requires that there should be at least more than two persons with same intention to commit a crime and at least one of the persons starts to commit crime.

³⁸ Kevin Heller and Markus D. Dubber, edited., *The Handbook of Comparative Criminal Law* (Stanford: Stanford University Press, 2011), 266.

However, by applying this theory, the instigator in the joint crime system can't be included in a joint crime system, especially when the instigated criminal refused to commit the crime. In this case, elements of each joint crime offender in unitary system are required to propose. On the one hand, the features of each offender that might compose to a joint crime would be clearly revealed. On the other hand, the instigator as a type of joint crime offender could be punished by considering their own elements as a perpetrator rather than referring them as attempts to crime or crime preparation. The instigation is completed notwithstanding that the person solicited was unmoved. And the essence of the offender is the act of solicitation, and this does not require a meeting of minds.³⁹ An incitement or instigation to commit a crime is an independent crime even where the target offence could not be committed at the time of solicitation.⁴⁰

Therefore, a specific and new perspective to exam the elements for each joint crime offender in a unitary system could be as followed: as for mens reus, each offender not only has criminal intention but also taking advantage⁴¹ of other criminals' actus reus or other conditions, such as identities and so on, to pursue the consequence of a crime (a total common or overlapped criminal purpose) or let it happened without resistance. The actus reus may appear in forms of arouse, participate, support or control a joint crime, so as to individually or jointly the criminal offenders fulfill the crime elements regulated in the specific part of criminal law.

The personal criminal liability in unitary joint crime system

When it comes to the criminal liability, theoretically, instigation or incitement marks the threshold of relational liability in the sense that it represents the first stage on a continuum that runs through conspiracy to attempt.⁴² The criminal liability of instigators in a distinguished system is regarded as a form of derivative criminal liability⁴³. However, if following this logic, the dilemma would appear in this way: why the instigator's criminal liability is decided by the behavior of another person? It seems contrary to the basic principal of personal criminal liability. Therefore, in a unitary system, it is necessary to consider the elements especially for each joint crime offender from the new perspective of the unitary system mentioned above and the function the offenders played by their own behavior at the same time.

The elements for crime identification while the function for distribution of criminal responsibility. Meanwhile, in order to avoid developing a "subjectivism criminal law" to impose criminal liability, take instigator as an example, it is necessary to set the following rules as a boundary of overgeneralization of joint crime offenders: if and only if the defendant's belief in the possibility of success was based on reasonable grounds, for then and only then can we say that he was intentionally committed an act which would normally have resulted in the commission of the target offence.⁴⁴ Namely, in the circumstances to instigate someone to commit a crime, it means only when he conducted the behavior of instigation on reasonable grounds, and he intentionally committed the act of instigation which can normally trigger or starts a commission of the targeted joint crime, then, it should be regarded as an instigator and accordingly have their criminal liability.

³⁹ R.v. Higgins(1801) 2 East 5.

⁴⁰ R.v. Banks(1873)12 Cox C.C.393,concerning an attempted incitement to murder an unborn child; concerning incitement to receive goods to be stolen in the future.

⁴¹ Keqian.Chen, "A Comparative Study of Identification Standard of Joint Crime Offender in Germany, Italy and China," *Studies in Law and Business* 1(2015),192; Shiwei.Chen, "On the Act of Joint Crime," *Hebei Law Science* 5(2007): 54-5.

⁴² Finbarr Mc Aulery and J.Paul McCutcheon, *Criminal liability* (Dublin:Round Hall Sweet & Maxwell,2000),430.

⁴³ Gabriel Hallevy, *The Matrix of Derivative Criminal Liability* (Berlin Heidelberg: Spinger-Verlag, 2012) ,63.

⁴⁴ Finbarr Mc Aulery and J.Paul McCutcheon, *Criminal liability* (Dublin: Round Hall Sweet & Maxwell,2000),439.

On the one hand, the instigation behavior itself must have done harm on important legal interests or had created a possibility for the victim involved in an environment that would already be detrimental to them or in the very near future. On the other hand, if the instigator is using specific measures, for instance, using internet to spread in a public way, which may strengthen their subjective maliciousness, it could be another factor to take into consideration for its punitive liability

V Conclusion

When it comes to identify the criminal liability of each joint crime offenders, the unitary system and distinguished system are trying to examine each of the joint crime offenders in a different way. While each of them has their own advantages: the distinguished system is featured with stereotype, while the unitary system is guided by the justice of criminal liability discretion. To combine the advantages from those two different systems, it's necessary to build up a new perspective of view to examine the criminality of joint crime offenders. The tools provided in this paper had tried to stereotype the criminality of each joint crime offenders and clarify the personal criminal liability in a unitary system.

Appendix

General part				Specific part	
The Concept of Joint Crime(25)				10 chapters divided by different legal interest protected by criminal law (Ke Ti)	
Types of Criminal Offenders			Punishment		
By Division of Labor	By Role or Function	Forms of Joint Crime Organization		Actus reus : Behavior	
		General Joint Crime	Criminal Group(26.2)		
Organizer	Principal offender(26.1)		Ringleader	all the crimes committed by the criminal group	
		Two or more persons	Three or more persons	Subject: Optional joint crime	
Perpetrator	Accomplice(27.1)	Mens reus: Joint intention	Depends on the nature of the criminal group	Shall be given a lighter or mitigated punishment or be exempted from punishment.(27.2)	Mens reus : Direct intention; indirect intention; Reckless; Negligence
Abettor					

Instigator (29.1)	Coerced offender (28)	Temporary or occasional	Relatively stable	Shall be given a mitigated punishment or be exempted from punishment in the light of the circumstances of the crime he commits.(28)	
	<p>(29.1) Anyone who instigates another to commit a crime shall be punished according to the role he plays in a joint crime. Anyone who instigates a person under the age of 18 to commit a crime shall be given a heavier punishment.</p> <p>(29.2) If the instigated person has not committed the instigated crime, the instigator may be given a lighter or mitigated punishment.</p>				
	Incoherent crime(22-24)				Accomplish when meets the criminal requirements

CHANGING CONTOURS OF HEALTH IN THE LIGHT OF INDIAN LEGAL SCENARIO

Swati Kaushal*

“Health care is not a privilege. It's a right. It's a right as fundamental as civil rights. It's a right as fundamental as giving every child a chance to get a public education”.

Rod Blagojevich

Abstract

Health is often considered as a scientific discipline that requires expertise, knowledge and skill of medicine confined to the medical professionals and scientists but it encompasses socio-economic and political determinants as well as defined by the WHO. Health is considered as one of the important factors for the development of a nation. In a welfare state, it is the obligation of the government to ensure the quality of life to its citizens. In changing conditions of the society in terms of health and availability of medical care, most of the Indian population is not able to avail healthcare facilities due to their poor economic status. This paper draws the journey of right to health in the Indian scenario from the Directive Principles of State Policy (DPSP) in our Indian Constitution to its judicial recognition through various precedents in the recent past. Right to health became a fundamental right way back in the case of Paschim Bang Khet Mazdoor Samiti v. State of West Bengal (1996) but its execution still remains a far dream for the marginalized section of the society. This paper will focus on the need for the State players to step in to execute right to health in the real sense. The paper also entails the International status of the right through various conventions such as International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

Keywords Right to Health, Public Health, Article 21, State Responsibility

I Introduction

Health is considered as one of the important factors for the development of a nation. In a welfare state, it is the obligation of the government to ensure the quality of life to its citizens. For achieving its goal of quality life to its citizens, health plays one of the major roles. In changing conditions of the society in terms of health and availability of medical care, most of the Indian population is not able to avail healthcare facilities due to their poor economic status. This research paper is an effort to study the present status of health in the Indian legal system-recognition and protections afforded to its citizens. The role of judiciary and government in recognition the Right to health.

A healthy body is the foundation of all its activities. Health is often considered as a scientific discipline that requires expertise, knowledge and skill of medicine confined to the medical professionals and scientists but it encompasses socio-economic and political determinants as well as defined by the World Health Organization (WHO). The importance of health has been emphasized by World Health Organization(WHO) as “Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease”. Indian constitution recognizes the right to health through Right to life and personal liberty under Article 21 which is the essence of every human being. It further provides protection under part-IV as Directive Principles of State Policy (DPSP).

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The right to health has become one of the most crucial issue in the light of non availability of proper medical care and healing facilities to the individuals in need and to the whole community at large with reference to community health. Various philosophers and their philosophies have often undermined health as a component to be looked upon as social good be it the Utilitarian Philosophy or Rawlsian Social Justice Theory. It is social problem which is also recognized by the Universal Declaration of Human Rights (UDHR), 1948 under Article 25. The right is universally recognized. Traditionally it had individualistic approach with the obligation on the individual to look after his health and take preventive measures to remain in the best of his health and then on the medical professionals to provide best medical treatment and facilities available with them. With the changing notions of healthcare in a welfare society, community health also gained importance.

With the judicial intervention and recognition, the right also found its obligation for execution on the state.¹ In a developing nation like India, not every individual is in a position to afford proper medical treatment due to the economic disparity of its citizens, so the role of state in a welfare state becomes crucial and pivotal to ensure that proper healthcare reaches all. For ensuring proper health, the inter-relationship between factors like clean living environment, safe working conditions, awareness about disease prevention and social security measures in respect of disability, unemployment, sickness and injury needs be addressed as well.

II Constitutional Aspects of Right to Health

Right to health raises many issues with regard to availability, affordability of the patient, and the quality of health care provided thereafter. This further questions the status of right as a legal, moral or constitutional right. At the time of formation of Indian Constitution, right to health was placed under the DPSP as not justifiable rights as our constitutional makers knew that execution of right to health will not be practically possible very easily. But the Constitutional Committee realized the significance of public health and other issues related to it. So, public health care and safety concerns by the government are indicated through Part IV of the Indian Constitution under Articles 39, 42 and 47 so that the State can enact statutes and form policies in consonance with these guidelines.

Article 39 (e) lays emphasis on the health of worker-men and women both. It is also to be taken care that children employed in industries are not exposed to dangerous or hazardous industries where they might be exploited. Work should also be assigned according to the physical health of the worker. The State is also obligated to provide opportunities to children to develop in a healthy manner under Article 39 (f).

It is indicated under Article 42 that maternity relief facility should be made available to women and State should make arrangements for just and humane conditions at workplace. The State is obligated to take measures for improving the level of nutrition, standard of living and public health as its primary duty. State is also required to be vigilant for prohibiting the consumption of drugs and intoxicating drinks except for medicinal purposes under Article 47 of Indian Constitution. Food Safety and Standard Authority of India Act, 2006 is a rightful step in this sphere. Other statute related to the issue is Narcotic Drugs and Psychotropic Substances Act, 1985 which keeps a check on the consumption of drugs as prescribed by medical practitioner and in appropriate quantity as directed.

¹ In the case of Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor. (1996) AIR SC 2426

Various other legislations have also been enacted to ensure healthy environment in hazardous industries, proper sanitation in work place, conditions of workers including women and children, etc. Community health is also emphasized. The right to health has been declared justifiable rightly by the Supreme Court of India by expanding the horizon of Article 21 of Indian Constitution. Supreme Court has provided a base for the interpretation of fundamental rights and directive principles under Chapter III and Chapter IV respectively, to claim and retain the right to health and health care services.

The ambit of Article 21 of Indian Constitution was widened through the landmark case of *Menaka Gandhi v. Union of India*², which provides that Article 21 will not only provide protection against actions but will also cover all varieties of rights which go to make up the personal liberty of man³ and right to health is one such right.

III International Law and Right to Health

Right to health has been recognized in the international arena by considering it as a human right. Health is a socio-economic and political right of an individual which puts the individual into action and also obligates the state players i.e., the government to ensure this right reaches the masses in its true sense. Universal Declaration of Human Rights (UDHR) under Article 25 states:

“ 3(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services”. Thus, UDHR tried to put forth that right to health is an inseparable and interdependent with other rights such as social, economic, political and cultural rights. To ensure right to health, all these factors must be entrusted. Hence, right to health is a basic human right that needs to be guaranteed to the people for their overall development and enjoyment of quality life with dignity.

The entitlement and legal acknowledgment of right to health makes it a fundamental right. Various international agreements and fora have affirmed its commitments to improve standard of living and acknowledging it as a basic human right. World Health Organization (WHO), the highest body for health issues have also tried to define health under Article 12 of International Covenant on Economic, Social & Cultural Rights (ICESCR) as- “Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease”. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by livelihood in circumstances beyond his control⁴. UDHR along with International Covenant on Civil and Political Rights (ICCPR)⁵ and International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶ constitute “International Bill of Human Rights” that serves as guidelines for the nations to maintain human right conditions in their respective countries.

² 1978 AIR 597

³ Subhash C. Kashyap, *An Introduction To India's Constitution And Constitutional Law* (New Delhi: National Book Trust, 2001), 134-137

⁴ Saroj Kant Chaoudhary, *Judicial Approach In Realising Health Rights: Indian Perspective*, *Social Science Research Network* [Online] (17 July 2014) (cited 24 April 2016), available from < <http://ssrn.com/abstract=2467601>>

ICCPR, laid down emphasis that for ensuring civil and political rights, maintenance of public health is also necessary under Articles 18, 19, 21, 22. ICESCR also lays down emphasis on the proper and healthy working conditions of the workers through Articles 7(b), 10(3), 12(1) and 12(2) (a).

According to WHO, Health Security of an individual can only be ensured when its human rights components are addressed as mentioned in the Universal Declaration of Human Rights. It necessitates universal access to health care facilities, right to information, education and employment and above all food security within its ambit. The role of state players i.e. the government from grass root level till the central level, private sector and also the social responsiveness of an individual as a member of the society becomes crucial. Health rights are also legally enforceable rights. These international instruments are binding on the member countries. Gross neglect of human rights affect the health of an individual might have serious implications on the right to life and personal liberty as emphasized under Article 21 of Indian Constitution. Indian Constitution through Article 51(c) obligates the Government of India to enact statutes for the execution of treaties of which it is the signatory. As a signatory to these international instruments, it becomes pertinent for India to recognize the right to health and medical care under its legal system.

IV Government Policies and Right to Health

Under DPSP, the state i.e., the government is obligated to make its policies keeping in view the fundamental rights and other human rights to its citizens. It must make its policies, rules and agendas to execute the very purpose of these directive principles. The Swacch Bharat Abhiyan put forth by the present government is an appreciative step in this respect. Major population of the country resides in rural areas where even basic necessities have not reached its residents like proper toilets and potable water. Squatting in open areas make them more exposed to airborne diseases and non-availability of potable water makes them victims of water borne diseases. The Government of India has launched a National Rural Health Mission (NRHM) which is a leap forward in establishing effective merger and convergence of health services and affecting architectural correction in the health care delivery system in India.⁷

National Health Mission (2012-17)⁸

The National Health Mission Aims at ensuring Universal access to affordable, effective and quality health care to all its citizens by active coordination of inter-sectoral participants. The core object of the mission:

- Safeguard the health of the poor, vulnerable and disadvantaged, and move towards a right based approach to health through entitlements and service guarantees
- Strengthen public health systems as a basis for universal access and social protection against the rising costs of health care.
- Build environment of trust between people and providers of health services.
- Empower community to become active participants in the process of attainment of highest possible levels of health and to improve efficiency to optimize use of available resources.
- Institutionalize transparency and accountability in all processes and mechanisms.

⁷ Subitha Lakshminarayanan, Role of government in public health: Current scenario in India and Future Scope, *Journal of Family & Community Medicine* [Online] (Jan-Apr. 2011) (cited 20 April 2016), available from <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3114612/>>

⁸ National Health Mission 2012-17 [Online] (cited 14 April 2016), available from <<http://nrhm.gov.in/>>

V Judicial Interpretation of Right to Health

Right to Health and health care services exist passively under our Constitution through the widening of Article 21 and Directive Principles of State Policy (DPSP). Ever since the growing instances of non-availability of medical care to the accident victims due to procedural hassles or non-affordability of the medical expenditure by the patients or his/her family, the utter need was realized by the Indian judiciary to recognize this right.

In *Parmanand Katara v. Union of India*⁹, it has been held that it is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without legal formalities to be complied with by the police under Cr.P.C. The very essence of Article 21 must be fulfilled by all possible measures. In this case, accident victims were refused treatment by the hospital and were directed to seek treatment at the specific hospital assigned to take up medico-legal cases. It was held due to the seriousness and utter need of the patients to seek treatment, administrative hassles must be bending and patients should be provided treatment as soon as possible.

In 1987 decision of *Vincent Parikurlangana v. Union of India*¹⁰, Hon'ble Supreme Court held that the right to maintenance and improvement of public health is included in the right to live with human dignity enshrined in Article 21. In a welfare state, it is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health. In another case of *Paschim Bang Khet Mazdoor Samiti v. State of West Bengal*¹¹, a train accident victim was denied treatment at government hospitals of Calcutta due to non-availability of beds. Ultimately, he was admitted to a private hospital. Due to delay in treatment, his condition deteriorated. Supreme Court directed the state to compensate the victim. In the case of *Consumer Education and Research Centre v. Union of India*,¹² Supreme Court held that the right to health and medical care is a fundamental right under Article 21 of the Constitution as it is essential for making the life of the workman meaningful and purposeful with dignity of person.

It also includes protection of the health and strength of the worker. Public interest litigation (PIL) has played an instrumental role in strengthening the right to health and making the State realize its responsibility towards public health. In a Public interest litigation¹³ filed against the Municipal Council of Ratlam for not clearing the garbage lying in particular vicinity, the Supreme Court of India through Justice Krishna Iyer directed that the State should realize and make Article 47 its paramount principle of governance and take steps for the improvement of public health as amongst its primary duties. Since the establishment of National Green Tribunal, the environmental issues which affect public health have also been seriously tackled rightfully.

VI Suggestions

With the changing needs of the society, laws should be enacted or modified to suit the present need of its people. Public health of the citizens becomes one of the crucial factors for the working for an ideal social structure. In a welfare State, provision for adequate medical facilities and health care should be made by the State.

⁹ 1989 AIR 2039

¹⁰ 1987 AIR 990

¹¹ Supra, note 1.

¹² 1995 AIR 922

¹³ 1980 AIR 1622

Due to many factors an individual might not be in a position to look after his health like non-availability of health facility within his vicinity, economic disparity (affordability), discrimination, physical disability, and inferior quality of medical care available to him/her.

In a developing country like India where a large proportion of population is still confined to rural areas, one of the major challenges for the government is to make quality medical facilities reach every nook and corner of the country. Most of the best quality hospitals are confined to metros which makes it difficult for the villagers to access timely. The economic disparity of the Indian population is very wide. According to a recent report by National Survey Sample Office (NSSO)¹⁴, 86% of rural population and 82% of urban population is not covered by any public or private scheme for funding health needs. Only 13 % of people in villages are covered under government funded insurance scheme and in cities its even less than 12%. The alarming condition of Indian population in health sector reflects the failure of the government to tackle the issue.

The survey also reflects that the more and more people are accessing healthcare from private facilities which puts them under massive financial burden¹⁵. For the proper execution of right to health, State should step in to take charge and redress the issue by making policies and laws which should consider these factors. Health facilities must be made available to all persons in need. There should be not be any disparity or discrimination based on the economic or social status of any individual. Policies should be framed by the State to converge all the sections of the society to access health facilities from common sources. The access to medical facilities must also be distributed without any physical discrimination. All other conditions for maintenance of public health like potable water, clean environment, and proper shelter should also be made available within the reach of persons with physical disability.

The quality of medicines and medical care made available to poor and rich class should not be different. Due to the poor purchasing capacity of the marginalized section, the medicines of inferior quality are prescribed to them while the rich have access to best and expensive medicines. The role of State in bridging this gap is important. The World Intellectual Property Organization (WIPO) and Trade Related Aspects of Intellectual Rights (TRIPS) in the International arena also gave directions to lower the prices of medicines for cancer and HIV/AIDS so as to suit the lower purchasing capacity of the people of developing countries like India.

VII Conclusion

The journey of right to health has been full of struggles and still its recognition in the true sense remains a distant dream for many. From the contours of DPSP, as placed by our draft makers of the constitution to its judicial interpretation as a fundamental right under Article 21 of the Indian Constitution, at present the onus has been shifted to the State i.e., the government through significant judicial pronouncements to execute the right effectively. The State needs to act from grassroot level till the highest level for effective implementation. Public health is required to be monitored from the panchayat level, district and block level also for making the defaulters liable if they fail to perform.

¹⁴ India - Social Consumption: Health, NSS 71st Round : Jan - June 2014[Online] (cited 25 April 2016), available from <<http://mail.mospi.gov.in/index.php/catalog/161>>

¹⁵ "Medical Expenses Bleed India's Poor", *Times of India*, 23 April 2016, p. 1.

Engagement of community and state players at each level can only achieve the goal of healthy society and hence execution of right to health as fundamental right. The Judiciary has also done its part by recognizing the right to health way back in 90's in the case of Paschim Bang Khet Mazdoor Samiti v. State of West Bengal¹⁶ but not much has changed within these years. Now the onus is on the State to act and reflect its commitment to enforce this right by providing free legal aid to all the sections of the society with the best of facility available in the market without any discrimination.

¹⁶ Supra, note 1

CORPORATE GOVERNANCE IN INSURANCE COMPANIES: CRITICAL ANALYSIS OF IRDA ROLE

Dr. Veena *

Abstract

Effective and efficient corporate governance is the need of the day for companies and for financial stability and sustainable development. The protection of shareholders and stakeholders interest is prime concern of the corporate governance as they play as spinal-cord of the company governance. The insurance business is one of the most crucial elements of the financial sector and need to be governed with utmost care and caution for efficient financial results. The policy holders and shareholders are focal points for the insurance business. The insurance companies need to undertake efficient corporate governance systems for sustainable growth of the industry which forms the significant sources for the government. The Board of Directors of every insurance company is responsible for the effective governance and the Insurance Regulatory and Development Authority of India (IRDAI) is the supervisor or the regulator of the insurance business in India. The International Association of Insurance Supervisors have formulated the insurance core principles and laid down the standards for conducting the insurance business. The Insurance Core Principle 7 has set the standards and guidelines to the insurance companies and the insurance supervisors. The IRDAI has issued guidelines relating to corporate governance in 2009. It has notified the revised guidelines on corporate governance on May 18, 2016. This article has made critical analysis of the role of IRDA and provisions of the Insurance law and regulations concerning to the corporate governance in insurance industry in India.

Keywords Policy Holders, Stakeholders, Mismanagement, Corporate Governance, Insurance Core Principle, Risk Assessment, IRDA, Whistle Bowler Policy

I Introduction

Insurance business and services forms a major chunk of financial services and contributor to the economic development of our country. There is a close interaction between insurance and economic growth. 'As economy grows the living standards of the people increase, as a consequence, demand for life insurance business increases. As the assets of people and business enterprises increase in growth process... widening of the economy demand for new types of insurance products emerges.¹' The above statement of Sri C Rangarajan, former Governor of Reserve Bank of India and well known economist, enlightens the key role of the insurance in the economic growth of a country. Insurance plays multifaceted role in the society as it provides protection against vulnerabilities like health problems, accidents, disasters and many other losses caused to the assets and people on happening of uncertain events. It promotes economic efficiency by risk transformation, risk pooling and risk sharing techniques. It aids economic development through its financial intermediation function by providing low cost and long term funds to the government for development activities. In precise, the insurance business helps to increase the public savings and deployment of funds as investments, for development under cooperative system. It mobilizes resources, accelerates and stabilizes the economic growth of a country.

A well-developed and constant evolution of insurance sector is a boon for economic development of a nation since it provides long-term funds for infrastructure development of that particular nation and at the same time strengthens the risk-taking ability by the citizens of the country.

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¹ Sri C Rangarajan, Former Governor of Reserve Bank of India, 'Widening Scope of Insurance' addressed at Institute of Insurance and Risk Management, July 2006

There is every need to manage the insurance business efficiently and effectively to make the optimum use of the funds available with the insurance companies which are considered as the low cost funds available for long time.

II Regulation of Insurance Business

One of the important reasons for nationalization of insurance business after independence is the mismanagement of funds collected by the insurance companies, which includes the diversion of funds by the management for their personal benefits. Even after the nationalization, the insurance companies have failed to concentrate on management of funds of the company and paved a way for effective regulations and monitoring of the insurance companies by establishing an exclusive regulatory body, the Insurance Regulatory and Development Authority of India (IRDAI). The objectives of establishing the IRDAI are:

- To create the public confidence in the insurance business which helps the long-term stability of the business,
- To protect the insurance business, policyholder and customer,
- To regularize the channels of funds and investments of funds,
- To have the transparency of insurance business and improve the innovative consumer based insurance products,
- To regularize the low-cost-longtime funds for the economic growth of the country,
- To help the insurer in the beginning, saving him from the frauds to be committed by the insured while presenting the proposals and the insured after the policy is allotted during settlement of the claims to him.

The IRDA is established under the provisions of the IRDA Act 1999. The stakeholders of the insurance business are:

- a. Policyholders
- b. Shareholders
- c. Intermediaries such as the agents, brokers, corporate agents, third party administrators, consultants, Surveyors and loss assessors
- d. Government
- e. Society
- f. Industry and business houses
- g. Regulators

Aforesaid stakeholders are the sufferers with the mismanagement of the insurance companies and require better management of the insurance companies in order to protect the interests of the parties. Mismanagement of insurance business by the companies has a greater impact upon the stakeholders and the problems associated with the mismanagement include:

- a. Nonpayment of claims
- b. Excess calculation of premium
- c. Diversion of funds by investing the funds in private companies of their own choice
- d. Fraudulent payment of claims
- e. Collusion of insurance policyholders with that of intermediaries such as agents, surveyors and loss assessors, consultants and brokers etc.
- f. Internal frauds
- g. Practicing of unethical practices in settlement of claims
- h. Improper underwriting processes

- i. Non-compliances of provisions of Insurance Act 1938 and regulations made by the IRDAI etc.
- j. Improper planning and designing of insurance products.
- k. Delays in claim settlements and grievances settlement mechanism
- l. Improper valuation of physical and financial assets
- m. Lack of accurate, accurate and timely data
- n. Lack of proper disclosures by the insurance company and its directors
- o. Incurring expenses beyond levels permitted by the law and regulators
- p. Lack of best practices.

The policyholders and shareholders are required to be protected against aforesaid disasters to enhance the confidence and trust in the insurance business. The solution to check the above problems identified is to have best practices of effective and efficient corporate governance in the insurance companies.

III Corporate Governance

'Corporate governance (CG) is about promoting corporate fairness, transparency and accountability'². 'CG is conducting the business in accordance with owner or shareholders desires while confirming to basic rules of society embodied in the laws and local customs'³. Organization for Economic Cooperation and Development (OECD) while endorsing the principles of corporate governance stated by the council of ministers in 1999 states that the 'corporate governance frame work should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authority'⁴.

The OECD articulates towards an effective framework for the protection of shareholder rights, equitable treatment of minority shareholders, foreign shareholders with others, active cooperation between the stakeholders and companies, timely and accurate disclosures relating to financial performances, ownership and governances and effective monitoring of management by the Board of Directors.

World Bank focuses on the financial sector and capital markets in order to improve the corporate governance. It articulate for upholding public trust and suggests the Boards of financial institutions including the insurance companies to fulfill their fiduciary responsibilities by effectively communicating strategic business direction and assure transparent and effective organization, risk assessment and mitigation.

It also further states that the financial institutions are uniquely vulnerable to liquidity shocks which can result in institutional, and potentially, financial instability. Sound governance supports prudential supervision and regulation, enhancing the role and the effectiveness of the financial institution supervisor⁵. Thus, the corporate governance is a system of structuring, operating and controlling a company with a view to achieve long term strategic goals to satisfy the shareholders, creditors, employees, customers and suppliers with the legal and regulatory requirements, apart from meeting environmental and local community needs'. Corporate governance is just more than Board processes and Procedures involves full set of relationship between the company (Board) to its shareholders and stakeholders.

² Corporate Governance, according to James D Wolfensohn, Ninth President, World Bank, as quoted by an article in Financial times on June 21, 1999

³ Milton Friedman (Nobel Laureate), Capitalism and Freedom, University of Chicago Press, 1962, p.133

⁴ www.oecd.org - 2004

⁵ <http://www.worldbank.org/en/topic/financialmarketintegrity/brief/corporate-governance>

It is a relationship among various participants in finalizing the direction and performance of a company. Corporate governance means doing everything better to improve the relations between companies and their shareholders. It is defining and holding balance between economic and social goals; between the individual and communal goals.

IV Corporate Governance in Insurance Companies

The insurance business is the people centric and has many stakeholders. It is unanimously agreed to have a greater systems which are effective and efficient 'for maintaining a fair, safe and stable insurance sector for the benefit and protection of the interests of policyholders, beneficiaries and claimants as well as contributing to the stability of the financial system'⁶. The importance of corporate governance is recognized by the International Association of Insurance Supervisors and formulated the core principles and standards for the insurance companies and insurance supervisors across the globe. The insurance core principles are the internationally accepted framework for the supervisors of the insurance industry, to promote the financially sound sector having the strong protection to the insurance policyholders. These principles impose a responsibility upon the insurance supervisors to operate transparently with accountability. Thus, fairness, transparency, responsibility and accountability are the pillars of the supervision of the insurance industry.

The Insurance Core Principle (ICP) 7 formulated by the International Association of Insurance Supervisors articulates that 'the supervisor requires insurers to establish and implement a corporate governance framework which provides for sound and prudent management and oversight of the insurers business, and adequately recognized and protect the interests of the policyholders'. Every insurer should frame corporate governance policy and plan and implement effectively and efficiently in order to achieve the desired objectives of provide effective protection of policyholders and other stakeholder's interests. The corporate governance framework of an insurer should define roles and responsibilities of persona accountable to management and oversight on behalf of the insurers, defines the decision making process, authorities, and remuneration policies and provide for corrective actions. An effective corporate governance framework enables an insurer to be flexible and transparent; to be responsive to developments affecting its operations in making timely decisions and to ensure that powers are not unduly concentrated.

The corporate governance framework supports and enhances the ability of the key players responsible for an insurer's corporate governance; i.e. the Board, Senior Management and Key Persons in Control Functions to manage the insurer's business soundly and prudently⁷. The insurance regulators should ensure that the insurance companies should define the roles of the Board and Key personnel and oversee the same effectively by the senior management. It has suggested for the separation of the roles of the Chair of the Board and the Chief Executive Officer (CEO) reinforces a clear distinction between accountability for oversight and management. The insurance regulator requires 'the insurer's Board to have, on an on-going basis an appropriate number and mix of individuals to ensure that there is an overall adequate level of competence at the Board level commensurate with the governance structure; appropriate internal governance practices and procedures to support the work of the Board in a manner that promotes the efficient, objective and independent judgment and decision making by the Board; and adequate powers and resources to be able to discharge its duties fully and effectively'⁸.

