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EDITORIAL

Dehradun Law Review is a journal which reflects a magnificent symphony of legal scholasticism and academic inquisitiveness. The tenth anniversary of the journal is the testimony of the fact. We are immensely delighted to bring out Volume 10 Issue 1 of Dehradun Law Review, a journal of Law College Dehradun, Uttaranchal University on the auspicious Constitution Day, November 26, 2018. Peripheral growth of legal paradigms has necessitated deep explorations in the ocean of legal knowledge. As a consequence and as a natural corollary, the contributors of article have made a sincere attempt to permeate into pressing legal issues and offer an in depth analyses in accordance with their respective academic lenses.

It has been our consistent endeavour to provide quality articles not only for quenching the academic thirst of legal academia but also to expand and develop new horizons of legal research and analysis both at micro and macro levels. It is to our great satisfaction that Dehradun Law Review is gradually taking its desired shape as was visualized at the time of its launching. The editorial board of the journal has left no stone unturned to make it a splendid success. However, only the readers across the legal spectrum can assess whether we have lived upto their expectations or not.

We feel immensely honoured to receive contributions from eminent academicians of Indian universities. Issues like 'Death under Penal Law and Life under Constitution', 'Comprehending and Inquisitioning Democratic Decentralisation in India', 'Patenting Computer Related Inventions: India in Comparison with US and UK', 'Typological School of Criminology: Critical & Comparative Outlook', 'Environmental Law Enforcement and need for Reforming the Liability Regime in India: an Agenda to Revisit', 'Uniformity in Language a Nexus to the People and Court', 'Regulatory Framework for Foreign Direct Investment in the Indian Telecom Sector and its impact on the Telecom Economy', and 'Access to Medicines as an Element of Right to Health: with special reference to Pharmaceutical Patents in India' have been thoroughly discussed and analysed offering valuable insights in the different sub-spheres of legal knowledge.

Dr. S. D. Sharma and Mr. Vipul Sharma in their research paper titled 'Death under Penal Law and Life under Constitution' referring the pertinent views of Aristotle, Immanuel Kant, Rudolf Stammler, Marx, John Rawls and Friedrich about the ideology of justice approach as well as Constitutional morality aspects, and this backdrop examines the issues of death penalty or life imprisonment in the light of new dynamics of criminal administration of justice.

Dr. Rajesh Bahuguna and Mr. Vaibhav Uniyal in their paper titled 'Comprehending and Inquisitioning Democratic Decentralisation in India' incorporate the vision of Mahatma Gandhi and Pandit Nehru, analyse democratic decentralization in India through Panchayati Raj system with a contemporary insights.

Dr. Rajnish Kumar Singh in his paper titled 'Patenting Computer related Inventions: India in Comparison with US and UK' argues that the interpretation and possible scope of differences may not be in the interest of inventors and leads to a situation of confusion and uncertainty patenting computer related inventions. He also shares Indian experience in relation to various guidelines issued during last few years.

Mr. Pramod Tiwari in his paper titled 'Typological School of Criminology: Critical & Comparative Outlook' examines theoretical dimensions of school of criminology along with biological factors that are hereditary, that originally may be hereditary but may change during the life course in response to environmental condition, and that originate in the environment.

Mr. Ashwani Pant and Dr. Santosh Kumar in their paper titled 'Environmental Law Enforcement and need for Reforming the Liability Regime in India: an Agenda to Revisit' focus on environmental law regime in India in a globalised era with sole concentration on sustainable development, and primarily discuss the origin of environmental issues, environmental criminology and the concept of environmental harm.

Dr. Ajai Singh in his research paper titled 'Uniformity in Language a Nexus to the People and Court' examines the language of the people as the language of the court and use of any other language as means to conduct business in higher judiciary. His research work analyses historical evolution of language in court proceedings, law and application of languages in Indian courts.

Ms. Hansikaa Chauhan and Dr. Shabana Shabnam in their research paper 'Regulatory Framework for Foreign Direct Investment in the Indian Telecom Sector and its Impact on the Telecom Economy' analyse the regulatory framework which govern Foreign Direct Investment in the Indian telecom sector with an objective to highlight its impact on the growth and development of the telecom economy in techno-legal perspective.

Mr. Nazim Akbar in his research article 'Access to Medicines as an Element of Right to Health: with special reference to Pharmaceutical Patents in India' discusses the controversy between patent protection on the one hand, and its relation to the accessibility and affordability of drugs on the other hand, and also analyses the existing approach to access to medicine prevalent in India.

We are extremely thankful to all the contributors of the articles for their invaluable contribution. Analyses and criticisms are like chain reactions and integral part of an academic as well as epistemological endeavour. Hence, we always welcome constructive suggestions and criticisms, and promise to accommodate the same for the enhancement of the quality of our journal.

God Speed !

Prof. (Dr.) Rajesh Bahuguna

Editor-in-Chief

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DEATH UNDER PENAL LAW AND LIFE UNDER CONSTITUTION

S.D. Sharma* &
Vipul Sharma**

Abstract

Aristotle, Immanuel Kant, Rudolf Stammler, Marx and John Rawls theories support the ideology that justice is not some 'thing', which can be captured in formula once and for all. It is a process, a complex and shifting balance between many factors, including equality. On the same way Friedrich also observed that 'justice is never given, it is always a task to be achieved.[1] Justice is ideal but difficult to attain, like a pole star justice guides us to move in the right direction to achieve Dharma. In the Indian modern democratic polity Constitutionalism is the political dharma. Constitution is the source of justice, liberty, equality, fraternity, cooperation, welfare of all, dignity of individual including criminals and opportunity of reform. Constitutional morality protects the innocent from the invasion of administration in his life. Constitution provides life and liberty to all human beings, penal law have the provision to punish wrong dower in the criminal activities but it requires absolute prove in the eyes of law. In the modern civilized society principle of justice demands reform to the criminal by application reformative theory of law and not to apply retributive and deterrent method of punishment. The Constitutional political, administrative, and judicial principles are the mandate to balance the functions of individual and society in the interest of justice and avoid the miscarriage of justice. In this context, this paper highlights the issues of death penalty or life imprisonment in the light of new dynamics of criminal administration of justice.

Key words

Death Penalty, Constitution, law, Life imprisonment and Penology.

I. PROLOGUE

The concept of Dharma as law is the foundation stone of justice, self restraint and control, code of conduct, act according to morality, smooth and proper fair function in the society. Adharma is the anti-thesis of Dharma. Adharma includes the criminal activities; thus, criminal should be punished according to the principles of law *i.e*. dharma. Under the facet of dharma, law, liberty, co-operation, co-existence and love are the values and means of disciplined life. Reformative theory of justice demands that criminal should be reformed. He should not be killed by the legal principles. Reformative principles of

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[1]Friedrich, Justice: The Just Political Act 6, Nomos Justice at 34.

justice reveal that doctrines of justice are not only strict mechanism principles of retribution and deterrent but it co-relates the expiatory theory of criminal law. If any criminal suddenly first time commits serious crime, the chance by awarding life imprisonment may be given to him. The object of law is to maintain peace and tranquility, if a reformative system of justice is achieving this object by awarding life imprisonment, then, there is no need to use deterrent and retributive method. India is a country of non-violence, co-operation, live and let to live; these values should also be observed in the administration of justice with humanized principles of law.

Socrates rightly observed that "death is one of the two things, it is annihilation and dead have no consciousness of anything, or as we are told, it is really a change; It is a migration of soul from one place to another place. This ideology of Socrates indicates that death is essential, natural and ultimate truth, it can be stopped by any power, authority and superman". This statement of Socrates is in support of natural truth, but so far death penalty is concern, it is judicial order supported by law, logic and reason. Therefore, it requires more consciousness and deep searching of truth at the time of awarding it, where there is a system of rule of law.

II. CONCEPTUAL FEATURE

Death penalty prescribed by penal law for heinous and serious crime in the case of person who had taken life of another person. It is a deterrent method of justice to prevent the criminal from the society permanently by administration of law. Antithesis of this argument supports the reformative approach that the crime committed by human being should be reform by civilized norms of the society under the due process of law. Just and reasonable law is the facet of due process under democratic Constitution. In India rights of the under trial or convicted person is protected by the Constitution.[2]

Procedure Established by Law, Due Process and Save in Accordance of Law

The intention of the some of the members of the Constituent Assembly like-Kazi Syed Karimuddin and Pandit Bhargava were in favour of the test of substantive and procedural law by the judiciary under the "due process clause".[3] Whereas, some other members like Mahboob Ali Beg had argued that Art. 15 "Save in accordance with law" be substituted.[4] He said "why the original words" without due process of law were omitted and the present words "except according to procedure established by law" are inserted, the reason is stated to be that the expression is more definite and such a provision fines place in the Art. 31 of Japanese Constitution of 1946.[5] It has also argued that the other

[2]Arts. 20, 21 and 22 of the Constitution of India.

[3]Kazi Syed Karimuddin, Member of Constituent Assembly on 6th December 1948, moved amendment in the draft Constitution "that in Art. 15, for the words "No person shall be deprived of his life or personal liberty except according to procedure established by law" the words "No person shall be deprived of his life or liberty without due process of law" be substituted. (CAD Vol. VII at 843). The present Art. 15 in the Draft Constitution is Art. 21 in The Constitution. It was the amendment No. 524 of the Draft constitution.

[4]Mahboob Ali Baig Sahib Bahadur (Madras General) said "that in Art. 15 for the words "except according to procedure established by law" the words "save in accordance with law" are substituted. *Ibid*, at 844.

[5]Art. 31 of the Constitution of Japan says that "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law". The constitution of Japan promulgated on Nov. 3, 1946 and came into effect on May 3, 1946.

articles that find place in Japanese Constitution (Arts. 32, 34 and 35) had also been incorporated in this Draft Constitution that would have been a complete safeguarding of the personal liberty of the citizen. This Draft Constitution has conveniently omitted those provisions.[6]

It was also the debate in the Constitution Assembly that if "due process of law" shall be incorporated in place of "procedure established by law," it will be tool in the hand of judiciary to decide that law made by legislature is according to the conceptual feature of "due process". Thus, due process of law opposed by Alladi Krishnaswami Ayyar and said "…three gentlemen or five gentlemen, sitting in court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourse and arguments of briefed Council on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of executive responsible to the legislature".[7] Another debate was also in the Constitution Assembly on 13 December 1948 on the draft Art. 15 of the Constitution.[8]

The words as proposed in the shape of Amendment No. 528, 'due process of law' in the place of 'except according to procedure established by law' was negative, Amendment No. 526 'save in accordance with law' in place of 'except according to procedure established by law also negated by Constituent Assembly.[9] Finally Constituent Assembly adopted Art. 15, now it is Art. 21 of the Constitution.

Debate on Courts Power to Declare law Intra-virus and Ultra-virus

Dr. B R Ambedkar said the question of "due process of law" raises in my judgment, the question of relationship between legislature and judiciary. In federal Constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra-virus[10] or intra-virus in reference to power of legislation, which is granted by the Constitution to the particular legislature. If the law made by particular legislature exceeds the authority of the power given to it by the Constitution, such law would be ultra-virus and invalid. On the another way he has said that "…one is to give the judiciary the authority to sit in the judgment over the will of the legislature and question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad law".[11] In India death penalty to the hardcore criminal is the part of law made by British Parliament in the year 1860, needs to be analyzed by the judiciary in the light of democratic civilized principles of law.

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[6]Art. 32 of the Japanese Constitution provides that "No person shall be denied the right of access to the Court". Art. 34 says that "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of the Council, nor shall be detained without adequate cause and upon demand of any such person, such cause should be immediate shown in open Court in his presence and in the presence of his Council". Art. 35 is related to protection of safety in their homes.

[7]CAD Vol. VII at 853, Shri Alladikrishna Swami Ayyar has quoted observation of Professor Will for the purpose of the interpretation of "due process of law".

[8]CAD Vol. VII at 999 to 1001.

[9]*Id.* at 1001.

[10]*Id.* at 1000.

[11]*Ibid.*

Law and Issues of Protection of Life

Pandit Thakur Dass Bhargava member of the Constitution Assembly participated in the debate of Art. 15 of the Draft Constitution (Now Art. 21) that "…according to general connotation of the word, so widely accepted and the connotation which has been given to this word by Austin, law mean an Act enacted by legislatures whereas, I submitted that Dicey used this word "law of the land" he meant law in another meaning. Similarly when the Japanese Constitution and other Constitutions used this word in the broad sense they meant to convey by the 'law' universal principle of justice".[12]

Law as defined by L. B. Curzon Barrister that "the written and unwritten body of rules largely derived from custom and formal enactment which are recognized as binding among those persons who constitute a community or state, so that they will be imposed upon and enforced among those persons by appropriate sanctions and "the body of rules and guidelines within which society requires its judges to administer justice".[13]

Death Penalty under law and Non-Violence

Legal jurisprudence of civilized society reveals that 'eye for an eye makes the whole world blind'. It means if retributive punishment shall be awarded it will be against the principle of non-violence, because, it has seen that due to abnormal behavior of human being, he becomes violence, it is the weapon of weak person, whereas, non-violence is the weapon of the strong person. In a case of serious and heinous offence like-murder, rape with murder and rape with child less than age of 12 years punishment is death. In India it exists from the immemorial period, shadow of this law is in Manuscript. Manu has recognized homicide as crime.[14] Nonetheless, in Constitutional Assembly Debates of 3rd June 1949 Dr. B. R. Ambedkar was in favour of abolition of death penalty on the ground of Indian ancient culture, he said "…my other view is that rather than have a provision for conferring appellate power upon the Supreme Court to whom appeals in cases of death sentence cannot be made, I would much rather support the abolition of death sentence itself. That, I think, is the proper course to follow, so that it will end this controversy. After all, this country by and large believes in the principle of non-violence. It has been its ancient tradition, and although people may not be following it in actual practice, they certainly adhere to the principle of non-violence as a moral mandate which they ought to observe as far as they possibly can and I think that having regard to this fact, the proper thing for this country to do is to abolish death sentence altogether."[15] Though non violence has a moral sanction but it has more prominence rather than legal sanction.

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[12] *Id.* at 846, Art. 21 of the Constitution states that "No person shall be deprived of his life or personal liberty except according to procedure established by law". Art. 13 (3) defines the law, that "in this article unless the context otherwise requires - 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom of usage having in the territory of India the force of law. Art. 13 (1) all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistence with provision of this part, shall to the extent of such inconsistency, be void.

[13] L. B. Curzon, Dictionary of Law, First Indian Reprint 1994 at 219. Observation of Lord Scarman in *Duport Steel Ltd v. Sirs* (1980) ICR 161.

[14] Manu Institute, Ch. VIII On Judicature and On Law, Private and Criminal VV 44-380.

[15] Constituent Assembly Debate on 3rd June, 1949, Part III, quoted by Law Commission of India, Report No. 262 of 2015 at 17-18.

III. JURISPRUDENTIAL PONDER

Deterrent and retributive support in favour of death penalty[16] is an outdated technique of administration of justice. In the present scientific advance techniques investigation tools are very prompt and effective like-Narco-Analysis, polygraph test and Brain Electrical Activation Profile test etc.[17] This is declared constitutionally valid by the Supreme Court.[18] The Indian Law of Evidence Act, 1872 under Section 45 recognized the identity of handwriting or figure impression etc as relevant evidence. It is a traditional method of investigation. Latest, technology under Information Technology law is in advance, various techniques are working in a legalized manner, like-Close Circuit Television (CCTV), Internet activities, voice recording, remote image capturing instruments etc. Jurisprudentially enforcement of death penalty is antithesis of technical system because death penalty in India under penal law incorporated by the Britishers in the year 1860, whereas, technical development and its use in criminal administration is the 21st century, these techniques have the capacity to analyze the attitude, habits, social environment, economic, social background and conditions of the criminals but unfortunately complete legal status has not been provided by the competent legislature to these techniques except Information Technology Act, 2000. Therefore, a law enacted before one hundred fifty eight years back can be said a proper law where internationally new principles of humanity, dignity, human rights and freedoms has been developed after the second world war.

Jurisprudentially the utmost argument against the use of technical system is that it's some areas are against the principles of fundamental freedoms like-privacy. This issue has been analyzed by the competent court in various cases. *Sarda v. Dharampal*[19] Supreme Court said that medical examination is not violation of Art. 21 of the Constitution as privacy. *M. P. Sharma v. Satish Chnadra,*[20] Court held that Indian Constitution did not explicitly include Right to Privacy. *Kharak Singh v. State of UP,*[21] Court also held that "…right to privacy is not a guaranteed right under our constitution". In minority judgment Subba Rao J. said Arts. 21 and 19 have inter-relationship. This approach again retreated in *Maneka Gandhi v. Union of India,*[22] Justice Subba Rao said right to privacy is the ingredient of personal liberty and that the right to personal liberty is a right of individual to be from restriction and encroachments on his person, this

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[16]Supporter of Deterrent Theory were Plato, Fichte, Locke, Bentham etc. Retributive theory supported by Bentham and Brihaspati etc.

[17]*Selvi v. State of Karnataka* (2010) 7 SCC 263, In this case Court held that though technical test are under scrutiny of Constitutional validity of Art. 20 (3), however, validity of these tests to be examined from wider perspective of personal liberty under Art. 21, which includes right to mental privacy, right against cruel, inhuman and degrading treatment and right to fair trial

[18]*Id.* at 203 & 204.

[19](2003) 4 SCC 493, it was a case related to divorce.

[20]AIR 1954 SC 300; 1954 Cr L J 865: 1954 SCR 1077, In the American constitution by 4th amendment right to privacy is the part of Constitution.

[21]AIR 1963 SC 1295 at 1303 Para 20, In this case court considered that attempt to ascertain the movement of an individual which is merely a manner in which privacy is invaded is not an infringement of the fundamental rights.

[22](1978)2SCC 148. Court held that right to encroachment is in violation of personal liberty.

restriction may be direct and indirect. *Govinda v. State of MP*[23] Supreme Court said that right to privacy is not absolute right. *R Rajagopal v. State of TamilNadu,*[24] Supreme Court observed that right to privacy could be described as the "right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, mother hood, child bearing etc but no one can publish anything against the other without the consent. *People's Union for Civil Liberties v Union of India,*[25] it was held that unauthorized taping of telephones by the police personnel violated the right to privacy. *X v. Hospital Z,*[26] it was held that person could not invoke his 'right to privacy' to prevent a doctrine from disclosing his HIV positive status to others. In the latest controversy of privacy Supreme Court of India held in *Justice K S Puttaswami (Retd.) and Anr. v. Union of India,*[27] right to privacy is protected as fundamental Constitutional right under Arts. 14, 19 and 21. This judgment has overruled the previous judgment of *Khark Singh v. State of UP,*[28] and other judgments. The most relevant issue in K S Puttaswami was use of Aadhaar card is in violation of privacy, whereas, in earlier cases issues were police action, surveillance, police regulation and telephone recording etc.

Jurisprudentially right to privacy in use of investigation techniques for the crime of death penalty is a matter of legal debate. The crime committed by the criminals because of social and mental disorder inclined result that commit crime is itself a disease, the object of civilized jurisprudence is to cure the criminal disease as Italian jurist Lombroso and the French philosopher La Cassague originated reformative theory of criminal administration of justice.[29] Indian thinker like- Kautiliya thought that the object of punishment should be reformative.[30] Today's civilized analysis says that due to the mental disorder if crime has committed, on the ground of legal system of other countries criminal should reformed and death penalty should not be awarded.[31]

IV. LEGAL MISSION THROUGH LAW COMMISSION

Initially after the independence of India a new democratic system came into existence, where there were the aspirations of the people to get every kind of relief from the government. In another hand, it is the duty of the government to fulfill all legitimate expectation of the people including to reform the notorious habit of the criminals.

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[23](1975) 2 SCC 148, 1975 SCC (Cr) 468. It was a case of police surveillance on the ground of police regulation; Court declared police regulation is constitutionally valid.

[24](1994) 6 SCC 632. In this case a convicted person has intended to publish his autobiography which described the involvement of some politician and businessmen in illegal activities.

[27](1997) 1 SCC 301; AIR 1997 SC 568

[28](1998) 8 SCC 296. In another case of *X v. Hospital Z* (2003) 1 SCC 500, Court has held that if an HIV positive person contracted marriage with a willing partner, than the same would not constitute the offence defined under section 269 and 270 of IPC.

Writ Petition (Civil) No. 494 of 2012, decided on 24th August 2017.

[28]*Supra* note 21.

[29]A.C. Ewing, The Morality of Punishment at 73, reformative theory supports the ideology that criminal should be educated and prisons should be reform.

[30]Chowdhary, Studies in Ancient Indian Law and Justice.

[31]Shiv Datt Sharma, *Vidhi Shastra* (Ministry of law and Justice Government of India) 2004 at 215 -218.

First Stage

In 35th Commission's Report 1967, it has recommended that it is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition.[32] Nor does the Commission treats lightly the argument of the irrevocability of the sentence of death the need of modern approach, the severity of capital punishment, and the strong feeling shown by the section of public opinion in stressing deeper questions of human values. In conclusion Commission was in view that due to various factors of society like-social environment, disparity in the level of morality, standard of education, vastness of area, diversity of population and need to maintain law and order, Indian can not the risk of experiment of capital punishment.[33] The assessment of Commission is based on traditional factors, may be real but not progressive for the object of advance and development posture to move in civilized society because of changing psychology, correction and treatment.

Second Stage

It is certain that if there are some changes going on in the world, India cannot lagging behind from the humanized principles of humanized principles of criminal law. Thus Commission on 17th Oct 2003 has taken sou-moto death penalty issue because technological advances in the field of science, technology, medicine, and anesthetics.[34] Though there was single issue before the Commission that what should be the mode of execution of death sentence, nevertheless focus has also been given on the Constitutionality of capital punishment. The indication was that capital punishment is under controversy. Categorically Commission emphases and recommends for existing provision of hanging under section 354 (5) of Cr PC be amended to allow for the lethal injection. Right to appeal to Supreme Court after the judgment of High Court on capital punishment. Furthermore it suggested all death sentence cases be heard by at least 5 judges Bench of the Supreme Court.[35]

Third Stage

A comprehensive report on validity, abolition and Constitutionality prepared by Law Commission as report no. 262 of 2015. The reasons to consider the legality of death sentence was based on the observation of Supreme Court in *Shankar Kisanrao Khadev v. State of Maharastra*[36] and *Santosh kumar, and Satish Bhushan Bariyar v. State of*

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[32]The Commission began work on its 35th Report on 'Capital Punishment' in December 1962; It was in consequence of a reference of the parliament, because of resolution moved by Shri Raghunath Singh Member Lok Sabha for abolition of capital punishment. (Law commission of India.nic.in visited on 8th June 2018)

[33]*Id.* at Para 1 (summary of main conclusion and Recommendations).

[34]Law Commission of India 187th Report, 2003 at 5 &7; The Commission restricted itself on three issues- (a) the method of execution of death sentence. (b) the process of eliminating differences in judicial opinions among judges of the apex court in passing sentence of death penalty, and (c) the need to provide right of appeal to the accuse to the Supreme Court in death sentence.

[35]The recommendation of the commission has not accepted by the government. Supreme Court in Deena v Union of India (1983) 4SCC645 said hanging did not involve barbarity, humiliation, torture or degradation. *Parmanand Katara v Union of India* (1989) 1SCC 678; The court ruled that beyond the point of death to hang the body prescribed by Punjab jail Manual is Unconstitutional.

[36](2013) 5 SCC 546.

Maharashtra,[37] that abolition of death sentence is a main issue. The United Nations General Assembly also adopted the resolution on 18th December 2007 that death penalty should be abolished.[38] The Commission's report driven reference of the Supreme Court and re-examination of earlier courts.

The Commission concluded its report and observed that death penalty does not serve the penalogical goal of deterrence any more than the life imprisonment.[39] Death penalty is one of the facets of retributive theory of criminal administration of justice. It has no place in Indian Constitution.[40] It is essential that victim's restorative and rehabilitative aspect of justice should be developed.[41]

The Constitutional regulation on death penalty attempted by Supreme Court in *Bachan Singh v. State of Punjab,*[42] has failed to prevent death sentences from being 'arbitrary and freakishly imposed'.[43] A rigid, standardization or categorization of offences which does not take into account the difference between cases is arbitrary in that it treats deterrent cases on the same footing.[44] In the adversarial criminal justice system socially and economically marginalized criminals lack the resources of effective advocate.[45] Thus, death penalty becomes indefensible.

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[37](2009) 6 SCC 498.

[38]Resolution No. 62/149 Date 18.12.2007: India is in 59 Nations that retain the death penalty.

[39]Law commission Report 262 of 2015 at 213. *Gopal Vinayak Godse v. State of Maharasthra* AIR 1961 SC 600; *Manu Ram v. Union of India* (1981) 1 SCC 107.

[40]*Id.* the notion of 'an eye for an eye' tooth for tooth' cannot be reduced vengeance.

[41] *Id.* Para 7.1.3 Sec 357 A of Cr PC reads as:

1. Every state government in co-ordination with the Central government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who requires rehabilitation.

2. Whenever a recommendation made by the Court for compensation, the District Legal Services Authority or the Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred under subsection (1).

3. If the trial Court at the conclusion of trial, is satisfied that the compensation awarded under section 357 is not adequate for such rehabilitation or where the cases end in acquittal or discharge and the victim as to be rehabilitated, it may make recommendation for the compensation.

4. where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the state or Legal Services authority for award of compensation.

5. On received of such recommendations or on the application under subsection (4) the state or district legal service authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

6. The state and legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the Police Station or a magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

[42]AIR 1980 SC 898.

[43]*Supra* note 39 at Para 7.1.4.

[44]*Id.* Para 7.1.5.

[45]*Id.* Para 7.1.6.

Fourth Stage

This includes rarest of rare principle,[46] clemency and merely powers under Arts. 72 and 161, sometimes it has declared by the judiciary that gross procedure violations and non-application of mind by executive in the dispose of mercy cases.[47] In this stage, it may be discussed long delay in the trial, appeal and execution of death sentence. Due to the legal lacuna in the cases of capital punishment awarded by Subordinate Court, Supreme Court of India since 2000 has dismissed at least 9 special leave petitions against the imposition of death penalty.[48]

Supreme Court in *Mhd. Farooq Abdul Gafur v State of Maharashtra*[49] laid down the principle that "…a far more serious and intensive duty to discharge court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under Section 302 of Indian Penal Code an ostensible consideration of Rarest of Rare doctrine, but also that the decision making process survives the special rigors of procedural justice applicable in this regard". In *Dhananjoy Chatterjee v. State of West Bengal,*[50] the Supreme Court held that not informing mitigating circumstances of the case is serious error.

V. LATEST JUDICIAL APPROACH

In *Latesh alias Dadu Baburao Karlekar v. State of Maharshtra,*[51] the Supreme Court upheld the conviction of accused under sec 302 read with sec 34 of the Penal Code because of the one accused caught red handed with blood stained chopper in hand by police. In this case court has not awarded death sentence. In *Silvraj and another v State by Inspector of Police, Tamil Nadu*[52] Supreme Court upheld the conviction under section 302 on the ground of recovery of a knife from one of the accused named Kalaimohan s/o Desingu, which was capable of causing stab injuries mentioned in the post-mortem report as one of the causes of the death of deceased Umanath but not awarded capital

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[46]*Machhi Singh v. State of Punjab* (1983) 3 SCC 470; the test of rarest of rare theory are- (i) manner of the commission of the offence (ii) nature of offence committed (iv) Magnitude of offence and (iv) personality of victim.

[47]*Kehar Singh v. Union of India* (1989) 1SCC 204, *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1. Art. 72 of the Constitution of India prescribes the power of President to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the sentence is death. Art 161 gives same power to the Governor of the state. The difference between Arts. 72 and 161 is only that President under Article 72shall has the power to matter to which the executive power of the union extent, whereas under Article 161 governor of the State have the power to a matter to which the executive power of the state extends.

[48]Brandon L Garrett, the Benality of Wrongful Execution, MICHL Rev. (2014); Law Commission of India, as quoted in its Report 262, August 2015, at 167. In all so far 155 death row inmates have been exonerated in the US using DNA and non DNA evidence.

[49](2010) 14 SCC 641 at Para 155.

[50](2004) 9SCC 751. The mercy petition of Dhanajoy Chatterjee was subsequently rejected by the executive and he was executed.

[51]AIR 2018SC 659

[52]AIR 2018 SC 1020, it is a case of strong evidence and murder was committed intentionally but court has not awarded death sentence. Ordinarily Court's attitude under Section 354 (3) of Criminal Procedure Code is to award the imprisonment in matters of offences under section 302 of IPC.

punishment. *Joseph v. State of TamilNadu,*[53] judgment delivered by Justice Mrs R. Banumathi upheld the conviction of two accused sahayam and joseph under Sec. 302 read with Sec. 34, 109 of IPC the sentence of life imprisonment awarded each of them. *Kara Bhai v. State of Gujarat,*[54] in a case under Section 302 read with Sec. 34 of IPC Supreme Court upheld the judgment as delivered by the trial court and High Court that the sentence of life imprisonment on the appellant. In *Deo Nath Rai v. State of Bihar*[55] on the ground of sudden quarreling between two parties, this was proved by statement of eye witnesses and post mortem report, Supreme Court upheld the conviction to convert the sentence of imprisonment from Sections 302 to 304 of the Penal Code. On the same way in *Atul Thakur v. State of H.P.*[56] full Bench of the Supreme Court on the ground of sudden quarrel and without premeditation death caused by accused convicted under Section 304 and part II of Section 300 exception 4 for 10 years imprisonment, with fine of Rs 10,000. Dashrath aleas Jolo and another *ETC v. State of Chhattisgarh*[57] Supreme Court up held the judgment of Trial Court and the High Court to convict appellants under Section 302 read with Section 149 for murder, but not awarded the capital punishment. In a unique case *State of Himanchal Pradesh v. Hans Raj*[58] Supreme Court awarded the sentence of imprisonment under Section 302 of IPC, whereas, punishment awarded by trial Court and High Court under Section 304 of IPC.

In *State of Uttar Pradesh v. Mahipal,*[59] it is a direct case where trial court awarded capital punishment in a case of murder of two children on account of property issues within family. In appeal the conviction of accused was reversed and he has been acquitted of all the charges leveled. The Supreme Court did not agree with the view of High Court and upheld the judgment of Trial Court, but alter the sentence of death in life imprisonment and said it is not one of rarest of rare case of invocation of the death penalty. *State of MP v. Abdul Latif*[60] the case was related to murder under Sec. 302, but High Court and Supreme Court Converted the punishment under Section 304 IPC because of sudden quarrel between accused and deceased. In *Khushid Ahamad v. State of Jammu and Kashmir,*[61] trial Court acquitted accused in case of murder, whereas High Court of Jammu and Kashmir reversed the order of acquittal and convicted him for the offences punishable under Sections 302/341 of Ranbir Penal Code (12 of 1989) and sentence to him imprisonment for life. In a case *Satpal v. State of Haryana,*[62] where there was circumstantial evidence, Supreme Court upheld the conviction under Section 302 IPC,

[53] AIR 2018 SC 93, Para(s) 14, 15,16,17,18,19,20,23 &24 for the purpose of life imprisonment under section 302 of Penal Code.

[54] AIR 2017 SC 5413, the judgment delivered by full bench of the Supreme Court. (Ranjan Gogoi, Abhay Manohar Sapre and Navin Singh JJ.

[55] AIR 2017 SC 5428. Judgement delivered by Arun Mishra and Mohan M. Shantanagoudar JJ.

[56] AIR 2017 SC 570. Judgement delivered by Dipak Mishra CJI, AM Khanwilkar, and D Y Chandrachud JJ.

[57] AIR 2018 SC 1133. Judges were R K Agrawal and Mrs R. Banumathi JJ.

[58] AIR 2018 SC 1185. Judgment delivered by Ranjan Gogoi and Mrs R. Banumati JJ.

[59] AIR 2018 SC 1261. Author of the judgment were Ranjan Gogoi and Mrs R Banumathi JJ This case supports life imprisonment rather than capital punishment.

[60] AIR 2018 SC 1409. Judgment delivered by NV Ramana and S. Abdul Nazeer JJ.

[61] AIR 2018 SC 2457. Authors of the judgment was NV Ramana and S. Abdul Nazeer JJ. Ranbir Penal Code is enforcing in the State of Jammu Kashmir.

[62] AIR 2018 SC 2142. Author of the case were Kurain Joseph, Mohan M. Santana Goudar and Navin Sinha JJ.

but not awarded capital punishment.[63] *Guruwindra Singh allies Sonu v. State Punjab*[64] In this case Supreme court converted punishment from Sections 302 to 304 Part II of IPC on the basis of the fact sudden scuffle between parties.

Murugan v. State of Tamil Nadu,[65] the Supreme Court on the ground of circumstantial evidence upheld the conviction of appellant under Sec. 302, 364 and 34 of IPC. Life imprisonment has been given to the appellant.[66] On the same way Supreme Court in *Chandra Bhawan Singh v. State of Uttar Pradesh*[67] on the ground of circumstantial evidence, upheld the conviction of life imprisonment under Sec 302 of IPC, in all these cases the approach of Supreme Court is to avoid capital punishment.

All the latest cases of 2017-18 shows that under Sec. 302 IPC Court has awarded life imprisonment rather than capital punishment, because of Section 354(3) of Cr.P.C.[68] and application of rarest theory[69] on dated 9th July 2018 Supreme Court of India decided the review petition of *Vinay Sharma & Another v. State of NCT of Delhi & others*.[70] In this case six persons had committed rape and murder of 23 year old lady of the paramedical student in moving bus in the state of Delhi in the night of December 16, 17, 2012. It was the matter of gang rape, severely assaulted and thrown out on the road. She succumbed to her injuries on December 29, 2012 at Mount Elizabeth Hospital in Singapore.[71] High Court has confirmed the death penalty. Supreme Court also dismissed the criminal appeals. Again review petition filed by two accused, Vinay Sharma and Pawan Kumar Gupta to Supreme Court, but the Supreme Court rejected the petition on the ground that nothing is new in the review petition which has not submitted by the petitioner in the appeal.[72]

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[63] *Ibid.*

[64] AIR 2018 SC 2277. Author of the judgment were Ranjan Gogai and Mrs R. Banumatti. JJ.

[65] AIR 2018 SC 2149. Judgment delivered by R K Agrawal and Abhay manohar Sapre JJ.

[66] *Id.* at para 29, there were eight circumstances appearing against the appellant. These circumstances were: First motive was against the deceased due to his not agreeing to the proposal of marriage of kumar with his daughter; Second, the appellant and Kumar, both being the cousins, knew each other; Third, both went together to the house of deceased to invite him for a dinner at kumar,s house; Fifth, Murugan died immediately after dinner, Sixth Kumar gave his confessional statement; Seventh, recovery of weapon and cloths at the instance of kumar; Eighth, the dead body was found lying near iron cot where Murugan and deceased had last dinner with kumar and appellant.