⁶ 'Insurance Core Principles, Standards, Guidance, Assessment Methodology'
<http://www.iaisweb.org/page/supervisory-material/insurance-core-principles>

⁷ Insurance core principle 7.0.2

⁸ Insurance core principle 7.3.

The insurer supervisor or the regulator should ensure that the Directors of the insurance company should act in good faith, honestly and reasonably, exercise due care and due diligence, act in best interests of the policyholders, should not act detrimental to the interests of the insurer. The Board should have risk management and control systems. The insurance companies should have a written remuneration policy and system of reliable and transparent financial reporting. The core principles also insist upon the external audit of the insurance companies on regular basis. The insurance supervisor or the regulator should insist upon the insurance companies to follow the governance framework suggested by the International Association of Insurance Supervisors.

It is evident from the aforesaid discussion that the principles laid down by the International Association of Insurance Supervisors are on line with those of the principles of corporate governance envisaged by the World Bank, OECD and other relevant agencies. The insurance supervisors or the Regulators are bestowed with the responsibility of supervising the insurance companies dealing with the insurance business and the Boards of individual insurance company is responsible for effectively enforcing the corporate governance for the betterment of policyholders and other stakeholders.

V Corporate Governance in Insurance Companies in India

The insurance business is undertaken by the insurance companies incorporated under the provisions of the company law and insurance law in India. Indian company is permitted to undertake the insurance business either in life or general insurance sectors, after obtaining the registration certificate from the insurance regulator and apex body, the IRDA. As such, it is essential for every company to comply with the terms and provisions of the company's law and the corporate governance has a significant place under the company law, it is inevitable to follow the norms and standards relating to the corporate governance as envisaged by the company law. Any non-compliance or default will attract huge penalties and dissent from the shareholders. The provision of the Insurance Act 1938 has many provisions which are related to good governance.

The IRDAI is empowered to interfere with the management and operations of the insurance companies if it fails to comply with the directions of the Regulator and also non-compliance of provisions of the Insurance Act. The IRDA has the power to appoint an Administrator⁹ if it finds that the conduct of insurance business is prejudicial to the insurance company. The IRDA has the supervisory powers and authority to approve the application for the amalgamation of insurance companies and winding up of companies. If it feels that amalgamation¹⁰ or winding up¹¹ is against the interests of the policyholder and insurance business it may refuse to approve the same. Sections 27 to 28 of the Insurance Act 1938 provide for the guidelines to the insurance companies for the investment of funds of the insurance Company. The IRDA has made the Regulations in 2000 and made amendments to the same and directed the insurance company to invest their funds in various government securities and government approved securities.

Sections 64V, 64VA of the Insurance Act 1938 and regulations made by the IRDA direct the insurance companies to maintain sufficient funds to honor the claims of the insurance policyholders and shareholders. The IRDA has framed Regulations to protect the interests of policy holders¹².

⁹ Section 52A of the Insurance Act 1938

¹⁰ Section 36 of the Insurance Act 1938

¹¹ Section 58 of the Insurance Act 1938

¹² IRDA(Protection of Policyholders interests) Regulations 2002

Section 25 of the Act imposes duty upon the insurance companies to submit the returns to the IRDA and IRDA has a right to seek further information on the information submitted by the insurance companies. The Insurance Act 1938 makes mandatory for the insurance companies to get their account books, balance sheets, profit and loss account and other accounts audited by the qualified auditors under the provisions of the Company's Act 2013.

The IRDA has issued the guidelines relating to corporate governance in 2009. Later with the changes in the approach, the IRDA has issued the revised guidelines on May 18, 2016 which covers the areas such as

- Governance structure
- Board of Directors
- CEO
- Key Management functions
- Role of Appointed Actuaries
- External audit – Appointment of Statutory Auditors
- Disclosures
- Relationship with stakeholders
- Interaction with the Supervisor
- Whistle blower policy

The guidelines have focused upon the composition of the Board and suggested to have the Board members to have required qualifications and experiences in the areas of economics, law, accountancy, economics, management etc. It also focuses on the composition of Board to include at least three independent directors, non-executive directors and one women director. It also articulates for 'fit and proper' criteria for the key persons. The guidelines have captured almost all the provisions stated by the insurance core principles of International Association of Insurance Supervisors.

The guidelines also suggests for various committees to be constituted such as Audit Committee, Risk Management Committee, Nomination and Remuneration Committee, Investment Committee, Ethics Committee and Asset-Liability Management Committee, Corporate Social Responsibility Committee, and Policyholders Protection Committee. The IRDAI also plays a vital role in enforcing the corporate governance and interacts with the insurance companies:

- Seek confirmation that the insurance company has adopted and effectively implemented sound corporate governance policies and practices;
- Assess the fitness and propriety of board members;
- Monitor the performance of boards;
- Assess the quality of insurance company's internal reporting, risk management, audit and control functions;
- Evaluate the effects of the insurance company's group structure on the governance strategies;
- Assess adequacy of governance processes in areas of crisis management and business continuity.
- The guidelines also provide for various disclosures to be filed by the directors of board of directors.

VI Conclusion

The implication of the sound corporate governance in insurance companies is well recognized at global level. The insurance core principles defined by the International Association of Insurance Supervisors are the standards for each insurance Regulator or the supervisor to put them in practice in their jurisdictions.

The Regulators are responsible for preparing the regulations and directions to the insurance companies to follow and fix responsibility upon the Board of Directors of individual companies for implementations. Non-compliance of such regulations or guidelines should have stringent penalties including the cancellation of the registration for undertaking the insurance business. The insurance companies should be impressed upon to strictly follow the guidelines in order to protect the interests of the policyholders and other stake holders.

The Insurance Regulatory and Development Authority of India is on successful track in implementing the corporate governance in insurance business which can be seen from its mission statement - 'to provide protection to the policy holders' and the guidelines issued by the IRDA 2016 will help to instill effective corporate governance practices in the Indian insurance industry.

INTERNATIONAL COMMERCIAL ARBITRATION: GLOBAL JURISDICTIONAL ILLUMINATION

Dr. M. Madhuri Irene*

"Every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance inconvenience, we give and take, we remit some rights that we may enjoy others; and we chose to be happy citizens rather than subtle disputants".

Edmund Burke (Speech on Conciliation with America, 22 March 1775)

Abstract

When law runs with laity and levity, justice will be a freely purchased product on the streets. Law and Justice are not two distinct facets of fact but a unified amalgamation of truth and service. Their emergence is concomitant and coterminous and their existence is interdependent. Law is meant to yield justice and justice is to exemplify the nobility of law. This minimum and legitimate expectation of the ultimate consumer of justice system is universally applauded and acknowledged. The modes and means of justice delivery process may be different and various depending upon the nature, need and content of the issue or problem i.e. conventional, progressive or inventive. From Afghanistan to Vatican, the common thing in existence is Dispute and the perpetual quest is not for settlement but for 'resolution'. Resolution is achieved through Arbitration. Settlement subside the differences but resolution through arbitration annihilates the differences and disputes. To-day, human relations are not regional but global. Global village yearns for human bondage with peace and prosperity. The nucleus of global human bondage through fair and just trade relations is always entrenched by International Commercial Arbitration

Keywords *International Commercial Arbitration, Dispute Resolution, UNCITRAL, International Trade*

I Neo Light for Resolution

Business is fragile for buyer and audacious for seller. Despite the agreed atrociousness of the commerce world, the business dealings are moving swiftly and with buoyancy even in the modern global economy. It is natural that business implies controversies and disputes. Dispute is coterminous with business operations. The tradition of settlement of disputes through a neutral third party appointed by the parties has strong origin in India. There are arbitration tribunals recognized even in the ancient legal texts and digests. This third party's dispensation of justice is not only a symbol of moral and ethics disposition but also an authoritative legal settlement.

II Commercial Arbitration - A Legal Penumbra

In the present globalized era, International Commercial Arbitration has established itself as the best method of determining complex commercial disputes all over the world due to which States have modernised their laws of arbitration to facilitate this new need. International Commercial arbitration is a private method of dispute resolution, which is chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law. It is conducted in different countries and against different legal and cultural backgrounds, with a striking lack of formality in which there are no national flags or other symbols of State authority.¹

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¹ Alan Redfern and Martin Hunter, International Commercial Arbitration, Sweet & Maxwell, 4th. Editionn. 2004, p.1.

As known globally, the economy of India is the eleventh largest economy in the world by nominal GDP and the fourth largest by Purchasing Power Parity (PPP). India has been one of the fastest growing economic powers in recent times with an expected growth of 8.5% in its GDP for the year 2010-11.² (But in view of economic slowdown, the growth rate did not touch the expected figure) The IMF projected 7.3 per cent GDP growth for India in 2015-16 and 7.5 per cent in 2016-17, levels unchanged from its outlook released in October. In 2014-15, it estimates, GDP grew 7.3 per cent. The report of International Monetary Fund further observed that "India and the rest of emerging Asia are projected to grow at a robust pace, although with some countries facing strong headwinds from China's economic rebalancing and global manufacturing weakness."³ Arbitration occupies a prime position in commercial dispute resolution in India. Its relevance and importance have been recognized by the prime bodies and over the years great effort has been made to modernize the law to adapt to the needs of the business environment.⁴

III Formal and Informal Justice Systems

Democracy functions as a system with formal and informal institutional Inter-related mechanisms serving the purpose of translating social preferences into public policies. Enhancing the effectiveness of society's dispute resolution mechanisms is also a way to address social preferences through public policies within the judicial domain.⁵ Therefore, it is necessary to ensure that the institutions responsible for the interpretation and application of laws are able to attract those parties who can't find any other way to redress their grievances and solve their conflicts.⁶ In order to avoid cultural, socio-economic, geographic, and political barriers to access the court system, the judiciary must adopt the most effective substantive and procedural mechanisms capable of reducing the transaction costs faced by those seeking to resolve their conflicts.

If barriers to the judicial system affect the socially-marginalized and poorest segments of the population, expectations of social and political conflict are more common, social interaction is more difficult, and disputes consume additional resources.⁷ The factors affecting the demand and supply for dispute resolution need to be considered when analysing the efficiency/effectiveness in its provision. For those who demand dispute resolution mechanisms, three factors may be considered as relevant:

- (i) the ex-ante guidance effect,
- (ii) the objective determination of the disputants interests, and
- (iii) The reinforcement of the assigned rights and obligations. Factor 1 represents a public good while factors 2 and 3 can be considered as non-public (i.e. private dispute resolution can provide these services).

² <http://timesofindia.indiatimes.com/business/india-business/GDP-to-grow-at-8.5-in-2010-11-says-Pranab/articleshow/5714174.cms>.

³ <http://www.thehindu.com/business/Economy/imf-retains-indias-gdp-forecast-for-2017-at-75/article8124019.ece>

⁴ A.K.Bansal, Shivani sidhu and Kanika Bansal, International Commercial Arbitration-Practice & Procedure, Universal Law Publishing Co. ND (2012) P.517.

⁵ See Buscaglia, Edgardo (1996), "Introduction to Law and Economics of Development," *Law and Economics of Development*, New Jersey: JAI Press

⁶ *Ibid.* at 56

⁷ Norms are here understood as coordinating mechanisms for social interaction. Refer to Buscaglia, Edgardo (1996), "Introduction to Law and Economics of Development," *Law and Economics of Development*, New Jersey: JAI Press, pp. 24-29; and to Cooter, Robert (1996) "The Theory of Market Modernization of Law", *International Review of Law and Economics*, Vol. 16, No 2, pp. 141-172

“Top-down” approaches to law making may cause social rejection of the formal legal system among marginalized segments of the populations in developing countries who perceive themselves as “divorced” from the formal framework of public institutions.⁸ This “divorce” reflects a gap between the “law in the books” and the “law-in-action”⁹ This divorce between formal and informal rules is usually rooted in the lack of formal system's benefits (i) (ii) and (iii) as stated above.

IV Pros and Cons of International Commercial Arbitration

The confidence of the international business community on India as a suitable venue for international commercial arbitration can be raised if further developments are made in the area of institutional arbitration, according to Mr. Justice G.N.Ray, former judge of the Supreme Court. He urged the corporate to think how the institutional arbitration mechanism could be improved so that the country became an effective centre for resolving international commercial disputes. Stating that both the Government and Chambers of Commerce were attaching a lot of importance to dispute resolution through alternative methods such as mediation/conciliation and arbitration, he added that it was a pity “we in India still cannot come out of this court-driven justice delivery system”. In India, even now, arbitration was taken up only after exhausting the court procedures, due to the rigidity of the justice delivery system, and this should change. He said that things had improved after the new Arbitration Act came into being in 1996, but were still far from satisfactory.

As a result, large segments of the population who lack the information or the means to surmount the significant substantive and procedural barriers seek informal mechanisms to redress their grievances. Informal institutions do provide an escape valve for certain types of conflicts. Yet many other types of disputes involving, for example, fundamental rights and the public interest remain unresolved. This state of affairs damages the legitimacy of the state, hampers economic interaction, and negatively affects the poorest segments of the population.¹⁰ Hon’ble J.J. Spiegelman AC, Chief Justice of New South Wales in his opening address to the International Commercial Arbitration Conference held at Sydney, Australia on 10-08-2007, elucidated on the vitality of the international system for commercial dispute resolution. The Hon’ble Chief Justice stated that the multi-faceted process known as globalisation has brought with it a widespread recognition of the benefits potentially available from reducing national barriers to mutually advantageous exchange by trade and investment. The rapid expansion of such commercial interaction inevitably brings with it the need for dispute resolution.

Parties to a commercial contract have chosen a jurisdiction. The autonomy of the parties should be respected for the same reasons that that has been accepted by the large number of nations that have adopted the New York Convention. It will be interesting to see whether nations approach this Convention as if it were an application of the commercial autonomy of the parties who have chosen a specific forum for resolution of disputes, or whether the element of national sovereignty involved with the formal courts will lead nations to adopt the traditional territorial approach that has bedevilled any attempt to produce a regime for enforcement of judgments.

⁸ The “Law and Development” movement is ascribed to Seidman (1978), Galanter (1974), and Trubek (1972). These authors generally sponsored a comprehensive and centralized legislative reform covering the modernization of the public and private dimensions of the law through international transplants from “best practice” legal systems. Also Refer to K. Pistor's latest work.

⁹ See Buscaglia, Edgardo (1996), "Introduction to Law and Economics of Development," *Law and Economics of Development*, New Jersey: JAI Press, pp. 24-29

¹⁰ Buscaglia, Edgardo (1996), "Introduction to Law and Economics of Development," *Law and Economics of Development*, New Jersey: JAI Press, pp. 24-26.

Issues of national sovereignty remain the dominant theme whenever the Institutions of one nation are faced with the exercise of the sovereign power of another nation as manifest in the courts of that other nation. In contrast, the international community has, to a significant extent, been prepared to set aside the capacity of nation states to interfere with international commerce in favour of giving respect to the choices made by parties to international commercial transactions involving arbitrations. It is well to remember that this abdication of formal power is accepted throughout the world only on the basis that it serves the interests of each nation that participates in such a system. Reciprocity is at the heart of this international deal. Each such nation has accepted that it is in its interests to behave in this manner, in order to receive for its citizens and corporations the benefits of other nations behaving in the same manner. There is no law of nature which says that this form of enlightened self-interest will continue.

In the world before World War I, when international communications had been revolutionised by wireless telegraphy over international cable connections and a substantial decline in transportation costs, the benefits of globalisation were as obvious as we believe them to be today. That globalised world changed very quickly into war and national autarky, at great cost. No-one should assume a similar regression is impossible today. For all of those who are involved as practitioners in the resolution of international commercial disputes, whether as lawyers or arbitrators or judges, the contribution that we can make to the maintenance of the system is twofold. Firstly to ensure the public and political decision makers are aware of the benefits of the system. Secondly, to ensure that the system actually delivers the benefits of which it is capable.

The costs and uncertainties of international commercial dispute resolution are capable of being minimised, and brought into some kind of reasonable relationship with the costs and uncertainties of domestic commercial dispute resolution, only if all of us who are involved in the process are committed to the just, quick and cheap resolution of such disputes. Business lawyers have been described as “transaction cost engineers” who facilitate commercial intercourse by reducing future transaction costs. Well drafted commercial arrangements avoid conflict with regulatory regimes, anticipate and therefore avoid disputes and create structures for dealing with the unknown or the unanticipated. By such involvement transaction lawyers add value to commercial transactions.

The same is true of dispute resolution processes. The cost structure of most economic activity has been transformed over recent decades by new management techniques, by technology and by the reduction in barriers to trade through microeconomic reform, both domestic and international. Lawyers are not and will not be immune to these pressures. The same is true of commercial arbitrators. Both lawyers and arbitrators must be seen to deliver a cost effective service or they may very well find themselves bypassed by the requirements of commerce. Judges as well as arbitrators must be sensitive to the costs that the procedures for dispute resolution impose upon the parties. That is particularly the case in international commerce; Judges as well as arbitrators must be sensitive to the costs that the procedures for dispute resolution impose upon the parties. That is particularly the case in international commerce, the benefits of which can be substantially undermined by the transaction costs that arise whenever something goes wrong. Many believe that commercial arbitration mimics court processes too often and to a greater extent than it should.

This restricts to a significant degree the extent to which arbitration delivers in fact on its potential to be cost effective. There is little evidence that commercial arbitration is in fact quicker and cheaper than decision-making processes by commercial judges. It is possible for it to be so but it does not seem to happen as much as it should.

The international regime for commercial arbitration does have one advantage because it avoids the proclivity to engage in venue disputation that has bedevilled such litigation in Australia, England and North America, but not yet elsewhere. The burgeoning case law on anti-suit injunctions and then anti-anti-suit injunctions and, inevitably, anti-anti-anti-suit injunctions, reflects the simple proposition that when it comes to the procedure of courts and the quality of judiciaries, parties believe that where a case is determined matters. This is so even if the disputation involves considerable expenditure that is, on any objective view, completely wasteful.

Avoiding venue disputation is a real cost and time advantage for choosing the international arbitration regime. There is of course a long history of tension – one hopes that in this day and age it is a creative tension – between courts and arbitrators who have on occasions treated each other as if they were trade rivals in the dispute resolution business. One need not believe that is a prevalent attitude today, but one cannot say that it has completely disappeared.

In *Raguz v Sullivan*,¹¹ President Mason and Spielmann J. referred to the traditional hostility of common law judges to commercial arbitration in the period up to the middle 19th century, until the famous case of *Scott v Avery*¹² upheld the validity of arbitration agreements which made an award a condition precedent to any right of action under a contract. As we said in that judgment, the canny Scot, Lord Campbell, explained that hostility by the fact that judicial salaries were almost entirely dependent upon court fees and, accordingly, English judges had a personal financial incentive to maximise the number of cases that were brought in the courts. That incentive did not disappear until the mid-19th century. It was never a feature of Australian judicial practice, although the first Chief Justice of New South Wales, Sir Francis Forbes, had to suppress the wishes of his fellow judges to establish such a system here. Only those judges who are historians can look back wistfully to the days when being a judge was a route to substantial wealth.

As the judgment in *Raguz* clearly shows, Australian commercial judges have, generally, become active proponents of alternative dispute resolution mechanisms, including commercial arbitration. This was manifest most recently in the judgment of the Full Federal Court last year in *Comandate Marine Corp v Pan Australia Shipping Pty Limited*¹³ Of course there will be exceptions, but there is no doubt that throughout Australia commercial judges do not manifest the kind of hostility to commercial arbitration that may once have been the case. This is in part a function of the managerial role that judges have assumed over recent decades with respect to both individual case management and case load management within their courts.

By comparison with the past, judges do not sit back as neutral umpires allowing parties to take as much time as they like but, particularly in commercial litigation, insist on the early disposition of the real issues in dispute in the most economical manner possible. Often enough that involves support for alternative dispute resolution processes. When it comes to international commercial litigation, Australian judges are conscious of the advantages of arbitration from the point of view of enforcement. They are also aware that arbitration has certain other advantages, particularly to those parties who wish, for perfectly appropriate commercial reasons, to ensure confidentiality. Of course one person's privacy is another person's secrecy and there are many people, not simply trade rivals, who have an interest in knowing what is going on.

¹¹ (2000) 50 NSWLR 236

¹² House of Lords, 811, 854

¹³ (2006) 157 FCR 45

There is, of course, express provision for judicial supervision of commercial arbitration. Many arbitrators may remain doubtful that judicial expressions of support are fully reflected in the exercise of these powers. One should recognise that one may be in no different position to those numerous trial judges who complain about the intervention of appellate courts, or administrators who complain about judicial review. Courts have specific statutory powers, indeed duties, with respect to commercial arbitration. The statute must, of course, be applied in accordance with its terms. However these statutory powers should be regarded as conferring a supervisory jurisdiction principally directed to maintaining the integrity of the process of arbitration. This is an essential function which the courts perform in a number of different spheres of conduct – notably in other supervisory jurisdictions such as administrative law.

The statutory power to review creates an appeal on a question of law. That does not mean that whenever such a question exists the power to intervene must be exercised. The exercise of the discretion to make orders raises distinct issues. Whenever a court's intervention is concerned with matters of personal and institutional integrity, the system of commercial arbitration is enhanced. Practitioners should accept that arbitrations do go wrong, sometimes fundamentally so. Arbitrators can manifest bias. Arbitrators have been known to commit errors of so fundamental a kind as, on any view, to justify intervention by a court. It cannot be suggested that a light-handed but effective supervisory jurisdiction interferes in any way with the autonomy of the parties which is the underlying rationale of commercial arbitration and the reason why it has acquired a broad level of acceptance in dispute resolution.

The party's choice was not, however, to select arbitration per se, but to select arbitration by persons and by procedures that manifest a high degree of integrity. Knowledge that the integrity of arbitration can be assured by a light-handed but effective supervisory jurisdiction, enhances the confidence of the commercial community with respect to the arbitration process. Accordingly, a supervisory intervention should be welcomed by arbitrators, rather than treated with suspicion. The confidence of the commercial community in arbitration depends, in large measure, on the knowledge that the process will work as intended. That can only occur if both the personal integrity of the individuals conducting arbitrations and the institutional integrity of the processes are assured. Sometimes that requires the exercise of a supervisory jurisdiction after the event.

Plainly, the process of selecting arbitrators and agreeing upon the rules pursuant to which the arbitration will be conducted plays an important role in maintaining the confidence of the commercial community in this regard. The recognition that institutions are fallible and sometimes need to be corrected in retrospect is not an insight unique to arbitration. The very existence of a supervisory jurisdiction assists in maintaining confidence in the system by ensuring that, on those few occasions when that confidence may not be fulfilled, that the failure is capable of correction. Such a jurisdiction is not a threat to commercial arbitration.

It is a desirable, indeed an essential part of its effective operation. It is necessary for commercial judges to bear in mind the need to support, to the extent that they are able while acting in accordance with law, the autonomous choice of the parties to refer disputes to arbitration. Furthermore, a significant advantage of commercial arbitration is the potential it has, albeit not always realised, for being more cost efficient than the processes of a formal adversary system. It is not desirable for the courts to insist upon the replication of the procedures with which they are familiar in commercial arbitrations although, it appears, that many who practice in arbitration are continually pushing the process in that direction.

Such tendencies are a matter of concern to many of us. The decision in *BHP Billiton Limited v Oil Basins Limited*¹⁴ requires arbitrators to give reasons, in certain circumstances, in the same form as is required from a judge. However, it is to be noted that there are a number of cases on the subject, not referred to in the judgment, which were the subject of comprehensive exposition two decades ago by Tom Bingham in an address in which he set out in point form the different requirements of reasons by a court and reasons by an arbitrator.¹⁵ There is much wisdom in his Lordship's analysis. The relationship between courts and arbitrators should remain one of collaboration which is how the relationship has developed over recent years.

Indeed, many of the ideas for case management now regularly employed in commercial litigation were first developed in commercial arbitration. Most recently, the addition in Australian Commercial List Practice Note of a stopwatch system was an idea to be picked up from commercial arbitration. It deserves more widespread use in both spheres of dispute resolution. With respect to collaboration, the Hon'ble Chief Justice raised the possibility of permitting judges of the Supreme Court to be appointed as commercial arbitrators, where parties wished that to occur. Such an option has long existed in England, although it is very rarely used.

Tom Bingham, the current senior Law Lord, when he was a commercial judge, did once sit as a commercial arbitrator in a dispute between two of the United Kingdom's major corporations. He told that that had been a successful exercise, because those corporations wanted to have a senior commercial judge resolve their disputes, but to do so in private.

It may be possible that the availability of an option of this character may be useful in establishing Australia as a desirable venue for international commercial arbitration. This idea was worth pursuing so long as the arbitration community regarded it as a valuable addition to the Australian scene.¹⁶ In USA, a new paradigm for commercial arbitration is proposed. That model centres on a redefined relationship between reasoned awards and the judicial standards for vacatur.

Central among the issues presented by the evolution of commercial arbitration to centre stage of the American civil justice system is the question of whether commercial arbitrators should provide the parties to the process with substantive reasoned awards revealing their mode of decision.

Unlike in labour arbitration, and contrary to the prevailing practice in other industrialized countries, commercial arbitrators in the United States seldom articulate their reasons for decision in their written awards. Thus, commercial arbitration awards issued in the United States typically do not set forth the key facts material to the issue(s) in dispute, do not identify the relevant law and contract language, and do not demonstrate how the arbitration tribunal applied the pertinent law and contract language to the material facts in order to resolve the controversy before it.¹⁷

¹⁴ (2007) VSCA 255

¹⁵ Bingham "Reasons and Reasons and Reasons: Differences between a Court Judgment and an Arbitral Award" (1988) 4 *Arbitration International* 1 reprinted in Australia in (1997) 16 *The Arbitrator* 19.)

¹⁶ The Honourable J J Spigelman AC, Chief Justice Of New South Wales, Opening Address To The Joint Conference Of Acica And Acla, Sydney, 10 August 2007 (http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=1806789) (Visited On 2-3-12)

¹⁷ Stephen L Hayford, *ARTICLE: A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, *The George Washington Law Review* (1998) (<https://litigation-essentials.lexisnexis.com>) VISITED on 2-2-12

V Revolution in Evolution

Though the alternate justice dispensation system in the form of A.D.R. has been serving the cause of the needy, but still new species of seekers of justice from entrepreneurial society proliferated both in the national and international segments. The New International Economic Policy gave birth to globalization, liberalization and privatization which in turn forced the emergence of 'On-Line Dispute Resolution'. Information Technology revolutionized the E-commerce and consequently an expeditious dispute settlement on-line. This fraternal and inextricable consanguinity between cyber regime and commerce regime justly warrants effective management of 'On-Line Arbitration'. Online arbitration can provide an effective and convenient method to mitigate costly litigation and uncertainty on cyber disputes. The importance of out-of-court resolution in cyberspace is reflected in several community initiatives and E.U legislation, such as the Directive on E-commerce, the Directive on E-Signatures, and community initiatives. Even as technology and tools available are being developed to improve the capabilities and effectiveness of online arbitration.

On-line arbitration is still in the threshold of development in the E.U. Most O.D.R providers are located in the United States and Canada and are privately-run for profit organization. However, online arbitration is still fraught with many risks in comparison to traditional arbitration. Online arbitration may provide consumers less due process than regular courts. Many consumers are forced to waive their rights and do not have the assurance that procedural guarantees such as independence and impartiality, due process and transparency. The fee charged to consumers is still high and they do not guarantee the other party's cooperation. In order to boost online arbitration, legal framework must be improved.

To begin with, the New York Convention must be amended to expressly include the modern means of communication to satisfy the form and writing requirements, and incorporate the UNCITRAL Model Law. The use of online arbitration requires a change of national laws to include "writing" and "form" in relation to arbitration agreement and awards to include electronic data. The Commission Recommendation 2001/31/EC should be transformed into a Directive in order to harmonize national laws and guarantee that all out-of-court bodies involved in consensual resolution of consumer disputes adhere to the principles of impartiality, effectiveness, fairness and transparency. Particular rules to ensure procedural guarantees unique to the online environment are necessary, especially in the case of consumer arbitration. Another possibility would be the creation of an EU Court for arbitration or cyber court to deal with online issues.

The cyber court should be tasked with issues related to the enforcement and recognition of awards, interpretation of the provisions and mandatory laws, and issues dealing with the violation of procedural guarantees. The world of O.D.R is a changing and uncertain world. According to the survey undertaken within the framework of the White Book in Mediation in Catalonia, the technological chapter of this has showed that today there are less than 30% of those ODR service providers existing only five or six years ago. The survey has been coherent with the ODR concept employed and therefore it has excluded systems which fall outside this e. g. internal complaint systems. What it may be intuited is that ODR initiatives should gain strength in order to position themselves in the globalised market of conflicts. Perhaps, this could be accomplished with the provision of ODR mechanisms used in conjunction with other off-ODR systems. Again, this is particularly important in the consumer domain where ODR services may be an item to add to seals of quality, codes of conduct, formation activities, or publicizing activities.

In a way, it recalls some of the notions promoted within the e-commerce Directive as regards self-regulation entities. It can be noted that those entities providing these kinds of off-ODR services enjoy a certain stable position in their territorial market of reference.

This is the case with *Confianza Online* in Spain but also with Better Business Bureau in the EEUU and Canada providing seals of quality to B2C activities providing a seal of quality regarding privacy activities. Disputes seem to be some of the most employed controversies in ODR systems as we have seen in our research. It may be noted that consumers take the most of these systems since they are far better off with inexpensive services as compared with businesses. Yet, it seems that companies are not fully devoted to ODR and they may even be opposite to such systems.

Bodies are mostly located in the United States as well as in Europe whereas other continents lay far behind. However, ODR platforms do not take into account the different tools that the web 2.0 enables. ODR providers do not base their services in cutting-edge technology and it appears that ODR entrepreneurs may not see the need for losing time and resources to adapt platforms to the standards of web 2.0. It has been pointed out that ODR would be one of the biggest beneficiaries of web 2.0 technologies. Twitter, Wikis, Face book, Flickr or You tube are well known examples of this and are not used as with ODR systems. The results of the research indicate that ODR practice is far from using web 3.0 tools. For example, ODR platforms rely particularly on concerns. However, web 3.0 relies on a preference for the treatment of real-time data and is concerned with systems interoperability. Even though the limited use of this, we should be far from hopeless. For one thing, some of the characteristics of consumer mediation, such as the standard claims typology and a low value of the disputes suggest the consumer domain to be a convenient arena for ODR.¹⁸

VI Borderless Solution for Bounded Disputes

The inflorescence of International Commercial Arbitration display new zones of commercial prosperity through pleasant and co-operative willingness of the parties to dissolve the conflicting issues and resolving the future transactions. Though the play of A.D.R. mechanism in international business transactions is age old both in the Eastern and Western spheres of the globe, modern trade practices are not evenly found in the international commercial transactions and dispute settlement modes have also been found varied and incongruous.