[67] AIR 2018 SC 2205. Author of the judgment RK Agrawal and Abhay Manohar Sapre J

[68] Section 354 (3) of CrPC provides that "when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

[69] *Supra* note 42, Dharam Deo Yadav v. State of UP (2014) 5 SCC 509

[70] Review Petition (CRL) nos. 671-73 of 2017 In Criminal Appeal No. 608 &609-610 of 2017, Judgment delivered by Deepak Mishra CJI, R. Banumati and Ashok Bhushan JJ It is known as Nirbhaya rape case.

[71] The Hindu, July 10, 2018 at 11.

[72] *Supra* note 70. Review petition filed under Art 137, Order XLVII Rule 1, of the Supreme Court Rules, 2013. The provision states that "the Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in the order XLVII, rule 1, of rule 1, of the Code, and in criminal proceeding, except on the face of the record". (At Para 19) Show *Chandra Kante and Anothors v. Sheikh habib* (1975) 1 SCC 674, *P N Eswara Iyerand Others v Registrar Supreme Court of India* (1980) 4 SCC 480, *Kamlesh Verma v Mayawati and others* (2013) 8 SCC 320, *Vikram Singh alies Vicky Walia and another v State of Punjab and Another* (2017) 8 SCC 518.

One of the most important question raised by the council of petitioner that death penalty has been abolished by the parliament of UK in year 1966 and several Latin American countries and Australian States. This argument was rejected by the Court by observing that this is no ground to efface the death penalty from the statute book of our country. So far the death penalty remains in the Penal Code the courts cannot be held to commit any illegality in awarding death penalty in appropriate cases.[73]

VI. AMNESTY COMMENTS ON VIVEK SHARMA CASE

Amnesty International a human rights protection organization comments on the *Vivek Sharma v. State of NCT of Delhi*[74] that executive will not eradicate violence against women. Organization comments on the judgment of the Supreme Court, there was no evidence to show that death penalty acted as a deterrent to sexual evidence. The government must allocate adequate resources for effective implementation of laws, improve conviction rate and insure certainty of justice in all the cases.[75] All too often, law makers in the country hold up capital punishment as a symbol of their resolve to tackle crime, and choose to ignore more difficult and effective solutions like-improving investigations, prosecutions and support for victims families: Far reaching procedural and institutional reforms are the need of the hour.[76]

VII. REPORT NO 262 OF LAW COMMISSION OF INDIA RECOMMENDATION[77]

The Commission recommended police reforms, witness protection scheme and victim compensation should be taken up expeditiously. Horizons of the right to life and due process requirements in the interactions between the state and the individual, prevailing standards of Constitutional morality and human dignity, the commission feels that time has come for India to move towards abolition of death penalty.[78] Commission also recommended that although there is no valid penalogical justification for treating terrorism, differently from other crimes, concern is often raised offences and waging war, will affect national security. However given the concern raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.[79] The Commission further recommended that death penalty be abolished for all crimes, other than terrorism related offences and waging war.[80] The commission also expressed the views that the movement towards absolute abolition will be swift and irreversible.[81]

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[73] Judgment had written by Ashok Bhushan J on behalf of the FB of the Court. Observation pertaining to death penalty is constitutionally valid, discussed at paragraph no. 25 of the case.

[74] *Supra* note 70. Judgment delivered on 9th July 2018 by the Supreme Court.

[75] Asmita Basu, Amenesty International India's Programs Director, the Hindu, July 10, 2018 at 11.

[76] *Ibid.*

[77] Government of India, the Law Commission of India, Report No. 262 on the Death Penalty at 271-18.

[78] *Id.* at Para 7.2.1 & 7.2.2.

[79] *Id.* at Para7.2.3.

[80] *Id.* at Para 7.2.4.

[81] *Id.* at Para 7.2.6.

Recommendation of the Commission of 262 Report 2015 is in favour of abolition of death penalty, except waging war against state and offences committed by terrorists. In the civilized society, there is no scope for barbaric punishment, but the criminal should not committed barbaric offence. In the modern technique of 21st century, the barbaric offence should be controlled with the help of techniques.

VIII. EPILOGUE AND SUGGESTIONS

The survey of whole background of death penalty indicates that there were ups and downs to award of death penalty in India on the ground of the recommendation of law commission and judicial pronouncement and ultimately evolved the theory rarest of rare. Law has also amended time to time.[82] However, in the rape cases for regrious imprisonment and capital punishment criminal law has also amended in 2018. This law has amended and substituted Sections 166A, 376B, Sec 376C, 376D, 376AB, 376B, 376C, 376D, 376DA, 376DB, 228A of Indian Penal Code 1860; Sections 53A and 146 of the Evidence Act 1872, Sections 26, 154, 161, 164, 173, 197, 309, 327, 357B, 357C, 374, 377, 438, 439, and first schedule of Criminal Procedure Code 1973.[83] Specially Section 376 provides that "persons committing offence of rape on a women under sixteen years of age shall be punished of rigorous imprisonment for a term which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of the person's natural life and with fine, Section 376AB provides that "person committing an offence of rape on the woman under twelve years of age shall be punished for rigorous imprisonment not less than 20 years but which may extend to imprisonment for remainder of that person's natural life and with fine or with death.[84] This amendment in Criminal law provides death penalty in the special case of rape on the women under the sixteen years of age.

Latest judgments delivered by Ranjan Gogoi and Mrs. R. Banumathi JJ. had strictly applied the literal rule of interpretation. In some cases in the matter of murder, punishment under Section 304 as awarded by Subordinate Courts converted into Section 302 of Indian Penal Code.[85] However, in some other cases death penalty awarded by trial court and acquitted by the High court, converted into the life imprisonment.[86] The approaches of the judges are different for punishment under Sections 304 and 302 of IPC.[87]

Generally Court's approach is to avoid the death penalty. In the exceptional cases like-terrorism, waging war against state, rape with murder and rape of minor girl less than twelve years, and in case of gang rape of the girl in between twelve to sixteen years court also awarded death penalty. The latest trend of the court in life imprisonment is remainder of that person's natural life. This trend may solve the purpose of death penalty, because, in heinous crimes criminal should be kept out of society, by awarding life imprisonment of remainder of natural life, will solve this problem. It shall fulfill the object

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[82] *Supra* note 30, 31, 32, 33, 34, 35, 38, 39, 40 & 41.

[83] The Criminal (Amendment) Act 2018, earlier it was the Criminal law (Amendment) Ordinance 2018, notified on 21 April, 2018 in the Gazette of India, and came into force at once.

[84] First Schedule, Column 2 and 3 of the Criminal Procedure Code 1973.

[85] *Supra* Note 56.

[86] *Supra* note 59.

[87] *Supra* note 55, 56, 57 & 59.

and purpose of deterrent and retributive theory. The following suggestions may be fruitful, helpful, and useful for the solution of the controversy between death penalty and life imprisonment.

The Constitution Assembly Debate of 3rd June 1949, shows that strict precaution should be taken at the time of awarding death sentence in the following manner: in case of awarding death penalty, there are chances of miscarriage of justice by not getting justice by the innocent people;[88] and Prof. Shibban Lal Saksena said that in the punishment of death sentence right to appeal up to the Apex court should not stopped by reason of poverty and other reasons.[89]

It is in the interest of justice to provide facility to death convicted accused the help of competent legal practitioner without cost on the part of accused. The fee of an Advocate should be paid by the government, as per the highest rate of leading lawyer. Dr. Ambedkar was also in favour of abolition of death sentence, because of principle of non-violence as moral mandate in India.[90] Dr. B. R. Ambedkar also suggested that the abolition of death penalty issue should be left to the parliament to enact the law for the purpose.[91]

i. Reform in police attitude, behavior, investigation and use of latest techniques should be changed, so that innocent person may not be convicted for death penalty.

ii. According to principles of penology the purpose of death penalty is to remove criminal from the society. This purpose may be fulfilled by awarding life imprisonment in lieu of death punishment.

iii. Life imprisonment means convicted person's remainder natural life. This kind of punishment is also comes within the width of deterrent and retributive theory of criminal administration of justice, life imprisonment is the only way in case of abolishing death penalty.

iv. In exceptional situation on activities of terrorists, if they had killed the human being, death sentence may be awarded but not in all activities of terrorists and abetment charges against the them.

v. If the matter related to rape and death of victim, death penalty may fulfill the purpose of justice.

vi. In case of wagering war against state, death penalty may be the punishment but it should not be used in the exercise of democratic rights on the basis of opposition against the policy, like in the name of sedition etc.

vii. Compensation under victim-logy system of justice should be developed to provide sufficient compensation to the victim.

viii. United Nations principles of humanity, dignity and equality should be respected and human rights of everyone should be protected.

At last it should be reasonable to quote Justice Hall, Manu and justice V R Krishna Iyer in context to avoid death sentence. The object of criminal law is in terms of order, survival, security, of higher values and finally the good life which subsumes all the ideas of the world; in which a democratic society moves" (Justice Hall). Our code provides for capital punishment for wide range of offence. But sadly the death penalty has never reduced these crimes in the country (Justice V R Krishna Iyer).

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[88] Pandit Thakur Das Bhargava, Constituent Assembly Debate, 3rd June 1949.

[89] *Id.* Quoted by Law Commission of India, Report No. 262, August, 2015 at 16.

[90] *Ibid.*

[91] *Supra* note 15.

COMPREHENDING AND INQUISITIONING DEMOCRATIC DECENTRALISATION IN INDIA

Rajesh Bahuguna* &
Vaibhav Uniyal**

Abstract

The portentousness of Democratic Decentralization can be apprehended by the verity that popular participation is the quintessential module for success of the nation. Mahatma Gandhi encapsulated "India lives in its villages", whereas Pandit Nehru furthered "There is still truth in the saying that India lives in its villages". The idea of both was decentralization through local self- governance. The Constitution (Seventy Third Amendment) Act, 1992 further escalated the local area governance. Decentralization implies deconcentration in terms of administrative decentralization, legislative decentralization and fiscal decentralization. The system of Panchayat Raj in India (local self-government) reinforces decentralization in a very efficient manner. The subsequent endeavour is to analyse democratic decentralization in India through Panchayat Raj system in India. This paper analyses development in India through democratic decentralization.

Key words

Democratic Decentralization, Panchayat Raj, and Local Self-Government.

I. INTRODUCTION

"India lives in its villages"

-Mahatma Gandhi.

The contemporary communities are blemished by decentralized governance as a strategy and ideology to usher reforms in democracies. This prompts to rectitude of transparency, responsiveness and accountability and establishes good governance. Today decentralization and democracy are the most remarkable themes in the progressive discourse. In the current context of meteoric social transfigurements and accelerated activities, decentralization is more apposite to indenture with contemporary preferment of globalization, liberalization and privatization. In this milieu incessant ventures are made to analyse conceptual facets and magnitude of democratic decentralization as a systematized mechanism to govern rural and urban domains of the society. Democratic decentralization expedites expansive participation. It compliments and intensifies the system of Federalism in India.[1]

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[1]James Manor, "Democratic decentralisation in India"; *SIDA* (Embassy of Sweden, New Delhi, 2003)

II. DEMOCRATIC DECENTRALISATION

Popular participation in the policy process and in local politics proliferates invariably. Increased people partake, more frequently by the schemes of campaigning, contacting bureaucrats and elected representatives, protesting, petitioning, etc. Civil community is invigorated and people chain voluntary associations which grow increasingly vigorous and numerous, thereby, strengthening "political and civic pluralism". Democratic decentralisation augments the transparency of government, and circulation of information. Information progresses from government to citizens efficaciously because elected representatives are advantageous to bureaucrats at elucidating government policies to their constituents.[2]

Democratic decentralisation has a propensity to augment accountability. Democratic decentralisation makes the government more compliant. The briskness and volumes of ripostes (actions, projects) from government proliferates. Democracy is reckoned to be unsurpassed form of government since it establishes liberty of thought, expression, belief, faith and worship, equality of status and opportunity, fraternity and decisively the right to participate in political decision-making. Participation and charge of governance by the people of the country is the quintessence of democracy. Such participation is viable when the capacity of the state is decentralized to the district, block and village levels.[3] People can sit in conjunction and deliberate about their plights and propose solutions. Decentralization implies conveying of planning, decision-making or administrative authority from the central government to local administrative units, semi-autonomous organizations or local governments. Under decentralization authority is distributed to smaller administrative units. The expression 'democratic decentralization' is divergent from 'administrative decentralization'. Democratic decentralization affiliates people with government at national, regional and local levels. Democratic decentralization is people's right to pioneer their own projects for local well-being and the power to execute and manoeuvre them autonomously. Administrative decentralization initiated from the desire for effectiveness in terms of operation and rapidity of administrative personnel, particularly at the lower levels. Administrative decentralization is hence the right to freedom of realizing projects. Decentralization is adjudged as an imperative for social, economic and political advancement.[4] Participatory progress has transpired as an alternative over the past two decades resulting from the condemnation of the dominant model for development. Development is a phenomenon of progress towards amelioration. New perspective of growth accentuate that along with economic development, increase in the quality of life of individuals, families and society should also be ascertained. Development can be prolonged if distinctive attempts are made to encompass the deprived sections of the society in the process by taking into account their special needs in a coherent manner. It can reduce inequalities and bridge the ever-widening gap between the rich and the

[2] *Ibid.*

[3] Craig Johnson, "Decentralisation in India: Poverty, Politics and Panchayati Raj"; Department of Political Science University of Guelph, Ontario Overseas Development Institute, 111 Westminster Bridge Road London SE1 7JD UK.

[4] M. Laxmikanth, *Indian Polity,* (Mc Graw Hill Education, Fifth edn.)

poor.[5] Participatory development mandates creation of pressure from the grass-roots which capacitate them to participate vigorously in making strategies, execution and monitoring and more equitable dispensation of resources. Decentralization should be viewed as a postulation of advancement, which insists on a variety of institutions for emancipating and encouraging the marginalized and the poor. It is presumed to work for creation of an administrative space where the requirements of the impoverished can be conveyed. Through Decentralization democracy becomes truly representative and responsive.[6]

Decentralization drives to the emancipation of the local people. Decentralized governance seeks local resourcefulness and practices by incorporating grass roots organizations. Representative democracy and participatory democracy both become possible through decentralized governance. Another significant feature of decentralized governance is interactive policy making. Interactive policy is a process where government and non-governmental sectors such as private sector, non-governmental organizations, grass roots organizations and pressure groups all engage in decision-making to influence issues and recommend alternatives.[7]

Decentralized governance enables impoverished people to partake in politics, which is a requisite for buoyant execution of antipoverty programmes. In India the institution through which all this is possible is the Panchayat. The Panchayat is an ancient institution and has been part of the Indian tradition. The seventy-third and seventy fourth constitutional amendments in India have sought to create a new tier in country's governance structure by giving constitutional sanction to Panchayats and urban local bodies. The amendments provide a long list of functions to be devolved on the local self governments, both urban and rural. These amendments have institutionalized peoples' participation through gram Sabha and ward committees.[8]

III. GANDHIAN PRINCIPLE OF DEVELOPMENT IN INDIA

Shri M.K. Gandhi was a staunch supporter of village swaraj in India. It was his valiant efforts that ultimately led to the proposal of separate provisions for the grass roots in the Constitution of India at the very first instance in the first place. An ardent believer of "India lives in its villages", he gave an entirely new but best concept of development for the nation. According to Gandhiji, ideal society is a Stateless democracy, the state of enlightened anarchy where social life has become so perfect that it is self regulated. "In the ideal state, there is no political power because there is no State." Gandhiji believed that perfect realization of an ideal is impossible. However "the ideal is like Euclid's line that is one without breadth but no one has so far been able to draw it and never will. All the same it is only by keeping the ideal line in mind that we have made progress in geometry." In the political field he gave us Village Swaraj nearing the conception of his ideal of Stateless Democracy. He considers that Government best which governs the least.

According to the communist philosophy, the final phase is the "withering away of the

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[5] *Supra* note 3.

[6] B.L.Fadia and Kuldeep Fadia, *Indian Government and Politics* (Sahitya Bhawan, Agra)

[7] *Ibid.*

[8] *Supra* note 4.

State". But in the totalitarian State of Russia there is concentration of all power in the State. It is difficult to believe that at any time the State there will wither away. Mahatma Gandhi being a practical idealist, realized the practical usefulness of the ideal of Stateless Democracy, and presented Village Swaraj which is not the "withering away of the State" but "scattering of the State". Thus, Village Swaraj is the ideal given expression to on a realizable plane unlike the distant goal of the "withering away of the State".

Gandhiji wanted true democracy to function in India. He, therefore, observed: "True democracy cannot be worked by twenty men sitting at the centre. It has to be worked from below by the people of every village." In Village Swaraj, the village being the decentralized small political unit endowed with fullest powers, every individual will have a direct voice in the government. The individual is the architect of his own government. The government of the Village Swaraj will be conducted by a Panchayat of five persons annually elected by adult villagers possessing minimum prescribed qualifications. It will have all the authority and jurisdiction. The Panchayat will be the legislature, judiciary and executive rolled into one as there will be no system of punishment in it. In such a system of government there will be citizens who are self-controlled, not authority-controlled; endowed with initiative and highly developed sense of civic responsibility in place of those who look to government for all things. Real Democracy, i.e. Swaraj works for the full freedom and growth of the individual who is the ultimate motive power of a real political system. Village Swaraj as conceived by Gandhiji is thus a genuine and virile democracy which offers a potent cure for many of the political ills that mark the present political systems. Such a pattern of decentralized genuine democracy will have a message for the whole of humanity.