India is yet to prove its prominent, vigorous participation and application of neo zones in international commercial arbitration. At the outset, though the Indian Arbitration and Conciliation Act, 1996 is modelled on the spirits of UNCITRAL Model Law, but in practice and adaptation, some controversies and inconsistencies are noticed which are advisedly remedial. Basing on the experiences in the course of research, the following suggestions are proposed for consideration: -

1. Both lawyers as well as litigants should be made to realise the importance of arbitration methods for Speedy resolution of commercial disputes, and encourage parties for settlement of disputes through resolution process.
2. There is an urgent need to professionalise arbitration in India as observed by Ms Louise Barrington, former Director of International Chamber of Commerce.
3. That enforcement of a foreign award may be denied on public policy grounds 'only where enforcement would violate the State's most basic notions of morality and justice'.

¹⁸ (Josep Suquet 1 , Marta Poblet 1 , Pablo Noriega 2, Sílvia Gabarró 1, Online Dispute Resolution in 2010: a Cyberspace Odyssey? UAB Institute of Law and Technology UAB Campus, B Building, Faculty of Law 08193 Bellaterra, Spain 2 Artificial Intelligence Research Institute (IIIA-CSIC) UAB Campus 08193 Bellaterra, Spain {Josep.Suquet, Marta.Poblet, Silvia.Gabarro}@uab.cat {pablo@iiia.csic.es} (http://ceur-ws.org/Vol_684/ODR2010_proceedings.pdf)

If the arbitration law does not contain a statutory procedure for speeding up the arbitral process—at least after one year—or for control of the excessive charge of fee by the arbitrators, the State must step in and make some law for speeding up arbitration. The amendments which the 176th Report of the Law Commission had proposed addressed these questions. The arbitration has to be completed in one year, if not, the court will monitor it by fixing dates and during the interregnum, when the court is moved and it passes orders, there shall be no stay of the arbitral proceedings. The prospect of a civil court setting the time schedule for retired judges of the superior courts (whose award would any way go under the Act before the civil courts, if challenged) should be a deterrent and if once this amendment comes into force, arbitration in India will be quite fast, if not faster than elsewhere, and the mechanism we have proposed for speeding up arbitration is unique and there are no parallel provisions elsewhere in any other country.

4. An amendment to the Arbitration and Conciliation Act, 1996 to be made for absolute enforceability of foreign awards in India. Art. 1(2) of the UNCITRAL Model Law on international commercial arbitration should be added to our Arbitration Act. This will provide safety measures to any party requiring interim measures etc. The present act of Supreme Court dismissing foreign awards under 'public policy' has got criticism from various ends.
5. To establish a regional branch of the Permanent Court of Arbitration (PCA) for South Asia in New Delhi in recognition of the contributions made by India to the cause of peaceful settlement of disputes through strict adherence to international law, a policy that India has vigorously and faithfully pursued over the years.
6. In order to boost online arbitration, legal framework must be improved. To begin with, the New York Convention must be amended to expressly include the modern means of communication to satisfy the form and writing requirements, and incorporate the UNCITRAL Model Law. The Commission Recommendation 2001/31/EC should be transformed into a Directive in order to harmonize national laws and guarantee that all out-of-court bodies involved in consensual resolution of consumer disputes adhere to the principles of impartiality, effectiveness, fairness and transparency.
7. Sufficient number of On-Line Service Providers should be encouraged and established to deal with the increasing number of cases in E-commerce.

VII Conclusion

With the proliferation of global economy, the colour and complex of commerce and trade has metamorphosed into unpredictable spectrum of trading universe. Conventional negotiations between physical entities have been replaced by invisible conversations through air and space. Modern technology created information age where most of the human and business relations are created, contained and closed in the virtual world. Virtual world became borderless erasing the significance of boundaries of nation-states, and the jurisdictional contention is becoming a fictitious contention inviting a new jurisdictional illumination with regard to resolution of disputes expeditiously, efficaciously and exponentially. International Commercial Arbitration forayed into On-line Dispute Resolution not to tame the parties but to tame avoidable irritants of justice delivery system. This is a good augury welcomed with business enthusiasm to complement the conventional justice system. International Commercial Arbitration is growing from strength to strength to assist peaceful and prosperous trade and commerce beyond border-boulders.

JUDICIAL REVIEW OF LEGISLATIVE ACTIONS

*Dr. Sanjay S.Bang**

Abstract

To study the judicial review of legislative actions and the principles and procedures followed by Courts in India and the United States of America in a comparative study method. The research methodology used for the present research article is traditional Doctrinal research method. Judicial review of legislative Acts is the power of the court to determine the constitutionality of the Acts by the legislature. Judiciary has utilized this tool to solve the dispute and to maintain the supremacy of the constitution. Though there is some difference between the procedure of the two countries, but the Courts have utilised this future when the question of constitutionality arises. Judicial review is important feature of modern democracy. It has become a more important feature than ever before. Today even after having the written constitution, the pillars in the democracy is trying to encroach the other wings area. In todays globalised and human rights world, the people cannot be overlooked. The Principle of Judicial review, though originated from England but properly developed in the United States of America after the Marbursys case. Indian constitution, has adopted this concept from its American counterpart. So it has made me curious to study the concept of "Judicial Review" in a comparative manner between the two countries.

Keywords *Judicial Review, Supreme Court, Constitution, Fundamental Rights, Directive Principles*

I Introduction

Judicial Review basically is an aspect of judicial power of the state which is exercised by the courts to determine the validity of a rule of law or an action of any agency of the state. In the legal systems of modern democracies it has very wide connotations. The judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also they try to provide every citizen what has been promised by Constitution.

All this is possible because of the power of judicial review. India is lucky enough to have a constitution in which the fundamental rights are enshrined and which has appointed an independent judiciary as guardian of the constitution and protector of the citizen's liberties against the forces of authoritarianism. In a true form of democracy, the rule of a fearless independent and impartial judiciary is indispensable and cannot be over-emphasized. Judicial review, whatever else it may be, provides a mechanism by which the judiciary can affect the implementation, contours, and the formulation of policy.

As such, it provides a possible avenue of access to a variable 'open' state. Thus, the Judicial Review sets the legal framework within which decisions such as affecting the rights, interests or legitimate expectations of individuals are taken into considerations. Every representative democracy committed to written constitutional limits upon legislative power must resolve the tension between enforcement of those limits through the relatively unrepresentative institution of judicial review and reliance upon the self-restraint of legislators.

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II Meaning and Definition of Judicial Review

The word 'review' stands for an act of inspecting or examining something with a view to correct it or to improve it. This meaning shows that there is something which is already done by somebody whose correction or improvement is envisaged in the process of 'review'. The word 'review' in the phrase 'judicial review' stands for something which is done by a court to examine the validity or correctness of the action of some other agency. Thus the power of the Judiciary to review and determine the validity of a law or an order may be described as the power of "Judicial review". It means that the constitution is the supreme law of the land and any law inconsistent therewith is void. 'Judicial Review' legislation or executive action can be defined as "Judicial review is the ultimate power of any court to declare any act of legislatures or of executives as unconstitutional and hence unenforceable as a) any law. b) Any official action based upon a law and c) any other action by a public official that it deems to be in conflict with the constitution."

In *L. Chandra Kumar Vs Union of India*¹, the Supreme Court held that "Henry J. Abraham's definition of judicial review in the American constitution is, subject to a few modifications, equally applicable to the concept as it is understood in Indian constitutional law. Broadly speaking judicial review in India comprises three aspects. Judicial review of legislative action, judicial review of judicial decisions (lower courts and tribunals) and Judicial review of Administrative action. According to Howard Mebain, an American author judicial review mean, the power possessed by American courts to declare that legislative and executive action are null and void if they are volatile of the written constitution.

III Aims and objectives of the study

The study is carried out with the following aims and objectives

- 1) To trace the source and development of judicial review in India and the U.S.A in brief.
- 2) To identify the principles and procedures adopted by the courts in India in relation to the legislative action of the state.
- 3) To identify the principles and procedures adopted by the courts in the U.S.A in relation to the legislative action of the state.
- 4) To compare the procedure of judicial review of both the countries.
- 5) To come with the concluding remark how this controversial concept has maintained the balance in all the wings of the state.

IV Methodology

The research methodology used for the present research article is traditional Doctrinal research method. As most of the information can be sought form the available literature. So the researcher has chosen doctrinal method as method of research for the present article and has used books, journals, research articles for preparation of the same.

V History and origin of Judicial Review in India and the U.S

A study of the concept of Judicial Review revolves round the question how far the courts can go in examining the decisions of State agencies in their proceedings of review as distinguished from other judicial proceedings.

¹ (AIR 1997 SC 1125)

The nature and scope of this particular power can be understood with reference to the historical factors that guided and shaped the jurisdiction of the Courts in the matter of exercising their power of judicial review. The reason for adopting such an approach is that the system of Judicial Review has not remained the same as it was in its origin; on the other hand it has undergone several changes depending upon the developments in the legal system of the country.

While in England and United States the courts through their own action modified the method of review in India it was the Statute of the British Government in pre-Independence period and the Statutes enacted by the Indian Parliament under the Constitution of India which modified the nature and scope of Judicial Review. Though the focus of study here is to study the system of judicial review in India and the U.S.A reference is made to the system of England as well which shows in clear terms the changes which have occurred in the history of the two countries. For this reason a study has been made of the historical developments in England related to development of judicial review affecting the system of judicial review in the U.S.A and India. The Glorious Revolution of 1688 in England was a victory of Parliament against the Crown, and it is as such that it is primarily remembered, importantly, it was also a victory of Parliament against the judiciary.

The judiciary in pre-1688 Britain had often constructed the common law so as to hold that “the King could not, on the basis of his powers and prerogatives as a monarch, make any change in the general law of the land without the support of Parliament” and soon found that punishable acts could only be defined by Parliament: the King could not “make a thing unlawful which was permitted by the law before”² Nevertheless it was far from a loyal servant of Parliament against the Monarchy, and was frequently allied with the King against Parliament and had declared its willingness to set aside Acts of Parliament on the basis of the it’s reading of the common law. As Sir Edward Coke proclaimed, “it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void”³ Coke’s dictum received considerable judicial support in the 17th century, albeit far from unanimous, and some scholars have claimed that Coke “based his conclusion upon medieval authorities that indicated that courts did indeed declare statutes void”⁴.

It received substantial judicial support in Hobart C.J.’s obiter dictum in *Day v. Savadge (1615)* in which it was observed that “an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself. Support was also expressed in Lord *Sheffield v. Radcliffe (1615)*, *R. v. Love (1653)*, *Thomas v. Sorrell (1677)* and in the Case of Ship-Money, whereby Finch C.J. stated that “No act of parliament can bar a king of his regality... they are void acts of parliament to bind the king not to command his subjects.... Acts of parliament may take away flowers and ornaments of the crown, but not the crown itself”⁵. This support was in part indicative of the increased attention given to the judiciary as it was forced to mediate between the King and Parliament over the course of the factitious 17th century.

It was against the lawmaking powers of both the King and the judiciary that the 1688 Bill of Rights “proclaimed loudly that proceedings in Parliament ought not to be questioned or impeached in any court or any other place”⁶ The Bill of Rights, and the subsequent consolidation of the revolutionary

² (Koopmans, 2003: p.17).

³ (*Dr. Bonham’s Case*, 8 Co. Rep. 107a, 114a C.P. [1610]).

⁴ (Walters 2001: 111).

⁵ *ibid*

⁶ Ewing, 1999: p.79).

advances made by Parliament, established the sovereignty of Parliament as the central basis of the modern British constitution: “the ‘emergence’ of parliamentary supremacy *post* 1688 and its entrenchment (through widespread acceptance by the key constitutional players) indicate a particular constitutional relationship between Parliament and the courts, in which the essential principles are that judicial power is derived and subordinate and is not autonomous (and co-equal) with Parliamentary power”⁷. The Act of Settlement, 1701, was crucial in assuring widespread acceptance amongst the judiciary by guaranteeing judicial independence relative Parliament. The effect of the Revolution, however, was to effectively bury the possibility that the judiciary would engage in review and possible invalidation of Parliamentary statutes.

Although Coke’s dictum would be invoked at various points in the 18th and early 19th centuries, either by judges such as Holt C.J. in *London v. Wood* (1701) or by lawyers, “this support usually came in obiter dicta or in unsuccessful arguments at bar”⁸ Writing at the height of the doctrine of Parliamentary supremacy, James Bryce noticed that “Common Right and Reason” had been frequently expressed as a basis for the invalidation of positive enactments repugnant to it, but that “little (if any) effect has ever been given” to these assertions⁹ During the debates at the Convention the U.S.A, the Founding Fathers made a number of references to the concept of judicial review. The greatest number of these references occurred during the discussion of the proposal known as the Virginia Plan. The Virginia Plan included a “council of revision” that would have examined proposed new federal laws and would have accepted or rejected them, similar to today’s presidential veto.

The “council of revision” would have included the President along with some federal judges. Several delegates objected to the inclusion of federal judges on the council of revision. They argued the federal judiciary, through its power to declare laws unconstitutional, already had the opportunity to protect against legislative encroachment, and the judiciary did not need a second way to negate laws by participating in the council of revision. For example, Elbridge Gerry said federal judges “would have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some states the judges had actually set aside laws, as being against the constitution. This was done too with general approbation.”¹⁰

Luther Martin said: “As to the constitutionality of laws that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative.”¹¹ These and other similar comments by the delegates indicated that the federal courts would have the power of judicial review. Other delegates argued that if federal judges were involved in the law-making process through participation on the council of revision, their objectivity as judges in later deciding on the constitutionality of those laws could be impaired.¹²

These comments indicated a belief that the federal courts would have the power to declare laws unconstitutional. At several other points in the debates at the Constitutional Convention, delegates made comments indicating their belief that under the Constitution, federal judges would have the power of judicial review.

⁷ (Hadfield 2000: 195-6).

⁸ (Walters 2001: 112).

⁹ Bryce 1901: 601).

¹⁰ Farrand, Max, (1911) *The Records of the Federal Convention of 1787*, Yale University Press, p. 97

¹¹ *Ibid.*

¹² 49 *Stanford Law Review*, 1031, (1997)

For example, George Mason said that federal judges "could declare an unconstitutional law void."¹³ James Madison said: "A law violating a constitution established by the people themselves would be considered by the Judges as null & void."¹⁴ In all, fifteen delegates from nine states made comments regarding the power of the federal courts to review the constitutionality of laws. All but two of them supported the idea that the federal courts would have the power of judicial review.¹⁵ Some delegates to the Constitutional Convention did not speak about judicial review during the Convention, but did speak about it before or after the Convention. Including these additional comments by Convention delegates, scholars have found that twenty-five or twenty-six of the Convention delegates made comments indicating support for judicial review, while three to six delegates opposed judicial review.¹⁶

One review of the debates and voting records of the convention counted as many as forty delegates who supported judicial review, with four or five opposed.¹⁷ In their comments relating to judicial review, the framers indicated that the power of judges to declare laws unconstitutional was part of the system of separation of powers. The framers stated that the courts' power to declare laws unconstitutional would provide a check on the legislature, protecting against excessive exercise of legislative power.¹⁸ However, The Constitution of U.S.A. makes no specific reference to the Judicial Review of legislation. There was a clear effect of common law on the U.S soil. Chief Justice Lord coke's decision in Bonham's case repudiated in England but it found a fertile soil in the United States, where the U.S. Supreme Court it in number of decisions. This has laid down the foundation of Judicial Review of legislation in the United States of America, which has now become one of the most outstanding features for the operation of that Constitution.

In *Hylton v. United States*¹⁹, chief justice chase remarked in 1796 as under:

"It is unnecessary for me to determine whether the court constitutionally possesses the power to declare an act of the congress void on the ground of its being contrary to and in violation of the constitution, but if the court has such powers, I am free to declare it but in a clear case."

The federal convention was much concerned with the problem of keeping of the powers of congress within constitutional bounds. Chief Justice Marshall before the expressed his view on Judicial Review in *Marbury v. Madison*²⁰, spoke in the capacity of a delegate to the Virginia convention. "If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void. In 1795 in *Van Horn's Lessee v. Durance*²¹, Justice William Paterson, Associate Judge of the Supreme Court observed: "every act of the legislature repugnant to the constitution is absolute void."

¹³ Farrand, Max, (1911) The Records of the Federal Convention of 1787.

¹⁴ Ibid, p. 93

¹⁵ Prakash and Yoyo, 'The Origins of Judicial Review, 70 U. of Chicago Law Review, p. 952.

¹⁶ Beard Charles, (1962) The Supreme Court and the Constitution, Prentice Hall, p. 69

¹⁷ Melvin, Frank, 'The Judicial Bulwark of the Constitution, 8 American Political Science Review, 167 (1914)

¹⁸ Prakash and Yoyo, 'The Origins of Judicial Review', 70 University of Chicago Law Review. 931

¹⁹ 3(Dall,171) (1796)

²⁰ 5 US(Cranch)137(1803)

²¹ 2Dallas 304 (1795)

In *Marbury v. Madison*²², Marshall declared that- “the legislature has no authority to make laws repugnant to the constitution and in the case of constitutional violation the court has absolute and inherent rights to invent the system of judicial review which was already in the process of evolution, but by this decision he strengthened the system to a remarkable extent. Again Marshall in *McCulloch v. Maryland*²³ declared the stature of Maryland unconstitutional. In this case Marshall expanded the powers of the Federal Government by invoking the doctrine of implied powers. The doctrine of judicial review established by Chief Justice Marshall in *Marbury v. Madison*²⁴ is still vibrant and its force stands unabated, although it has been criticised. By 1803 Judicial Review had a long history in America.

Chief Justice Marshall through his various constitutional decisions established the following principles:

- (a) The people as a whole are sovereign.
- (b) The Government is the Government of the people, it emanates from the people, its powers are granted by the people and it is to be exercised for the benefit of the people.
- (c) The constitution is Supreme.
- (d) The Central Laws have Supremacy over the State Laws.
- (e) A law repugnant to the Constitutions is void.
- (f) The court has power to determine the constitutionality of a legislative Act and declare it void when it is repugnant to the constitution.
- (g) Doctrine of implied powers can be invoked to expound the Federal powers.
- (h) Legislation can be declared unconstitutional only in clear case of unconstitutionality and not in any doubtful case.

In India, judicial review is not an event of sudden emergence but its gradual evolution depended on the constitutional ideas in different stages of Indian constitutional history. The Supreme Court at Calcutta was established by the Charter of 1774, which was issued under the Regulating Act, 1773. The powers of the judges of that court were same as those of the judges of the court of Kings Bench in England. The Indian legislature from 1858 to the enforcement of the Government of India Act, 1935 was like subordinate body and had no plenary power of legislation but nevertheless the power of judicial review existed. The law court had power to examine the constitutionality of legislative Act on the ground of legislative incompetence of legislative powers. The Government of India Act, 1858 put certain restrictions upon the law-making power. Positive restrictions were imposed by the Indian Council Act, 1861. Section 22 of the Indian Council Act, 1861 lays down constitutional restrictions in framing laws, as follows:

“Provided always that the said governor General in Council shall not have the power of making any law or regulations which shall repeal or in any way affect any of the provisions of this Act”. The Constitutional thinkers of India were of the view that in the Constitution of free India there must be provision for a supreme court with the power of judicial review. That the Supreme Court should be conferred with the power to declare ultravires measure which go against constitution.” During the pre-Independence days the system of Courts in India was of the same type as it was in the English legal system, So much that the Courts in India could exercise their jurisdiction in civil and criminal matters as per the rules of Common Law, Principles of Equity and Statutes. The statutes applicable to civil and criminal matters were those that had been enacted by the British Parliament and the local legislatures of India under delegated authority. Judicial Review worked in the then Courts of Law and they could examine the validity of a legislative or administration action.

²²See Supra 3

²³ 4 Wheaton 316(1819)

²⁴See Supra 3

Since India had no independent status then there was no sovereign legislature to make primary legislation and the system of judicial review was not of a full-fledged character like the one of United Kingdom or United States of America.

Being a colony of the British Empire the local government could make bye-laws, rules or regulations and all these legislative actions were under the authority delegated to them by the Imperial Legislature of England. The subordinate legislation or delegated legislation was usually the subject matter of judicial review and the Courts considered the validity of such pieces of legislative action on the touchstone of a superior rule or regulation of the Imperial Government. The principle followed by the Courts at that time was to sanctify the Statutes enacted by the appropriate legislatures and to protect and preserve the British interests. Persons affected by any of the bye-laws, rules or regulations could challenge their validity, and the courts existing at that time did review the validity of the laws. This is how the concept of Judicial Review operated during the pre-Independence days.

In short, the set up of Courts in the Pre-Independence period was that the Courts were organized by the Britishers on the pattern of their own courts in England. They could exercise their powers at law and in equity and appeals could be preferred against the decision of the Indian courts to Privy Council as was the procedure with regard to appeals from other colonies. The High Courts at the provincial level were the highest courts to decide the matter subject to appeal to the Privy Council in England. The Courts in India did consider the question of validity of legislative action, and that was mostly in the case of the legislature exercising the power of delegating the legislative functions. At the time of making of Constitution the framers of the Indian Constitution were inclined towards the British principles of Parliamentary Supremacy but although they adopted the English model of parliamentary Government and made parliament the focus of political power in the country and the dominant machinery to realize the goal of social revolution, they did not make it a sovereign legislature in the same sense and to the same extent as the British Parliament was sovereign.

They placed, as much supremacy in the hands of the legislature as was possible within the bounds of a written constitution with a Federal distribution of powers and a bill of rights. The Judiciary has been assigned a superior position in relation to the legislature, but only in certain respects. The constitution endows the judiciary with the power of declaring the laws as unconstitutional, if that is beyond the competence of the legislature according to the distribution of powers provided by the constitution or if that is in contravention of the constitution. Thus, while the basic power of review by the judiciary was recognized and definitely established, significant restrictions were placed on such a power, especially in relation to the fundamental rights concerning freedom, and liberty.

VI Supreme Court's interpretation to maintain the supremacy of the constitution

Under the constitution of India, the scope of judicial review has been extremely widened. Unlike the U.S.A., the constitution of India has made express provision for judicial review. The scope of judicial review is present in several articles of the constitution, such as, 13, 32, 131-136, 143, 226 and 246. Thus, the doctrine of judicial review is firmly rooted in India and in this sense it is on a more solid footing than it is in America.

Judicial review in India is based on the assumption that the constitution is the supreme law of the land and all the governmental organs, which owe their origin to the constitution and derive their powers from its provisions, must function within the framework of the constitution. Under the Indian constitution there is a specific provision in Article 13(2) that "the state shall not make any law which

takes away or abridges the rights conferred by Part III of the constitution containing fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void”.

The courts in India are thus under a constitutional duty to interpret the constitution and declare the law as unconstitutional if found to be contrary to any constitutional provisions. It can be appreciated that the protection of the judicial review is crucially inter-connected with that of protection of Fundamental Rights, for depriving the court of its power of judicial review would be tantamount to making Fundamental Rights non-enforceable ‘a mere paper provision’ as they will become rights without remedy.

The following cases vividly demonstrate the nature, extent and importance of the role played by the Supreme Court of the Indian Union in protecting the supremacy of the constitution. The Supreme Court in *State of Madras v/s Row*²⁵ stated that the constitution contains express provisions for judicial review of legislation as to its conformity with the constitution. The court further observed “while the court naturally attaches great weight to the legislative judgments, it cannot desert its own duty to determine finally the constitutionality of an impugned statute”. In *A.K.Gopalan v/s state of Madras*²⁶ the court held that “In India it is the constitution that is supreme and that a statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not”.

Justifying judicial review, in *S.S. Bola v/s B. D. Sharma*²⁷, justice Ramaswami held “The founding fathers very wisely, incorporated in the constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, a ailment and enjoyment of equality, liberty. In *Subhash Sharma v/s Union of India*²⁸, The court observed that judicial review is a basic and essential feature of the constitutional policy and held that the Chief justice of India should play the primary role in the appointment of judges of High court and Supreme Court and not the Executive. Justice Bhagwati in *Sampath Kumar v/s Union of India*²⁹ held that “Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is”.

In *Minerva Mills* case, Chandrachud, C.J speaking on behalf of majority observed “It is the function of the judges, nay their duty, to pronounce the validity of laws. If courts were totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will become uncontrolled”. In the same case, Bhagwati, J observed “it is for the judiciary to uphold the constitutional values and to enforce the constitutional limitation.

That is the essence of the rule of law, which inter alia requires that the exercises of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the constitution and the law. The power of judicial review is an integral part of our constitutional system and without it there will be no Government of laws and the rule of law would become a teasing illusion

²⁵ (AIR 1952 SC 196)

²⁶ (AIR 1950 SC 27)

²⁷ (AIR 1997 SC 3127,3170)

²⁸ (AIR 1991 SC 631)

²⁹ (AIR 1987 SC 386)

and a promise of unreality. I am of the view if there is one feature of our constitution which, more than any other is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionable, to my mind, part of the basic structure of the constitution". Ahmadi, C.J in *Chandra Kumar v/s Union of India*³⁰ has observed "The judges of the Supreme Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limits".

After the period of emergency the judiciary was on the receiving end for having delivered a series of judgments which were perceived by many as being violative of the basic human rights of Indian citizens and changed the way it looked at the constitution. The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen. Judicial review extends to every governmental or executive action - from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in *S.R. Bommai v/s Union of India*³¹ case, to the highly discretionary exercise of the prerogative of pardon like in *Kehar Singh v/s Union of India*³² case or the right to go abroad as in *Satwant Singh v/s Assistant Passport Officer, New Delhi*³³ case. Judicial review knows no bounds except the restraint of the judges themselves regarding justifiability of an issue in a particular case.

In *Maneka Gandhi v/s Union of India*³⁴, the judicial review has acquired the same or even wider dimensions as in the United States. Now 'procedure established by law' in Article 21 does not mean any procedure lay down by the legislature but it means a fair, just and reasonable procedure. A general principle of reasonableness has also been evolved which gives power to the court to look into the reasonableness of all legislative and executive actions.

Recent Judgment of Supreme Court dated 11.01.2007 rendered in the case in *I R Coelho (Dead) by LRs Vs. State of Tamil Nadu and Others*³⁵ is a master stroke of the judiciary. Prima facie, it is laudable for the reason, that it is a unanimous judgment of nine judges Constitution Bench of the Supreme Court, unlike fractured earlier judgments on the point. In *Keshavananda Bharati vs. State of Kerala*³⁶ which is said to have first propounded the Doctrine of basic structure of the Constitution, the Hon'ble 13 Judge Constitution Bench of Supreme Court delivered 11 truncated judgments. Since 24th April 1973, the date of the judgment of the Keshavananda Bharati case, the debate is, what is the ratio decidendi, viz., the point of law laid down in the said judgment.

Fortunately, the present judgment of Supreme Court by providing unanimous verdict saved the Nation from such turmoil of searching for the ratio decidendi with magnified glasses. Fractured Judgments pains the Nation a lot to understand what is the Law and much time and energy of legal fraternity is spent on debating, interpreting and searching laws from such truncated judgments.

³⁰ (AIR 1997 SC 1125)

³¹ (AIR 1994 SC 1918)

³² (AIR 1989 SC 653)

³³ (AIR 1967 SC 1836)

³⁴ (AIR 1978 SC 597)

³⁵ (AIR 2007 SC 861)

³⁶ (AIR 1973 SC 1461)

The whole of the present judgment is devoted to understand and lots of pains have been taken to impress that Doctrine of Basic Structure was propounded in Keshavananda Bharati case.

Much effort is made to highlight and explain Justice Khanna's views in Keshavananda Bharti's case and as clarified by Justice Khanna in Indira Gandhi case, since Justice Khanna's vote in favour of Basic Structure Doctrine will give the much needed majority in its favour in Keshavananda Bharti's case. However the propriety and validity of the clarifications provided by Justice Khanna in Indira Gandhi case, whether the same clarification can be read into Keshavananda Bharati case, is a question to be answered. Now a day, it is a welcome feature that most of the landmark judgments are unanimous.

VII Judicial Review of Legislative Acts in USA

The performance of the central tasks in the federal constitutional systems of the United States is a study in irony. The American founders sought to create a central government supreme within certain delegated spheres, with the states left in possession of plenary authority over all matters not assigned to the central government. In U.S.A like other countries the Supreme Court decide the different cases, but it is enjoying also one another power and authority which is very important and unique called as "Judicial review". "Judicial review" is the principal and authority which gave the Supreme Court of the U.S.A the power to restrict any law which is made by the Congress or states. According to this power the Supreme Court of U.S.A rejects or abrogates any law which is not suit or conforms to the Constitution of the U.S.A. The U.S.A. Constitution doesn't mention "judicial Review".

However this power was used before 1787 by courts in several of the American States to overthrow laws conflicting with state Constitutions. In 1789, the Congress of the U.S.A passed The Judiciary Act, which gave Federal Courts the power of "Judicial Review" over acts of the state governments. This power was used first time by the U.S.A Supreme Court in Hilton v/s Virginia³⁷. In Marbury v/s Madison in 1803 the power of "Judicial Review" was used for the first time by the Supreme Court of the U.S.A to declare an act of Congress as unconstitutional, based upon the assumptions that the Constitution of U.S.A is superior law of the country. C.J John Marshall explained and justified the exercise of Judicial Review to strike down an unconstitutional act of Congress or states. He wrote "Certainly all those who have framed written constitution contemplate them as forming the fundamental and paramount law, of the nation and consequently the theory of every such Government must be that an act of the Legislature repugnant to the Constitution is void. This theory is consequently to be considered by this Court as one of the Fundamental Principles of our society"

VIII Role played by the Supreme Court of the U.S.A for Judicial Review

The United States Supreme Court has determined in a number of areas that the states may delineate the, boundaries of a constitutionally guaranteed right. The American analogue to the provincial override begins with recognition by the Supreme Court that the scope of a certain federal constitutional right, in a given context, is best determined by the states. The state determines the substance of the right, yet the principle of federal supremacy is preserved in a purely formal fashion. A brief examination of some concrete applications may elucidate this process.