To Gandhiji political power was not an end in itself, but one of the means for enabling people to better their condition in every sphere of life. He, therefore, observed in his famous "Last Will and Testament" that though India has attained political independence, she "has still to attain social, moral and economic independence, in terms of seven hundred thousand villages as distinguished from the cities and towns." It embodied a picture and a programme of Village Swaraj that is Panchayat Raj which in other terms is a non-violent selfsufficient, economic unit with fullest political power. The Village Swaraj as conceived by Gandhiji is man-centred unlike the Western economy which is wealth-centred. The former is the life economy the latter is the death economy.

Laying down the duties of the village worker who naturally occupies the pivotal position in the planning of Village Swaraj of Gandhiji's conception, he says that the village worker will organize the villages so as to make them self-contained and self-supporting through agriculture and handicrafts, will educate the village folk in sanitation and hygiene and will take all measures to prevent ill health and disease among them and will organize the education of the village folk from birth to death along the lines of Nai Talim.

IV. PANCHAYAT RAJ SYSTEM IN INDIA

The momentousness of the Panchayat Raj system in India can be comprehended from its inception per se. Infused as a system of five members working as a judicial body, the system today is now completely modified. Panchayati Raj system in India is a system of local area governance. Panchayati Raj is a system of governance in which Gram Panchayats are the basic units of administration. Mahatma Gandhi advocated Panchayati Raj, a decentralised form of government. It is the oldest system of local self

government in the Indian sub continent.[9] This system was adopted by State governments during the 1950s and 60s as laws were passed to establish Panchayats in various States. It also found backing in the Indian Constitution with the 73rd Amendment in 1992 to accommodate the idea. Currently, the Panchayati Raj system exists in all the States except Nagaland, Meghalaya and Mizoram and in all Union Territories except Delhi.[10]

The Panchayat Raj system comprises of three constituents often called the three tiers of the system i.e.:

i. Village level: Village is the fundamental constituent of Panchayat Raj institutions. It is basically a revenue component. The unit of local government here is known as village Panchayat. In the structure of Panchayati Raj, the village Panchayat is the smallest unit.

ii. Block level: Block or Union is the second or intermediate level of local self government in rural India. In Andhra Pradesh it is known as Mandal Parishad, in Assam it is known as Anchalik Panchayat, in Bihar, Jharkhand, Haryana, Himachal Pradesh, Tripura, West Bengal, Maharashtra, Orissa, Punjab and Rajasthan it is known as Panchayati Samiti and so on.

iii. District level: Besides the state of Jammu and Kashmir, the District/Zila Panchayat constitutes the apex body of the three-tier structure of the Panchayat Raj system. The Panchayat at the district level is called Zila parishad in most of the states.

V. CONCLUSION

Today decentralisation and democracy are the most remarkable themes in the development discourse. Decentralisation means transfer of planning, decision-making or administrative authority from the central government to its field agencies. Democratic decentralization is an extension of the democratic principle which aims at widening the area of the people's participation, authority and autonomy through devolution of powers.[11] Democratic decentralisation is a global phenomenon. In India 73rd and 74th Constitutional Amendment Acts have widened the scope of democratic decentralisation both in rural and urban areas. These Acts have institutionalized people's participation through gram sabhas and ward committees. A note worthy feature of these amendments is an emergence of a new generation leadership at the local level from women and marginalized sections of the society.[12] The Amendments have contributed to bring substantive democracy at local level. 'Democratic decentralization' is an extension of the democratic principle aims at widening the area of the people's participation, authority and autonomy through dispersion or devolution of powers to people's representative organizations from the top levels to the lowest levels in

[9]N.D. Arora, *Political science for Civil services Main Examination* (Tata McGraw Hill Education Private Limited, New Delhi)

[10]S.R. Myneni, *Political Science for Law Students* (Allahabad Law Agency, Faridabad)

[11]D.D. Basu, *Introduction to the Constitution of India* (Lexis Nexis, 21st edn.)

[12]*Supra* note 8.

all the three dimensions of political decision-making, financial control and administrative management with least interference and control from higher levels. Democratic decentralization and local self-government both aim at greater participation by the people and more autonomy to them in the management of their affairs, it can be said that democratic decentralization is a political ideal and local self government is its institutionalized form.

PATENTING COMPUTER RELATED INVENTIONS: INDIA IN COMPARISON WITH US AND UK

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Abstract

Computer programme per se is not a patentable subject matter. But the issue does not settle here as a large number of computer related inventions are granted patents in various patent offices. Before the advent of TRIPs the status of computer program protection was undefined under the Paris Convention, which regulates global patent rights. Despite the TRIPs Agreement, the question of whether or not computer programs can be patented has not been solved completely. The present paper examines the interpretation of the exclusion from patentability of computer programme per se in American, English and Indian laws. Under the American law generally it is evident from the various decisions that the definition of what is patentable subject matter at the USPTO is in a state of flux. In the Indian context the problem further aggravated because of back to back guidelines issued by the Indian Patent Office in last few years. In India the lack of case law is another reason for the lack of clarity on the subject. The paper argues that the interpretation and possible scope of differences may not be in the interest of inventors and the same may also lead to a situation of confusion and uncertainty. Indian experience in relation to various guidelines issued during last few years indicates the same.

Key words

Computer related inventions, Patentable subject matter, Patent for CRI, Guidelines for Examination of Computer Related Inventions, and Patent manual.

I. INTRODUCTION

One of the most significant areas in which innovations are taking place in 21st century is information technology[1] and more particularly computer related inventions.[2] In the present information age information technology and related innovations shall decide the future of wealth creation for any country. It is the way we manage our intellectual asset that determines economic prosperity. Out of various forms of intellectual property protection Patent protection to inventions seem to affect the economic development of

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[1]The term "Information Technology" encompasses the whole gamut of inputting, storing, retrieving, transmitting and managing data through the use of computers and various other networks, hardware, software, electronics and telecommunication equipment. Guidelines for Examination of Computer Related Inventions (CRIs) 2017, Office of the Controller General of Patents, Designs and Trademarks. available at:

http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI.pdf

[2]Computer Related Inventions (CRIs) comprises inventions which involve the use of computers, computer networks or other programmable apparatus and include such inventions having one or more features of which are realized wholly or partially by means of a computer programme or programmes. *Ibid.*

any country. Patent law provides negative rights in the form of limited monopoly. In return the patent office demands detailed disclosure of the invention. Patent laws of various countries identify a list of non-patentable subject matter. In India Sections 3 and 4 of Patent Act, 1970 contain such list. Section 3(k) of the act provides that "computer programme per se in not a patentable subject matter". The exclusion raises some very relevant doubts such as what does this 'per se' mean? Do we have to go by meanings of dictionaries or other lexicons? Or the rulings of ECJ or US courts. It is felt that meaning of "per se" must be clearly defined. However, the answer to these questions may not be that simple. In the light of the role which India is playing in the field of information technology and also looking at the policy of Government of India to promote startups it becomes important to identify the clear boundaries of the above exception. The above objective of the government is evident from the inclusion of provisions for startups in the Patent (Amendment) Rules 2016 which provide for creation of Startup as a new category of applicant and facilitating Startup applications with 80% Fee concession and expediting examination of patent applications filed by startups and the applicants selecting Indian Patent Office as ISA/IPEA for their PCT applications.[3]

The ubiquity of computer related devices and other emerging technologies across different spheres of the economy pose new challenges to patent regimes across the world. Given the diverse nature of claims and applications in this sphere, there is a need to ensure certainty in the interpretation of the law - in the form of putting in place consistent protocols for the examination of patent applications for CRIs. Accordingly, patent offices indifferent jurisdictions have developed examination guidelines/ manuals for examination of patent applications from these areas of technology so as to achieve uniform examination practices and certainty in the grant of patents.

Before examining the national practices it shall not be out of context to mention the relevant provisions of the TRIPs Agreement which forms the single most important rule based international document for protection of intellectual property.[4]

Before the advent of TRIPs the status of computer program protection was undefined under the Paris Convention, which regulates global patent rights. Despite the TRIPs Agreement, the question of whether or not computer programs can be patented has not been solved. Article 27 of the agreement states that "...patents shall be available for any

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[3]The Startup India program was launched by the Hon'ble Prime Minister on January 16, 2016. 80% fee concession in patent and 50 % in trademark has been provided through the patents and trademarks amendment rules, respectively. Complementing the startup initiative of Government of India, the Department of Industrial Policy and Promotion, a nodal agency for the purpose, launched the "Scheme for Facilitating Startups Intellectual Property Protection (SIPP)" to encourage IPR protection amongst Startups. The Scheme, which was initially in force up to 31-03-2017, has been subsequently extended for next 3 years. The scheme includes providing facilitators to start ups for filing/processing of their applications for patents, designs and trademarks and reimbursement of professional charges to facilitators. A list of the facilitators for patents, designs and trademark has been uploaded on the website and the office of CGPDTM has taken necessary steps for effective implementation of the SIPP scheme. Necessary assistance is provided through e-mails and help-desks in order to resolve the queries raised by Startups. Annual Report 2016-17, The Office of the Controller General of Patents, Designs, Trade Marks and Geographical Indications, India, at 23, available at:

http://www.ipindia.nic.in/writereaddata/Portal/IPOAnnualReport/1_94_1_1_79_1_Annual_Report-2016-17_English.pdf

[4]Comments and recommendations on the Guidelines for Examination of Computer-Related Inventions (CRIs), 2015

inventions…in all fields of technology, provided they are…capable of industrial application." The second and third paragraphs of the article allow member states to exclude from patentability some categories such as medical treatment, or inventions dangerous to health or environment, it makes no mention of computer programs.[5] Thus the agreement leaves the issue open for the contracting parties to settle. This approach creates scope for different approaches to be adopted by various countries.[6] It is in this context the present paper examines the interpretation of the exclusion from patentability of computer programme per se in American, English and Indian laws. The paper argues that the interpretation and possible scope of differences may not be in the interest of inventors and the same may also lead to a situation of confusion and uncertainty. Indian experience in relation to various guidelines issued during last few years indicates the same.

II. THE AMERICAN APPROACH

Under American law in order to get patent the claimed invention must relate to one of the four statutory categories.[7] The four categories of invention that is deemed to be the appropriate subject matter of a patent *viz.* processes, machines, manufactures and compositions of matter.[8] The claimed invention also must qualify as patent-eligible subject matter, i.e., the claim must not be directed to a judicial exception unless the claim as a whole includes additional limitations amounting to significantly more than the exception. The judicial exceptions are subject matter that the courts have found to be outside of, or exceptions to, the four statutory categories of invention, and are limited to abstract ideas, laws of nature and natural phenomena (including products of nature). It is also relevant to note that the Court in Alice Corporation has also emphasized that an

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[5]TRIPs Agreement, Section 5: Patents: Article 27 Patentable Subject Matter 1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. 2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law. 3. Members may also exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

[6]Talat Kaya, "A Comparative Analysis of the Patentability of Computer Software under the TRIPS Agreement: The U.S., The E.U., and Turkey", 4(1), *Ankara Law Review,* (2007) at 46.

[7]Chapter 10 of the US Patent Act outlines the equivalent grounds and limitations of patentability before the US Patent and Trademark Office (USPTO). Section 101 states "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title". This broad and unlimited definition for patentability meant that obtaining a patent in computer-related technologies was generally considered, for many years, more achievable at the USPTO than that at the EPO, and hence many inventors regarded the US as a gateway to obtaining patents for computer inventions.

[8]35 U.S.C. 101.

invention is not considered to be ineligible for patenting simply because it involves a judicial exception.[9]

The Supreme Court in *Mayo v. Prometheus*[10] laid out a framework for determining whether an applicant is seeking to patent a judicial exception itself, or a patent-eligible application of the judicial exception. The first part of the Mayo test is to determine whether the claims are directed to an abstract idea, a law of nature or a natural phenomenon (i.e., a judicial exception). If the claims are directed to a judicial exception, the second part of the Mayo test is to determine whether the claim recites additional elements that amount to significantly more than the judicial exception. The Alice/Mayo two-part test is the only test that should be used to evaluate the eligibility of claims under examination. While the machine-or-transformation test is an important clue to eligibility, it should not be used as a separate test for eligibility, but instead should be considered as part of the "significantly more" determination in the Alice/Mayo test.[11]

In Alice Corp.,[12] the Supreme Court identified the claimed systems and methods as describing the concept of intermediated settlement, and then compared this concept to the risk hedging concept identified as an abstract idea in *Bilski v. Kappos*.[13] Because this comparison revealed "no meaningful distinction between the concept of risk hedging in Bilski and the concept of intermediated settlement at issue here", the Court concluded that the concept of intermediated settlement was an abstract idea.[14] Although the Supreme Court has not delimited the precise contours of the abstract idea exception, it is clear from the body of judicial precedent that software and business methods are not excluded categories of subject matter.

Examples of Claims that are not directed to Abstract ideas:[15]

i. If a Claim is based on or involves an abstract idea, but does not recite it, then the claim is not directed to an abstract idea. Some claims are not directed to an abstract idea because they do not recite anything similar to a judicially-identified abstract idea, although it may be apparent that at some level they are based on or involve an abstract idea.[16]

ii. If a claim recites an abstract idea, but the claim as a whole is directed to an improvement or otherwise clearly does not seek to tie up the abstract idea, then the claim is not directed to an abstract idea. Some claims reciting an abstract idea are not directed to the abstract idea because they also recite additional elements (such as an improvement) demonstrating that the claims as a whole clearly do not seek to

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[9] Alice Corp.,134 S. Ct. at 2354, 110 USPQ2d at 1980-81.

[10] *Mayo Collaborative Service s v. Prometheus Labs., Inc.,* 132 S. Ct. 1289 (2012).

[11] Manual of Patent Examining Procedure (Mpep) Ninth Edition, Revision 08.2017, Last Revised January 2018, available at: https://www.uspto.gov/web/offices/pac/mpep/s2106.html

[12] Alice, *Supra* note 9.

[13] *Bilski v. Kappos,* 561 U.S. 593 (2010).

[14] Alice, *Supra* note 9.

[15] *Supra* note 9

[16] Judicial decisions discussing such claims include *Enfish LLC v. Microsoft Corp.,* 822 F.3d 1327, 1336, 118 USPQ2d 1684, 1689 (Fed. Cir. 2016) (claims to self-referential table for a computer database were based on, but not directed to, the concept of organizing information using tabular formats).

tie up the abstract idea. In such claims, the improvement, or other additional elements, shifts the focus of the claimed invention from the abstract idea that is incidentally recited.[17]

However, the lack of definition of what is considered "abstract" in the two-step test introduced uncertainty which made the outcome of prosecution of computer-related technologies at the USPTO unclear. In the immediate aftermath of Alice, many applications related to computer-related technology were flatly refused.[18]

Further in *Enfish LLC v. Microsoft Corp*[19] the United States Court of Appeal for Federal Circuit observed in relation to Alice decision that "we do not read Alice to broadly hold that all improvements in computer-related technology are inherently abstract and, therefore, must be considered at step two. Indeed, some improvements in computer-related technology when appropriately claimed are undoubtedly not abstract, such as a chip architecture, an LED display, and the like. Nor do we think that claims directed to software, as opposed to hardware, are inherently abstract and therefore only properly analyzed at the second step of the Alice analysis. Software can make non-abstract improvements to computer technology just as hardware improvements can, and sometimes the improvements can be accomplished through either route."

It was further observed that "we thus see no reason to conclude that all claims directed to improvements in computer-related technology, including those directed to software, are abstract and necessarily analyzed at the second step of Alice, nor do we believe that Alice so directs. Therefore, we find it relevant to ask whether the claims are directed to an improvement to computer functionality versus being directed to an abstract idea, even at the first step of the Alice analysis."

Although the Enfish case casts some new light on patenting for computer-related technologies, the newly introduced requirements generally appear very strict and it is evident that the definition of what is patentable subject matter at the USPTO is in a state of flux.[20]

III. UK LAW

Section 1(2) of the UK Patents Act, 1977 enumerates what are not inventions.[21] The

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[17]Judicial decisions discussing such claims include McRO, Inc. v. Bandai Namco Games America Inc., 837 F.3d 1299, 1315, 120 USPQ2d 1091, 1102-103 (Fed. Cir. 2016) (claims to automatic lip synchronization and facial expression animation are directed to an improvement in computer-related technology and not to an abstract idea),

[18]Emanuele Mele, An Applicant's Guide to Patenting Computer Programs in the US and Europe, Available at https://www.hmc-ip.com/content/docs/Patenting_Software.pdf

[19]*Enfish LLC v. Microsoft Corp,* Decided: May 12, 2016 at p 11.

[20]Emanuele Mele, *Supra* note 18.

[21]The UK Patents Act, 1977 Section 1: Patentable Inventions (1) A patent may be granted only for an invention in respect of which the following conditions are satisfied, that is to say - a. the invention is new; b. it involves an inventive step; c. it is capable of industrial application; d. the grant of a patent for it is not excluded by subsections (2) and (3) below; and references in this Act to a patentable invention shall be construed accordingly.