³⁷ (1796)

Free Speech and Obscenity

Despite the seemingly absolute nature of the command that "Congress shall make no law abridging the freedom of speech,"³⁸ the guarantee has never been interpreted to prohibit Governmental restrictions on obscene speech or expression. The problem, of course, has been to separate the obscene from the merely racy. Although Justice Potter Stewart professed to "know it when I see it,"³⁹ such judgments inevitably are personal and subjective. Jerry Farwell and Larry Flynt, for example, are apt to have wildly disparate notions of the obscene. For sixteen years the United States Supreme Court struggled to avoid such individualized judgments, but the Court abandoned that effort in its 1973 decision, *Miller v. California*⁴⁰; the Court conceded that the line between obscenity and protected speech was defined by "contemporary community standards" and could be drawn to include speech that was *not* "utterly without redeeming social value."

The referent community was no longer national, but was at least as localized as the states. Once again, the Court recognized the *form* of a uniform national constitutional entitlement, while leaving the substance of such rights in the hands of the states: "Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive' Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation"

Cruel, Unusual, and Capital Punishment

In *Furman v. Georgia*⁴¹, the United States Supreme Court ruled that Georgia's death penalty statute constituted cruel and unusual punishment⁴² because it gave "untrammeled discretion" to juries which resulted in the "freakish and wanton" imposition of the death penalty. The Furman "majority" (consisting of five separate opinions) established a new role for eighth amendment jurisprudence. The majority contended that the eighth amendment commanded the Court to review all facets of state death penalty legislation in order to determine whether, in its totality, the body of state law constituted cruel and unusual punishment.

In contrast, the Furman dissenters maintained that the cruel and unusual punishments clause warranted nothing more than an examination of the mode of punishment. Thus, the classic English punishment for treason being dragged to the place of execution, hung until near death, disemboweled, and burned—presumably would be cruel and unusual, while execution by lethal injection would be neither. The Furman dissenters were confident that the eighth amendment did not provide a vehicle by which the courts could displace the judgments of the state legislatures concerning constitutionally acceptable applications of the death penalty. The Court elaborated on the newly proclaimed role of the eighth

³⁸ U.S. CONST. amends. I. This prohibition is binding upon the states as well via the due process clause of the fourteenth amendment.).

³⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)

⁴⁰ 413 U.S. 15 (1973).

⁴¹ 408 U.S. 238 (1972).

⁴² See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The prohibition of cruel and unusual punishments applies to the states through the due process clause of the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).

amendment in *Gregg v. Georgia*⁴³ First, the Court attempted to identify national "contemporary societal values" and sought to compare a state's legislation to those values.

Thus, state imposition of the death penalty for shoplifting would be so outside national societal values that the statute would be deemed cruel and unusual. Second, the *Gregg* Court concluded that even if a death penalty statute conformed to the national societal consensus, the judiciary had an independent duty to decide if such a statute was cruel and unusual due to a disproportionate penalty or because it did not make a "measurable contribution to acceptable goals of punishment." Applying this test, the Court prohibited the death penalty in the following circumstances: rape of an adult woman; felony murder where the defendant neither killed nor intended to kill; and offenses committed by juveniles under the age of sixteen. Additionally, execution of a convict who is insane at the time of execution has been deemed unconstitutional.

Procedural Due Process

For nearly two centuries the United States Supreme Court thought that the procedural safeguards afforded by the due process clauses⁴⁴ applied to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. The Court deemed procedural due process essential to ensure "fundamental fairness" or prevent governmental invasion of the "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."⁴⁵ The rights protected by procedural due process and the type of process due were treated as separable issues- issues that derived their content from a "higher law." But not all exercises of governmental power were to be tested by the procedural demands of due process. In the classic formulation, only "rights"-derived from constitutional, natural, or common law sources-were protected."Privileges"-governmental largesse-could be granted or withheld at the government's discretion.

In a series of cases in the early 1970s, the Court rejected the right/ privilege distinction. The justices regarded governmental largesse as an "entitlement," which deserved due process protection if it was sufficiently "important" to the individual or if it derived from either "an independent source such as state law or mutually explicit understandings between state and citizen. But this expansive conception of the "liberty" and "property" interests protected by due process has shrunk into a wizened raisin of its original fruit. For example, *Bishop V. Wood*⁴⁶ held that a policeman's claim of entitlement to continued employment "must be decided by reference to state law." Similarly, in *Meachum v. Fan*⁴⁷ the Court held that a state prisoner possessed no liberty interest in resisting transfer to another prison "absent a state law or practice conditioning such transfers on proof of serious misconduct or other events." In short, expectations ungrounded in positive state law are insufficient to trigger due process protection.

Free Exercise of Religion

Even though everyone agrees that the free exercise clause protects "the right to believe and profess whatever religious doctrine one desires"⁴⁸, there has been considerably more difficulty in deciding when

⁴³ 428 U.S. 153 (1976).

⁴⁴ U.S. CONsT. amends. V & XIV.

⁴⁵ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁴⁶ 426 U.S. 341 (1976).

⁴⁷ 427 U.S. 215 (1976).

⁴⁸ *Employment Div. v. Smith*, 110 S. Ct. 1595, 1599 (1990).

the clause shields religious practices from state regulation. In *Reynolds v. United States*⁴⁹, the Court upheld the application of criminal prohibitions of polygamy to Mormons, noting that although laws "cannot interfere with mere religious belief and opinions, they may with practices." For the better part of the century following Reynolds, states were free to enact generally applicable laws that prohibited practices unique to certain religions. This doctrine remained until the heyday of the Warren Court. In *Sherbert v. Verner*⁵⁰, the Court invalidated South Carolina's denial of unemployment benefits to a Seventh Day Adventist who refused to accept employment on Saturdays, reasoning that only a compelling state interest could justify the imposition of such a burden on religious practices. The Court thus rendered every state law that might have an impact upon religious practices subject to close judicial scrutiny. This legacy of the Warren Court was swept away by the Court's decision in *Employment Division v. Smith*⁵¹.

Oregon had denied unemployment benefits to two Native Americans who were fired from their jobs with a drug rehabilitation organization because their sacramental use of the hallucinogen peyote constituted a work-related instance of misconduct and a violation of Oregon law which prohibits the possession or use of peyote and makes no exception for religious use. The Court upheld the Oregon law and concluded that the Sherbet test-requiring a compelling state interest to justify governmental action that substantially burdens a religious practice-was not applicable. As long as the state acts in a religiously neutral fashion to prohibit all citizens from engaging in specified conduct, it complies with the demands of the free exercise clause. The result returns free exercise jurisprudence to the Reynolds rule, giving the states virtually unfettered authority to define the extent of the free exercise guarantee.

Some Other Decisions of The Supreme Court

*McCulloch v. Maryland*⁵²: The Constitution gives the federal government certain implied powers. Maryland imposed a tax on the Bank of the United States and questioned the federal government's ability to grant charters without explicit constitutional sanction. The Supreme Court held that the tax unconstitutionally interfered with federal supremacy and ruled that the Constitution gives the federal government certain implied powers. *Brown v. Board of Education*⁵³ Separate schools are not equal. In *Plessey v. Ferguson* (1896), the Supreme Court sanctioned segregation by upholding the doctrine of "separate but equal." The National Association for the Advancement of Colored People disagreed with this ruling, challenging the constitutionality of segregation in the Topeka, Kansas, school system.

In 1954, the Court reversed its Plessey decision, declaring that "separate schools are inherently unequal." *Cooper v. Aaron*⁵⁴ States cannot nullify decisions of the federal courts. Several government officials in southern states, including the governor and legislature of Alabama, refused to follow the Supreme Court's *Brown v. Board of Education* decision. They argued that the states could nullify federal court decisions if they felt that the federal courts were violating the Constitution. The Court unanimously rejected this argument and held that only the federal courts can decide when the Constitution is violated. *Mapp v. Ohio*⁵⁵ illegally obtained material cannot be used in a criminal trial. While searching *Dollree* Map's house, police officers discovered obscene materials and arrested her.

⁴⁹ 98 U.S. 145 (1879).

⁵⁰ 374 U.S. 398 (1963).

⁵¹ 110 S. Ct. 1595 (1990).

⁵² 1819

⁵³ 1954

⁵⁴ 1958

⁵⁵ 1961

Because the police officers never produced a search warrant, she argued that the materials should be suppressed as the fruits of an illegal search and seizure.

The Supreme Court agreed and applied to the states the exclusionary rule from *Weeks v. United States* (1914). *Gideon v. Wainwright*⁵⁶ Indigent defendants must be provided representation without charge. Gideon was accused of committing a felony. Being indigent, he petitioned the judge to provide him with an attorney free of charge. The judge denied his request. The Supreme Court ruled for Gideon, saying that the Sixth Amendment requires indigent criminal defendants to be provided an attorney free of charge. *Miranda v. Arizona*⁵⁷: Police must inform suspects of their rights before questioning. After hours of police interrogations, Ernesto Miranda confessed to rape and kidnapping. At trial, he sought to suppress his confession, stating that he was not advised of his rights to counsel and to remain silent.

The Supreme Court agreed, holding that police must inform suspects of their rights before questioning. *Terry v. Ohio*⁵⁸: Stop and frisks do not violate the Constitution under certain circumstances. Observing Terry and others acting suspiciously in front of a store, a police officer concluded that they might rob it. The officer stopped and frisked the men. A weapon was found on Terry and he was convicted of carrying a concealed weapon. The Supreme Court ruled that this search was reasonable. *U.S. v. Nixon*⁵⁹: The President is not above the law. The special prosecutor in the Watergate affair subpoenaed audio tapes of Oval Office conversations. President Nixon refused to turn over the tapes, asserting executive privilege. The Supreme Court ruled that the defendants' right to potentially exculpatory evidence outweighed the President's right to executive privilege if national security was not compromised. *Texas v. Johnson*⁶⁰: Even offensive speech such as flag burning is protected by the First Amendment. To protest the policies of the Reagan administration, Gregory Lee Johnson burned an American flag outside of the Dallas City Hall. He was arrested for this act, but argued that it was symbolic speech. The Supreme Court agreed, ruling that symbolic speech is constitutionally protected even when it is offensive.

IX Concluding Remarks and Findings of the Research

The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society". These words of chief justice P.N Bhagwati worth mentioning because the role of judges is not only strictly interpreting the constitution but also is to give the true meaning to the legislation. Judicial review provides an avenue for individuals to challenge the legality of particular decisions by government agencies affecting rights, interests or legitimate expectations and to obtain binding determinations as to the legality of such decisions. As such, it is a crucial component of the rule of law and permits individuals to hold government to account both in U.S.A and in India as well.

At a systemic level, judicial review is that it promotes lawful and accountable decision-making by public agencies, primarily. The 'psychological impact' of judicial review is in the government agencies knowing that their actions may be subject to review. Evidence from research suggests that judicial review can indeed play an important role in encouraging compliance with the law in agency decision-making. This evidence suggests that in a substantial number of cases where applications were successful, judicial review has led to substantive changes to the methods of decision making at the governmental level at

⁵⁶ 1963

⁵⁷ 1966

⁵⁸ 1968

⁵⁹ 1974

⁶⁰ 1989

the top level of both the countries. Justice Marshall's categorical judicial review stands in sharp contrast to the notions of judicial restraint and judicial respect for legislative determinations expressed.

The policy bases supporting legislative decision making such as separation of powers, legislative expertise, competence familiarity with local problems and innovative solutions have little weight when the court both distrusts legislatures and gives property rights a predominate position in the Constitutional hierarchy as expressed by Justice Scalia's dissenting opinion in *Pannell v/s City of San Jose*⁶¹ presents another possible example of categorical judicial review. He asserted that a provision in the San Jose Rent Control ordinance that allowed a hearing officer to consider the 'hardship' of the tenant in fixing a reasonable rent, renders the ordinance facially invalid. In the United States of America, unconstitutionality is the only ground for a Federal Court to strike down a federal statute.

Justice Washington spoke for the Marshall Court, in this way in 1829 in *Satterlee v/s Matthewson*⁶² "we intend to decide no more than that the statute objected in this case is not repugnant to the Constitution of the U.S.A and that unless it be so, this Court has no authority under Sec 25th Section of Judiciary Act 1789, to reexamine and reverse the judgment of the Supreme Court of Pennsylvania in the present case. Further, in India there has been a tremendous development in the field of principles and procedures relevant to the system of review. The Courts have developed the theory of basic structure of the constitution, the theory of due process, the theory of judicial activism, the theory of public interest litigation etc. The basic task of the Courts in India is to uphold the Constitution, to protect the fundamental rights of the individuals and enable the authorities of the State to implement the Directive Principles of State Policy. In short, the Courts exercise their power of judicial review for the purpose of upholding the Rule of Law, the Sovereignty of the Republic and the principles of socialism, human rights and good governance.

⁶¹ 485 U.S.1(1998)

⁶² 27 U.S 380 (1829)

RID THE FRAUD – LEAD THE FAIR BIGI

Dr. Aarati Tyagi*

Abstract

International Economic Policy which ushered amazing world of promises for the people breathed invincible power into the transnational tycoons. Justice has been rating corporate then, and corporate have been rating justice now. Reversal is not rhetoric but a real realm or realty regime. Unfortunately, the corporate power became corporate frailty by swerving from the path of economic morality, and impacted on most of the fundamental aspects of people's life – food, health, employment, environment and leisure – designed or directed, either directly or indirectly, by global agencies like WTO, World Bank or IMF etc. Global economic policy subdued even the national economic sovereignty. Corruption has become the horrendous bye-product of national and multi-national corporates. Economic crime, an obstinate threat, has become an evangelic mask for transnational companies. Economic crime has become a diversified issue plaguing nearly one third of the corporate world, affecting the developed and developing markets and the laws have been meek in subduing the big corporations to comply with preventive and remedial measures. The new prodigy of Indian Company legislation of 2013 in the form of Corporate Social Responsibility is projected as a remedy against the grotesque fraud whose infantile performance is yet to be appreciated. Further, the punitive measures to arrest the financial frauds assiduously incorporated in the Companies Act, 2013 throw another ray of hope for public interest. This paper intends to present a brief sketch of the interplay of Corporate business and Corporate ethics and respect for rule of law.

Key Words Economic Crime, Corruption, Corporate Social Responsibility, Corporate Ethics, Rule Of Law

I Corporate – A Connatural Commercial Connoisseur

Justice has been rating corporate then, and corporate have been rating justice now. Reversal is not rhetoric but a real realm or realty regime. Large corporations are an economic, political, environmental, and cultural force that is unavoidable in today's globalized world. Large corporations have an impact on the lives of billions of people every day, often in complex and imperceptible ways.¹ Small companies may not be potential threat to giant corporate, but commitment, business ethics and concern for social cause may lure even TNCs to absorb successful small trading entities. Take for example, the case of Ben & Jerry's – whose ice cream product is popular among consumers, might look as 'anti-thesis' to big business, but it was well known for its support of environmental and social causes, its involvement in local communities, and its fair labour practices.²

The perplexing fact is that in 2000, Ben & Jerry's was purchased in a semi-hostile takeover by Unilever one of the largest consumer goods manufacturers in the world, which is misstated to be symbolic of 'transformational leadership'. Transformational leaders elevate people from low levels of need, focussed on survival (following Maslow's hierarchy), to higher levels.³ In fact, Transformational leaders encourage followers to become part of the overall organizational environment and its work culture. They empower followers through persuasion and empathic understanding to propose new and controversial ideas without fear of chastisement or ridicule⁴. The acquisition of Ben and Jerry's by Unilever is but one example of the growth and increasing globalization of modern corporations.

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¹ (Brian Roach, Corporate Power in Global Economy, <http://ase.tufts.edu/gdae>.)

² (www.benandjerrys.com.)

³ (Kelly, 2003; Yukl, 1989).

⁴ (Kelly 2003, Stone, Russell & Patterson 2003).

The growth of these corporations is typically measured in economic terms – profits, assets, number of employees, and stock prices. However, the impact of global corporations extends well beyond the economic realm. In contrast to the earlier years of xenophobic exclusion, globalisation has in recent years become so pervasive that national economies have become embedded in each others' production processes. As such changes gain momentum, what is of concern is that the transformation has been coupled with the subsumption of national factors of production, which could lead to the endorsement of the immediate interests of transnational corporate bodies at a cost to the vulnerable developing economies.⁵

II Corporate Power - Not Corporate Frailty

Big World

Willy nilly, the economic sovereignty of a nation, particularly developing and under-developed, naturally subordinates itself to the modern global economic sovereignty or economic dominance big brother nations. Most of the fundamental aspects of people's life – food, health, employment, environment and leisure – are designed or directed, either directly or indirectly, by global agencies like WTO, World Bank or IMF etc. Even nature which is in the infinite form of land, air, water, energy, and space has been converted into finite finished commercial and consumer products, the production, sale and distribution of which is controlled by multinational corporations. Resultantly, a nation's economic sovereignty is not wholly independent but dependent upon the international economic interests. The key functionaries of global economic balance, rather imbalance, are transnational corporate.

The interchangeable terms "Multinational Corporation," "transnational corporation" and "global corporation" owns and operates subsidiaries in more than one country. Though a MNC is not mandated to be big or large in size, most of the largest firms happen to be transnational corporations. There is divergence of opinion with regard to the functional aspects and objects of these global corporations. While some people perceive the ascendancy of global corporations as a positive force, bringing economic growth, jobs, lower prices, and quality products to an expanding share of the world's population, others view large firms as exploiting workers, dominating the public policy process, damaging the natural environment, and degrading cultural values.

The global net work of M.N.Cs, according to the report of UNCTAD-2006, consisted of about 75,000 MNCs operating worldwide, with 73% headquartered in developed economies like Denmark (12%), South Korea (10%), Germany (8%), Japan (7%) and U.S. (3%). Developing countries with significant numbers of MNCs include China (with 5% of the world's MNCs), India, and Brazil. MNCs are becoming more dispersed globally, spreading particularly to the developing nations. While the number of MNCs in developed countries increased by 66% between 1990 and 2005, the number in developing countries increased by a factor of more than seven during the same period. About 64% of the largest 250 industrial companies, ranked by revenues, were headquartered in the U.S. in 1960. By 2006 we find only 34% of the world's 500 largest firms headquartered in the U.S. Japan was second with 14%, and then about 7% each in France, Germany, and Britain. (Fortune – 2007) About 8% of the largest MNCs are now located in developing countries, including China, Brazil, India, Malaysia and Mexico.⁶

⁵ Pradeep Banerjee, *Corporate Governance, Economic Reforms, and Development – The Indian Experience* : Edited by Darryl Reed and Sanjoy Mukherjee, Oxford University Press, New Delhi, 2004)

⁶ Data published by the U.S. Census Bureau present statistics on the domestic and foreign economic activity of all nonbank11 U.S. MNCs. (U.S. Census Bureau, 2007

In 2003, these corporations contributed \$2.7 trillion to the world's gross product, or about 7% of the global total of \$36.9 trillion⁷. No data are available on the contribution of all MNCs to world economic activity. However, considering that the U.S. GDP is about one-third of the global total, an estimate that the world's 75,000 multinationals are responsible for about 20% of the world's economic activity might be considered reasonable.

As the exact number of MNCs now existing is inaccessible, it may be presumed that they may be more than one lakh throughout the globe. Following the lacklustre growth in global economy, Global FDI inflows declined in 2014. Global foreign direct investment (FDI) inflows fell by 16 per cent to \$1.23 trillion in 2014, mostly because of the fragility of the global economy, policy uncertainty for investors and elevated geopolitical risks. New investments were also offset by some large divestments. Inward FDI flows to developing economies reached their highest level at \$681 billion with a 2 per cent rise. Developing economies thus extended their lead in global inflows. China became the world's largest recipient of FDI. Among the top 10 FDI recipients in the world, 5 are developing economies.⁸

After 2008, for the first time, India again broke in to the top 10 recipients of foreign direct investment (FDI) during 2014. (UNCTAD World Investment Report 2015). India jumped to the ninth rank in 2014 with a 22 per cent rise in FDI inflows to \$34 billion. India was at the 15th position in the previous two years. China became the largest recipient of FDI in 2014 with \$129 billion inflows, followed by Hong Kong (China) that received \$103 billion and the U.S. with \$92 billion. At 39 per cent, Hong Kong saw the biggest surge in inflows during the year.

Corporate Fiscal vivarium

'The vice bulge phenomenon is grotesque and scary' may not be a cynical observation though virtue remains smart and strong. The economic magnitude of the world's largest corporations may be compared to various mid-sized national economies. A commonly-quoted report notes that of the world's 100 largest economies, 51 are companies while only 49 are countries.⁹

"To put this in perspective, General Motors is now bigger than Denmark; DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan."¹⁰ The report further stated that the revenues of the world's 200 largest corporations were equivalent to 27.5% of world gross domestic product (GDP) and the growth of large corporations has paralleled the growth of the world economy. The value of capital assets owned by the world's 50 largest corporations increased by an astonishing 686% between 1983 and 2001.¹¹

Despite the devil strength of big corporate, the greed for sucking the life of hapless humanity is not satiated and flouting the rules and mocking at the law became a part of their survival. One of the sinister exercises adopted by large scale corporations and the most saddening and deplorable act of MNCs is avoidance of corporate tax in developing countries. A study report of UNCTAD recently revealed that developing countries lost around \$100 billion per year in revenues due to tax avoidance by multinational enterprises (MNEs), and as much as \$300 billion in total lost development finance. When we go in detail,

⁷ . (World gross product data, obtained from the World Bank's World Development Indicators, is the sum of all nations' GDP)

⁸ UNCTAD World Investment Report of 2015).

⁹ Anderson and Cavanagh, 2000)

¹⁰ (p. 3 ibid)

¹¹ (The Fortune Global 500 list last published firm-level data on corporate assets in 2001.)

- MNE foreign affiliates contribute an estimated \$730 billion annually to government budgets in developing countries, of which corporate income taxes account for some \$220 billion. These contributions represent on average, around 10% of total government revenues, compared to around 5 percent on average in developed countries. In Africa, the share is 14 percent.
- An estimated \$100 billion of annual tax revenue losses for developing countries is related to inward investment stocks directly linked to offshore hubs. The estimated tax losses represent around a third of the potential total – or towards half of current MNE corporate income taxes. Adding up both lost tax revenues and with the reinvested earnings that are lost as profits are shifted away from the developing country yields a total ‘development finance loss’ in the range of \$250 – \$300 billion (see the note below for more details).
- Some 30% of cross-border corporate investment stocks – FDI, plus investments through Special Purpose Entities (SPEs) – have been routed through offshore hubs.
- A 10 percent increase in the use of ‘offshore hubs’ for inward investment is associated, on average, with a fall of over one percent in reported taxable returns.
- Increasing international efforts to tackle tax avoidance practices have managed to reduce the share of offshore investments in developed countries, but exposure of developing economies is still on the rise.

As mentioned, the leakage of development resources is not limited to the loss of domestic tax revenues. Profit-shifting out of developing countries also affects their overall GDP (as it reduces the profit component of value-added, which is what GDP measures). And, as companies shift profits away from the country that is the recipient of the inward investment, they may further undermine development opportunities by reducing the reinvestment of those profits for productive purposes. Applying an average reinvestment rate of 50% to UNCTAD’s estimate of \$330 – \$450 billion in (after-tax) profit shifting, would suggest a loss in reinvested earnings in the range of \$165- \$225 billion.¹²

Economic crime, an obstinate threat, has become an evangelic mask for transnational companies. Economic crime has become a diversified issue plaguing nearly one third of the corporate world, affecting the developed and developing markets and the laws have been meek in subduing the big corporations to comply with preventive and remedial measures. The situation is further compounded by cyber threats which constitute the second most economic crime affecting 32% of organisations and most of the companies are not adequately equipped with the knowledge of understanding the risks. It is estimated that only 37% of organisations have a ‘cyber incident response plan’.¹³

According to the report of PwC’s Global Economic Crime Survey, 2016, incidence of crime has been reversed which came down albeit marginally by 1%, but that detection and controls programmes are not keeping up with the pace of change. What’s more, the financial cost of each fraud is on the rise, morphing into different forms depending on industrial sector and region. Despite this evolving threat, we have seen a decrease in the detection of criminal activity by methods within management’s control, with detection through corporate controls down by 7%. What’s more, one in five organisations (22%) have not carried out a single fraud risk assessment in the last 24 months.

¹² (<http://www.taxjustice.net/2015/03/26/unctad-multinational-tax-avoidance-costs-developing-countries-100-billion/>)

¹³ (www.pwc.com/gx/en/services/advisory/consulting/forensics/economiccrimesurvey)

The message is clear: the burden of preventing, protecting and responding to economic crime rests firmly with organisations themselves. Andrew Gordon, Global Forensic Services Leader, says that Economic crime is ever-evolving, and becoming a more complex issue for organisations and economies.

The regulatory landscape is also changing, bringing with it numerous challenges to doing business. ¹⁴ Corporate fraud is an intra-generated and intentional evil reared and nurtured by big entrepreneurs. Corporate fraud is one that occurs within an organisation or by its owners or managers and involves deliberate dishonesty to deceive the public, investors or lending companies, usually resulting in financial gain to the individuals or organisation (Serious Fraud Office, U.K.) Corporate fraud and misdemeanours are real and pervasive threat to public trust and their confidence in the capital markets and such infractions are ever evolving and unpredictable and its impact ever increasing.

The Global Fraud Report, 2013/14 stated that at least 70% of the companies are afflicted with at least one type of fraud and the incidence crime rise is 61% when compared with the previous year. The economic cost for fraud has also increased to 1.4 % revenue from average of 0.9 % with one in 10 businesses reporting a cost of more than 4% of revenue. In a study, Dyck, Alexander, Morse, Adair and Zingales⁴, find that the probability of a company engaging in a fraud in the USA in any given year is 14.5% and there is a median loss of 20.4 percent in valuations of companies hit by the fraud. They report “on average corporate fraud costs investors 22 per cent of enterprise value of fraud committing firms and 3 percent of enterprise value across all firms.”¹⁵

Plug the Leak – Neigh the New

When Donald Trump blows his trumpet on the obverse, Madoff and Mallaya and Sahara Subrato Roy blow on the reverse of the big ideals of multi-national corporations. It is needless to touch unending list of corporate frauds or economic culprits where the gullible public is victimised.

Donald R. Cressey, a famous criminologist relates following three elements in every fraud i.e.

- i) Pressure/Incentive to commit fraud, which can be attributed to factors like, sustaining growth or profitability in a volatile economic environment increasing competition, meeting stock market/ analysts’ expectations, financial need, job performance, etc.
- ii) Opportunity to seize resulting from ineffective or lack of controls, management override of controls, insufficient monitoring or ineffective segregation of duties, etc.
- iii) Rationalisation/Justification by the perpetrator of fraud as, “it’s for the company’s good”, “it’s a small amount to the company”, “I deserve it”, “just this once”, etc.

The cost of fraud is not restricted to financial loss alone. The impact of fraud also includes:

- a) Reputation loss
- b) Cultural loss, involving loss of trust, insecurity or anxiety, low productivity or team morale
- c) Loss of customer relationships.

Further, the prospects of recovery of monetary proceeds from fraud are remote. Out of the few victims who have attempted recovery of financial loss due to fraud, have recovered just 25% or less of the misappropriated funds from the fraudster on an average and majority of victims have recovered nothing.¹⁶

¹⁴ (<http://www.pwc.com/gx/en/services/advisory/consulting/forensics/economic-crimesurvey>)

¹⁵ Krall, Corporate Fraud, Risks and Challenges ahead, Global Fraud Report 2013/2014)

¹⁶ (Corporate Resiliency: Managing the growing risk of fraud and corruption A holistic approach,

Foreign Direct Investment

'Cut your coat according to cloth' may be a wise saying for the disciplined past. 'Cut the coat off the body or keep the body without cloth' may be sizzling statement for the present and fast generation. Thought for enjoyment drowns the reason for sustainable existence. Inviting foreign investment is advisable when it preserves and perpetuates the indigenous intelligence and natural resources for the natives. Contrary machinations divest the state of its inherent and natural potential of the nation and its people. Interestingly, the concept of FDI has been apparitional angel caught in the cobweb of misapprehensions, prejudices and predilections. F.D.I. is entry point for a foreigner to establish his level-play field on our soil and strength.

Foreign Direct Investment (FDI) in India is the major monetary source for *economic development in India*. Foreign companies invest directly in fast growing private Indian businesses to take benefits of cheaper wages and changing business environment of India. Economic liberalisation started in India in wake of the 1991 economic crisis and since then FDI has steadily increased in India.¹⁷ According to the Financial Times, in 2015 India overtook China and the US as the top destination for the Foreign Direct Investment. In first half of the 2015, India attracted investment of \$31 billion compared to \$28 billion and \$27 billion of China and the US respectively.¹⁸ Our leaders boast of the magnitude of the inflow of F.D.I. and Foreign Exchange. Both may not be equally harvesting. F.D.I. may be channelized by two routes

- i) Automatic route through which FDI is allowed without prior approval by Government or Reserve Bank of India.
- ii) Government route - Prior approval by government is needed via this route. Foreign Investment Promotion Board is the responsible agency to oversee this route.¹⁹

The question is whether free entry of the flow of funds of MNCs through both the channels occurs and if so how far it is innocuous for our economic stability. Almost all 100% FDI is allowed in the essential segments like infrastructure, Railways, chemicals, Textiles, Services, Pharmaceuticals and automotives etc. No doubt, there is phenomenal increase in the FDI inflow into our country, but at what cost? What is quantum of our natural resources and mines and minerals that are being erased in the garb of world trade policy? How far these transnational corporations comply with our patriotic poems? The utility and futility of FDI obesity has to be judged with reference to the aforesaid doubts – whether they are typhoon or transient.

Corporate Social Responsibility – Glittery Tiding!

Indian Industrial boat has been on high-seas for the last six decades and the new millennium prompted to mechanise the boat. Native industrial knowledge realised the need for bracing with the modern enthusiasm and expectations, and the Indian governance and law assurance conceded liberty to revolutionise the industrial development for the welfare of the people, majority being the morbid mass. This is further required to maintain the economic equilibrium globally to further the compliance with International Economic Policy. We realise that every new feature is not a future problem nor every existing habit is an everlasting enjoyment.

icci.in/spdocument/20310/FICCI-Deloitte.pdf)

¹⁷ (R. Nagaraji. "What Has Happened since 1991? : Assessment of India's Economic Reforms" (PDF). *Igidr.ac.in*) and "How the Indian economy changed in 1991–2011". *The Economic Times*. 24 July 2011. Retrieved 11 October 2015.)