(2) It is hereby declared that the following (among other things) are not inventions for the purposes of this Act, that is to say, anything which consists of- a. a discovery, scientific theory or mathematical method; b. a literary,

judgment in *Aerotel Ltd v. Telco Holdings Ltd & Ors*[22] (Aerotel/Macrossan) provides a framework for the examiner to assess, and decide upon, the issue of excluded matter. The test comprises four steps, which are as follows: (1) Properly construe the claim; (2) identify the actual contribution; (3) ask whether it falls solely within the excluded subject matter; (4) check whether the actual or alleged contribution is actually technical in nature. The third step does not require determining whether the contribution falls solely within the excluded subject matter categories as they are listed in Section 1(2), but rather whether it falls solely within excluded subject matter as such. The "as such" qualification therefore narrows what is excluded - inventions may appear to fall solely with the excluded categories, but are not excluded as such.[23]

AT&T Knowledge Ventures/Cvon Innovations v. Comptroller General of Patents[24] (AT&T/CVON), set out five signposts that is considered to be helpful when considering whether a computer program makes a relevant technical contribution. The signposts are:

i. whether the claimed technical effect has a technical effect on a process which is carried on outside the computer (from Vicom[25])

ii. whether the claimed technical effect operates at the level of the architecture of the computer; that is to say whether the effect is produced irrespective of the data being processed or the applications being run (from IBM T 0006/83, IBM T 0115/85, Merrill Lynch, Symbian)

iii. whether the claimed technical effect results in the computer being made to operate in a new way (from Gale),

iv. whether the program makes the computer a better computer in the sense of running more efficiently and effectively as a computer (from Vicom and Symbian[26])

v. whether the perceived problem is overcome by the claimed invention as opposed to merely being circumvented (from Hitachi T 0258/03 - note that the problem in question must be a technical problem)

In the case of Halliburton Energy Services Inc.,[27] which related to a computer program which was meant to increase the drilling efficiency drill-bits and their operational life, the U.K High Court, Chancery Division (Patents Court) considered this exception in the context of computer program as well as mental act. It has been held by the Court in Paragraphs 30 & 32 that:

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dramatic, musical or artistic work or any other aesthetic creation whatsoever. a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer; d. the presentation of information; but the foregoing provision shall prevent anything from being treated as an invention for the purpose of this Act only to the extent that a patent or application for a patent relates to that things as such.

[22]Rev 1 [2007] RPC 7.

[23]Aerotel was followed by a number of domestic first instance decisions which sought t apply it, namely Cappellini's Application; Bloomberg LLP's Application (2007), Ineida Indian Nation's Application (2007); Raytheon Co's Application (2008); Astro Clinica v. Comptroller General (2008), and Autonomy Corp Ltd's Patent Application (2008). Terrell on the Law of Patents, 18th Edition, Sweet & Maxwell(Thomson Reuters),2016 at 49.

[24][2009] EWHC 343 (Pat).

[25]Case No. T 208/84.

[26]*Symbian v. Comptroller- General of Patents* [2009 R.P.C 1].

[27]2011 EWHC 2508 Pat.

Para. 30. The difficulties in this area arise mostly in relation to inventions which involve the use of computers. All the Court of Appeal cases (from Merrill Lynch to Symbian) are about inventions implemented in software. The simple problem is that computer programs (as such) are excluded by s1(2)(c) (c.f. EPC Art 52(2)(c) and 52(3)). Whether it was so clear in the past however, one thing is clear today. An invention which makes a contribution to the art which is technical in nature (to echo Kitchin J's words in Crawford) is patentable even if it is implemented entirely on a computer and even if the way it works is entirely as a result of a computer program operating on that computer. The outcome of the Symbian case proves that.

Para. 32. Thus when confronted by an invention which is implemented in computer software, the mere fact that it works that way does not normally answer the question of patentability. The question is decided by considering what task it is that the program (or the programmed computer) actually performs. A computer programmed to perform a task which makes a contribution to the art which is technical in nature, is a patentable invention and may be claimed as such. Indeed (see Astron Clinica [2008] RPC 14) in those circumstances the patentee is perfectly entitled to claim the computer program itself. The technical contribution test has again been reiterated in this judgment.

The Court of Appeal once again considered the computer programme exclusion in *HTC v. Apple*[28] and held that if the invention could solve a problem within the computer or outside the computer, in either case it can have a technical effect and hence be patentable. Further, merely because the invention is implemented in software, does not make the invention non-patentable.

It seems unlikely that the above discussion represents the last word on this subject but in the absence of any admissible referral to the Enlarged Board of Appeal and/or any consideration by the Supreme Court, the law under the 1977 Act is as set out in *HTC v. Apple*.[29] From the above it is clear that even the UK, like EU does not reject software based inventions on the ground of excluded subject matter.

IV. INDIAN POSITION

In India, the Patent Amendment Act, 2005 sought to introduce software patent. The amendment proposed in the Patent Amendment Act, 2005 for clause 3 (k) was, "a computer programme per se[30] other than its technical application to industry or a combination with hardware; a mathematical method or a business method or algorithm." However, this amendment was rejected by the Indian Parliament, which chose to retain clause 3 (k) as it is.[31] The changes suggested in the ordinance were taken

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[28]*HTC v. Apple,* [2013] EWCA Civ 451.

[29]Terrell on the Law of Patents, 18th Edition, Sweet & Maxwell (Thomson Reuters), 2016 at 53.

[30]The term "per se" is not defined in Indian statutes including the Patents Act, 1970 and hence, for interpretation of this term, the general dictionary meaning is being used. The general dictionary meaning of "per se" is ""by itself" or "in itself" or "as such" or "intrinsically" - to show that you are referring to something on its own, rather than in connection with other things. Guidelines for Examination of Computer Related Inventions (CRIs) 2017, Office of the Controller General of Patents, Designs and Trademarks. available at: http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Revised__Guidelines_for_Examination_of_Computer-related_Inventions_CRI__.pdf

[31]In India Section 3 (k) and (m) were added by 2002 Amendment Act. The provision as proposed in the Patent (Second Amendment) Bill, 1999 reads as under: "4. In section 3 of the principal Act,- ...(k) a mathematical or

back.[32] As the Patent Act clearly says that computer software per se is not patentable, there are differences between pro-software and anti-software patent supporters.[33] It may also be argued that the clause that software per se is not patentable would mean that only software as part of a larger invention of which it is a part could be considered for a patent as a whole provided it meets the criteria of patent given in the Act. This makes clear that software "standing alone" is not patentable under Indian law. It is pertinent that as software cannot execute on its own without any hardware, this means that software running on general purpose data processing machine (computer) do not qualify for patents. The mere addition of conventional data processing equipment to a software application does not turn that application into an invention. Only if the software application is a part of a large system and the system as a whole is eligible for patent, can the invention be patented as a whole.[34]

In Section 3 (k), it is mandated that the computer programs are 'per se' not patentable. Now what does this 'per se' mean? Do we have to go by meanings of dictionaries or other lexicons? Or the rulings of ECJ or US courts. It requires that the domain of per se be clearly defined.[35]

According to the report of the Joint Committee on the Patent (Second Amendment) Bill, 1999, "the insertion of 'per se' was proposed because sometimes the computer programme may include certain other things, ancillary thereto or developed thereon. The intention here is not to reject them for grant of patent if they are inventions. However, the computer programmes as such are not intended to be granted patent. The amendment was proposed to clarify the purpose".[36] The decision of the Delhi High Court in the *Ericsson v. Intex*[37] matter made it clear that computer related inventions that have a technical contribution or technical effect are patentable in India, aligning with the position taken by courts in the EU and the UK.

In order to understand the exception, it is relevant to mention the relevant provisions of the Manual of Patent Office. In relation to Section 3(k) of the Act the clause 08.03.05.10 of Manual of Patent Office Practice and Procedure Version 01.11 clarifies that a mathematical or business method or a computer programme per se or algorithms are not inventions and hence not patentable.

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business method or a computer program per se or algorithms: ...(m) a mere scheme or rule or method of performing mental act or method of playing game:" In the above provision it can be seen that the words per se in Section 3(k) were missing. In fact when this bill was referred to the Joint Parliamentary Committee, it was suggested by various experts and stake holders that India should follow the EU/UK route and not completely exclude computer program from patentability. The Parliament after accepting the aforesaid proposition, added the words per se which was introduced in section 3(k) enacted by the Patent (Amendment) Act, 2002. I.A. No. 6735/2014 in CS (OS) No.1045/ 2014 at 151.

[32]Ravindra Chingale and Srikrishna Deva Rao, "Software Patent in India: A Comparative Judicial and Emperical Overview", 20 *Journal of Intellectual Property Rights,* July 2015 at 212.

[33]*Id.* at 213.

[34]Comments on Draft Mannual of Patent Practice and Procedure (2008), All Indian Peoples Science Network, New Delhi, available at : http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_60_1_16-indian-peoples-science-network-newdelhi.pdf

[35]Parliament of India Rajya Sabha Department Related Parliamentary Standing Committee on Commerce, Eighty Eighth Report on Patents And Trade Marks Systems In India, 2008

[36]Parliament of India Rajya Sabha The Patents (Second Amendment) Bill, 1999 Report of The Joint Committee, 2001

[37]CS(OS) 1045/2014

i. Under this provision, mathematical methods, business methods, computer programmes per se and algorithms are not considered as patentable subject matter.

ii. Mathematical methods are considered to be acts of mental skill. A method of calculation, formulation of equations, finding square roots, cube roots and all other methods directly involving mathematical methods are therefore not patentable. With the development in computer technology, mathematical methods are used for writing algorithms and computer programs for different applications and the claimed invention is sometimes camouflaged as one relating to the technological development rather than the mathematical method itself. These methods, claimed in any form, are considered to be not patentable.

iii. Business Methods claimed in any form are not patentable subject matter. The term Business Methods involves whole gamut of activities in a commercial or industrial enterprise relating to transaction of goods or services. With the development of technology, business activities have grown tremendously through e-commerce and related B2B and B2C business transactions. The claims are at times drafted not directly as business methods but apparently with some technical features such as internet, networks, satellites, telecommunications etc. This exclusion applies to all business methods and, therefore, if in substance the claims relate to business methods, even with the help of technology, they are not considered to be a patentable subject matter.

iv. Algorithms in all forms including but not limited to, a set of rules or procedures or any sequence of steps or any method expressed by way of a finite list of defined instructions, whether for solving a problem or otherwise, and whether employing a logical, arithmetical or computational method, recursive or otherwise, are excluded from patentability.

v. Patent applications, with computer programme as a subject matter, are first examined with respect to (b), (c) and (d) above. If the subject matter of an application does not fall under these categories, then, the subject matter is examined with a view to decide whether it is a computer programme per se.

vi. If the claimed subject matter in a patent application is only a computer programme, it is considered as a computer programme per se and hence not patentable. Claims directed at computer programme products are computer programmes per se stored in a computer readable medium and as such are not allowable. Even if the claims, inter alia, contain a subject matter which is not a computer programme, it is examined whether such subject matter is sufficiently disclosed in the specification and forms an essential part of the invention.[38]

vii. If the subject matter of a patent application is not found excluded under the foregoing provisions, it shall be examined with respect to other criteria of patentability.

Until 2015, there was no uniformity among the four patent offices (Kolkata, Mumbai, Delhi and Chennai) in India on the issue of grant of software patents (a fact which was also noted by the Intellectual Property Appellate Board (IPAB) in the case, Yahoo v.

[38]Manual of Patent Office Practice and Procedure Version 01.11 As Modified on March 22, 2011, Published By: The Office of Controller General of Patents, Designs & Trademarks.

Controller, and Rediff). In the absence of any guidelines on the issue of patents on computer related inventions (CRI), it was found that while some patent offices refused to grant software patents, others were inclined to grant patents on software. In order to remove inconsistencies related to grant of software patents in India, the Controller of Patents issued guidelines related to CRI.[39]

A draft version of the computer-related inventions (CRI) guidelines was first published by the Indian Patent Office (IPO) on June 28 2013. The IPO consulted various stakeholders and considered their feedback. The final guidelines were published on August 21 2015. This version was more liberal than the draft version. However, the final guidelines were put in abeyance using a public notice on December 14, 2015 without clearly specifying reasons for the changes. A revised set of guidelines considered more restrictive than the previous set was issued on February 19 2016. Aggrieved by the restrictive terms, stakeholders made requests to the Department of Industrial Policy and Promotion (DIPP) and the IPO to reconsider the revised guidelines. The latest version was issued on June 30 2017 and marks a return to the liberal approach. This version is based on the recommendations of an expert committee established by the DIPP. The committee examined various representations and held intensive stakeholder consultations in order to consider a diverse range of views.[40]

According to CRI Guidelines of 2016 examiners may rely on the following three stage test in examining CRI applications: properly construe the claim and identify the actual contribution; if the contribution lies only in mathematical method, business method or algorithm, deny the claim; and if the contribution lies in the field of computer programme, check whether it is claimed in conjunction with a novel hardware and proceed to other steps to determine patentability with respect to the invention. The computer programme in itself is never patentable. If the contribution lies solely in the computer programme, deny the claim. If the contribution lies in both the computer programme as well as hardware, proceed to other steps of patentability.

The Guidelines clarify that sub-section 3(k) excludes mathematical methods or business methods or computer programme per se or algorithms from patentability. Computer programmes are often claimed in the form of algorithms as method claims or system claims with some 'means' indicating the functions of flow charts or process steps. It is well-established that, while establishing patentability, the focus should be on the underlying substance of the invention and not on the particular form in which it is claimed.

In relation to the Guidelines the Special 301 Report of USA 2016 observes that "India has also introduced unpredictability for patent applicants through the issuance of guidelines on the patentability of computer-related inventions following an opaque process for soliciting comments.

With respect to the computer-related invention guidelines, there was a lack of transparency in the process used to arrive at the current set of guidelines and the

[39]Devika Agarwal, Software Patents: Prohibited under Indian law but granted in Spirit, available at: http://www.firstpost.com/tech/news-analysis/software-patents-prohibited-under-indian-law-but-granted-in-spirit-3702725.html

[40]Joginder Singh, International report - Latest Guidelines for Examination of Computer - Related Inventions, available at: http://www.iam-media.com/reports/detail.aspx?g=655f040d-d793-4449-962c-f48827c2a72c

guidelines reflect a seemingly narrow interpretation of the relevant law, both of which raise concerns and threaten to undermine an important sector of India's economy."[41]

It is relevant to note that the criteria of 'further technical effect' and 'technical advancement' as mentioned in the previous guidelines have been removed completely in the 2016 Guidelines. Instead, a new, detailed test has been laid down under Regulation 4.2. Patent applicants will have to clearly prove that their invention shows either technical advancement or economic significance in comparison with existing inventions in the field.[42]

Further, it is also important to note the observation of Ashish Bharadwaj that "the revised CRI guidelines are also likely to curtail the global presence of Indian software firms that have so far relied mostly on software-enabled services. Growth of Indian software companies (including a host of dynamic start-ups) will be determined by their ability to come up with patentable innovations to reach out to the global marketplace."[43]

Criticisms of 2016 led to a new 2017 guidelines for CRIs. The most notable feature of the recent guideline is that it has done away with the three step examination process of the previous guidelines. The recent document does not refer to novel hardware for granting patent. The revisions have been carried out with great attention and even subtle or implicit references to hardware have been removed. For example, paragraph 4.4.5 of the 2016 guidelines contained two references to the "implementation" of claimed inventions. These have now been replaced by the word "performance". Implementation presupposes hardware, while performance does not. Like traitors in Ancient Rome or the intelligentsia in Stalinist Russia, the novel hardware requirement seems to have been killed and buried in an unmarked grave, purged completely from official memory.[44]

The official position of Indian Patent Office as quoted by PTI on the 2017 guidelines is that the new guidelines only present clarification to the patent office's earlier guidelines. There is no change as far as policy of granting patent to CRIs.

"The language of the guidelines issued in February 2016 was somehow giving the understanding that 'novel hardware' clause is mandatory to seek patents for CRIs, which was not the case. But the Indian Patent Office has revised those guidelines and clarified that this clause is not mandatory."[45]

Clause 4.5.4 of Guidelines for Examination of Computer Related Inventions (CRIs) 2017, Office of the Controller General of Patents, Designs and Trademarks provides for Claims

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[41]2016 Special 301 Report, Office of the United States Trade Representative, April 2016 at 42, available at: https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf

[42]Asheeta Regidi, India says no to Software Patents, here's What This Means, available at:

http://www.firstpost.com/tech/news-analysis/india-says-no-to-software-patents-heres-what-this-means-3677617.html

[43]Ashish Bharadwaj, Patents on software: India's CRI Guidelines Create Impractical Situation, available at: http://www.financialexpress.com/opinion/patents-on-software-indias-cri-guidelines-create-impractical-situation/424635/

[44]Balaji Subramanian, Patent Office Reboots CRI Guidelines Yet Again: Removes "novel hardware" Requirement, available at: https://spicyip.com/2017/07/patent-office-reboots-cri-guidelines-yet-again-removes-novel-hardware-requirement.html

[45]http://www.india.com/news/agencies/govt-eases-process-to-seek-cri-patents-revised-norms-out-2288062/

directed as "Computer Programme per se": Claims which are directed towards computer programs per se are excluded from patentability, like: claims directed at computer programmes/ set of instructions/ Routines and/or Sub-routines; and claims directed at "computer programme products"/"Storage Medium having instructions" /"Database"/"Computer Memory with instruction" stored in a computer readable medium.

In the final analysis it is felt that while addressing the "computer programme per se" exclusion under indian patent law, the recent cri guidelines, though vague, appear to adopt a position similar to that proposed by the court of appeal of england and wales in aerotel/macrossan's.[46] As mentioned before The test comprises four steps, which are as follows: (1) Properly construe the claim; (2) identify the actual contribution; (3) ask whether it falls solely within the excluded subject matter; and (4) check whether the actual or alleged contribution is actually technical in nature.