¹⁸ ("India pips US, China as No. 1 foreign direct investment destination". *The Times of India*. 30 September 2015. And Rishi Iyengar (30 September 2015). "India Tops Foreign Investment Ranking Ahead of U.S and China". *Time*. Retrieved 11 October 2015.)

¹⁹ Refer Reserve Bank of India – Frequently Asked Questions

Indian Corporates in Social Structure

Tata, Google, Maruthi, Apple, Delhi Metro Rail Corporation, State Bank of India, L.I.C., Infosys, Reliance, Mahendra, Face Books. Birla, etc. are some of the shining stars in the firmament of Indian Industrial, and Economic sky, presumably assuring stability, prosperity and reliability for Indian Social Structure. The State through the Ministry of Corporate Affairs promises proper vigilance, check and control over the activities of the corporate bodies primarily through the Companies Act, 1956 and 2013 and other allied Acts, Bills and Rules. M.C.A also protects investors and offers many important services to stakeholders. Latest data from the Corporate Affairs Ministry (for the year 2013-14) show that 98,473 companies together having an authorised capital of nearly Rs. 39,000 crore were registered in different parts of the country in the last financial year. "... predominant share of companies were in business services (32,254) followed by manufacturing (14,996), real estate and renting (10,752), trading (10,646) and construction (10,335)," according to a Ministry report for March 2014.

The maximum number of new companies was established in Maharashtra, Delhi and West Bengal. With the new ones coming up, the total number of registered companies stood at 13, 94,819 at the end of March 2014. However, of them, only 9, 52,433 were active, according to official records. Interestingly, just 216 foreign companies were set up during 2013-14 period²⁰. Thus we can assess the quantity and quality of publicity and practice. Though universally applicable definition for C.S.R. is not articulated since the concept varies from one country to another, it is understood as a means for a company to achieve a balance of economic, social and environmental imperatives, and the definition of C.S.R. as given by the U.N. Industrial Development Organisation coincides with that notion.

The U.N.I.D.O. defines C.S.R. as

"Corporate Social Responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders."²¹ Thus, Corporate Social Responsibility is based on the premise that the company should deal with the resources obtained from the society judiciously and should take up such initiatives which are beneficial to the society as a whole. Simply put, CSR is a vision of business accountability which extends to persons of the society and not necessarily the shareholders or directly related parties to the corporate.²² The European Council defines CSR as "the responsibility of enterprises for their impacts on society".²³ To completely meet their social responsibility, enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders" Corporate social responsibility involves ensuring that:

- i) The goods and services meet customer requirements, and are provided in a fair way.
- ii) The employees are given responsibility and opportunities to work with the organisation in supporting community projects.
- iii) The organisation is involved in relevant sponsorship and 'corporate giving' activities that are relevant and helpful to the community.
- iv) The organisation is involved in activities and programmes that support the development of the whole community.

²⁰ <http://www.thehindubusinessline.com/companies/nearly-one-lakh-new-companies-registered-in-india-last-year/article5952863.ece>

²¹ "What is C.S.R?", UNIDO. N.d. Wb. 14th. February, 2015

²² Akanksha Sharma, (2014) 3 MLJ p. 35

²³ http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm

Many organisations today realise the importance of building a prosperous 'inclusive society'. This involves including members of society by providing them with opportunities and futures rather than marginalising and excluding them. In addition large companies like Cadbury Schweppes and Nestlé have strong corporate social responsibility programmes involving employees working on community projects and the sponsorship of relevant community activities.²⁴

Defining New Contours Legally

In August 2013, the Indian parliament passed the Indian Companies Act, 2013 (the "New Act"), which has replaced the Companies Act of 1956. The New Act has made far-reaching changes affecting company formation, administration and governance, and it has increased shareholder control over board decisions. The New Act is being implemented in stages, and we have been monitoring its progression.

Corporate Social Responsibility

One of the New Act's most startling changes—which came into effect on April 1, 2014—has been to impose compulsory corporate social responsibility obligations ("CSR") upon Indian companies and foreign companies operating in India. These obligations mainly come in the form of mandatory amounts companies must contribute to remediating social problems. This is a wholly new requirement; although companies were permitted, within certain limits, to make charitable contributions in the past, the New Act is essentially a self-administered tax. The Indian Ministry of Corporate Affairs recently has published, or "notified," detailed rules implementing the CSR requirements. Entities Covered By the CSR Obligations.

The threshold coverage levels for CSR are low. Companies are subject to the CSR requirements if they have, for any financial year:

- a net worth of at least Rs. 5 billion (approximately U.S.\$80 million);
- a turnover of at least Rs. 10 billion (approximately U.S.\$160 million); or
- Net profits of at least Rs. 50 million (approximately U.S. [\$800,000]).

Companies meeting these thresholds are required to develop a CSR policy, spend a minimum amount on CSR activities and report on these activities, or prepare to explain why they didn't required amount of CSR Spending. An entity or business that meets these specified thresholds must spend on CSR activities no less than two percent of its average net profit for its preceding three financial years. Net profit means a company's profits as per its profit and loss account prepared in accordance with the New Act, but excludes profits from a company's operations outside India or dividends received from an Indian company that has itself met its CSR requirements.

Permitted CSR Activities

There is a long list of permissible areas for CSR funding. They include such purposes as ending hunger and poverty; promoting public health; supporting education; addressing gender inequality; protecting the environment. All CSR funds must be spent in India. The New Act encourages companies to spend their CSR funds in the areas where they operate, but money cannot be spent on activities undertaken that are part of the normal course of the company's business or on projects for the exclusive benefit of employees or their family members. Contributions of any amount to a

²⁴ (<http://businesscasestudies.co.uk/business-theory/external-environment/responding-to-social-responsibilities-and-ethics.html#ixzz3Oti8RhiE>)

political party are not a permitted CSR activity. However, the New Act has an exception allowing companies to use their CSR funds to support development projects initiated by the prime minister or central government. It is important to note, as discussed further below, that such projects in India have had a troubling tendency to become vehicles for political patronage, and they can raise legal issues in other jurisdictions if they come to be seen as political payoffs.

CSR Committee and CSR Policy - The New Act requires companies to appoint a Corporate Social Responsibility Committee consisting of at least three directors. If a company is one that is required by the New Act to appoint independent directors to its board, then the CSR committee must include at least one independent director. The CSR committee is required to recommend a formal CSR Policy. This document, which is to be submitted to the company's board, should recommend particular CSR activities, set forth a budget, describe how the company will implement the project, and establish a transparent means to monitor progress. **Administration of CSR Projects**- A company can meet its CSR obligations by funnelling its activities through a third party, such as a society, trust, foundation or Section 8 company (i.e., a company with charitable purposes) that has an established record of at least three years in CSR-like activities. Companies may also collaborate and pool their resources, which could be especially useful for small and medium-sized enterprises. **Reporting Requirements** - unfortunately, the New Act imposes significant bureaucratic requirements.

It requires companies to prepare a detailed report, in a particular format, about the company's CSR policy, the composition of the CSR committee, the amount CSR expenditures, and the specifics of individual CSR projects. A company's board must include this report in its annual report to shareholders and publish it on the company's website. The report must also include a statement from the CSR committee that the implementation and monitoring of the board's CSR activities is, in letter and spirit, in compliance with its CSR objectives and CSR Policy of the company. The provisions relating to non-compliance of the provisions relating to C.S.R. do not appear to be effective. It is still not clear whether failure to comply is an legal offense of any sort. Failure of non-compliance is not stated to be punishable, but not reporting the non-compliance is subject to investigation. What is the effective mechanism or instrumentality that will compel the MNCs to comply with our Indian CSR provisions?

New Company Law on Corporate Fraud

The company law in India, for the first time defines what is meant by fraud and entails stringent penalties for it. The Section 447 of the Companies Act 2013 defines "*fraud*" in relation to a relation to a company or body corporate as :

"any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss."

Any person guilty of fraud under section 447 of the Companies Act 2103, is punishable with:

- Imprisonment for a term from six months to ten years ;
- Fine not be less than the amount involved in the fraud, and may extend to three times the amount involved in the fraud
- Fraud involves public interest, imprisonment term cannot be less than three years

There are several sections of the Act that coming under which a person or officer of the company can be held liable for fraud. Some important act of fraud under which a person can be held liable under Section 447 include: inducing persons to invest money (section 36); conducting business of the company with fraudulent or unlawful intent (section 206(4) and 339(3)); fraud, misfeasance or

other misconduct or withholding of information (section 213); making false statement in any of the return, report, certificate, statement or any other document (section 448). The offences of the fraud under Act are cognizable and person accused under these sections cannot be released on bail or own bond.

The Companies Act 2013 incorporates several vital provisions to effectively deal with menace of fraud.

- To establish a vigil mechanism for use only by directors and employees to raise genuine concerns and grievances. It also provides for adequate safeguards against victimisation of whistle-blower.
- The directors to act in good faith to promote the objects of the company and not to achieve or intend to achieve any undue gain/advantage either to themselves or to their relatives, partners, or associates. Any director who is found guilty of making any undue gain is liable to pay an amount equal to that to the company.
- Independent directors have entrusted responsibilities with additional responsibilities to protect interest of stakeholders. They have responsibility of reporting any concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy and act within his authority to protect the legitimate interests of the company, shareholders and its employees. (III, Duties of Independent Directors, Schedule IV of the Companies Act 2013)
- Auditors of the company (including, Cost Accountants for Cost Audit and Company Secretary in Practice for Secretarial Audit) have been made responsible for reporting fraud (Section 143) during the course of performance of its duties to immediately report to the Central Government for any offence involving fraud that is being or has been committed against the company by its officers or employees.
- The company Law for the first time allows shareholders and depositors of the company to file class action suits (Section 245) against company, its directors, and auditors for any fraudulent, unlawful or wrongful act or omission or conduct. They have empowered to claim for the compensation or damages on account of fraud committed on them by the company, the directors and auditors of the company.

The company law and securities law, now both give greater empowerment to the enforcement agencies to effectively deal with frauds. The SEBI, now in its legislative capacity can conduct investigations, substantially pass orders, seek information from any person or entity, and put strict sanctions. SEBI has also been given powers to pass disgorgement orders for an amount equivalent to wrongful gains or to losses averted by contravention of regulations. The Serious Fraud Investigation Office (SFIO) has been provided statutory backing under new Company Law (Section 211) for the purpose of investigating the affairs/fraud relating to a company. The SFIO is empowered as a sole authority to investigate such cases, papers, documents for such malafide practices that involve fraud. The new company legislation reasonably provides for the protection of the interests of all stakeholders and to check the unscrupulous acts of these corporate entities. Only when these measures are strictly enforced as against M.N.Cs, we will be able to appreciate the role of international economic policy and its traits in our national economic sovereignty.

Contemplate Without Confusion

Modern global business involves in general three elements i.e.

- i) Fast-moving competition,
- ii) Pressure on growth and financial performance and
- iii) The rigors of expansion into new markets worldwide.

These dynamics are often confronted with numerous aggressive Regulatory Authorities with inter-country exchange of modalities that control and regulate business much to the discomfort of the trading world. Enforcement expect too much of accountability for business conduct around the world. This is true not only in developed countries but also in developing and emerging markets.²⁵ (www.lexmundi.com/bestpracticesseries) Some acceptable programs that will avoid, detect and remedy wrongdoing, especially fraud and corruption, are proposed –

- Understanding the regulatory enforcement environment.
- Getting management to understand, commit to, and support anti-fraud and anti-corruption initiatives.
- Prioritizing the key risks to the company's business, brand and reputation.
- Maintaining compliance in light of the scope and complexity of global business growth.
- Obtaining expert advice when responding to compliance issues or threats.
- Educating the workforce about the risks of wrongdoing.
- Cultivating a company-wide culture of compliance.²⁶

To reap the benefits of new regulatory mechanism in Indian Corporate sector

- Corporate at first need to understand the various regulatory provisions and evaluate the framework that applies for fraud prevention and control.
- The stringent punishments to corporate fraud culprits envisaged in the new company law must be inflicted upon the culprits through expeditious and timely disposal of the cases by the state agencies like courts and SEBI
- For shareholders, investors and corporations to claim for the damages of the fraud through adjudication of courts is time consuming and uncertain. This should be attended by expeditious judicial process.
- Establishment of vigil mechanisms in every corporate entity.
- companies need to adopt anti-fraud measure in pro-active manner to capture fraud at early stages and reduces the fraud losses. They should be attentive to observe the red-flags or warnings signs of fraud.

For an effective regulatory regime to deal with fraud cases, our enforcement agencies need to have better coordination among themselves, more resourceful and leverage technology in prosecution and investigation. Our judicial system need to incorporate steps to bring in greater efficiency in adjudication of cases to reduce staggering time delays. Moreover, in our state of affairs, preachers are potential predators. Most of the frauds are committed by the owners or the top management of the company.

The 2014 report by Association of Certified Fraud Examiners has pointed that higher the perpetrator's level of authority, greater are fraud losses. The cases of fraud by Owners/executives, account for only 19%, but the median loss in these fraud cases is \$500,000. Whereas employees were involved in 42% of frauds cases but the median losses in these frauds was only \$75,000. This implicates a significant concern for companies and investors as there could be fraud cases which in spite of the stringent provisions of the new company.²⁷ India Inc. is on the verge of the next quantum leap. Recent fraud cases like the AugustaWestland deal have cast a shadow of doubt on India Inc.

²⁵ www.lexmundi.com/bestpracticesseries)

²⁶ (ibid)

²⁷ Kaushik Dutta and Dr Naveen Srivastava, tari.co.in/wp-content/uploads/.../Corporate-Fraud_Risk-and-Challenges-Ahead.pdf).

Policy makers have taken their first step to increase corporate transparency by writing several pieces of legislations, including the Companies Act 2013 and the proposed revision(s) to the Prevention of Corruption Act, amongst others. It is now India Inc.'s opportunity to step-up to the plate. The need of the hour for corporate organisations is thus to invest in right anti-fraud measures, such as, employee background screening, business partner or third party due diligence, effective and well-understood whistle-blowing systems and well-tested fraud risk management systems, which would help reduce losses on account of fraud and corruption.

“Setting an example is not the main means of influencing another, it is the only means.”

(Albert Einstein)

RIGHT TO PRIVACY VIS-A-VIS RIGHT TO INFORMATION: NEED FOR RECONCILIATION

*Dr Ramesh Kumar**

Abstract

Privacy of a person is so dear to mankind that all efforts are aimed as to protect and nurture it in all manifestations. UDHR recognizes the right to privacy in all its manifestation from individualistic concerns to family life. Even ICCPR provides that individual should not be subjected to physical, mental, or economic losses without his will, thus recognizing the right to privacy. The law of contract which revolves around the 'consent' as the essential ingredient is nothing but the recognition of the privacy of a person. The family law also revolves around the privacy element as no encroachment is allowed in the private relationship and the privacy of home, which is considered to be the castle for an individual. However, along with 'right to privacy' the dimensions of 'right to information' are also taking shape side by side and it is quite possible that there conflict may occurs between the two. One's privacy right may offend other's information right. It is not an easy task to balance the opposing interests, but it is not an impossible one either. Success lies in providing a workable formula which encompasses balances, and protects all interests yet places emphasis on the fullest responsible disclosure. Heavy burden lies upon the judiciary to balance the tilt.

Keywords *Dignity, Manifestation, Individualistic, Assault, Battery, Defamation, Conversion, Tilt, Balance Wheel*

I Privacy and Individual Life

The struggle of mankind has always been to attain eternal peace and create a heaven on earth, where every human being can enjoy his freedom without any interference from any corners whereby he can gain the material, spiritual and intellectual fulfillment. The annals of the progress of mankind from the animal existence till this modern era reflect only that part of story. The rules were framed by the gregarious homosapiens and later on customs and laws were formed in this regard to bring about a social cohesion ruling out the deviant behaviors which were considered to be impediment for this task.

Even in the countries with a constitution or without a constitution the individualistic freedom was given a priority and encroachments only to the extent were permissible which were meant to foster the public good. This was because everything revolved around the individual and more the individuals are happy, more easily the human race can progress in the quest of spiritual and intellectual wellbeing which would be ultimate objective. In the countries with a Constitution, a common understanding was reached whereby the individual sacrificed some of their rights for the social benefit but retained the very basic rights which are very dear to every individual. These rights were later on classified as Fundamental Rights, Natural Rights or Human Rights and such terminologies only exhibited a shift as to emphasis but entitled a variety of inviolable rights. The Right to Privacy undoubtedly is one of such right. The dictionary meaning of 'Privacy' is "*seclusion, avoidance a notice*"¹ "the right to be let alone, the right of person to be free from unwarranted publicity, the right to individual to withhold himself and has property from public scrutiny, if he so chooses"²

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¹ Chambers English Dictionary (1959) P. 1162

²Black, *Black' Law Dictionary*, St. Paul Minn's, West Publishing Co., 1968 P. 1358.

II Privacy as a Legal Concept

The most popular and famous definition of privacy is given by *Cooley*³ “the right to be let alone” which means the right to live ones life in seclusion without being subjected to an unwarranted and undesired publicity. It is very difficult to give precise meaning of privacy because it varies from society to society but its importance and need in any society cannot be ignored. It is necessary and essential to preserve and protect the dignity of the individual. In this regard the words of Madgwick are noteworthy he says “Ever since man’s emergence as a social animal his right to be private has been one of his essential guarantees of liberty. In this sense he may be considered free to the precise extent that he is let alone in that inner core of his being which concerns only himself, to think and act unfettered by either legal restraint or private curiosity. In today’s rapidly changing society a part of man’s life must be reserved to himself and it is a form of tyranny to attempt to invade and capture another’s privacy which is more than a negative state. This last is significant because of privacy is a positive state occurring in the ordinary course of human relations, the burden of justifying any invasions must logically fall on the invader.”⁴ Madgwick continues and defines the right to privacy “as the right of the individual to be in a state of privacy to whatever extent he might wish and an invasion of privacy as any thing which in any way interferes with his right. Privacy of a person is so dear to mankind that all efforts are aimed as to protect and nurture it in all manifestations. The Right to privacy is recognized specifically in the United Nation Convention as under.

III Right to Privacy under International Human Rights Instruments

Preamble to the *Universal Declaration of Human Rights* 1948 provides that:

Recognition of the inherent dignity and of the equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace of the world. Whereas, the people of the UN have in the charter reaffirmed their faith in Fundamental Human Rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Furthermore it provides that:

Everyone has the right to life, liberty and security of person;⁵ no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment;⁶ or shall be subjected to arbitrary arrest, detention or exile,⁷ nor shall be subjected to arbitrary interference with his privacy, family, home or correspondence,⁸ not to attacks upon his honor and reputation. Every one has the right to the protection of the law against such interference or attack.⁹ Marriage shall be entered into only with the free and full consent of the intending spouses.¹⁰ The family is the natural and fundamental group of society and is entitled to protection by society and the state and every one has the right to own property alone as well as in association with others,¹¹ and no one shall be arbitrarily deprived of his property.¹²

³ Cooley, *Torts* (2nd ed., 1895) P 188.

⁴ Madgwick, *Privacy Under Attack*, (1968)

⁵ Art.3 of Universal Declaration of Human Right, 1948,

⁶ Art. 5 of Universal Declaration of Human Right , 1948,

⁷ Art.9 of Universal Declaration of Human Right , 1948,

⁸ Art.12 of Universal Declaration of Human Right , 1948,

⁹ Art.16(2) of Universal Declaration of Human Right , 1948,

¹⁰ Art. 16(3) of Universal Declaration of Human Right , 1948,

¹¹ Art.17(1) of Universal Declaration of Human Right , 1948,

¹² Art. 17(2) of Universal Declaration of Human Right , 1948,

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economics, social and cultural rights indispensable for his dignity and the free development of his personality.¹³ Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is author.¹⁴ Therefore, UDHR recognizes the right to privacy in all its manifestation from individualistic concerns to family life and as a member of society. Even the International Covenant of Economic, Social & Cultural Rights provides that: The state parties to the present covenant shall recognize that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group of society, particularly for its establishment.¹⁵

The state parties to the present covenant shall recognize the right of everyone to the enjoyment of the highest attainable standards of physical and mental health.¹⁶ The state parties to the present covenant recognize the right to every one:

- a. To take part in Cultural life.
- b. To enjoy the benefits from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.¹⁷

Therefore it recognizes that individual should not be subjected to physical, mental, or economic losses without his will, thus recognizing the right to privacy. The International Covenant on Civil and Political Right provides that: to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.¹⁸ Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life,¹⁹ nor shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.²⁰

No one shall be subjected to arbitrary or unlawful interference, with his privacy, family, home or correspondence, not to unlawful attacks on his honor and reputation. Every one has the right to the protection of the law against such interference or attacks.²¹ Thus it is clear from the provisions of this covenant as how important is the right to privacy for the individual, family and society. Under the common law systems, the whole evolution of law of torts incorporates nothing but this right to privacy. Assault and battery, defamation talk about the privacy of person; trespass, conversion and nuisance talk about the privacy of property or home that is to say that nothing can be done without the consent of the person which is unreasonable against the person or property of an individual.

The law of contract which revolves around the 'consent' as the essential ingredients is nothing but the recognition of the privacy of a person. The family law and criminal laws also centre around the privacy element as no encroachment is allowed in the private relationship and the privacy of home, which is considered to be the castle for an individual wherein the individual can enjoy the life as he feels best, of

¹³ Art.22 of Universal Declaration of Human Right , 1948,

¹⁴ Art.27 (2) of Universal Declaration of Human Right , 1948,

¹⁵ , Art. 10 (1) of ICESCR 1966,

¹⁶ Art. 12 (1) of ICESCR 1966

¹⁷ Art.15 (1) (a)&(c) of ICESCR 1966

¹⁸ Art.2 (3)(a) of ICESCR 1966

¹⁹ Art.6 (1) of ICESCR 1966

²⁰ Art.7 of ICESCR 1966

²¹ Art. 17(1)&(2) of ICESCR 1966

course, keeping in view the reasonableness of his actions. Within the permissible limit he is the master of his destiny, his life and property and the purpose of law is nothing but to protect and foster the privacy in all its manifestations. Even the copyright and intellectual property right laws are nothing but the recognition of the right to privacy of a person, so that he can enjoy the fruits of his labour and no other person could encash the crop sown by him without his permission

IV Right to Privacy under the Indian Constitution

The Right to privacy is not expressly provided under the Indian Constitution though it exists as a necessary corollary to the expressed provisions therein. Even during the Constituent Assembly debates, an attempt was made to incorporate specifically a right to privacy when Art 14 was moved which provided:

‘The Right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be reached and the persons or things to be seized.’²² It is amply clear from this that the founding fathers were of opinion that the body of a person should not be touched unreasonably; no encroachments should be made in the house of an individual unreasonably on unreasonable seizure of a paper be made and the person should be entitled to remedy in such cases. Thus, the effort was made to recognize the privacy as to person, house and papers which can not be disturbed unless supported by a reasonable and probable cause.

The Indian Constitution provides a right to freedom of speech and expression,²³ which implies that the person is free to express his will about certain things; but is subjected to exception of defamation.²⁴ In recognizing defamation as an exception to the freedom of speech and expression, idea was to secure the reputation which also relates to recognition of privacy of person. Defamation means unreasonable attack on the reputation of a person without his consent; and reputation is very dear to an individual as an essential ingredient of his complete privacy. The word ‘privacy’ implies unexposed area of personality and is opposite of going ‘public’. The Freedom to form association,²⁵ to move,²⁶ to reside and settle²⁷ are also recognized which allow the person to be intimate to other away from public gaze; to move anywhere without being noticed; and to reside; All these freedoms essentially talk about the privacy of a person. But these freedoms are not absolute and reasonable restriction can be placed.

The most important freedom which a person has is the freedom of life and personal liberty which can be taken only by a procedure established by law.²⁸ This means that the privacy of person is secured unless there is a procedure established by law. Initially, a strict interpretation was given to this part²⁹ but later on liberal interpretation afforded it to blossom. Maneka Gandhi’s case led the expansion of the right to life and personal liberty wherein it was pointed out that the *procedure must be just, fair and reasonable*. One can not imagine a dignified life unless he is secure in person, house and everything which is personal and dear to him.

²² CAD, Vol. VII, p. 794

²³ Art. 19(1)(a) of the Constitution of India

²⁴ Art. 19 (2) of the Constitution of India

²⁵ Art. 19 (1)(c) of the Constitution of India

²⁶ Art. 19(1)(d) of the Constitution of India

²⁷ Art. 19 (1)(e) of the Constitution of India

²⁸ Art. 21 of the Constitution of India

²⁹ A. K. Gopalan Vs State of Madras, AIR 1950 SC 27

The First Case in which the issue of the right of privacy came specifically before Supreme Court was in *M.P. Sharma Vs Satish Chandra*³⁰ where the question involved was, whether the state power of search and seizure authorized by section 96 of the criminal procedure code was violative of individuals right of privacy, particularly enshrined in Art 19(1) (f) and Art. 20.

The Eight judges bench of the Supreme Court unanimously speaking through Mr. Justice Jagannathdass pointed out the lack of specific provisions like Fourth Amendment of the U.S. Constitution providing for the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures under the Indian Constitution and arrived at the conclusion that when the constitution makers have thought fit not to the subject such regulation of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import a totally different fundamental right by some process of strained Construction.”

In *Khark Singh Vs. State of U.P.*³¹ a question was raised whether the right to privacy could be implied from the existing Fundamental Rights, such as, Arts. 19(1)(d), 19(1)(e) & 21. The majority of judges participating in the decision said of the Right to privacy that “Our Constitution does not in terms confer like constitutional guarantee.”³² On the other hand minority opinion (SUBBA RAO J) was in favour of inferring the right to privacy from the expression ‘personal liberty’ in Art 21. In the words of *SUBBA RAO J.* “Further, the right to personal liberty takes is 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 declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every country sacrifices domestic life.....”³³

In *Govind Vs. St. of Madhya Pradesh*,³⁴ the Supreme Court undertook a more elaborate appraisal of the right to privacy. In *Govind*, the Court considered the constitutional validity of a regulation. The Court upheld the regulation by ruling that Art 21 was not violated as the regulation in question was “procedure established by law” in terms of Art 21. The Court also accepted a limited Fundamental Right to privacy “as an emanation” from Art 19(a),(d) and 21. The Right to privacy is not, however, absolute; reasonable restrictions can be placed thereon in public interest under Art 19(5). Thus *Mathew J.* observed in *Govind’s* case.³⁵ “The right to privacy in any event will necessary have to go through a process of case by case development. Therefore even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.”

Further Mathew J. observed on the same point³⁶:

“Assuming that the fundamental right explicitly guaranteed to a citizen have penumbral zones and that the right of privacy is itself a fundamental right, the fundamental right must be subject to restriction on the basis of compelling public interest.” Again in *R. Rajagopal Vs. State of Tamil Nadu*,³⁷ the Supreme Court has asserted that in times the right to privacy has acquired constitutional status; it is implicit in the right to life and liberty guaranteed to the citizens” by Art 21. It is a “right to be let alone”.

³⁰ AIR 1954 SC 300

³¹ AIR 1963 SC 1295

³² *Ibid*, at 1302

³³ *Supra* note 32, p. 1306

³⁴ AIR 1975 SC 1378

³⁵ *Ibid* at 1385

³⁶ *Supra* note 35 at 1386

³⁷ (1994) 6 SCC 632

After taking note of above mentioned cases Supreme Court has observed in *People's Union for Civil Liberties Vs. Union of India*³⁸ "We have therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Art 21 of the constitution. Once the fact in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law'".

The Right to privacy has now become established in India, but as part of Art 21. It is well established that is a essential Human Right. However a problem arises when confrontation takes place between Right to Information & Right to privacy. They both are oppositely charged. They act as exception towards each other. In *Dinesh Trivedi, MP Vs Union of India*³⁹ Supreme Court observed: "In modern Constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is by no means absolute. In transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would than be in the public interest that such matters are not public disclose or disseminated." It is submitted that since both the rights nurture dignity of human being, so whenever they come in each other's way then the case should be decided objectively. It should be seen in giving preference one over another what good we are receiving. The decision should be as such which creates minimum friction in the society.

In *Ms. X Vs Mr. Z*.⁴⁰ The wife filed a petition for dissolution of marriage in the ground of cruelty and adultery against husband under S. 10 of Divorce Act. The husband also asserted that his wife had adulterous affairs with one person which resulted in family way. The pregnancy of wife was terminated at AIIMS & records and slides of tubular gestation were preserved in the hospital. The husband filed an application for seeking DNA test of the said slides with a view to ascertain if the husband is father of foetus. The Court held that the right to privacy, though fundamental right is not absolute. When the right to privacy has become a part of a public document, in that case a person cannot insist that such DNA test would infringe his or her right to privacy. When adultery has been alleged to one of the grounds of divorce in such circumstances the application of the husband seeking DNA test of the said slides can be allowed.

In case of *District Registrar & Collector, Hyderabad v. Canera Bank*⁴¹. Where in The A.P. State Legislature amended Section 73 of the Stamp Act, 1899 which gave inspecting officers not only the power to search premises but also the power to seize deficiently stamped documents. The purpose behind the amendment was to combat stamp duty evasion and also to supplement the stamp revenue of the state. The amendment was challenged before the Andhra Pradesh High Court as the amendment had given unbridled power to the officers with respect to exercising discretion and, consequently the amendment was held to be arbitrary and violative of Article 14 of the Constitution of India. The decision of the High Court was challenged by the Appellant before the Supreme Court, and the Respondent contended that the impugned provision amounted to a violation of the fundamental Right to Privacy. A two Judge Bench of the Supreme Court upheld the A.P. High Court decision and reiterated recent Supreme Court decisions and held that the Right to Privacy was implicit in the Constitution of India.

³⁸ AIR 1991 SC p. 207

³⁹ (1997) 4 SCC 306

⁴⁰ AIR 2002 Delhi 202

⁴¹ A.I.R. 2005 S.C. 186

Furthermore, Court held that the impugned amendment was arbitrary and violative of Article 14 of the Constitution, thus it cannot be construed as *procedure established by law* under Article 21 of the Constitution. Therefore the amendment was held unconstitutional as the Right to Privacy had been violated in the absence of procedure established by law. In India though there has been recognition from the judiciary and even from the National Commission to Review the Working of the constitution to make right to privacy a fundamental right and a demand has also been made to enact the required legislation, there has been no law till today to govern the right to privacy. Nearly every country in the world recognizes a right of privacy explicitly in their constitution.

At a minimum, these provisions include rights of inviolability of the home and secrecy of communications. The protection of right to privacy becomes an important issue in India because it being a democratic country, individual freedom holds primary importance. Right to privacy being an integral part of one's right to life and personal liberty has to be given due importance. It is also important to note that India is a signatory to the Universal Declaration of Human Rights and International covenant on civil and political Rights, both of which recognize right to privacy as a fundamental human right.

Thus it is time for Indian Legislators to joint their effort and frame a comprehensive legislation recognizing and protecting people's right to privacy Not only that, it is also the job of Legislature and the judiciary to provide for a broad but well-defined scope of the right to privacy. The norms of privacy should be determined and measured to a usual standard because a right without description is a right without protection. The uncertainty about the constitutional basis of privacy and its protection should be removed immediately as 'The right to be alone is indeed the beginning of all freedom. However, the right to privacy is not an absolute right. Two competing values (viz. prevention of crime and the respect for the right of privacy) have to be properly balanced. Every smuggler, every drug-peddler and every criminal cannot claim to indulge in or plan criminal activities without let or hindrance from the government. Equally, every citizen does not have to be turned into a suspect simply because that may help in detecting a crime.

If there exists reasonable and objective grounds of suspicion, the right to privacy has to yield to the requirement of national security risks. But if there are no reasonable and objective grounds of suspicion, the citizen's right to privacy must be respected. There is another area where the right to privacy has to be adjusted against the people's right to know. In liberal democratic society information about policy problems, available alternative courses of action and the consequences of these alternatives, political as well as economic and social, provides the raw material for decision-making which the public must be informed about for participation in the decision-making process. It may be noted that although "knowledge" and "opinion" are two different things but they are so inextricably mixed that separation of the two is extremely difficult, if not impossible. Knowledge helps creating opinion.

On the other hand, in free societies, the community ostensibly speaks through a popularly constituted government Thus, government protection of privacy rights is a measure of a society's commitment to liberty and, in a broader sense, autonomy. Privacy law reflects the tolerance of a nation. Although privacy is only one example of autonomy, privacy rights are a substantial subset of personal autonomy. Thus, examining privacy rights is one way to evaluate the general measure of liberty a society confers on its members. But, even if one recognizes the need for privacy, the right of privacy cannot be absolute.

The existence of political community requires the relinquishment of certain rights, prerogatives, and freedoms. However, along with 'right to privacy' the dimensions of 'right to know' are also taking shape side by side and it is quite possible that there may occur a conflict between the two. One's privacy right may offend other's information right.

V Conclusion

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses balances, and protects all interests yet places emphasis on the fullest responsible disclosure. Heavy burden lies upon the judiciary to balance the tilt. It is expected from the judiciary that by playing the role of a "balance wheel", it should adjudge which interest requires to be comparatively more protected-interest inherent in the "privacy right" or that which is inherent in the "information right".

SELF-GOVERNANCE IN INDIA: A BRIEF HISTORICAL REVIEW

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Abstract

Self Governance have been the backbone of the Indian villages since the beginning of recorded history. In fact, any concept of political system in ancient India would remain incomplete without the important role of the small village republics. Kingdoms in ancient India were fundamentally conglomeration of semi-autonomous village republics. Sabhas and samities in vedic period played key role in political and administrative functions of villages republics. Villages as administrative units and panchayats were important local self-governing institutions under the Gupta rulers. The British colonial rule established and developed statutory local self-governing institutions/bodies at both urban and rural areas. Despite its long historical tradition, the village republics or local self-governing institutions were not matter of serious concern during the constitution-making for independent India. The constitution-makers of India had always tried to project India as a giant nation without realizing the consequences of this giantism. While several efforts were made before and after the independence for the growth and development of local self-governing political institutions the same could not take a formal constitutional structure in India until as late as in 1990s during which the seventy-third and seventy-fourth constitution amendments made explicit constitutional provisions for local self-governance and created the third tier of governance in India. This paper briefly highlights the historical context of the growth and development of local self-governing institutions in India. It highlights the growth and development of statutory self-governing institutions/bodies during the British. It makes a critical analysis of the Constituent Assembly Debates on the issue. Most importantly, it makes a detailed analysis of the various measures adopted in post-independent India for the growth and development of local self-governing institutions/bodies. In conclusion, the paper highlights the weaknesses of the existing local self-governing institutions and underlines the need for devolution of all district-based state activities to an elected district government as suggested by the second Administrative Reforms Commission. The paper also highlights the need for promoting local political leaders for effective self-governing institutions.

Keywords Panchayati Raj, Local Governance, Self-Governing Institutions, Reform Commission

I Introduction

The concept of self-government has a long history in India. In fact, any political system in ancient India would remain incomplete without the important role of the small village republics. Kingdoms in ancient India were fundamentally conglomeration of semi-autonomous village republics. Sabhas and samities in vedic period played key role in political and administrative functions of villages republics. Villages as administrative units and panchayats were important local self-governing institutions under the Gupta rulers. The autonomous village has best been described by Sir Charles Metcalfe in his famous minute of 1830 in which he wrote:

The village communities are little republics, having nearly everything they can want within themselves. They seem to last where nothing else lasts. Dynasty after dynasty tumbles down, revolution succeeds revolution but the village community remains the same. This union of the village communities, each one forming a separate little state in itself, has contributed more than any other cause to the preservation of the peoples of India and the enjoyment of freedom and independence.¹ It is of course a matter of serious debate that such important idea of village autonomy and institutions of local governance were not given due recognition during the constitution-making of independent India.

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¹ Sir Charles Metcalfe, Reports: Select Committee of House of Commons; cited in Redhakumud Murkerji, Local Government in Ancient India (Oxford: Clarendon Press, 1920), 2-3

Panchayats and local self-governance nevertheless continued to reverberate in the political space of the post-independent India. Several attempts were made in post-independent India to revive and re-invent panchayati raj and local self-governing institutions. In 1990s, panchayats and local self-governments at both rural and urban levels were given constitutional recognition. In the contemporary political discourse, the concept of swaraj i. e. self-governance has again been given renewed importance. However, informal caste based khap panchayats are increasingly tending to challenge the formal constitutional structure of panchayati raj institutions.

In the context of the above, this paper briefly highlights the growth and development of statutory self-governing institutions in pre-independent and post-independent India. It makes a critical analysis of the Constituent Assembly Debates on the issue. Most importantly, it makes a detailed analysis of the various measures adopted in post-independent India for the growth and development of local self-governing institutions/bodies. In conclusion, the paper highlights the weaknesses of the existing local self-governing institutions and underlines the need for devolution of all district-based state activities to an elected district government as suggested by the second Administrative Reforms Commission. It also highlights the need for promoting local political leaders for strengthening local self-governing institutions below district level.

II Self-governing Institutions under the British

Villages as autonomous self-governing units existed long back but it was the British rule that gave a proper institutional shape to local self-governing institutions in India. Towards the end of the seventeenth century, the British started to develop modern local self-governing institutions in India in the form of urban municipal bodies. Municipal bodies in the form of municipal corporations were set up in the presidency town of Madras in 1688 and in Bombay and Calcutta in 1726. The 1870 resolution of Lord Mayo turned these urban municipalities into elected representative bodies. Ripon further carried forward the local self-government to district and rural localities.

The 1882 resolution of Lord Ripon paved the way for creation of the district board at the district level and the rural board at the taluka/tehsil levels. It was, however, the Bengal Local Self Government Act 1885 that led to the first major step towards the development of modern self-governing institutions beyond urban localities. It led to the establishment of district local boards across the entire territory of the then Bengal province.²

To quote from the report of the second Administrative Reforms Commission, Within a span of five years, a large number of district boards came into existence in other parts of the country, notably Bihar, Orissa, Assam and North West Province. The Minto-Morley Reforms, 1909 and the Montague Chelmsford Reforms, 1919, when Local Self Government became a transferred subject, widened the participation of people in the governing process and, by 1924-25, district boards had a preponderance of elected representatives and a non-official Chairman.³

Statutory panchayats of course owe their origin to the 1907 Royal Commission on Decentralization, which in its Report had recommended the creation of village panchayats for reducing the financial burden of the provincial governments and for extending the concept of local self-government to the village level and based on this recommendation the government of various provinces enacted village panchayat Acts in the second decade of twentieth century.⁴

² Government of India, Second Administrative Reforms Commission, Sixth Report, Local Governance: An Inspiring Journey into the Future (October 2007)

³ Ibid.

⁴ Ranbir Singh and Dalia Goswami, "Evolution of Panchayats in India", published in Kuruksheetra, (October 2010): 4

III Constituent Assembly Debates on Local Self-Governance

It is however a matter of regret that despite having a long historical tradition, the village republics or local self-governing institutions were not matter of serious concern during the constitution-making for independent India. The constitution-makers of India had always tried to project India as a giant nation without realizing the consequences of the giantism. While several efforts were made before and after the independence for the growth and development of local self-governing political institutions the same could not take a formal constitutional structure until as late as in 1990s. Long before independence of India, Gandhi was strongly in favour of de-centralisation of political power to district and village level. Gandhi wanted the central government to have very limited powers and instead wanted that the villages should have autonomous powers to govern themselves through sarpanches and panchas (village chiefs and councillors). However, although Gandhiji's idea of village as autonomous self-governing political units (i.e. village panchayat) was a matter of some debate and discussion in the constituent assembly such an idea was altogether discarded during the final constitution-making.

According to Mahendra Prasad Singh, The Constituent Assembly Debates do not have anything great and exciting on Panchayats of Gandhi's imagination. The idea of Gram Swaraj as a bottom-up scheme of power from the people (rather than the rhetorical power to the people), was simply buried without much wide lament. The debate on Article 31A of the draft constitution, which ended up being Article 40 in Part IV of the Constitution on the directive principles of state policy, was marked by a profusion of rhetorics and naivety by a few Gandhians.⁵ Although some members of the constituent assembly argued in favour of Gandhi's concept of village as self-governing autonomous units (i.e. his idea of gram swaraj)⁶, the drafting committee of the Constitution in constituent assembly deliberately attempted to avoid making any provision for local self-governing institutions under the Constitution. B. R. Ambedkar, the chairman of the drafting committee of the Constitution, did not find any merit in the panchayat system. While moving the draft Constitution of India in the constituent assembly on fourth November 1948, Ambedkar in fact spoke at length against the very concept of village republics as follows:

The love of the intellectual Indians for the village community is of course infinite if not pathetic... It is largely due to the fulsome praise bestowed upon it by Metcalfe who described them as little republics having nearly everything that they want within themselves, and almost independent of any foreign relations. The existence of these village communities each one forming a separate little State in itself has according to Metcalfe contributed more than any other cause to the preservation of the people of India, through all the revolutions and changes which they have suffered, and is in a high degree conducive to their happiness and to the enjoyment of a great portion of the freedom and independence. No doubt the village communities have lasted where nothing else lasts. But those who take pride in the village communities do not care to consider what little part they have played in the affairs and the destiny of the country; and why? Their part in the destiny of the country has been well described by Metcalfe himself who says: "Dynasty after dynasty tumbles down. Revolution succeeds to revolution.

Hindoo, Pathan, Mogul, Maratha, Sikh, English are all masters in turn but the village communities remain the same. In times of trouble they arm and fortify themselves. A hostile army passes through the country. The village communities collect their little cattle within their walls, and let the enemy pass unprovoked."...Such is the part the village communities have played in the history of their country. Knowing this, what pride can one feel in them? That they have survived through all vicissitudes may be a fact. But mere survival has no value. The question is on what plane they have survived.

⁵ Mahendra Prasad Singh, "Whither Indian Republic? Representative versus Direct Democracy", December 7, 2012 <<http://www.socialsciences.in/article/whither-indian-republic>, accessed on 09/12/2013>

⁶ For example, Narayan Singh argued in the Constituent Assembly as follows: I desire that the primary units of Government should be established in villages. The greatest measure of power should vest, in village republics and then in the provinces and then in the Centre [Thursday, the 21st August, 1947, Constituent Assembly of India Debates (Proceedings) - Volume V]

Surely on a low, on a selfish level. I hold that these village republics have been the ruination of India. I am therefore surprised that those who condemn Provincialism and communalism should come forward as champions of the village. What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism? I am glad that the Draft Constitution has discarded the village and adopted the individual as its unit.⁷

Ambedkar was opposed to the idea of village republics because he fundamentally believed that it would be detrimental to the interests of the minorities and particularly the untouchabled Dalit community, of which he was the most iconic leader. Ambedkar argued that village republics were the cause of India's ruination, and empowering village institutions would perpetuate the dominance of the upper castes, who would continue to exploit the lower castes and the poor.⁸ Autonomy to village republics was also against his centralization project in the constituent assembly. Ambedkar even wanted only limited powers to the provincial government because he believed that such localised governments would not sincerely protect and safeguard the rights and interests of the minorities and the Dalit communities.

Ambedkar's stinking comment on village republics in the constituent assembly of course drew severe criticisms. For example, K. Hanumanthaiya argued that in this vast country centralization would ultimately work to the detriment of what we call 'unity' itself and it would be impossible for any human being or any government to control effectively all the administration.⁹ Arguing de-centralization as a necessity, Hanumanthaiya reminded the constituent assembly as late as in November 1949 that de-centralization was also the principle on which Mahatma Gandhi wanted to construct the Constitution.

In order to quell the sharp criticism of B. R. Ambedkar's comment on 'village republics' by some members of the constituent assembly, including their resentment against the omission of village panchayats, Alladi Krishnaswami Ayyar had to clarify that although the draft Constitution does not give sufficient importance to village communities there was nothing to prevent the provincial legislatures from constituting the villages as administrative units. Subsequently, there emerged a general consensus in the constituent assembly which paved the way for decentralisation of power and a provision of panchayat was made in the Constitution in the form of directive principles of state policy.

VI Local Self-governance in Post-Independent India

Panchayats found only a peripheral place in the original Constitution of independent India under Part IV on the directive principles of state policy wherein Article 40, inter alia, provides that the state shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Article 40 does not provide guidelines for organizing village panchayats. Under this Article, the creations of panchayats as statutory institutions were left with the state legislatures. Entry 5 of List II (State List) of the Seventh Schedule of the Constitution empowers the state legislatures to make laws with respect to local self-government or village administration.

The original Constitution of post-independent India recognised only two tiers of governments – the Union and the state governments. However, for a vast empire-like country of India the issue of local self-governing institutions continued to be raised from time to time in post-independent period. In compliance with the provisions of the directive principles of state policy pertaining to establishment of village panchayats as units of self-government the government of India launched an ambitious Community Development Programme in 1952 with the thrust on securing socio-economic

⁷ Thursday, the 4th November 1948, Constituent Assembly of India Debates (Proceedings) - Volume VII

⁸ Kuldeep Mathur, Panchayati Raj: Oxford India Short Introduction (New Delhi: Oxford University Press, 2013), 8

⁹ Tuesday, the 15th November 1949, Constituent Assembly of India Debates (Proceedings) - Volume XI

transformation of village life through people's own democratic and cooperative organisations with the government providing technical services, supply and credit.

Under this programme 100 to 150 villages formed a community development block and participation of the whole community was the key element of this experiment which strengthened the foundation of grassroots democracy. In 1953, the National Extension Service was introduced with the aim of transferring scientific and technical knowledge to agricultural, animal husbandry and rural craft sectors. In 1956, when the second five year Plan was launched it recommended that the village panchayats should be organically linked with popular organisations at higher levels and in stages the democratic body should take over the entire general administration and development of the district or the sub division excluding functions such as law and order, administration of justice and selected functions pertaining to revenue administration.

In view of this recommendation, government of India appointed a committee under the chairmanship of Balwantrai Mehta in 1957. The Balwantrai Mehta committee suggested that there should be administrative decentralisation for effective implementation of the development programmes and the decentralised administrative system should be placed under the control of local bodies. It also recommended for establishment of community development and national extension service blocks throughout the country as administrative democratic units with an elected panchayat samiti.

Balwantrai Mehta committee report recommended democratic decentralization of power to the sub-district level to encourage popular participation in decision making at the local level. Based on Balwantrai Mehta committee report, a three-tier panchayati raj system was introduced in late 1950s under various state legislations consisting of gram (village) panchayats at the base, mandal or taluqa panchayat in the middle, and zila panchayat at the higher district levels. Panchayati raj was also promoted by the central government as a matter of national policy from 1957 to 1963 when state governments were pressured to adopt some form of democratic decentralization and to involve the people down to the village level directly in the planning process.¹⁰ Based on Balwantrai Mehta committee recommendations, Andhra Pradesh, Rajasthan, Maharashtra and Gujarat took some legislative and administrative initiatives to set up panchayat raj institutions.

In 1963, K. Santhanam committee was appointed to look solely at the issue of the finances of the panchayati raj institutions (PRIs). It recommended that (i) the panchayats should have special powers to levy special tax on land revenues, home tax, etc; (ii) all grants and subventions at the state level should be consolidated and untied; and (iii) a Panchayat Raj Finance Corporation should be set up which would look into the financial resources of PRIs at all three levels, provide loans and financial assistance to these grassroots level governments and also provide support for non-financial requirements of villages. However, by mid-1960s support for panchayati raj had declined as most of the state political leaderships were reluctant to devolve much power to the district level and below for they feared that if such local institutions acquired real powers they would become alternative sources of political influence and patronage, which would threaten their own abilities to exercise influence in the districts and to use such influences as bases of their own power at the state level.¹¹

By 1970s panchayati raj bodies remained in existence without adequate functions and authority.¹² In fact, during this time, the political and economic centralisation by Indira Gandhi virtually made the panchayati raj system redundant. After the end of Indira's controversial emergency period, the Janata government came to power and, in 1977, it constituted a new committee on panchayati raj institutions,

¹⁰ Paul R. Brass, *The Politics of India since Independence* (The New Cambridge History of India: IV.1) (United Kingdom: Cambridge University Press, 1990 (South Asian Edition, 2012 Reprint)), 139

¹¹ Ibid.

¹² Government of India, *Second Administrative Reforms Commission – Sixth Report, Local Governance: An Inspiring Journey into the Future*, (October 2007)

namely the Asoka Mehta committee, which assessed the problems faced by the panchayati raj institutions and recommended a two-tier panchayati raj structures at the mandal and district levels. The Asoka Mehta committee chose the district as the first point of decentralisation below the state level and under the Asoka Mehta scheme the zila parishads (district boards) were to be given control over all the development activities in the district, although the law and order functions would remain under the control of the existing district administrative apparatus.¹³ Most importantly, Asoka Mehta scheme of the panchayati raj system introduced taxation powers by the local bodies. The committee which submitted its Report in 1978 was also of the view that despite the rhetoric, panchayat empowerment was not of much use unless it received constitutional standing.¹⁴

The GVK Rao committee appointed in 1985 recommended that PRIs at the district level and below be assigned responsibilities for planning, monitoring and implementation of rural development programs and that the block development office should be the spinal cord of rural development. In line with the Ashok Mehta committee viewpoint, the L. M. Singhvi committee in 1986 recommended that local self-government should be constitutionally recognized, protected and preserved by the inclusion of a new chapter in the Constitution. As per the report of the second Administrative Reforms Commission, By end 1980s, except Meghalaya, Nagaland, Mizoram and the Union Territory of Lakshadweep, all other States and UTs had enacted legislation for the creation of PRIs. In 14 States/UTs, there was a three-tier system, in 4 States/UTs it was a two-tier structure and in 9 States/ UTs only one tier functioned.¹⁵ Strong arguments were also made for re-organisation of constituent units of the Indian federation with smaller political units.

Greater political participation and effective democratic governance were cited as the major reasons for such large scale re-organisation; and a demand was in fact made for a second re-organisation commission for the same. It was argued that there was much room and need for devolution of the power of the states to the panchayati raj institutions at the district level to begin with. For V. M. Dandekar, the panchayati raj institutions have-generally failed because genuine devolution of power had not been tried.¹⁶ To quote V. M. Dandekar further, unfortunately, there is much resistance from the political leadership and the bureaucracy both to any attempt at devolution of power and authority. This has frustrated the will, initiative, and self-reliance among the local people and the old habit of looking at the state capital and Delhi for every little local problem continues.¹⁷

The Sarkaria Commission in its 1988 Report recommended that the local self-governing bodies need to be significantly strengthened both financially and functionally, and recommended enactment of a parliamentary law uniformly applicable throughout India. The landmark move with regard to decentralized self-governing structures was initiated by Rajiv Gandhi when he introduced the sixty-fourth and sixty-fifth constitutional amendment Bills in parliament in July 1989, making it mandatory for all states to set up elected panchayati raj institutions (PRIs)/urban local bodies (ULBs), entrusting the panchayats and local bodies with more powers and functions, authorizing panchayats/ULBs to levy taxes/tolls and fees, etc. These Bills were however passed in 1993 under the prime ministership of Narasimha Rao as seventy-third and seventy-fourth amendment of the Constitution, resulting in insertion of new Parts IX and IXA in the Indian Constitution with addition of new Articles 243 to 243ZG.

The seventy-third and seventy-fourth constitutional amendments are claimed to have formally created the third tier of government in India, namely panchayats in villages and urban local bodies. These amendments have again brought back a three-tiered local self-governing decentralized political

¹³ Brass, *The Politics of India*, 139

¹⁴ Government of India, *Second Administrative Reforms Commission – Sixth Report*

¹⁵ *Ibid.*

¹⁶ V. M. Dandekar, "Unitary Elements in a Federal Constitution", published in *Economic and Political Weekly* 22, no. 44 (Oct. 31, 1987):1870

¹⁷ *Ibid.*

structure on the line of 1957 Balwantrai Mehta committee but with certain exceptions. More fundamentally, the enactment of the seventy-third constitutional amendment Act 1992 marks a new era in the federal democratic decentralization paving the way for constitutional status to the PRIs. It has provided for panchayats at the village, intermediate and district levels but with the provision that panchayats at the intermediate level may not be constituted in a state having a population not exceeding twenty lakhs. As mentioned above, a new Part IX relating to panchayats has been inserted in the Constitution. Pursuant to this, the states are now required to devolve administrative and financial powers to PRIs in respect of 29 subjects listed in the newly inserted Eleventh Schedule of the Constitution.

For constitutional recognition of the urban local bodies, parliament enacted the seventy-fourth constitutional amendment Act 1992 (known as Nagarpalika Act) in 1992, which received the assent of the President on twentieth April 1993 and came into force on first June 1993. The seventy-fourth constitutional amendment has led to the insertion of a new part, Part IX-A, in the Constitution clearly mentioning the subject matters under the municipalities. It has provided three kinds of municipal bodies - Municipal Corporations for larger urban areas, Municipal Councils for smaller urban areas and Nagar Panchayats for rural-urban transitional areas. The seventy-third and seventy-fourth amendments of the Constitution have made special provisions for participation of SCs/STs and more importantly of women in the panchayats and urban local bodies. Most importantly it has given the local bodies the constitutional power to impose tax.

Along with the three-tiered structure, some new provision has been made for district and metropolitan planning committees under Articles 243ZD and 243ZE. The district planning committee is meant to consolidate the plans prepared by the panchayats and the Municipalities in the district and prepare a draft development plan for the district as a whole and similarly, the Metropolitan Planning Committee is "to prepare a draft development plan for the Metropolitan area as a whole."¹⁸ The composition of these committees is left to the laws made by state legislatures.¹⁹ The panchayats in villages and urban local bodies are elected bodies but are still under the political authority of the states and it is the states through their legislative assemblies that exercise political control over the third tier.²⁰

Most panchayats continue to be treated as agencies of the state for implementation of prescribed schemes, even though essential services such as provision of drinking water, rural sanitation, preventive health and primary education are accepted as their legitimate core functions.²¹ On the economic front, in order to effectively devolve financial resources to the third tier of government, the Constitution amendment has added an additional task to the Finance Commission to recommend measures to supplement the resources of the third tiers, including grants, which are supplementary to the devolutions by the State Finance Commissions (created as part of the seventy-third and seventy-fourth constitutional amendments). Although the eleventh and twelfth Finance Commissions have provided untied grants to these institutions, their financial capacity remains a suspect. As a result, PRIs exist as over-structured but under-empowered organisations, boasting of constitutional status but suffering from lack of effective devolution of powers and functions from the state Governments.²²

In order to address the gap between the state governments and the local self-governing panchayati raj institution, the National Commission to Review the Working of the Constitution (NCRWC) has

¹⁸ Mahendra Prasad Singh, *Indian Federalism: An Introduction* (New Delhi: National Book Trust, 2011), 134-5

¹⁹ *Ibid.*, 135

²⁰ Vijay Kelkar, "The Recent Evolution of Indian Federalism", Address at the International Development Research Centre (IDRC), March, 2010 <http://www.forumfed.org/libdocs/Misc/Speech_IDRC-Mar2010.pdf, accessed on 27/02/2014>

²¹ Government of India, *Second Administrative Reforms Commission, Sixth Report*

²² *Ibid.*

recommended that a provision for constitution of a State Panchayat Council under the chairmanship of the chief minister (on the pattern of Gujarat State Council for Panchayats as provided in the Gujarat Panchayats Act, 1993) may be made in the Constitution on the analogy of the provision in Article 263 of the Constitution relating to the Inter-State Council.²³ It further recommends that the leader of the opposition may be made ex-officio vice-chairman of the Council to provide a consensual approach to the development of panchayats as fully democratic, efficient and responsible institutions.

The seventy-third constitutional amendment Act excluded the Adivasi and Scheduled Areas from the purview of the panchayati raj. However through Article 243 M (4) it kept open the possibility that parliament may, by law, extend the provisions of panchayati raj to these areas. In 1994, Bhuria committee was set up to formulate a law for extending the provisions of Part IX to of the Constitution to the Scheduled Areas and to suggest modifications in other Acts relevant to the Fifth Schedule in order to strengthen institutions of local self- government in the Fifth Schedule Areas. The Bhuria committee recommendations led to the enactment of the Panchayats (Extension to the Scheduled Areas) (PESA) Act 1996, which came into effect from twenty-fourth December 1996. The PESA Act has led to extension of panchayats to the tribal areas in the states of Andhra Pradesh, Chattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Maharashtra, Madhya Pradesh, Orissa, and Rajasthan. It enables tribal society to make effective controls over their traditional rights over natural resources.

It may be important to highlight here that for quite some time now proposals have been mooted for devolution of all district-based state activities to a district government, including the police, land administration and other economic and social services within the district. The Ashok Mehta committee in its 1978 report considered district as an important governing unit. In carrying forward the Asoka Mehta scheme of democratic decentralization, the second Administrative Reforms Commission (ARC) in its report on local governance has also recommended the operationalization of the idea of district government (DG) with each district having an elected district Council comprising of representatives of both rural and urban bodies. The ARC has also recommended for an eventual abolition of the post of District Collector. In the interim period (i.e. till the abolition of the District Collector), the ARC suggests a dual role for District Collector as head of administration and secretary of the DG, presumably to allow a breathing period to the DG to take roots. The observation of the ARC is as follows:

there must be a single elected District Council with representatives from all rural and urban areas, that will function as a true local government for the entire district. In such a scheme, the District Council will be responsible for all the local functions, including those listed for them in the Eleventh and Twelfth Schedules. The DPC in its present form will be redundant, once a District Council comes into existence as envisaged by the Commission. Planning for the whole district – urban and rural – will become an integral part of the District Council's responsibility. The role of the District Collector/DM also needs to be reviewed in the context of the District Council and the District Government... the institution of District Collector must remain in the current form for some more time. Eventually, the District Council should have its own Chief Officer. Meanwhile, as an interim mechanism, there is merit in utilising the strength of the Collector's institution to empower local governments. The Commission is of the considered view that a golden mean between these two positions is desirable and the District government must be empowered while fully utilising the institutional strength of the District Collector. The Commission believes that these two objectives can be realised, by making the District Collector function as the Chief Officer of the District Council. In such a case, the Collector's appointment should be in consultation with the District Council. The District Collector cum- the Chief Officer would have dual responsibility and would be fully accountable to the elected District Government on all local matters, and to the State Government on all regulatory matters not delegated to the District Government.

²³ Government of India, Report of the National Commission to Review the Working of the Constitution – Chapter 9: Decentralisation and Devolution, (2002) <<http://lawmin.nic.in/ncrwc/finalreport/v1ch9.htm>, accessed on 19/04/2014>

V Conclusion

Several attempts have been made in post-independent India to revive and re-invent the traditional concept of swaraj and traditional local self-governing institutions such as the panchayati raj. Panchayati raj institutions at rural and urban levels have been given constitutional recognition through seventy-third and seventy-fourth amendments of the Constitution of India. The constitutional structure of the panchayati raj system is credited to have introduced the third tier of government in the Indian democracy – the other two tiers being the central government and the state government. This constitutional recognition of the panchayati raj has of course failed to bring any noticeable change in the governance and functioning of the local self-governing institutions. Upholding the constitutional validity of the Haryana Panchayati Raj (Amendment) Act, 2015 (Act 8 of 2015) enacted by Haryana government to bar the illiterate from contesting panchayat polls in the state, the Supreme Court in *Rajbala & Ors vs. state of Haryana & Ors*²⁴ ruled that “it is only education which gives a human being the power to discriminate between right and wrong, good and bad”²⁵.

The top court also said it would be perfectly valid for the legislature to disqualify a candidate from seeking election to a civic body if he or she lacks “basic norms of hygiene” by not having a functional toilet at home. Delivering the verdict, which may pave the way for introduction of minimum education as a prerequisite for contesting polls at various levels, the bench of Justices J Chelameswar and Abhay Manohar Sapre said such a disqualification has to be upheld as a reasonable restriction on people’s “constitutional right” to contest polls. The provision of 33% reservation for women candidates in Panchayat raj institutions seem to be a step towards the women empowerment. But in reality, such a reservation ends up elected women candidates as mere proxies of their men folk. The elections for elected Panchayats again are influenced by caste factor majorly due to which khaps overpower PRI. Whilst panchayats provided a forum for women, through mandatory quotas, to articulate their interests, while the seventy-third and seventy-fourth amendments have devolved power and functions to local self-governing institutions a clear demarcation of power and authority of these local institutions is missing in the constitutional scheme. In the constitutional scheme the power and authorities of the central and state governments are clearly defined under Seventh Schedule of the Constitution; but when it comes to panchayats and other local governing units the power and authority are dependent on state legislatures.