V. CONCLUSION

The merits of above guidelines being binding on the patent applicants are questionable, as they supersede neither the statute nor judicial precedents. However, these guidelines will be binding on the patent examiners and controllers. The latest guidelines will also have noteworthy practical implications. As examiners and controllers are obliged to abide by the latest guidelines while examining patent applications involving computer-related inventions, their approach when issuing examination reports or granting or rejecting patents to computer-related inventions will be determinative.[47] The merit of the recent guidelines is that now the inventors are assured that they need not always include a novel hardware for claiming patent on computer related inventions. The Indian law has largely followed the English and European laws. And it may be concluded that the recent attempt is in line with the Aerotel test of UK. India unlike USA and UK does not have the advantage of series of judicial decisions which could have developed the law on the point, therefore it becomes important that we explain the legal provisions with guidelines and thus to that extent the guidelines of Indian Patent Office are useful. The foregoing leads to the conclusion that the position of law and its interpretation is much less than harmonized and is in the state of flux even in USA and UK.

[46] Jacob Schindler, India's latest computer-related invention rules are a boon to SEP holders, but leave plenty of uncertainty, available at http://www.iam-media.com/Blog/Detail.aspx?g=0122504a-1c2f-437d-8568-92c9914fc05e

[47] Joginder Singh, *Supra* note 40.

TYPOLOGICAL SCHOOL OF CRIMINOLOGY: CRITICAL & COMPARATIVE OUTLOOK

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Abstract

Various criminologist have sought to explain criminal behaviour from many years. With the advancement of behavioural sciences, the monogenetic explanation of human conduct lost its validity and a new trend to adopt an eclectic view about the genesis of crime gradually developed. In this connection anthropological features of criminals have been emphasized by typological school of criminology. In this research paper an attempt has been made to examine First, Biological factors that are hereditary, which result from the genes individuals receive from their parents at the time of conception. Second, Biological factors that originally may be hereditary but may change during the life course in response to environmental condition. Third, Biological factors that originate in the environment.

Key words

Crime Causation, Criminality, Typological School, Atavism, and Phrenology.

I. INTRODUCTION

The causes of crime are one of the important phases of crime problem that requires more discussion, investigation and research and call for more social and governmental action. Various criminologists have sought to explain criminal behaviour for many years. Prior to 18th century the causes of crime were explained to be demonological (Possession of an evil spirit) or naturalistic (an affected brain). Later on various disciplines emerged particularly Biology, Anthropology, Sociology as well as the causes which exist in the physical and social environment of man. Some important theories advanced from time to time by the leading criminologists are reproduced in belief in order to highlight the different aspects of criminal behaviour and crime causation.[1]

With the advance behavioural sciences, the monogenetic explanation of human conduct lost its validity and a new trend to adopt an eclectic view about the genesis of crime gradually developed. By the 19th century, certain French doctors were successful in establishing that it was neither 'free will' of offender nor his innate depravity which actuated him to commit crime but the real cause of criminality lay in anthropological features of the criminals. Some phrenologists also tried to demonstrate the organic functioning of brain and enthusiastically established a co-relationship between

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[1]G.B.Vold, *Theoretical Criminology,* 33 (Oxford University, 1998).

criminality and the structure and functioning of brain. This school is named as Positive School, Italian School, Scientific School and Biological theory of crime causation.

Modern biological theories in criminology do not argue for biological determinism, rather, these theory argue that certain biological characteristics increase the probability that individuals will engage in certain types of behaviours such as violent or anti-social behaviours, that are legally defined as criminal. In this research paper an attempt has been made to examine. First, Biological factors that are hereditary, which result from the genes individuals receive from their parents at the time of conception. Second, Biological factors that originally may be hereditary but may change during the life course in response to environmental condition. Third, Biological factors that originate in the environment.

II. CHIEF EXPONENTS OF THIS SCHOOL

- John Caspar Lavates (1741-1801) : Physiognomy
- Franz Joseph Gall (1758-1828) : Phrenology
- John Gaspar Spurzheim (1776-1832)
- Cesave Lombroso (1836-1909) : Atavism
- William Sheldon (1936) : Somatotypes

The earliest biological theories in criminology emphasized physical appearance as the distinguishing mark of the criminal. Criminals were thought be some how different, abnormal defective and therefore inferior biologically.[2]

Physiognomy

The belief that the criminals have an unusual physical appearance goes back to ancient times. For example, Socraties was examined by a Greek Physiognomist who found that his face revealed him as brutal, sensuous and inclined to drunkenness.

In 1775 Johan Caspar Lavates (1741-1801), a Swiss Scholar and theologian, published a four volume work on physiognomy that received nearly as much favourable attention as Baccaria's work had only eleven years earlier. Lavates systematized many popular observation and made many extravagant claims about the alleged relation between facial features and human conduct.

Prenology

Where physiognomy studied the fact, phrenology studied the external shape of the skull. This concept was originally based an Aristotle's idea that the brain is the organ of the mind. Phrenologists assumed that the shape of the skull revealed the shape of the brain inside and different parts of the brain were associated with different facilities. Therefore, the shape of the skull would indicate how the mind functioned.

In 1791, the eminent European anatomist Franze Joseph Gall (1758-1828) was one of the first thinker who present systematically the idea that bodily constitution might reflect personality. His theory can be summarized in four propositions:

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[2]Donald Toft & R.W. England, *Criminology,* 64 (Macmillan, 2nd edn., 1964).

i. The brain is the organ of the mind.

ii. The brain consists of localized faculties or functions.

iii. The shape of the skull reveals the underlying developed of areas within the brain.

iv. The personality can be revealed by a study of the skull.

Gall's student and onetime collaborator, John Garpar Spurzhium (1776-1832), carried their doctrines to England and America.

Contribution of Phrenological Theory

Phrenology remains a part of popular culture today. Movies of the fictional Sherlock Holmes depict the great investigator making use of skulls inked with phrenological maps, and personality readings based upon liberal interpretations of Gall's theory are available at some country fairs, church socials, and fortune-telling booths.

III. ATAVISM: CESAVE LOMBROSO (1835-1909)

Origin and Development

Cesare Lombroso was a physician who became a specialist in psychiatry, and his principle career was as a professor of legal medicine at the University of Turin. He was of the pessimistic and fatalist view that a criminal is always a 'born' criminal. He was the leader of Italian school and the first statement of his theory was published in 1876 in his pamphlet entitled 'L' Uomo Delinquente (The criminal Man). In that book Lombroso proposed that criminals were biological throwbacks to an earlier evolutionary stage. Lombroso used the term 'atavistic' to describe such people. The idea of evolution itself was relatively, recent at the time, having first been proposed by Darwin in his book 'On the origin of species (1859) Lombroso himself latter modified his initial thesis.[3]

The real basis of Lombroso theory however, is the search of the causes of criminal behaviour. That search is based on the conception of multiple factor causation, in which some of the factor may be biological, other psychological and still others social.[4]

Lombroso did much by way of documenting the effects of many of these factors. As his thinking changed over the years, he looked more and more to environmental rather than biological factor. This change and growth of his thinking was evidenced by the increase in the number of pages in successive edition of 'L' Uomo delinquente'. In its first edition in 1876, Lombroso required 252 pages to explain his theory of evolutionary atavism as the causes of crime. 20 years later in the 5th edition of his book, he needed over 1900 pages to include all the items that appeared to be related to crime causation. Those included such things as climate, rainfall, the price of grain, sex and marriage customs, criminal laws breaking practices, national traffic policies. Lombroso's last book 'Crime, its causes and remedies' includes discussion of many factors related to crime causation of which by far the largest number are environmental rather than biological. In this way he accepted the quetatet and Guerrey explanation of crime causation.[5]

Lombroso's latter, more mature thought therefore included many factors other than the

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[3] Sutherland & Cressey, *The Principle of Criminology,* 55 (6th ed).

[4] *Ibid.*

[5] *Ibid.*

physical or anthropological. He maintained that there are three major classes of criminals.

- Born criminal: to be understood as atavistic reversions to a lower or more primitive evolutionary form of development and thought to constitute about one third of the total number of offender.
- Insane criminal: idiots and those afflicted with general paralysis, dementia, alcoholism, epilepsy or hysteria and
- Criminaloids: a large general class without special physical characteristic or recognizable mental disorder, but whose mental and emotional make-up are such that under certain circumstances they indulge in vicious and criminal behaviour, e.g. habitual, passionate, occasional criminal etc.[6]

IV. CENTRAL THESIS OF THE LOMBROSIAN THEORY

As far Lombroso, his belief was that the presence of certain physical characteristics frequently found in criminals, afforded grounds for treating the criminals as an anthropologic type. Lombroso adopted the objective and empirical approach to the study of criminals through his anthropological experiments. After an intensive study of criminals through his patients and latter on of criminals, he came to the definite conclusion that criminals were physically inferior in the standard of growth and therefore developed a tendency of criminology. Limited extent Lombroso did accept the effect of environment, society, education, parental factors etc. as the causes of criminality.

Lombroso's View Regarding Environmental Effect on Crime

As in the head of origin and development this effect has already been discarding. However, considering the two hemisphere, Lombroso again found that summer had the greatest number of revolutions, as does crime. Following Lombroso, Enrico Ferri published a study in a German magazine entitled "Das Verbrechen in Siner Abhangigkeit Vom Jahrlichen Temperature Wechsel", in which he says that in month of June sex offences are maximum in France.[7]

It must however be stated that at the latter stage Lombroso himself was convinced about the futility of his theory of atavism and therefore extended his theory of determinism to social as well as economic situation of criminals. Thus he was positive in method and objective in approach which subsequently paved way to formulation of multiple causation theory of crime by sociologists.[8]

Lombroso's View Regarding Parental Factor on Criminality[9]

Another method for determining the effects of heredity on criminality is to study the records of adopters. Researchers found that the adoptee's probability of being convicted of a crime was influenced by the number of court convictions of their biological parents,

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[6] *Ibid.*

[7] Vonting, "Crime Causation", *Journal of Criminal Law, Criminology and Police Science,* 43 (1952-53), p. 53.

[8] *Ibid.*

[9] K.T. Van Dusen: "Social Class and Crime in an Adoption Cohort", *Journal of Criminal Law and Criminology,* 74 (1983), 249-69.

but not their adoptive parent. Later re-analysis of the same data found that the socio-economic status of adoptive and biological parents and the personality disorder of biological parent and the number of placement before final adoption all influenced adoptee convictions.

Fore Runners to Lombroso[10]

- Homer: The Greek epic poet Homer described thersites as an ugly and deformed person with harsh hair and a pointed head.
- Aristotle: Recognized the physiognomic signs of habits, vices and crimes inferior acts. He further generalized that criminals are less sensitive to pain and therefore they have little regard for the sufferings of others.
- Samudrika Lakshman: Indian scholar of the view that the character of person could be found by an examination of factors such as height, voice, weight, blood etc., was perhaps the fore runner of Lombrosian's idea.

Cesare Lombroso was of the view that criminals could be recognized by certain stigmata and anomalies. The atavistic and degenerative stigmata enumerated by Lombroso are as follows:

Asymmetrical cranium, Long lower jaw, A defective or flattened nose often w/o bony skeleton, Scanty beared, Low sensitivity to pain, A receding forehead, Projecting/ voluminous ears, Cold fixed and glassy eyes, A thin upper lip, Epilepsy, Skin that is pale and wrinkled, Teeth (morals undeveloped, wisdom teeth absent, canine teeth overdeveloped), Excessive length of arms and Supernumeracy fingers / toes.

The "criminal type" claimed Lombroso, could be recognized by the possession of at least five of these stimata Lombroso was of the view that physical anomalies and stigmata do not in themselves cause crime, rather they identify the personality which is predisposed to criminal behaviour.

According to Lombroso the 'term' is not confined only to a legally confined criminal but include any person who is potentially a criminal and who possesses the characteristics of the criminal type. Thus he is concerned not only with criminals in law but also with the anthropological criminals. He was of the view that because of their personal natures, such persons (with the anomalies and stigmata) can not refrain from crime unless the circumstances of life are unusually favourable.

Lombroso's Modified Views

Lombroso after further research and in the wake of heavy criticism, himself admitted that in perhaps two criminals out of three, environmental factors may be important.

Lombroso's Contribution

Following scholars who made post-Lombrosian research and agreeing with Lombroso, *viz.*:

- Prof. Ernest Hooton: He after his research concluded that there is unduly large proportion of very short fat men among sex offenders, and an excess of tall, slender

[10]Gabriel Tarde, *On Communication and Social Influence,* 3-4 (1969).

men among murderers. Thus he agreeing with the idea of Lombroso that a particular physical constitution makes a particular type of 'Criminal man'.[11]

- Prof. J. Lange: He studied the criminal behaviour of twins and concluded that both members of identical twins take to crime; further the crime committed were identical or similar. Thus, heredity or inborn traits did play a role in making-up of the criminal personality.[12]
- J. Trenaman's: report on army offenders showed them to be generally inferior to the normal army intake as regards both height and weight.[13]
- T. Ferguson: found some physical inferiorities among juvenile delinquents as compared to non-delinquents.[14]
- Hans Von Henting: Red hair was classified by Lombroso as one of the stigma in degeneracy, and presented name evidence to the effect that American outlaws were red-haired to an unusual extent.[15]
- William Sheldon: "Somatotypes" - The last of the famous constitutional theorists was William Sheldon (1893-1977) Sheldon studied 200 juvenile delinquents between the age of 15 to 21 at the Hayden Goodwill Institute in Boston, Massachusetts, and decided that the young men possessed one of three somatotypes (or body types).[16]

The types of bodies described by Sheldon were :

	Physique	**Temperament**
a.	**Endomarphic :** relative predominance of muscle, bone and connective tissue.	**Viscerotonic:** General relaxation of body, a comfortable person, loves soft luxury, but still essentially an extrovert.
b.	**Mesomorphic :** having a soft roundness throughout the various regions of the body, short tapering limbs, small bones and soft smooth velvety skin.	**Somotonic :** active, dynamic person; walks, talks, gestures assertively; behaves aggressively.
c.	**Ectomorphic :** relative predominance of skin and its appendages, which include the nervous system; delicate body; small, delicate bones; droopy shoulders; small face, sharp nose; fine hair, relatively little body mass and great surface area.	**Cerebrotonic :** an introvert, full of functional complaints, allergies, skin thoubles, sensitive to nosie and distractions; shrinks from crowds.

[11] Katherine S. Williams, *Text Book on Criminology* (1st Indian reprint 2001), pp. 147.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

Although he wrote that each somatotypes was possessed of a characteristic personality, Sheldon believed predominantly mesomorphic individual were most prone to aggression, violence and delinquency.

Lombroso's Criticism

The findings of Lombroso were seriously challenged, around the turn of the century, by some medico-statistical study and other studies as well of a considerable merit, viz: Charles Goring; He studied some english prisoners with normal persons of society in 1910 and published his finding in his work 'The English Convict'. The results were distinctly contrary to the Lombrosian finding:

Goring and his associates spent 12 years making greatly detailed study of 3000 prisoners. These studies included measurement in almost infinite detail of certain physical features of the prisoners, and he worked out co-relation between figures obtained from one group of prisoners and corresponding figure obtained from each of several other groups. There were no striking differences to be found between those of one group and those of anothers. The evidence for the criminal 'physical type' based on anthropometric data relating to skull and face and based too upon certain descriptive data concerning facial and other features, is nothing. No such physical characteristics can be accepted as sign of criminal or any other sub-group of criminals.[17]

In addition, Goring found that "weakmindedness", was probably most important factor in criminality. His finding also pointed to the fact that social conditions had very little to do with criminality". This work of Goring a model of research in criminology, though its finding on "weakmindness" and social influence are questionable.[18]

- Edwin H. Sutherland: "The Lombrosian school by shifting attention from crime as a social phenomenon to crime as an individual phenomenon, delayed for 50 years the work which was in progress at the time of its origin and in addition made no lasting contribution of its own."[19]
- Gabriel Tarde (1834-1909): He believed that crime was essentially imitative behavious and that it developed throughout life. Though Trade did not present sufficient data to back up his beliefs his arguments were appealing to the people who uncomfortable with Lombrosos's biological determinism.[20]
- Fatalistic Approach: If theory of Lombroso is accepted then, it follows that what is inborn is incorrigible and that is the reason why Lombroso is in favour of capital punishment. The net effect of Lombrosian thesis is that the effort of the priest, judge and social reformer are wasted on any criminal for he is a born criminal, and therefore incorrigible. This is a fatalistic approach and deserves criticism.[21]

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[17] N.V. Paranjape, *Criminology, Penology & Victimology,* 48 (Central Law Publication, 10th ed.).

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

- Lombroso's researches did not provide for adequate control groups constituted from the non-criminal population. Not having examined non-criminals could one conclude that particular physical characteristics were associated with the "criminal type"?[22]

V. OTHER CHIEF EXPONENTS OF THIS SCHOOL

Except Lombroso other chief exponents of positive school of criminology are: Enrico Ferri (1856-1928) and Raffaele Garofalo (1852-1934).