Panchayats and urban local bodies are not in a position to autonomously legislate on any matters that have been assigned to them. They are simply acting as extended wings of state governments and their success or failure depend on the political patronage of state political leaders who are generally reluctant to give more power and autonomy to these local bodies. They lack financial power and autonomy to make independent policy and decisions. A clear-cut fiscal transfer policy applicable in the case of centre- state fiscal relations is missing in the case of local self-governing institutions. At times, the central government is trying to directly engage itself with the local self-governing institutions for the effective implementation of its various welfare programmes and schemes. Here too most of the state governments demand that all the centrally sponsored schemes should be routed through state governments.

It is indeed very difficult to formally recognize the panchayati raj institutions (particularly below district level) as third tier of government. They can at best be used to devolve and decentralize the political functioning of state and central governments and that too mainly for implementation of government schemes and policies. The monumental argument to recognize panchayats as third tier of government is in fact not going to change the dynamics of local self-governance below the district level. Stable and sustainable local self-governing institutions can best be established at district level only. Villages are important institutions of local governance but these villages have never been considered as

²⁴ Writ Petition (Civil) No. 671/2015

²⁵ Id

administrative units. Contrarily, districts have historically been recognised as important administrative units for governance. The emergence of caste panchayats (Khap panchayats and Shariat Courts) and its so called diktats based on difference of caste brought challenge to the constitutionally valid institutions of Pachayati raj. In *Vishwa Lochan Madan Vs. Union of India* Hon'ble Judges C.K. Prasad and Pinaki Chandra Ghose opined:

One may not object to issuance of Fatwa on a religious issue or any other issue so long it does not infringe upon the rights of individuals guaranteed under law. Fatwa may be issued in respect of issues concerning the community at large at the instance of a stranger but if a Fatwa is sought by a complete stranger on an issue not concerning the community at large but individual, than the Darul-Qaza or for that matter anybody may consider the desirability of giving any response and while considering it should not be completely unmindful of the motivation behind the Fatwa. Having regard to the fact that a Fatwa has the potential of causing immense devastation, we feel impelled to add a word of caution. We would like to advise the Dar-ul-Qaza or for that matter anybody not to give any response or issue Fatwa concerning an individual, unless asked for by the person involved or the person having direct interest in the matter.

However, in a case the person involved or the person directly interested or likely to be affected being incapacitated, by any person having some interest in the matter. Issuance of Fatwa on rights, status and obligation of individual Muslim, in our opinion, would not be permissible, unless asked for by the person concerned or in case of incapacity, by the person interested. Fatwas touching upon the rights of an individual at the instance of rank strangers may cause irreparable damage and therefore, would be absolutely uncalled for. It shall be in violation of basic human rights. It cannot be used to punish innocent. No religion including Islam punishes the innocent. Religion cannot be allowed to be merciless to the victim. Faith cannot be used as dehumanising force.²⁶

The contemporary political scenario (particularly in the context of emergence of caste based khap panchayats) also demands that the local self-governing institutions primarily be located at the district level only. It may be important to highlight here that for quite some time now proposals have been mooted for devolution of all district-based state activities to a district government, including the police, local administration, local resources and the economic and social services within the district. There is a need to operationalize this idea of district government (DG) with each district having an elected district Council comprising of representatives of both rural and urban bodies. The District Government can in fact play a crucial role in promoting local self-governing institutions below district level through training and capacity building of local political leaders.

²⁶ Writ Petition (Civil) No. 386 of 2005 (Under Article 32 of the Constitution of India)

PRINCIPLE OF DIVISION, COORDINATION, AND SUPERVISION AMONG POLICE, PROCURATORATE AND COURT: A CRIMINAL PROCEDURAL PRINCIPLE WITH CHINESE CHARACTERISTICS

Bo Yin* Jingye Huang**

Abstract

The Principle of Division, Coordination and Supervision among Police, Procuratorate and Court in China's Criminal Proceedings can be seen as a real Chinese legal system, representing the feature of socialist legality claimed by western scholars. It illustrates how these three agencies interact with each other in criminal proceedings. However, it shall not be denied that certain creation in Chinese criminal proceedings exist without identical repetition elsewhere. It shall be analyzed in combination with the socialist ideology (or called Sino-Marxism) and the particular routine for Chinese legal system development. We tried to introduce this principle and its historical evolution. Then the underpinning ideology is analyzed in the respect of Chinese characteristics.

Keywords *Division, Coordination and Supervision; Police, Procuratorate and Court; Criminal Proceedings; Chinese Characteristics*

I Introduction

As is provided by the general part of the Criminal Procedure Law (the CPL) as well as the Constitution¹, the principle of Division, Coordination and Supervision among Police, Procuratorate and Court illustrates how these three agencies interact with each other in criminal proceedings. The police, procuratorate and court are obligated by laws to engage in activities of three indispensable aspects, namely 'division of duties', 'coordination of works' and 'mutual supervision'. The first aspect is division of duties², which means that agencies shall neither exercise their authority beyond legal boundary nor replace each other. Coordination of works means that agencies need to adjust their activities accordingly under the common goal of attacking crimes and protecting the society. Finally, mutual supervision means they should restrain each other, suggest their own opinions to other agencies, and take precautions against undesirable deviations by other agencies and require them to correct existing errors, no matter whether they are harmful or harmless. Notably, the final objective of mutual check is to ensure the correct and effective enforcement of law. It can be exemplified by the following circumstances: (1) the police checks any refusal to arrest by the procuratorate;³ (2) the police check non-initiation of prosecution by the procuratorate;⁴ (3) the procuratorate check the case filed for investigation by the police;⁵ (4) the procuratorate check illegalities by the police in their investigatory activities;⁶ (5) the procuratorate checks salient errors in a judgment or order of first instance made by the court;⁷ and so on.

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¹ See art. 7 of CPL and art. 135 of Constitutional Law; the sentences in both articles are almost the same except that the conditions are slightly different in expression: the former is 'in conducting criminal proceedings', but the latter is 'in handling criminal cases'.

² Its main purpose might be 'to ensure the correct and effective enforcement of law' (art. 7), whereby 'procedural instrumentalism' arises to accentuate substantial accuracy and speed of processing the case. See H Ma and B Li, 'Procedural Instrumentalism and the Use of Torture to Extract Statements' (1999) 14 Law Journal of Shanghai Administrative Cadre Institute of Politics & Law (in Chinese) 63.

³ CPL, art.90.

⁴ Ibid art.174.

⁵ Ibid art. 109.

⁶ Ibid art. 98.

⁷ Ibid art. 216.

II Normative analysis of this principle

This principle can be used to restrict the problems of the prevailing bureaucratic culture by multi-directional checks. For example, it can effectively limit the abuse of power of ‘guiding legal explanations’ issued by the Supreme Court, the Supreme Procuratorate, the Public Security Ministry and other agencies.⁸ We will not deny the function of ‘mutual check’ amongst criminal justice agencies for motivating compliance with the rules. However, it is a significant possibility that the legislators tacitly evaded stipulating procedural consequences in criminal procedure and therefore merely enacted elastic communicative mechanisms to resolve procedural disputes. Under this circumstance, procedural deficiencies are not solved by a hierarchical legal process, but by compromise. The police checking disapproval of arrests by the procuratorate are an example:

If the Public Security Organ thinks that the Procuratorate’s decision to disapprove an arrest is wrongful, it ‘may’ request the latter’s reconsideration. If refused, it ‘may’ request a review by the higher Procuratorate. The higher Procuratorate shall review the issue and decide whether or not to change and notify the lower Procuratorate and the Public Security Organ to implement its decision (art. 90). The frequent use of ‘may’ can be read to dilute the legal coercion necessary for the law to operative effectively, because ‘may’ can be interpreted as leaving an element of discretion or choice. Hence, the Procuratorate’s illegal decision found by the Public Security Organ may – or may not – lead to its request for reconsideration and if refused, it may – or may not – request a review.

The procuratorate checking illegalities by the police in their investigatory activities is also an example:

If in the process of examining and approving arrests, a People’s Procuratorate discovers illegalities in the investigatory activities of a public security organ, it shall notify the public security organ to make corrections, and the public security organ shall notify the People’s Procuratorate of the corrections it has made (art. 98). Notification as a communicative measure of the criminal justice agencies also demonstrates a lack of rigidity in the ‘mutual check’ mechanism. If the procuratorate finds deficiencies by the police in the investigation, it shall notify the police to correct them, and then the police shall notify the procuratorate of the details of their corrections.⁹ However, it is not necessary for the police to make corrections. As the police are not subordinate to the procuratorate, the notification by the police to the procuratorate can be understood as a report of how they dealt with illegalities, a process which is within the police discretion. To sum up, the principle of division, coordination and supervision has shaped a structure of criminal authority that is different from its counterparts in continental law jurisdictions or the Soviet Union. Instead of focusing on sole center like court or prosecution service, judicial authority in China’s criminal procedures is evenly distributed among the police, procuratorate and court, creating multiple power centers in a horizontal structure of authority. And this unique structure is deeply rooted in China’s history of justice practice. However, how has system with great originality been evolved? What is the underpinning ideology?

III Early development (from 1949 to 1969) of this principle

During this period, structure of judicial authority was not officially laid down by legislation. On September 27th, 1949, The Organic Law of The Central Government was passed by the First Plenary Conference of the People’s Political Consultative Conference. It signaled the formation of major state bodies including criminal justice agencies. According to Article 5 of this Law, the Government

⁸ With the emergence of the principle of safeguarding the procedural rights of participants, this principle can be used to indirectly protect the individual and strictly enforce the law, because the conflicts amongst agencies sometimes means a protection to the individual.

⁹ CPL, art.98.

Administration Council, the Supreme People's Court and the Supreme People's Prosecutor's office¹⁰ were recognized as the supreme authorities of administration, trial and prosecution respectively. By contrast, Ministry of Public Security was subordinated to Council of Political and Legal Affairs set up within the Government Administration Council in accordance with art. 18. These stipulations constituted the jurisprudential basis of threefold bureaucracy of police, court and procuratorate, as being imbedded in the Principle of Division, Coordination and Supervision. By examining these provisions, one might reach a conclusion that the court and prosecutor's office share same level of authority with administration council, thus outranking the Ministry of Public Security, which was only the Council's subordinate. The practice, however, defied this assumption in the following years.

In order to reestablish social order, the newly founded communist government launched a large scale operation named 'Campaign to Suppress Counterrevolutionaries' between March of 1950 and August of 1952. Being labelled as counterrevolutionaries under Mao's class struggle theory, remnants of former Kuomintang regime that caused social unrest were convicted and executed in mass trials.¹¹ During the campaign, the court, procuratorate and police served together as 'important weapon to establish people's democratic dictatorship'¹² against class enemies. But the distribution of duties among these three agencies in this period was rather based on technical issues instead of nature of activities and differences on political authority thereof. Dong Biwu, the then Deputy Premier of the Government Administration Council and Director of Council of Political and Legal Affairs, mentioned in the First National Judicial Conference that 'Though there will be reports presented by four different agencies¹³, the content of those reports is a product of joint discussion and cannot be seen as independent opinions of either agency.'¹⁴

This expression revealed prevailing belief in leadership that regarded the police, court and procuratorate as homogenous units of an inclusive, incriminating entity that dominates the whole criminal procedure. The belief had a significant impact on the relationship among three agencies. Institutional integrity or independence was negotiable as long as they remain functional weapons against class enemies as a whole. And this was vindicated by the continuous dissolution of court and procuratorate in the 'Three-anti and Five-anti Campaigns (sanfan wufan yundong)'. After serving as accessories to establish political order, the police, procuratorate and court were mobilized to fight crimes against economic development including corruption, waste and bribery.¹⁵ The integrity of court as a whole was diminished, as certain administrative units were entitled to assemble tribunals under courts' supervision to prosecute corruption and embezzlement.¹⁶

And those tribunals were supervised by a special committee set up by court, procuratorate, police and party, in an effort to 'reinforce the leadership on trials'.¹⁷ Compared with courts, changes in

¹⁰ The Government Administration Council and the People's Prosecutor's office were later succeeded by the State Council and the Supreme People's Procuratorate respectively in September of 1954.

¹¹ See Yang, Kuisong (2008) 'Reconsidering the Campaign to Suppress Counterrevolutionaries', *The China Quarterly*, 193: 102-121.

¹² Central Committee of CPC, 'Instruction on activities to suppress counterrevolutionaries', in 'Selected Important Documents since the founding of P. R. China', Party Documents Research Center eds., volume 1, Central Documents Press, 1992, at 422

¹³ Namely the Supreme People's Court, Supreme People's Prosecutor's Office, Department of Justice and Judicial Commission

¹⁴ Dong Biwu, 'Prioritize the judicial works', 26 July 1950, in 'Collection of Dong Biwu's works on judicial matters', Law Press, 2001, at 42

¹⁵ 'Resolution of the Second National Judicial Conference', 25 April 1953, http://news.xinhuanet.com/ziliao/2004-12/24/content_2375560.htm, accessed 28 April 2014

¹⁶ Central Inspection Committee of Austerity (Zhongyang jiejue jiancha weiyuanhui), 'regulations on tackling embezzlement, wasting and bureaucratic errors', March 8th of 1952, in 'Selected Important Documents since the founding of P. R. China', Party Documents Research Center eds, volume 3, Central Documents Press, 1992, at 112-113

¹⁷ Government Administration Council, 'Decision to assemble people's tribunals in Three-anti campaign', March 28th

procuratorates were more radical. During the National Public Sector Reform Conference held in winter of 1951, motion was proposed to cut all the staffs and offices of procuratorate, and shift its routine works to the police¹⁸. And this motion was confirmed by Government Administration Council, which issued a draft of 'decision to streamline department' in December to urge the police, procuratorate and court to combine offices (heshu bangong). By adhering to the draft, drastic annexation of procuratorates commenced nationwide. Taking Jilin Province for example, its provincial prosecutor's office was directly absorbed by department of public security in 1952, leaving only three staffs to manage dossiers and conduct research.¹⁹ And this process was not stalled until the then Deputy Chief Procuratorate Li Liuru filed report to the then Premier Zhou Enlai to contend the importance of an independent procuratorate, which eventually persuaded Mao Zedong into abolishing procuratorate.²⁰

The expansion of police power considerably reduced procedural safeguard against wrongful conviction, which necessitates the recovery of authority of court and procuratorate. But direct conference to the soviet model established in art. 5 of the Organic Law seemed impractical. Under the Legal Supervision Theory of Leninism, procuratorate was the supreme agency in Soviet criminal system that exercised direct leadership over the investigative body.²¹ Its Chinese counterpart, however, was primitive when compared to the integral and powerful police. Consequently, the following legal reform was guided by pragmatism. By intentionally misinterpreting the vertical leadership of Soviet model as horizontal coordination and supervision, the reformers sought to lower the threshold of reform through compromise. Li Lin, the then secretary of Council of Political and Legal Affairs, derived the expression of 'coordination of work and mutual supervision among police, procuratorate and court'²² from the Marxist dialectical method that regards nature as 'a connected and integral whole, in which things, phenomena, are organically connected with, dependent on, and determined by, each other.'²³ This principle was accepted by the party's Central Committee on March 12th of 1954. When ratifying the 'Report on Status Quo of Procuratorial Work and Recommendations upon its Policy and Task' by the Supreme People's Prosecutor's office, it contended that 'it is possible and necessary to reinforce people's procuratorate and the people's democratic legal system.

We shall systematically establish and improve people's procuratorate on every level.'²⁴ The principle became more influential when it was officially adopted by Chairman Liu Shaoqi in his keynote speech during the Eighth National Congress of the Communist Party of China.²⁵ However, the attempt to restore power balance among police, court and procuratorate failed to challenge the dominant decision that prioritize rule of the mass against enemies. The principle became inferior mechanism implementing the priority of class struggle. In other words, these three departments still served as 'three workshops, or three working processes'²⁶ of a unified body, rendering their relationships fragile and unstable.

of 1952, People's Daily, 31 March 1952

¹⁸ Wang Lili, Wang Songmiao, 'The Peoples' Procuratorate Should Only Be Strengthened Instead of Being Diminished', Procuratorial Daily, 9 November 2009

¹⁹ Sun Qian eds., 'Evolution of the People's Procuratorate', China Procuratorate Press, 2009, at 169

²⁰ See Wang Songmiao, Wanglili, 'Six Questions and Answers: Prominent Figures and Events in Procuratorial History', Procuratorial Daily, 13 July 2009

²¹ See Брадинский, 'The Right, Obligation and Organization of District Chief Procurator', in Xie Pengcheng eds., 'Procuratorate in Soviet Union', China Procuratorate Press, 2008, at 207

²² Wang Guiwu, 'Wang Guiwu's Lecture on Procuratorate', China Procuratorate Press, 2008, at 429

²³ Commission of The Cental Committee of the C.P.S.U.(B.) eds., 'History of the Communist Party of the Soviet Union (Bolsheviks) Short Course', International Publishers Co., INC., 1939, at 126

²⁴ Sun Qian eds., 'Evolution of the People's Procuratorate', China Procuratorate Press, 2009, at 217

²⁵ Liu Shaoqi, 'Political Report on the Eighth National Congress of the Communist Party of China', September 15th of 1956, <http://ccp.caac.net/ziliao/ziliao/liu2/lxjx022.html>, accessed 4 May 2016

²⁶ 'Comrade Peng Zhen's Speech on National Forum of Chief Procurators, National Conference of presidents of Higher Courts and Military Courts, The third National Conference on pretrial procedure', 'The People's Judicature', 27 July 1979

During the ‘Great Leap Forward Movement’ from 1958 to 1961, criminal justice was guided by a slogan known as ‘one chief²⁷ exercises the power of three, one officer²⁸ conducts activities of three, obtain cases together and distribute duties later.’ By upholding the joint operation as ideal form to accomplish mission in mass movement, activists condemned the ‘idolization and mystification of law’ that inappropriately deprive the liberty to fight against the enemy through mutual supervision.²⁹ In fact, joint operations caused *de facto* merge of police, court and procuratorate, for they were conducted in such a chaotic way that it was impossible to clarify jurisdiction in practice.³⁰

In 1959, the Supreme People’s Procuratorate officially replaced principle of Division, Coordination and Mutual Supervision by principle of ‘Prioritizing Support over Supervision’ (zhi chi di yi, zhi yue di er)³¹. As a result of voluntary subordination, horizontal balance of authority completely collapsed due to the tumbling procuratorial authority. On November 11th, 1960, the Central Committee approved police-led motion to subject the Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security entirely to the leadership of the latter’s party group, and combines offices of these agencies. The monopoly of police directly contradicted with arts. 47, 79 and 81 of the Constitution, which nominate State Council, Supreme People’s Court and Supreme People’s Procuratorate separately as the highest department of administration, trial and supervision. By subordinating these latter two departments to a component of the former, this experiment utterly overturned the constitutional structure of the People’s Republic of China. Fortunately, the *de facto* monopoly of police only lasted for three days before intervention from Liu Shaoqi and Peng Zhen succeeded in revoking the order to merge.³²

The change of general attitudes toward rule of law also had a major impact on the principle of Distribution of Duty, Coordination of Work and Mutual Supervision. When addressing the enlarged meeting of the politburo of CPC in Beidaihe, Mao Zedong expressed his idea on rule of law “Laws may not be abandoned, but we have our own way.....The majority cannot be ruled by the law, and we should depend on habit.....Who can remember so many articles in civil Law or criminal law. as a participant in the making of Constitution, I cannot even remember its content..Ninety percent of rules were made by our departments, but we do not act according to them. We count on resolutions, meetings four times a year. The social order is not maintained through rule of civil or criminal law.”³³ Inspired by the leadership, the Politics and Law Leading Group of CPC quickly submitted ‘Report to the chairman and Central Committee Concerning Political and Legal Issues after the Establishment of People’s Commune’, contending that ‘There is no need to pass Civil, Criminal and Procedure Law based on current condition.’³⁴ And major legislative activities were suspended soon after the report was ratified.

IV Anarchy of the Cultural Revolution and resumption of this principle afterwards

The rule of law has not been resumed after the Anti-rightist Movement and the Great Leap Forward. The value of law was entirely denied. Then the Cultural Revolution until 1976 brought a new type of legal anarchy. The judicial agencies were entirely destroyed. The normal administration of justice was entirely

²⁷ Chief of police, court or procuratorate

²⁸ Officer in charge of investigation, prosecution or sentencing

²⁹ See Zhang Min, ‘The Whole Process and Grave Consequences of the Fourth National Conference of Judicial Works’, in ‘Essay Collection on Dong Biwu’s Legal Thinking’, Volume 4, People’s Court Press, at 423

³⁰ See Cui Min, ‘Rethinking and Reviewing the Fourth National Conference of Judicial Works’, 2011, 4 Criminal Justice Forum 17

³¹ See Wang Guiwu eds., ‘Research on the Procuratorial System in The People’s Republic of China’, China Procuratorate Press, 2008, at 49-50

³² See Zhou Yongkun, ‘History and Development of Central Politics and Law Commission of the Communist Party’, 2012, 9 Yanhuang Spring and Autumn, at 8

³³ Mao Zedong, ‘The Fourth Speech on the Enlarged Meeting of the Politburo of CPC in Beidaihe’, 21 August 1958, in ‘Long Life Maoism(January 1958 to February 1960)’, internal copy, 1967, at 109

³⁴ Wang Tengting, ‘Background of Title Changing of The National Conference of Political and Legal Works’, Nanfang Daily, 18 January 2014

substituted by mobilization campaigns of activities and Red Guard youth. During these episodes the remaining laws could not be applied on account of 'their close relationship to the political struggles that characterized the period.'³⁵

In 1979, following the Third Session of the Eleventh Congress of the Chinese Communist Party, China began reconstruction of its legal system. In the fifth plenary of the China People's Committee's second meeting, the National People's Congress approved seven significant laws, including Criminal Procedure. In the meantime, this principle of Distribution of Duty, Coordination of Work and Mutual Supervision was resumed. In socialist jurisprudence, criminal procedure is seen as a tool for the ruling class to govern the other classes. Thus many scholars criticise that this principle creates too much collaboration rather than mutual supervision, resulting in fierce attack upon the enemies rather than protection of human rights of the accused. Especially when the Communist Party guide how to deal with the case sometimes and three segments may work together in many cases under the leadership of Party, the check and balance amongst agencies were suspected. These three agencies must be directed and supervised by the Political and Legislative Affairs Committee of the Party (*zheng-fa-wei*) after 1980s enhanced the collaboration of them.

V Conclusion

Nevertheless, if we consider the previous legal nihilism before 1978, it shall be recognized that resumption of this principle constituted a great achievement towards rule of law. It at least ensures the separation of powers amongst agencies and formally reckons mutual check and balance. The wording of this principle sounds formalist but leaves enough space to interpret it in a more reasonable meaning. Nowadays in China's justice reform, a new ideology called trial-centralism is advocated. The trial will be more substantiated and the status quo of the court is emphasized. In this circumstance, this principle can be interpreted as the collaboration for ensuring the trial-centred model whilst supervision of police and prosecution upon the court is weakened. This vague and formalistic wording in Chinese criminal proceedings can be flexibly used for justifying the reform from the authority. True, Chinese criminal procedure learned too much from its Soviet counterpart. The ideology and structure of code derived tremendously from the Soviet Code of Criminal Procedure. This principle is actually Chinese-made. That is one of reasons that this principle has been criticised but never repealed from the Code. It is necessary to reserve certain Chinese creation in the law, either from a normative perspective or from a historical perspective.

³⁵ D Cai, 'Development of the Chinese Legal System Since 1979 and its Current Crisis and Transformation' (1999) 11 *Cultural Dynamics* 137.

EMERGENCE OF THE *RIGHT TO BE FORGOTTEN* IN CYBERSPACE IN THE EUROPEAN UNION

Sajal Sharma*

Abstract

Cyberspace has emerged as a repository of information pervading all aspects of the human lives. This has become possible because all kinds of human activities like business or personal are being increasingly done over the internet. Thus information relating to individuals both past and present are available at the click of a button on the internet. This is because search engines collect the data from individuals. A host of other sources also provide a lot of data to the virtual world. This has serious implications for the privacy of the individuals as searches are made on the internet about specific individuals by typing their names. In the year 2010 a complaint was lodged by a Spanish citizen against a local newspaper and google Inc against the appearance of old and demeaning information about him in search results. This matter went to the Court of Justice of the European Union and led to the emergence of what is known as the right to be forgotten in the year 2014. This research paper makes a detailed analysis of the existing European regulations with regard to the protection of the data in the virtual world. It traces the development of the right to be forgotten and argues that what has been done by the European Court of Justice in the Google Spain case is of utmost unique character. Such a right was probably never conjured in the past and its impact has been so great that not only did it lead to search engines changing their privacy policies in Europe but also other countries have drawn inspiration from it in order to formulate or restructure their own laws. Finally from the Indian perspective in the current scenario of privacy related issues, one can only see this right to be a boon and a crusader in the fight against online privacy information leaking giants.

Keywords *Cyberspace, Data Protection, Search Engines, Privacy, Google*

I Introduction

Cyberspace with its initial innovation in the late 1960s has been widely debated to the fact as should it be seen as boon or a curse to mankind though its technological advancement can never be doubted. The term Search Engine has now become common on the lips of many with due credit to multinational giants such as that of Google, Bing, and Duckduckgo. These are used to search anything and everything and are able to give out results in the millions within a fraction of a second. However the issue of privacy has come into the limelight with questions being raised in the minds of many. The concept of search engines have become quite synonymous to the lives of every person who has an active access to the internet and can become a part of the parallel universe commonly known as that of cyberspace. Search engines such as that of Google and or Bing are not only used for educational purposes but also for entertainment, leisure and so on and so forth, but the question arises when analyzing the mere thought that the information we type in gets stored somewhere or the other in some server in a remote part of the world. The situation intensifies when one thinks that what is the reason and aim of storing that particular information.¹

The concept of data retention has been widely debated and certain countries have also passed laws as to the limit of retaining of such data dividing it into categories of importance. Such is seen to be complied as well however when the retention period is not exhausted the question that revolves is the concept of sharing of data. The internet is a wide aspect and anyone with a connection can secure any form of data that one desires. The search engines will be more than happy enough to give you ample of results which may include certain data relating to a person or group or even corporations which may not be intended to be shared with third parties.

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¹ Prashant Mali, "Cyber Law and Cyber Crimes", page 3, First Edition, Snow-white Publishers

Even the concept of particular news can circulate through the cyberspace for a number of years even though the matter could have been controversial or even solved in nature and had no importance in the current period of time perse. A hypothetical example of a serious situation could that be of a man who is accused of murder and nowadays such news in not only circulated to great extents on online news portals but also through a large number of social media. Even at a later point of time when the person has been acquitted of the allegation of murder the news will still be doing rounds without modification or any form of removal for many years to come.

The person will have been harassed and humiliated enough during and immediately after the trial but the humiliation can still continue forever in the cyberspace. The article hence will be focusing on the aspects of deletion or modification of such news and archives in order for such people to lead normal lives so that such data and information is forgotten. It focuses on this unusual form of right being asked for a growing population of people around the world that is The Right of being forgotten especially in the case of such online data or information which does not have a reason for existence in the current environment as it may lead to the infringement of various other rights along with harassment, defamation and also humiliation. It also covers aspects of information being actively shared by such search engines with third parties in reference to advertisements being showcased according to the information searched for in order to make it more user friendly.² However such content can also be sensitive in nature as one will not wish to always have their search preferences being showcased around on various other websites simply due to a large concern for security of such data.

II *Google V Spain: Litigating To a Privacy Right in the Cyberspace*

The concept of the right to be forgotten has its roots deep in the case titled as the Google Spain Case³. The complaint was originally brought by Mr Gonzalez, a Spanish national living in Spain, against the publisher of a Spanish daily newspaper named La Vanguardia and against Google Spain and Google Inc. The complaint related to the fact that when a search was undertaken on the Google search engine against his name the results provided links to articles in the La Vanguardia from 1998, mentioning Mr Gonzalez in connection with bankruptcy proceedings leading to the auctioning and selling of his private property. Mr Gonzalez wished to put those matters behind him and after years of mental rehabilitation found the story existing to be still humiliating.

Although he had failed in his complaint against the newspaper as it enjoyed immunity under the journalistic exemption under the Directive, he contended that the continued publication by Google breached his rights under the Directive⁴, leading to the intrusion into privacy. He sought an order requiring Google to remove or block the search results.⁵ The proceedings which eventually led to the repossession had been concluded over 6 years back but was still available and causing him a lot of pain and humiliation. He also claimed that the information was irrelevant and an intrusion into privacy.

He requested the newspaper to remove the content and then also requested Google to do the same. He then filed a suit in the Spanish Court which in turn referred the matter to the European Union Court. It is hence required to look in the existing laws of the European Union (E.U), to understand

² Prashant Mali, "Cyber Law and Cyber Crimes", page 5-6, First Edition, Snow-white Publishers

³ C 131/12

⁴ The Data Protection Directive (officially Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data) is a European Union directive adopted in 1995 which regulates the processing of personal data within the European Union. It is an important component of EU privacy and human rights law.

⁵ <http://eutopialaw.com/2014/05/16/case-comment-google-spain-sl-google-inc-v-agencia-espanola-de-proteccion-de-datos-mario-costeja-gonzalez/> 15/09/2014, 11:23

whether this form of intrusion into privacy was covered by the laws or not. The main issues that the court had to look into were:

“The main issues for the court were whether:

- The activity of a search engine in finding information on the internet, indexing it, storing it temporarily and making it available to the public in the form of search results linking to other websites amounts to the processing of personal data;
- The operator of a search engine carrying out the above activities is a data controller;
- The territorial scope of Directive 95/46 extended to Google Inc, an establishment based in the United States but which had a subsidiary in the European Union;
- The extent of the responsibility of the operator of a search engine to remove links to web pages that are published by third parties from its own search results, including in circumstances where the information remains available on website of the original publisher;
- The criteria to be applied by the operator of the search engine in deciding whether to accede to a request to remove certain links from its search results;
- There is a right to be forgotten under the Directive, entitling an individual to demand that information which he considers out dated be removed from the search results of a search engine.”⁶

III EU Data Protection Directive

The case threw main focus on the 1995 EU Data Protection Directive. The Directive can be regarded as a unique legal instrument in how it supports the exercise of a right to privacy and rules for personal data protection. Its principles are regarded in many quarters as a gold standard or reference model for personal data protection in Europe and beyond.⁷ This particular directive had but one intention to try and protect the privacy of the individuals.

IV Meaning of Privacy

In order to delve in deeper into the context of privacy it is important for us to understand what we actually mean by privacy. Judge Samuel Warren and Louis Brandeis summarised in 1890 in the celebrated article *Right to Privacy*⁸ and later found mention in the case of *Olmstead v/s U.S* (1928) as the right of the individual to “be let alone”, and expanded the notion of data protection beyond the fundamental right to privacy.⁹ Privacy in today’s world has been elevated to the status of being a derived fundamental right. The Universal Declaration of Human Rights (UN, 1948) and the European Convention on Human Rights (ECHR, Council of Europe, 1950) were the forerunners in the idea of making an individual’s privacy a right that has to be protected at all cost.