Another chief exponent of typological school of criminology was Enrico Ferri. He challenged Lombrosian view of criminality. Through his scholarly researchers, Ferri proved that mere biologic reasons were not enough to account for criminality. He firmly believed that other facts such as emotional reaction school infirmity or geographical conditions also play a vital role in determining criminal tendency in men. It is for this reason that he is sometimes called the founder of 'criminal sociology'.[23]

Ferri propounded the theory of "Law of Criminal Saturation". This theory presupposes that the crime is the synthetic product of three main factors: Physical or geographical; Anthropological; and Social.[24]

VI. CONCLUDING OBSERVATION

Criminal behaviour is an outcome of a variety of factors having their combined effect on the individual. Social change, which is inevitable to a dynamic society: results in disharmony conflict and cultural variations. As a result of this social disorganization takes place and traditional pattern of social control mechanism totally breakdown. In the wake of such rapid social changes, the incidence of crime is bound to increase tremendously. The heterogeneity of social conditions destroys the congenial social relationship creating a social vacuum which proves to be a fertile ground for criminality. Following may be the types of criminals, viz.: Born criminals; Occasional criminals; Passionate criminals; Insane criminals; and Habitual criminals. Thus, other factors such as emotional reaction, social infirmity or social and geographical condition also play a vital role in determining criminal tendency of men.

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[22] *Ibid.*

[23] Ahmad Siddique's, *Criminology, Penology & Victimology,* 16 (Eastern Book Company, 7th ed.).

[24] *Ibid.*

ENVIRONMENTAL LAW ENFORCEMENT AND NEED FOR REFORMING THE LIABILITY REGIME IN INDIA: AN AGENDA TO REVISIT

Ashwani Pant* &
Santosh Kumar**

Abstract

Environmental law is a regulatory regime providing for the protection of environment and addressing the effects of human activity on the natural environment. It also focuses on the concept of sustainable development and provides environmental justice through fair treatment and involvement of people in the development, implementation and enforcement of environmental laws, regulations and policies. Various socio-political-economic factors that has contributed towards environmental deterioration needs to be regulated to stop further deterioration. There is no dearth of legislations on environmental protection in India but their enforcement has been far from satisfactory. There is need for effective and efficient enforcement of the Constitutional mandate and other environmental legislations. Judiciary has played a creative role in propounding environmental jurisprudence in India which is significant and laudable. Caring for regulating and protecting the environment is essentially required for sustainable development. The present paper focuses on environmental law regime in India in a globalised era with sole concentration on sustainable development. The paper also focuses on origin of environmental issues, environmental criminology and the concept of environmental harm/crime. How and in what manner we have responded to environmental harm/crime? What are the issues and challenges in actual enforcement? There is a concern to re-visit the liability clause in the present scenario.

Key words

Environmental harm, Green Criminology, Environmental law enforcement, Sustainable Development and Environmental Policies.

I. INTRODUCTION

The law of environment protection envisages growing interdependence of economic management of environmental resources and its impact on human life. Essentially, growing debate in recent times about the need for environmental protection has slowly but surely increased the focus on the nature and extent of development which is of inescapable wider perspective has to be sustainable, which embraces ecological dimensions, apart from social, economic and distributive justice components.[1] India is

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[1]G.S. Tiwari, "Sustainable Development as a Socio Economic growth Strategy expanding horizons of environmental law in India" in Manoj Sinha, *et al.* (eds.), *Environmental Law and Enforcement: The Contemporary Challenges* (2016).

facing problem of resource degradation and pollution of the environment despite employing a range of regulatory instruments. "But the law works badly, when it works at all. The judiciary, a spectator to environmental despoliation for more than two decades, has recently assumed a pro-active role of public educator,[2] policy maker,[3] super-administrator,[4] and more generally, amicus environment."[5] The flurries of legislation, lax enforcement and assertive judicial oversight have combined to create a unique implementation dichotomy: one limb represented by the hamstrung formal regulatory machinery comprised of the pollution control boards, forest bureaucracies and state agencies; the other consisting of a non-formal, ad hoc citizen and court driven implementation mechanism.[6]

The Indian Supreme Court has said as-

"If the mere enactment of laws relating to the protection of environment was to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world. But, this is not so. There are stated to be over 200 Central and State statutes which have at least some concern with environmental protection, either directly or indirectly. The plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation which, on the contrary, has increased over the years."[7]

Likewise, the "Approach paper to the Tenth Indian Five Year Plan" (2002-17) says that 'pollution of air, water and soil is emerging as a serious threat to human health, biodiversity, climate change, ecology and economy of the area.' The approach has recommended review of existing policy, laws, rules, regulations and executive orders and better enforcement. After 2015, all focus of each programme and policy is on sustainable development.

Einstein once remarked, 'the environment is everything that isn't me'. In this sense, the environment may mean virtually everything in the surrounding. Section 2 of the Environment (Protection) Act, 1986 defines environment as to include water, air and land and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, microorganisms and property.

Despite the development of environmental law as a branch of law, it does not comprise a single, distinct set of rules. Rather it is made up of law drawn from variety of sources including environmental legislation, the tort of nuisance, negligence, trespass, the rule in Ryland v. Fletcher, town and country planning legislation, land law, consumer protection, public health legislation etc.

Environmental Jurisprudence, in its essence consists of such basic fundamental postulates and values concerning restoration of balance and harmony in environment by regulating, ordering, preventing and controlling such human conduct that tend to

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[2] *M.C. Mehta v. Union of India,* A.I.R. 1992 S.C. 382.

[3] *S.Jagannath v. Union of India,* A.I.R. 1997 S.C. 811.

[4] *T.N. Godavarman Thirumulkpad v. Union of India,* A.I.R. 1997 S.C. 1228.

[5] Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* 1 (Oxford University Press 2001).

[6] *Id.* at 1.

[7] *Indian Council for Enviro-Legal Action v. Union of India* (1996) 5 S.C.C. 281.

disrupt, disturb, damage and destroy the ecology of the Earth. For upholding Rule of Law- there must be a balance between moral values, justice, human right, rights, and liability.

It is argued that the destruction of the world's life support systems is proceeding at such a pace and indeed, has already gone so far, has cut so deep into the delicate fabric of the natural world that no conventional response is adequate to deal with it. By the conventional response is meant a framework of environmental law to punish polluters, protect finite resources and steers society into a new way of living. It is said that such a response is totally inadequate to the scale of the problems we face and that the law has no meaningful role to play in tackling or finding solutions to the multiple environmental crises we face.[8] It essence this argument urges that environmental law is largely useless as a tool for achieving environmental protection because of its nature. The nature of environmental law as known to the public at large is 'soft' because of its implementation and enforcement strategy.

II. CONCEPT OF ENVIRONMENTAL HARM/CRIME

Environmental issues gained in importance when two different trends intersected each other. One was the capacity of humans to transform in a relatively short span of time their natural surroundings, with consequences that could be adverse for them. These adverse outcomes were not equally distributed across all societies or peoples, but they required and evoked responses from them. Here, there was a critical change: it was precisely their concern about the environment that made such responses possible at all. The ideas of people, or rather of people who chose to or tried to act to overcome the adverse situations remain as crucial to environmental dilemmas as the material conditions themselves.[9]

The environment has never been static, unchanging and in equilibrium. Today, the conservation, protection and improvement of human environment are major issues all over the world. Human environment consists of both physical environment and biological environment. Industrialisation, urbanisation, explosion of population, over-exploitation of resources, disruption of natural ecological balances, destruction of a multitude of animal and plant species for economic reasons are the factors which have contributed to environmental deterioration.[10] One country's degradation of environment degrades the global environment for all the countries. The problem of environmental pollution has acquired international dimension and India is no exception to it.

Environmental issues dominate media headlines today and are forcing many people to re-evaluate their day-to-day practices as citizens, as workers, as parents and as members of communities. So, too, concern about the environment is now starting to have greater resonance within the criminal justice field, albeit in a still fairly modest fashion. Within this context of social and professional concern about environmental matters, a new branch of criminology has emerged as 'green criminology'.[11]

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[8]Owen Lomes, *Frontiers of Environmental Law* 68 (Chancery Law Publishing,1992).

[9]Mahesh Rangarajan, *Environmental Issues In India,* XIII (Ed., Pearson India Education Services ,2017).

[10]*Sachidanand Pandey v. State of West Bengal,* A.I.R. 1987 S.C. 1109.

[11]Rob White, *Crime Against Nature* 3 (Routledge, 2008).

Green or environmental criminology basically refers to the study of environmental harms, environmental laws and environmental regulations by criminologists. The interest of green criminology incorporates specific incidents and events, often within defined geo-political areas, through to issues of global magnitude. Humans are implicated in interactions with different components of ecology as the relationship between human and environment is crucial to understand how environment changes over the time, for better or for worse.[12] Analysis of environmental issues proceeds on the basis that someone or something is indeed being harmed. Environmental Justice refers to the distribution of environments among peoples in terms of access to and use of specific natural resources in defined geographical areas, and impacts of particular social practices and environmental hazards on specific populations.[13] The various conceptualisations of harm within a green criminology framework involve reference to different kinds of justice pertaining to humans, nonhuman animals and the environment itself can be put into an abstract analytical model that can be used to weigh up harm in relation to human centric, animal centric and eco centric considerations.[14]

Environmental harm which is an act against environment directly or indirectly and at the same time have relatively low risks of detection. It does not conform to the traditional form of crime and violence due to its nature. The various factors that must be considered in an environmental offence like what harm caused - whether having direct or indirect effect - who is the actual offender and victim. The nature of environmental harm is that it occurs everywhere and anywhere. It has no boundaries and it cannot be confined to a definite territory. The perpetrator of environmental harm includes individuals and groups from a wide range of backgrounds and socio-economic situations.

III. ENVIRONMENTAL LAW ENFORCEMENT APPROACH

The success of any environmental policy depends on changes in the behaviour of producers and consumers. Environmental policy can try to bring about these changes by means of various instruments. The emphasis of environmental policy should be to mitigate environmental hazards without compromising development. A centralized environmental policy requires that some central administrative agency will determine what is to be done and in what manner. The specific criteria for evaluating environmental policies are efficiency, fairness, incentives for improvement and enforceability.[15]

For a policy to be efficient, it must be cost effective. A policy is cost effective if it produces the maximum environmental improvement possible for the resources being expended. To be socially efficient, it must also balance costs with benefits. The impact of each policy will be different on society in terms of the income groups, ethnic and racial groups. Equity is thus a matter of morality and regard that relatively well-off people have for the underprivileged. A critically important criterion to evaluate any environmental policy is whether the policy provided a strong incentive for individuals and groups to find

[12] *Ibid.*

[13] *Id.* at 15-16.

[14] *Id.* at 24.

[15] Barry C. Field, *Environmental Economics: An Introduction* 184-189 (Mc Graw Hill London 1994).

new and innovative ways of reducing their impacts on the environment. The greater the incentive, the better would be policy in its application.[16]

The objective of enforcement is to get people to comply with an applicable law. There are two main components of enforcement, which are monitoring and sanctioning. Polluters, who stand to lose money, may try to frustrate monitoring of the applicable laws. More the process sophisticated and complicated of applicable law, it becomes easier for polluters to evade. Enforcement through sanctioning seems simple but polluters may use their vast resources to see that the court cases become long drawn affairs so that no penalty is imposed immediately.[17] It is essential to respond to environmental harms, whatever their specific nature, origins and dynamics.

Environmental law enforcement will become increasingly important as the incidence and consciousness of environmental harm grows. There are three main approaches to the analysis and study of environmental criminalisation and regulation.[18]

Socio-Legal Approach

The main emphasis is how to best utilise existing legal and enforcement mechanisms to protect environments and creatures. It attempts to improve quality of investigation, law enforcement, prosecution and conviction on illegal environmentally related activity.

Regulatory Approach

The main emphasis is on social regulation, using many different means, as the key mechanism to prevent and curtail environmental harm. It attempts to reform existing systems of production and consumption through adoption of constellation of measures, including enforced self-regulation and bringing non-government groups directly into the regulatory process.

Social Action Approach

The main emphasis is on need for fundamental social change and to challenge the hegemony of transnational capital and dominant nation-states in setting the environmental agenda. It attempts to engage in social transformation through emphasis on deliberative democracy and citizen participation, and support for the radical as well as other wings of the social movements.

In many jurisdictions the primary regulatory authority for the control of environmental harm is the Environmental Protection Authority (EPA) like Environmental Agency in UK. Their mandate generally includes such thing as:[19] regulating environmental crime through administration of environmental protection legislation; educating the community about environmental issues; monitoring and researching environmental quality; and reporting on the state of the environment to state or national legislature and other relevant bodies.

Implementation of this mandate includes protecting and conserving the natural environment, promoting the sustainable use of natural capital, ensuring a clean

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[16] *Ibid.*

[17] Barry C. Field, *Supra* note 15.

[18] Rob White, *Supra* note 11 at 182.

[19] *Id.* at 184.

environment and reducing risks to human health. Environment Australia, as the lead agency in regards to contraventions of federal environmental and heritage legislation, states that to achieve its compliance and enforcement objectives, it uses a range of flexible and targeted measures to promote self-regulation. 'Compliance' means the state of conformity with the law. Agencies can usually try to secure compliance through two types of activity:[20] promotion (Communication (e.g. environmental registry); Publication of information (e.g. technical information);Consultation with parties affected by the Act; Creation of environmental codes of practice and guidelines; and Promotion of environmental audits); and enforcement (Inspection to verify compliance; Investigation of violations; Measures to compel compliance without resorting to formal court action, such as directions by authorised enforcement officers, warnings, ticketing, and environmental protection compliance orders by enforcement officers; Measures to compel compliance through court action, such as injunctions, prosecution, court orders upon conviction, and civil suit for recovery of costs.)

The role of state in dealing with environmental harm is much more circumscribed than the policing and regulation of street crime. The tendency has been to emphasise efficiency and facilitation, rather than control. At a practical level the costs of monitoring, enforcement and compliance, in relation to traditional regulatory standards setting and role of government, are seen as problematic. So, too, the complexity of procedures and issues has been accompanied by efforts to streamline processes and by increased reliance upon expert-based advice, rather than full community discussion.[21]

According to Ayres and Braithwaite reconstitute the usual regulatory pyramid such that the bottom layer consists of self-regulation, the next layer enforced self-regulation, the next layer is command regulation with discretionary punishment and at the top, command regulation with nondiscretionary punishment.[22]

Command and Control regulation which includes setting of environmental standards; licenses and permits; environmental covenants; land and water use controls; environmental impact assessments; site specific management plans.

Self-regulation which includes organised group regulates the behaviour of its members; setting out 'codes of practice' via rules and standards; standard-setting and identification of breaches in hands of practitioners; serves industry not public interest; assessing and identifying non-complaint behaviour and punishing.

Voluntarism which includes individual firm undertaking to do the right thing unilaterally, without any basis of in coercion; non-mandatory contracts between equal partners; encouragement and invoking sense of responsibility.

Education and information includes education and training; corporate environmental reporting; community right to know; product certification; award scheme.

Economic instrument includes property rights; market creation; fiscal instruments and charge systems in the form of tax; financial instruments for environmental activities; liability instruments; creation of performance bonds.

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[20] *Id.* at 185-186.

[21] *Id.* at 211.

[22] *Id.* at 212-13.

Free market environmentalism includes allocating property-rights for natural resources to private interests; no government intervention, except to monitor and enforce the trading of individual property-rights; the market to determine the value people place on environmental goods.

The Indian institutional set up for enforcement of environmental laws is the Ministry of Environment, Forest and Climate Change (MoFECC) whose main work is to plan, promote, and coordinate programmes in addition to policy formulation for environment, forestry, wildlife and climate change. The MoFECC is supported by Central Pollution Control Board and State Pollution Control Board. The main environmental regime in India for environmental protection and pollution abatement is based on Command and Control Strategy. Under various legislations, rules and regulations is issued for implementation by prescribing standards and issuance of consents by the CPCB and the SPCB. In India, standards have generally been criticised for being too lax, too stringent or simply irrelevant.

IV. APPRAISAL OF ENVIRONMENTAL POLICIES OF INDIA

Environmental degradation affects national welfare by damaging human health, economic activities and ecosystems. Because environmental problems represent a classic externality,[23] some government regulation is generally warranted. From an economist's perspective, desirable regulation should weigh two factors: the benefits associated with reduced environmental damage, and the opportunity cost of mitigation. In reality, the extent and focus of government intervention will also reflect national political and institutional considerations.[24] It is therefore in this context that evolving a sound environmental policy is a condition precedent to having a sustainable environmental management. The worldwide concern for environmental degradation found its expression in 1972 at UN Conference on Human Environment. In 1979, a UN Symposium identified unsustainable consumption patterns and lifestyles as basic issues of environmental degradation. It was the Brundtland Commission's report titled as "Our Common Future" (1987), a landmark development thinking which brought environmental issues to the fore. The Commission came to the conclusion that the relationship between economic growth and environmental conservation should be one of the complementarily and interdependence. The idea of growth at all costs was replaced by the idea of sustainable development.[25]

The Constitution of India provides for certain directives for the states for governance in Part IV as 'Directive Principles of State Policy'. Stockholm Declaration of 1972 was perhaps the first major attempt to conserve and protect the human environment at the international level. As a consequence of this Declaration, the States were required to adopt legislative measures to protect and improve the environment. Accordingly, Indian

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[23]Some production processes and uses of certain materials can results in discharges of effluents and emissions. These effluents and emissions are called negative externalities. Activities like tree plantations would lead to production of oxygen and trees also act as sink for greenhouse gases. This is a case of positive externality.

[24]Dasgupta *et. al., Environmental Regulation and Development: Cross Country Empirical Analysis* 176(Oxford Development Studies 2001).