Privacy regulation aimed at governing , how personal data is processed was introduced in the 1970s and 1980s, and the European Data Protection Directive came into force in 1995. It has to be understood that the Internet was developed almost 30 years ago and has reached a scene where it is referred to as being a parallel Universe on its own. It is place where one can search and get results about anything and everything thanks to the like of search engines. Then came the question of these search engines violating the privacy of individuals as the laws of even the most modernized society could not cope up or adapt in the strides which were already being made by the internet.¹⁰ Seeing

⁶ <http://eutopialaw.com/2014/05/16/case-comment-google-spain-sl-google-inc-v-agencia-espanola-de-proteccion-de-datos-mario-costeja-gonzalez/> 15/09/2014, 11:55

⁷ http://www.hideproject.org/downloads/references/review_of_eu_dp_directive.pdf 17/ 12/2014, 22:10

⁸ Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1980)

⁹ http://www.hideproject.org/downloads/references/review_of_eu_dp_directive.pdf 17/ 12/2014, 22:16

¹⁰ <http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aii-2.htm#12> 17/ 12/2014, 22:19

the various violations of privacy with the use of the Internet the Directive was passed by the European Parliament and the Council of states.

3.3 This directive almost covers the entirety of privacy issues but the question faced by the Court was whether this also covered search engines. Article 12 of the Directive talks of Right of Access: "Member States shall guarantee every data subject the right to obtain from the controller:

(a) Without constraint at reasonable intervals and without excessive delay or expense: confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed; communication to him in an intelligible form of the data undergoing processing and of any available information as to their source; knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1) (of the said Directive);

(b) As appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(c) "Notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort."¹¹

Article 15 of the Directive talks about "Automated Individual Decisions:

1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

(a) Is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view, or

(B) Is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests."¹²

On an analysis of these two articles as provided in the Directive, it is evident that appropriate laws are actually in place for the protection of privacy. The Directive however talks about only the Controller and the Processor of the information. The question now faced by the court is that of whether search engines can also be included in this purview. Google which is considered to be the top search engine receives a large amount of personal data on a daily basis.

Hence it processes that same amount also. The court after looking into the various facts concluded that Google is to be considered a Controller of information also. Hence the rights which are available

¹¹ [http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aai-2.htm#12 17/ 12/2014, 22:23](http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aai-2.htm#12%2017%2012/2014,22:23)

¹² [http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aai-2.htm#12 17/ 12/2014, 22:27](http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aai-2.htm#12%2017%2012/2014,22:27)

under Article 12 to an individual include that of search engines for then onwards with the decision coming out in 2014. Article 15 on the other hand also includes the legal right to be concerned with the information being processed. In extending the meaning of the term controller to search engines also, companies like Google would now have to in all cases seek permission from the users into what form of information is it can acquire. This article does not only deal with the concept of retention of data but also the sharing of data with third parties.

V Sharing Of Data with Third Parties

Google works on the principle of internet marketing as pointed out by Jared Harris and Jenny Mead in their Article "Google and Internet Privacy"¹³ which deals extensively with the Darden Case¹⁴. This case is seen to be one of the foremost pioneering cases as to how search engines violate privacy in the United States. Internet marketing which is the marketing of goods and services over the internet became hugely popular as it was a cheap method of reaching the millions. It was seen as a boon for search engines like that of Google and Yahoo. All that was needed was the sellers to have an agreement with that of a search engine to forward its advertisement to its users. "Special technological tools also allowed Internet marketers to target individual consumers with products specific to their needs. One such tool was a cookie. Also known as Web cookies, cookies were bits of text sent back and forth every time a user's Web browser accessed the server of a given Web site. The server used these bits of text to authenticate and track user information, such as Web site preferences or specific purchases made through e-commerce.

Because they could be used for tracking Internet browsing behaviour, cookies had been the subject of increased privacy concerns in the United States and abroad. Also, cookies were often criticized for misidentifying users. While cookies were only sent either to the server setting them or a server in the same Internet domain, a Web page might contain images or components stored on the servers of other domains. Cookies that were set or dropped on a user during the retrieval of one of these images were called third-party cookies. Third-party cookies allowed a marketing company to track and compile an individual's Web activity across the sites of different companies as well as personal information provided under the assumption of anonymity.

The use of cookies, coupled with the storage of vast amounts of search-term data, had led to an increase in privacy concerns over large Internet search engines such as Yahoo! and Google."¹⁵ These cookies can only be seen to be the tool for the violation of privacy. On making a complete analysis of the search needs of the consumer the cookies would project the products or services required in forms of advertisement. This can mean going through the most sensitive of data. Such only came to light after the Darden case as to the levels and extent search engines go on providing data without the permission of the actual user.¹⁶

VI The Extraterritoriality of European Courts

Now coming back to the Google v Spain case the court would also have to decide the jurisdiction as the servers of Google are located outside Europe in the U.S. The court now had to decide whether passing such an order will have any effect on Google and whether Google is in fact within the jurisdiction of the court. The court held in this case even if the physical server of a company processing data is located outside of Europe, EU rules will apply to search engine operators if they have a branch or a subsidiary present in a Member State which promotes the selling of advertising

¹³ University of Virginia, Darden Publishing House

¹⁴ UVA-E-0344

¹⁵ Jared Harris and Jenny Mead "Google and Internet Privacy", University of Virginia, Darden Publishing House

¹⁶ Jared Harris and Jenny Mead "Google and Internet Privacy", University of Virginia, Darden Publishing House

space offered by the search engine, meaning the search engine is in fact under the jurisdiction of the court as well as the order which has been passed.¹⁷ The court in solving two of the issues has rightly placed Google in a position to be accountable for its actions.

“Privacy in Search Engines: Negotiating Control”, by Fedirica Casasora¹⁸ has put across a view regarding how the laws function in the EU referring the Articles in the directive. He states that the Member States in the EU, where the monitoring activity of personal data is carried out by independent authorities, have been appropriately placed under the tag of Data protection Authorities.¹⁹ This results in show of resolving difficulties in balancing the need of protection claimed by users with the interest in the free flow of data. Article 8 of the Directive states “the processing of special categories of data:

1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life;

2. Paragraph 1 shall not apply where:

(a) The data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or

(b) Processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law insofar as it is authorized by national law providing for adequate safeguards; or

(c) Processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

(d) Processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

(e) The processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims;

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy;

4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority;

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national

¹⁷ Jared Harris and Jenny Mead “Google and Internet Privacy”, University of Virginia, Darden Publishing House

¹⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 01:41

¹⁹ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 1:54

provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.”²⁰

The author stressing highly on this article claims to clearly highlight the fact that adequate laws for the processing of private data exists however with this judgement even search engines will have to comply with the said Articles in the manner which is to be considered most religious. He then goes on to speak about the privacy policy of Google The activity carried out by Google is not different from those provided by other search engines, however, the level of protection assured by Google has progressively caught the attention of all critics. The privacy policy²¹ available on the website states that, in order to receive the services from Google, it is not necessary to provide personal information, but it is possible that Google would use some tools which can collect users’ data so as to offer more personalised services (such as cookies, server logs, links, etc.).²² Now this may seem to appear as a problem, as already stated in the earlier parts of this article regarding the discussions made on cookies, if Google’s open privacy policy state that it may use such tools then the quantum of private information being leaked to other parties can be mammoth.

Article 6 states clearly that:

“1. Member States shall provide that personal data must be:

(a) Processed fairly and lawfully;

(b) Collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) Adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) Accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;

(e) Kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.”²³ This Article is very clear on the fact that the data has to be maintained for specific purpose and for a specific time period only with all the necessary changes being made to it, but that seemed not the case with what Google had done in the case and for which it was found to have infringed the privacy of the individual though Google claim that they abide by the articles of the Directive.²⁴ “In July 2007, following the increased interest of consumers on lack of privacy safety, Google in a haste measure, published the new policy concerning cookies and stated cookies were to expire after two years. But, any time the user opens up Google webpage a new expiration date is set. This solution does not change much the results for Google, as regular users who take to Google on a daily basis will move the expiration date further and further.

Moreover, this solution allocates on the user the choice to decide whether or not to allow the collection of data through cookies. This cannot be stated as consent to the data process as consent

²⁰ <http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aii-2.htm#12> 21/01/2015, 01:56

²¹ <http://www.google.it/privacypolicy.html>. 22/01/2015, 16:11

²² http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 02:41

²³ <http://www.dataprotection.ie/viewdoc.asp?m=&fn=/documents/legal/6aii-2.htm#12> 27/01/2015, 17:17

²⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 02:49

requires the ingredients of has been well informed and voluntary.”²⁵ The European Court of Justice ventured into the context of the Right to be Forgotten concept after answering the previous two relevant issues of whether the jurisdiction can be extended to search engines and whether search engines can be included in the definition of controllers as under Article 12 of the Directive. The court in its judgement stated that individuals will have the right but only under certain conditions and or circumstances to be able to ask search engines to remove links and or contents which is riddled with personal information about the users.²⁶ This applies where the information is inaccurate, inadequate, irrelevant, explicit or excessive for the purposes of the data processing and retention of data.

The court found that in this particular case the infringement of an individual’s right to data protection could never be justified merely on grounds of economic or monetary interest of the search engine. The Court also expressly clarified that the concept of the right is not absolute but will always have to be balanced with other fundamental rights, such as that of freedom of expression. On a case based assessment it can be considered as to the type of information in question, its sensitivity for the user’s private life and the interest of the public in having access to that information. The role or status of the person requesting the information to be edited or deleted, plays in public will also be relevant and will be considered.²⁷ The Court also in the case stressed the need for revamped laws for better regulation of data being synced into the search engines on a regular basis.

The proposed Data Protection Regulation which sought to provide the concept of the aforesaid right is about much more and on a broader concept. It is but a process of modernization of EU’s data protection rules, establishing a number of rights for the citizens of which the Right to be Forgotten is considered to be the foremost. This new proposed directive serves for creating a single platform for data regulation in the EU and establishing cooperation between the Member states regulations. In recognising that the Right to be forgotten exists, the Court established a general principle. This principle needs to be updated, modified and clarified for the digital age and for further ages to come. It is also stressed that that the right would be of no use if there was no point of extra judicial application of the same to companies and corporations and even individuals outside the jurisdiction of the EU.²⁸

This issue is solved in the ground of Article 3 of the new proposed Directive leaves no legal doubt that no matter where the physical server of a company processing data is located, even the non-European companies when offering their services to European consumers, must apply European rules. Further the commission also states that the right will be more effective for individuals by reversing the burden of proof that is the company has the onus and not the individual to prove that the data cannot be deleted because it is still needed or is still relevant and in no way is prejudicial to the interest of the consumer.²⁹ The proposed Data Protection Regulation also creates an obligation for a controller of the information and has made the personal data seep into the public forum to take all the reasonable steps to inform third parties of the fact the individual wants the data to be deleted and see to it that it is done which was also seen to be done by the European Parliament, in essence placed an obligation for the controller to ensure that the data is erased as per the wishes of the consumer.

It also adds that individuals have the right to erase where a court or regulatory authority based in the jurisdiction of the Union has ruled in a judgement decree or order that the data concerned must

²⁵ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 02:52

²⁶ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 16:35

²⁷ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 02:59

²⁸ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 16:43

²⁹ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 3:01

be erased.³⁰ Special mention has to be given to Article 17 of the proposed Directive which enshrines all of these features and ingredients. The proposed Data Protection Regulation allows data as under the above mentioned Article authorities to impose fines of up to an amount of 2% out of annual worldwide turnover, where the companies do not respect the rights of citizens, including the right to be forgotten. The proposed Data Protection Regulation is also specific and certain as to the reasons of public interest that would justify keeping data online for a prolonged period of time. This can be viewed as limitations to the right. These mainly include the fields of freedom of speech and expression, interests of public as well as situations in which data is processed for historical, statistical and scientific purposes.³¹

VII Right to Be Forgotten Vis-À-Vis Other Rights

The Court in its judgment did not elevate the right to be forgotten to a level where it would be seen as trumping the other fundamental rights, such as the freedom of expression or the freedom of the media. However, the Court clearly stated that the right to get ones data erased or edited is never absolute and has clear limits and limitations.³² The request for erasing has to be assessed from situation to situation. It only applies where personal data storage is no longer necessary, inadequate and explicit or is irrelevant for the original purposes for which the data was collected in the first place. Removing irrelevant and outdated links form its database does not necessarily mean deleting the content merely making it invisible to the other users and companies.³³ The Court also made it clear, that a situation based assessment will be conducted every time such a question is placed before the court. Neither the right to the protection of personal data nor and the right of freedom of speech and expression are absolute rights. A well deemed balance act should be sought between the interest of internet users and or clients or consumers and the one's fundamental rights.

Freedom of expression is a concept which carries with it both the responsibilities and has limits clearly present both in the online and offline world. This balance will always depend on the nature of the information in question, its effect on the person's private life and on the interest of the public in receiving that information. It may also depend on person to person basis ,i.e., the right to be forgotten is clearly not about making important people less important or making criminals any less criminal.³⁴

The Google Spain case provides an example of the balancing exercise that the Court is stressing on. The Court on one hand ordered Google to delete the links leading to access of the information deemed irrelevant by the Spanish citizen, but it did not rule that the content that was initially published by the newspaper had to be changed in the name of protection of privacy. The data regarding the Spanish citizen will still be accessible but is no longer be as open as it was before making it hard for third parties to gain access to it. This was considered enough for the citizen's privacy to be respected along with that of freedom of expression. The Court also made it clear that Google will have to assess the deletion requests on a situational basis and to apply the criteria mentioned in EU law and the European Court's judgment to determine whether the information is made accessible to the public or not.

These criteria relate to the accuracy, adequacy, relevance including time passed and proportionality of the links, in relation to the purposes of the data processing.³⁵ The criteria for the level of accuracy and relevance of the information may critically depend on how much time has lapsed since the

³⁰ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 16:56

³¹ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 17:11

³² <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 17:26

³³ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 03:17

³⁴ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 17:54

³⁵ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 17:58

original references relating to the person were made. While some search results regarding the content on other webpages and sites may remain relevant even after a considerable passage of time, others will not be so, and an individual may legitimately ask to have them deleted in the name of safeguarding his or her privacy. This is exactly the essence of the proposed EU data protection Regulation: empowering individuals to manage their personal data while explicitly protecting the freedom of expression and of the media.³⁶

Article 80 of the proposed Regulation includes a specific clause which obliges Member States to pass national legislation to reconcile data protection with the right to freedom of expression, including the processing of data for journalistic purposes.³⁷ The clause specifically asks for the type of balancing that the Court outlined in its ruling whereas today's 1995 Directive is silent implying that data protection could rank above freedom of the media. The Commission proposes to strengthen freedom of expression and of the media through the revision of Europe's data protection rules.³⁸

3.12 The Article 29³⁹ which talks about "Working Party on the Protection of Individuals with regard to the Processing of Personal Data states:

1. A Working Party on the Protection of Individuals with regard to the Processing of Personal Data, hereinafter referred to as "the Working Party", is hereby set up. It shall have advisory status and act independently;
2. The Working Party shall be composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission. Each member of the Working Party shall be designated by the institution, authority or authorities which he represents. Where a Member State has designated more than one supervisory authority, they shall nominate a joint representative. The same shall apply to the authorities established for Community institutions and bodies;
3. The Working Party shall take decisions by a simple majority of the representatives of the supervisory authorities;
4. The Working Party shall elect its chairman. The chairman's term of office shall be two years. His appointment shall be renewable;
5. The Working Party's secretariat shall be provided by the Commission;
6. The Working Party shall adopt its own rules of procedure;
7. The Working Party shall consider items placed on its agenda by its chairman, either on his own initiative or at the request of a representative of the supervisory authorities or at the Commission's request. Working Party recognizes the usefulness of search engines and acknowledges their importance."⁴⁰

It is thus clearly stated that the Working Party is endowed with a clear set of responsibilities under the Data Protection Directive for search engine providers as controllers of user data. As providers of content data the European data protection law also applies to search engines in specific situations

³⁶ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 18:13

³⁷ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 18:15

³⁸ <http://ec.europa.eu/justice/data-protection/> 22/01/2015, 18:23

³⁹ <http://www.dataprotection.ie/viewdoc.asp?DocID=94&m=23/01/15>, 06:42

⁴⁰ <http://www.dataprotection.ie/viewdoc.asp?DocID=94&m=23/01/15>, 06:46

such as that of when such search engines help in the formation of social or a public profile of the users and or when a caching service is provided which anonymously stores data for future reference. The primary objective throughout is to strike a balance between the business and or economic needs of the search engine providers and the protection of the personal data of internet users. This is the most clear way to address the definition of search engines to be included within the definition of controllers, the kinds of data processed is the provision of search services, the legal framework, purposes or grounds for legitimate processing, the obligation to inform data subjects, and the rights of data subjects.⁴¹

In conclusion of the Google case relating to search results, the proposed Data Protection Regulation strikes the right balance between the right to the protection of personal data and freedom of expression for the ultimate benefit of the millions of internet and non-internet citizens especially in Europe. Google is responsible for the processing of personal data that it carries out which appear on web pages published by third parties. Data subjects may approach the operator directly and, contact Data Protection Authorities if their request is not met.⁴² This decision clearly confirms that under the current directive although the new one has been presented argued upon and is in the procedure of finality, there is a right to be forgotten enshrine through the case that can be applied in relation to search engines, there however exists exception for those cases where the interest in keeping that information outweighs protection. This decision could have had very serious implications in the way in which we all access information on the Internet.⁴³

VIII Other Regulatory Framework in the EU

After looking in to the various laws it is the opportune moment to turn to certain more latest legislations that have been passed by the European Union which means the analysis of the Controversial Cookie Directive passed in 2011. Its applicability lies not only to the United Kingdom but all European countries. It clearly states that it is mandatory to reveal that the use of cookies by the European online businesses and also that explicit consent for their use has to be obtained from your users directly.⁴⁴ This Directive is seen to be a little controversial mainly due to the fact that it prescribes detailed plugins in order to establish procedures for Business concerns as well as the various private individuals to manually deactivate cookies.⁴⁵ Now the concept of what are cookies to be exactly along with how they help in distribution and retention of personal data, as well as how such are used by the various search engines including that of Google has been clearly stated in the earlier parts of the chapter while discussing the article "Privacy in Search Engines: Negotiating Control", by Fedirica Casasora⁴⁶. Thus this directive has its roots into the concept of stealing of privacy by the search engines way before the Google Spain case ever came across the European Court of Justice.

There however are a number of limitations to this Directive especially in the technical terms. The plugin expressly expects the URI of the privacy policy of the individuals and of the business whether private or public to be exist. If however one such policy does not exist then one has to formulate one. Further the plugin will never automatically assume the fact that cookies are going to be created and which will in turn start storing the information, later disseminating it.⁴⁷ One has to personally point out that cookies are being formed for intrusion of privacy and that to it depends on

⁴¹ http://www.gdpd.gov.mo/uploadfile/others/wp148_en.pdf 23/01/2015, 18:59

⁴² <http://www.privacylaws.com/Publications/enews/International-E-news/Dates/2014/5/Googles-search-engine-subject-to-EU-data-protection-laws/> 22/01/2015, 18:29

⁴³ <http://www.privacylaws.com/Publications/enews/International-E-news/Dates/2014/5/Googles-search-engine-subject-to-EU-data-protection-laws/> 22/01/2015, 18:32

⁴⁴ <http://cookiesdirective.com/> 22/01/2015 18:55

⁴⁵ <http://cookiesdirective.com/> 22/01/2015 18:59

⁴⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561571 21/01/2015, 01:41

⁴⁷ <http://cookiesdirective.com/> 22/01/2015 19:07

the privacy policy that has been formulated. The last major hurdle can be seen in the form of scripts. Scripts are the basis on which the various intricacies are based on a web portal or web sites.⁴⁸ This plugin which is now mandatory cannot keep track of the changing scripts and has to be re calculated every time the script changes. Since the concept of data retention is also one that plays a crucial role the laws of the European Union relation to data retention has to also be looked into. For this reason the E.U Directive on Data Retention 2008 has to be examined also.

Telecommunication and Internet service providers store client's or individual's personal data for the purposes of payments, communication, offers and so on and so forth.⁴⁹ Due to the widespread illegal use of the internet and detection of the high level of crimes being committed with the use of telecommunications and internet services, it was decided by the authorities in the European Union that certain information has to be collected and retained for the function of providing better security services.⁵⁰ As a form and source of precaution following the terrorist attacks in Madrid and London, the Data Retention Directive of 2008 was implemented for the better detection, precautionary measures, and counter terrorism through methods adopted for harmonization of the procedures and at the same time to ensure no breach of privacy takes place.

This Directive thus required the operators to retain certain information for a period of 6 months to 2 years depending on the vitality of the information, for the purpose of investigating, detection and prosecution of serious crimes also for efficient counter terrorism measures. This retained data over the years has been helpful in the prosecution of a number of criminals and also for the acquittal of the innocent, but has not delved deep into privacy concerns.⁵¹ Article 1(2) clearly lays down as to the extent and applicability of the Directive and states: "This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications; including information consulted using an electronic communications network."⁵²

On the basis of what is clearly stated the retention of data will only pertain to the information of traffic and location which will be applicable to both private and public entities whether natural or artificial. The content of the information will not be looked into, thus it appears to be a precautionary measure to deal with privacy related issues.⁵³

Article 5 is the most important aspect of this Directive and states: "1. Member States shall ensure that the following categories of data are retained under this Directive:

- (a) Data necessary to trace and identify the source of a communication:
 - (1) Concerning fixed network telephony and mobile telephony:
 - (i) The calling telephone number;
 - (ii) The name and address of the subscriber or registered user;
 - (2) Concerning Internet access, Internet e-mail and Internet telephony:
 - (i) The user ID(s) allocated;

⁴⁸ <http://cookiesdirective.com/> 22/01/2015 19:10

⁴⁹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 22:23

⁵⁰ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 22:25

⁵¹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 22:27

⁵² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF> 22/01/2015 22:27

⁵³ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 23: 15

- (ii) The user ID and telephone number allocated to any communication entering the public telephone network;
- (iii) The name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;
- (b) Data necessary to identify the destination of a communication:
 - (1) Concerning fixed network telephony and mobile telephony:
 - (i) The number(s) dialed (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed;
 - (ii) The name(s) and address(es) of the subscriber(s) or registered user(s);
 - (3) Concerning Internet access, Internet e-mail and Internet telephony:
 - (i) The calling telephone number for dial-up access;
 - (ii) The digital subscriber line (DSL) or other end point of the originator of the communication;
- (f) Data necessary to identify the location of mobile communication equipment:
 - (1) The location label (Cell ID) at the start of the communication;

2. No data revealing the content of the communication may be retained pursuant to this Directive.”⁵⁴

This particular article lays down all the necessary ingredients as to what form of information can be retained and only on this lines can the information be collected and on request from the authorities be handed over to them by the operators⁵⁵ for the purposes which already have been mentioned above. It also is expressly clear on the fact the content of the information cannot at any time be revealed by the operators nor can it be looked into by the authorities. Also this Article especially 5(3) is read in consonance with the 2005 E.U Directive on data protection, especially with Article 29.

Article 6 as mentioned above clearly lay down the time for the retention of data to be from a time period of six months to that of 2 years after which it has to be disposed of with. If that information exceeds the time frame then according to Article 13 of the Directive liabilities would be imposed.⁵⁶

Article 3 of the Directive also imposes obligation on the member states to set up the necessary procedures and institutions in order for the better utilization of the Directive. **Article 9** on the other hand places obligations on the member states to formulate a supervisory authority which is same as that of the ones which are created by the member state as under the 1995 Directive.⁵⁷

Article 7 is one more article of utmost importance and has to be quoted stating: “Without prejudice to the provisions adopted pursuant to Directive 95/46/EC and Directive 2002/58/EC, each Member State shall ensure that providers of publicly available electronic communications services or of a public communications network respect, as a minimum, the following data security principles with respect to data retained in accordance with this Directive:

- (a) The retained data shall be of the same quality and subject to the same security and protection as those data on the network;

⁵⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF> 22/01/2015 22:38

⁵⁵ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 23: 19

⁵⁶ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 23: 28

⁵⁷ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 23: 36

- b) The data shall be subject to appropriate technical and organizational measures to protect the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorized or unlawful storage, processing, access or disclosure;
- (c) The data shall be subject to appropriate technical and organizational measures to ensure that they can be accessed by specially authorized personnel only; and
- (d) The data, except those that have been accessed and preserved, shall be destroyed at the end of the period of retention.⁵⁸

From the above quoted Article it is evident that the law makers have taken ample amount of care in trying to safeguard the interest of the individuals as well as the various corporations by making it clear as to who will be the personal who will be handling the information, what sort of precaution has to be levied, the organizational procedures to be applied for the protection of privacy and so on and so forth. Lastly the Article 8 of the Directive is clear on stating that the information should be stored in correspondence to the other relevant provisions of the Directive and has to be handed over to the authorities upon request within the prescribed time span.⁵⁹ However the concept of the right still does not emanate for the Articles and Directives already discussed in the previous parts of the chapter. The Google Spain decision is sure to have certain effects and with the formulation of the draft articles envisaging the concept of right of erasure, the entire scenario read with the existing laws will be changed. Issues of privacy will and may be seen as historical events though only pertaining to cyberspace. The right of erasure being guaranteed by the draft article is in fact a clear cut reminiscent of the Right to be forgotten.

IX OECD Guidelines on the Protection of Privacy and Trans border Flow of Personal Data

A more international approach which has its significant influence on the European Union is that of the OECD Guidelines on the Protection of Privacy and Trans border Flow of Personal Data, has to be analyzed in order for the better understanding of the legal regime in the E.U relating to the protection of privacy and the concept of right to be forgotten.⁶⁰ The fast paced development of data processing, enabling huge quantities of data to be transmitted within seconds across the national borders, across the seas and even across the oceans and continents, has to be made sure that it is well protected and secure. Laws relating to the protection and safeguarding of these information being transported is of utmost importance and seeing the need of the hour almost half of the member countries of OECD have formulated domestic laws which incorporating measures of better data protection and protection for trans-border data sending or receiving.⁶¹ Among the countries which have formulated laws on the basis of the recommendations given by the OECD Council include European countries such as that of France, Sweden and so on.⁶²

There seems to exist certain hindrances namely in the form of dissimilarities in national legislations, which could be seen to hamper the free flow of personal and private data across the national borders. The flow of information has been seen to greatly increase as newer and newer forms of technology and communication is seen to be introduced. Any form of hindrance could lead to severe personal as well as loss to the nation in terms of economy, trade so on and so forth.⁶³ Though the

⁵⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF> 22/01/2015 22:44

⁵⁹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/data-retention/index_en.htm 22/01/2015 23: 45

⁶⁰ <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm> 23/01/2015 00:10

⁶¹ <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm> 23/01/2015 00:10

⁶² <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm> 23/01/2015 00:17

⁶³ <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm>

OECD guidelines and recommendations are seen to be important procedures for the protection of privacy and are also being adopted by the various countries in Europe, the dissertation paper solely will be focusing on the laws which are in place or is in the draft stages being formulated by the European Union.

The OECD guidelines are bit of a more international arrangement and in order to keep the point of the entire dissertation paper as precise as possible such vast covenants will become too cumbersome on the researcher to undertake. Hence only the laws that will be focused upon are the ones which are at this point of time prevailing in Europe exclusively prepared and implemented by the European Parliament. After witnessing through points which have been highlighted in the earlier portions of this article, the laws which have been swiftly developed by the European Union has indeed paved the way for better retention policy and ensuring to the fullest that privacy of all its citizens are well safeguarded. The concept of holding the largest of the search engines accountable just by broadening the definition of controllers under the Directive ensured that these websites which directly and or indirectly collect and share information without the permission of the users will be held accountable for their actions and it will be the right of the users to choose what information is displayed and which ones not to be based on a certain number of limitations off course.

X Conclusion

The Right to be forgotten is indeed a major development in the European Union. It would be apt to see how this rule may play out in other jurisdictions especially India. One will have to agree to the fact that the concept of the right is truly unique and would do wonders in the field of privacy protection in a country such as India. The IT Act of 2000 seems barely equipped enough to deal with it under section 43A which talks about corporations being made liable for negligently loosing personal information or under section 7 of the Act dealing with the retention of data. It would just take a simple Amendment, in order to incorporate the right, even if only in essence. This would make it easier for the millions already using the internet and the millions that would join them in the very near future. Unlike the U.S system the Indian system is quite similar to that of its European counterpart. A major law that even special in nature such as that of the IT Act would impose obligations on the states to enforce is just like the Directives being passed by the E.U.

Another important way to incorporate the right in a more concrete manner is to incorporate in under Part III of the Indian Constitution through ways of simple amendment, but since amending the Basic Structure is not an easy task to undertake, it can be done by our esteemed Judiciary as it has done previously on a number of occasions through the power of interpretation of the fundamental rights under the Constitution.

Article 21 is probably the most interpreted Article in the Constitution and has been done so by the Judiciary in order to incorporate certain rights for the betterment of the society as a whole. As seen earlier in the cases of Rajgopal, Maneka Gandhi cases, the Court has effectively incorporated the right of privacy into the ambit of one of the most important Article of the constitution. One case regarding such and the right can be incorporated in the Indian system itself.

But the drawback of such is the wait for such a case to actually raise its head in the Indian scenario. Fortunately the question of right to be forgotten has arisen before the Delhi High Court.⁶⁴ In this case the Delhi High Court has asked the Centre and Google whether right to privacy includes right to delink from the internet the irrelevant information. Thus in conclusion the researcher has to admit the fact that what has been done by the European Court of Justice in the Google Spain case is of utmost unique character.

Such a right was probably never conjured in the past, and its impact was so great that not only did it lead to search engines changing their privacy policies in Europe but also other countries have drawn inspiration from it in order to formulate or restructure their own laws. Finally from the Indian perspective in the current scenario of privacy related issues, one can only see this right to be a boon and a crusader in the fight against online privacy information leaking giants.

⁶⁴ Delhi high court asks Centre about Google's 'right to be forgotten', The Times of India, May 2, 2016 available at <http://timesofindia.indiatimes.com/tech/tech-news/Does-right-to-privacy-include-right-to-delink-info-from-netHC/articleshow/52072509.cms>

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