[25]Debajit N. Sarkar, *Environmental Policy in India,* 3 ARSS 17-20(2014), available at:
http://www.trp.org.in/wp-content/uploads/2016/11/ARSS-Vol.3-No.2-July-Dec-2014pp.17-20.pdf

Parliament inserted two Articles namely 48A and 51A in the Constitution of India in 1976.[26] Article 48A states that "State shall endeavour to protect and improve the environment and safeguard forests and wildlife of the country."[27] Article 51A(g) imposes a duty on every citizen of India, to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. Besides these two directives, Article 21 which provides for fundamental right of 'Right to Life and Personal Liberty' has been interpreted by the courts to include right to clean environment, right to clean air, water as an integral part of it.

Apart from Constitutional obligations, the liability clause for environmental pollution has been discussed under much legislation in pre-independence and mostly in post-independence era in India. Part XIV of Indian Penal Code, 1860 makes various actions affecting environment namely the spreading of infection of any disease to life;[28] fouling of water of public spring's or reservoirs rendering it less fit for the purpose for which it is ordinarily used;[29] making atmosphere noxious to health;[30] public nuisance[31] and mischief[32] have all been made offences. The punishment for these offences is ranging from three month imprisonment to five year and fine also. The Code proved to be not very effective because of its conservative approach to enforcement of these provisions. The other legislations making liability clause in India includes Wildlife Protection Act, 1972; the Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; the Public Liability Insurance Act,1991; the Forest (Conservation) Act,1980; the National Green Tribunal Act,2010; the Nuclear Civil Liability Act,2010.

The liability under these legislations includes civil as well as criminal liability. The National Green Tribunal has original jurisdiction over all civil cases raising a substantial question relating to environment, including enforcement of any legal right related to the environment. The substantial question relating to environment includes instances where there is a direct violation of a statutory provision that impacts or is likely to impact the community at large; that the gravity of damage to the environment is substantial or that the damage to public health is broadly measurable; or the applicant could show that the environmental consequences are being caused by a specific activity or a point source of pollution.[33] The Tribunal can order relief and compensation to victims of pollution, and order restitution of property damaged and environment of the area.[34] Still even having a comprehensive legislations relating to environment in India but the status of environment is deteriorating day by day because of non-compliance and other issues.

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[26] Inserted by the Constitution (Forty-second Amendment) Act, 1976.

[27] Part IV- Directive Principle of State Policy, The Constitution of India,1950.

[28] The Indian Penal Code, 1860, Sec. 269.

[29] *Id.* Sec.277.

[30] *Id.* Sec.278.

[31] *Id.* Sec.290.

[32] *Id.* Sec.425,426,430,431,432.

[33] The National Green Tribunal Act, 2010, Sec.2 (1) (m).

[34] *Id.* Sec.15.

The right of a person to pollution free environment is a part of basic jurisprudence of the land. Article 21 of the Constitution of India guarantees a fundamental right to life and personal liberty. The Supreme Court has interpreted the right to life and personal liberty to include the right to wholesome environment;[35] and right to life also includes right to clean environment, drinking water and pollution free atmosphere.[36]

In a famous case, Taj Trapezium,[37] the Supreme Court issued directions that coal and coke based industries in adjoining areas of Taj Trapezium damaging Taj should either change over to natural gas or to be relocated outside TTZ. In the Dehradun Valley Case,[38] directed the closing of limestone quarrying in the hills of Mussorie and said- "This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the rights of the people to live in healthy environment with minimal disturbance of ecological balance…" The Supreme Court asserted that court would not remain a passive spectator with eyes closed whenever there is an assault on environment as an environment protection is a constitutional mandate.[39] In Tarun Bhagat,[40] the court condemned the State Government 'while professing to protect the environment by means of various notifications and declarations should at the same time permit the degradation of environment by authorising mining operation in a prohibited area' which is a protected area in wild life sanctuary. Both development and environment must co-exist and run parallel in the interest of social good. The Apex Court called upon the State to create environmental awareness[41] in a citizenry through slides in cinema halls containing information and messages on environment through radio, television, and of making environment as a subject in academic institutions at all level.

In the case of *M.C. Mehta v. Union of India,*[42] popularly known as (Oleum Gas Leak Case), the Supreme Court evolved a new principle of liability called as Absolute Liability. The Court held that where an enterprise is engaged in a hazardous or inherently dangerous activity resulting in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability…[43] The Court further pointed out that the measure of compensation must be co-related to the magnitude and capacity of the enterprise because such compensation must have deterrent effect.[44]

In the post 1990, the judicial trend in India, on account of nexus between politician, polluters and bureaucrats and lack of transparency and accountability in environmental

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[35] *Rural Litigation & Entitlement Kendra Dehradun v. State of U.P.* AIR 1988 SC 1037.

[36] *Subhash Kumar v. State of Bihar* AIR 1991 SC 420; *M.C. Mehta v. Union of India* AIR 2000 SC 3192.

[37] *M.C.Mehta v. Union of India* AIR 1997 SC 734.

[38] *Rural Litigation & Entitlement Kendra Dehradun v. State of U.P.* AIR 1985 SC 653.

[39] *Charan Lal Sahu v. Union of India,* AIR 1990 SC 1480.

[40] *Tarun Bhagat Singh v. Union of India* AIR 1992 SC 514.

[41] *M.C.Mehta v. Union of India* AIR 1992 SC 382.

[42] AIR 1987 SC 1086.

[43] *Supra* note 38 at 1099.

[44] *Ibid.*.

management the poor suffer both from poverty and pollution while polluters make hay of resources for personal profit or greed under the cover of development. The Supreme Court in such situation has come to rescue the poor and suffering victims of pollution.[45] For the ensuing generation the opinions of Justice Jeevan Reddy in Bichhari[46] pollution case and Justice Kuldip Singh in Tamil Nadu Tanneries Case[47] would from the essential juristic compendium for an unpolluted environment and safe earth not only for Indian but for all men of all lands.[48]

The Supreme Court of India in *Vellore Citizen Welfare Forum v. Union of India,*[49] elaborately discussed the concept of 'sustainable development' which has been accepted as part of the law of the land. The 'precautionary principle' and the 'polluter pays principle' are essential features of 'sustainable development'. The 'precautionary principle' makes it mandatory for the State Government to anticipate prevent and attack the causes of environment degradation.[50] The 'polluter pays principle' demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertaking which cause pollution. It has been held to be a sound principle and as interpreted by Supreme Court of India,[51] it means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environment degradation. The above case clearly reveals that the Supreme Court of India has played a vital role for the protection and improvement of environment. The jurisdiction of the court has been expanded by the way of Public Interest Litigation which makes the creative role significant and laudable.

V. ISSUES AND CHALLENGES

The state of environment in India indicates that the present liability regime is not designed or implemented to suitably punish those responsible for environmental degradation or deter future violations. The major reasons:

- There has to be credible threat of non-enforcement and sanctions to be proportionate.
- Data collection, strong monitoring capacity of the regulatory agency.
- Transparency and accountability among the authority to stop corrupt and other malpractices.
- The legal, institutional, political, financial, bureaucratic and cultural in India has always dealt the environmental issues on lighter node.
- The main critical issues that have emerged in the current liability regime affecting the effectiveness of the existing enforcement mechanism in India.

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[45] *M.C. Mehta v. Union of India* AIR 1996 SC 1977; *M.C. Mehta v. Union of India* AIR 1996 SC 2231.

[46] *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446.

[47] *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715.

[48] In the meantime Justice Kuldip Singh has given two things: (1) to Delhi government for shifting polluting units outside Delhi; (2) suspend vehicle licences spawning fuel pollution to save Delhi from slow death.

[49] AIR 1996 SC 2715.

[50] *M.C. Mehta v. Union of India* (1997) 1 Camp L.J. 199 (SC).

[51] *Indian Council for Enviro-Legal Action v. Union of India* AIR 1996 SC 1446.

i. Absence of policy on enforcement and prosecution in environmental cases. There is no independent authority to dealing with environmental cases. The Pollution control Boards cannot levy penalties and fine, the power is with courts only. These are only regulatory agencies for compliance purpose.

ii. Punitive provision also not an effective solution. Just levying heavy fine and imprisonment will not work without deterrence factor among public at large.

iii. Even delay in justice by courts also hampers litigation in environmental causes.

iv. The National Green Tribunal Act, 2010 does not provide a complete relief. It only deals with civil remedies not with criminal liability. Limited jurisdiction apart, judicial recourse is not a viable mechanism for protecting the quality environmental conditions.

v. Non-compliance of environmental regulations by the individuals, groups and society at large.

VI. CONCLUSION AND SUGGESTIONS

In the era of sustainable development, environmental justice to all components of environment is necessary on equitable basis. We need to have strict regulations for actions against environment whether direct or indirect by human beings or other organisms. Human beings are the destroyer of the environment in the name of development. We need to strike a balance between development and environment. The current liability regime is not capable of tackling the scale of environmental damage that India is witnessing and is likely to experience in the near future. Few suggestions for betterment of environment in India are given as follows-

i. We need to have a comprehensive and integrated Environmental Code in India.

ii. A positive attitude on the part of everyone in society is essential for effective and efficient enforcement.

iii. Transferring more power or establishing a complete independent authority to deal with environmental cases.

iv. Environmental Education among the people from grass root level and make them aware about their environmental rights and duties.

v. Adoption of incentive based regime for effective implementation of environmental policies.

UNIFORMITY IN LANGUAGE: A NEXUS TO THE PEOPLE AND COURT

Ajai Singh*

Abstract

Language is the medium of communication. It provides access to information. It is also a vehicle of thought and expression. In context of court proceedings, the fundamental social function of language consists in promoting the ability to understand and to be understood as well. The process of communication is complete when court directly or indirectly understands the litigants and the others, and the litigants and the others understand the language of the court directly or indirectly. So it can be said that the language of the people as the language of the court should be accepted as a policy. In spite of concrete advantages of this policy its effectuation at all level faces serious difficulties. This paper examines two important questions. Firstly, whether language of the people as the language of the court should be accepted as a policy? Secondly, whether it is practical to use any other language as means to conduct business in higher judiciary? To know about answer of these questions, the researcher has tried to analyse his research work in the light of Historical evolution of language in Court proceedings, Law and application of Languages in Indian Courts, and to suggest the Pragmatic reforms through careful language planning and development to promote legal justice through linguistic justice.

Key words

Languages in Subordinate Court and Languages in Higher Courts.

I. INRODUCTION

According to Vedic era, Sanskrit as a pioneer of Indian languages and culture, it became a store house and communicative means of legal knowledge. Rama Jois in his book "Legal and Constitutional History of India" said that smirities do not mention about the role of language in jurisprudence and judicial procedure. Its reference can be drawn from the king and his court which transacted in Sanskrit and issued judgment in Sanskrit. At Royal level, Sanskrit remained as the official language of the court. With the development of Pali and Prakrit languages and other regional languages were felt to accommodate regional linguistic interests. All these languages got developed as cultivated vernaculars by gathering huge vocabular support from Sanskrit. There are following means for gradual development of direct and indirect multilingual norms and practices in adjudication system.[1] The above issue discusses in the light of vedic, medieval and modern era.

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[1]Rama Jois, *Legal and Constitutional History of India,* 685-91 (N.M.Tripathi Pvt. Ltd., Bombay, vol. I 1984).

II. HISTORICAL EVOLUTION OF LANGUAGEIN THE COURT PROCEEDING

Under Vedic era

The Shastrik law laid down by Law givers was mainly reflecting the living law of the people such as customs, popular usages, social morality, and familial obligations. Although the reformative sprit of living law did not so much purge the archaic shastrik law, at least as a system emerging from the society and expressing itself in intimate native dialect, the living law poured words of local usage into the corpus of law and in term brought the law into people's level of understanding. By this method Pakritand regional language words included in the Sanskrit legal verses.[2]

PV Kane in his book "History of Dharm Shastra" said that in ancient India, people's courts like kula, Shreni and Pughexisted as the base of hierarchy of courts. Kula consisted of impartial persons belonging to family or caste assembled to decide disputes among the members of the same family or caste, Shreni denoted the court of guilds consisting of persons from guild, competent to decide matters relating to special calling or trade. The pugacourt consisted of members belonging to different caste and professions but staying in the same village or town. Since the time of Gupta's, Sanskrit had been confined to the learned classes only, and the village community used to transact in regional languages, it would be appropriate to assume that the medium of language of people's court was the relevant regional language.[3]

Trial in Royal court's procedure indicates about substantive use of popular language. Katyayana said that the words of the witnesses when free from faults should be taken down as narrated by them naturally.[4] The Term naturally suggest about use of witness's natural language or mother tongue.

Discovery of a large number of Royal edicts has given opportunity to courts to use mixture of languages in courts proceedings.

Under Medieval era

K A Nilakanta Sastri and Srinivasachari in his book Advanced History of India[5] said that Urdu, an offshoot of Persian Language and camp dialect, was developed as the lingua franca[6] of the Sultanate. But after the influence of Sufi and Bhakti Movement, Hindi, with its Persian vocabulary and syntax, became transparent and interchangeable with Urdu. People familiar with Hindi could understand Urdu and communicative difficulties in legal and judicial proceeding were not felt. Persian as the official language of Muslim Kingdom has been introduced. Both the words Urdu and Persian infiltrated into a regional languages. People well acquainted with the popular usage of Hindustani and schooling in Persian languages. So it can be said that the maxim people's language as the language of the court has been confirmed. M. Rama Jois in his book said that Akbar

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[2] P. Ishwar Bhat, *Law and Social Transformation* 356 (Estearn Book Company, Lucknow, 1st edn, 2009).

[3] P V Kane, *History of Dharm Shastra,* 281 (Bhandarkar's Orient Research Institute, Poona, Vol.III, 1973).

[4] *Supra* note 1 at 549.

[5] K A Nilakanta Sastri and Srinivasachari, *Advanced History of India* 374 (Allied Publishers, New Delhi, 2nd edn., 1980)

[6] Lingua Franca: A language used habitually by people whose mother tongues are different in order to facilitate communication between them.

and Jahagir has shown great interest in popular access to justice and inference can be drawn that linguistic barrier was not a barrier to attain justice.[7]

During the early British Rule in India grievance redressal systems were partly continued the existing system and partly introduced the system of company's court. Since Company courts were presided over by English Judges and English was the language of court's business.[8] But, some injustice from disparity of languages of the participants of the Judicial Process can be seen in a Nand Kumar Trial and execution. In this case the Judges, Jury and councils were all foreigners unacquainted with the language of witnesses and Nand Kumar himself was not acquainted with the court's proceedings. Even an interpreter by which the trial proceeding was conducted was not proficient in Bengali language. Along with other procedural injustice, this linguistic injustice was an instrument of oppression. For ascertaining the law and custom of people in civil cases Kazis and pundits were employed to conduct the hearing. This procedure was not accepted at wider level. Up to certain extent to mitigate linguistic injustice, Cornwallis introduced the new system of legal profession which acted as a link between litigant and the court.[9] He appointed native law officers to assist the court in civil matters. By this mechanism he contributed to mitigate linguistic injustice in court proceedings.

Under Modern era

In year 1834, English was declared as the language of higher courts and of government business to replace Persian language.[10] Regional or Persian language continued in lower courts. Codification of procedural law in the form of C.P.C and CrPC and the relevant rules of practice provided for the use of English or regional language in various stages of proceedings. Service of interpreters and jury presupposed application of regional language.

However, Bal GangadharTilak case was an example of grave injustice on basis of language. In this case the Juries, who has been deliberately appointed to examine allegation of sedition through publication of articles in Maratha and Keshari by Tilak were well known about English but not acquainted with the regional language. Translated version of the article has been given to jury in English language but they were inadequate. Tilak was convicted for sedition.

Although, the latter half of the 19thcentury the Munsif courts have given some judgments in regional language. In his struggle for political freedom M. K. Gandhi raised question of national language and he said that while English language was great language which did lot of good, nevertheless no nation could become great on the basis of foreign language, because a foreign language could never be the language of people. Some debates regarding establishment of Indian language in public affairs and official use took place before Constituent Assembly .Constituent Assembly reveals that there was a substantial amount of consensus on two basic points and those were: that at some stage, the English language should be displaced from pre-eminent positions; and its place should be taken by Hindi.

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[7] *Supra* note 1 at19-20.

[8] *Ibid* at 159-60.

[9] M.P. Jain, *Outlines of Indian Legal History* 36 (N.M. Tripathi, Bombay, 3rd edn, 1972).

[10] Percival Spear, *The Oxford History of Modern India* 145 (Oxford University Press, Delhi, 2nd edn 1979).

But the major bone of contention, however was regarding the time limit within which this process should culminate .Because there are many difficulties in way of adopting Hindi immediately. Hindi was not so well developed as to replace English as a language of administration so it is needed to develop properly. The non Hindi speaking people apprehended that adoption of Hindi would give the Hindi speaking people an edge over them in the administration and the central services. Therefore, how much time it should be given to changeover became a controversial question in the Constituent Assembly.[11] In this regard Munshi-Ayyangar introduced a political compromise formula, which favoured status quo for 15 years, development of Hindi and empowerment of Parliament to mould, linguistic policy in future. It also provided for exclusive use of English in SC and HCs until the parliament or respective state legislature enacted otherwise. This formula was supported by Sri NG Ayyangar on basis of practibility and also supported by J L Nehru from a democrative prospective.[12]

III. LAW AND APPLICATION OF LANGUAGES IN INDIAN COURTS

Subordinate courts is said to be a base of judicial pyramid which allow use of Indian languages in courts, but from the point of view of linguistic justice its practice is not satisfactory. Although, the language in higher judiciary had to be both pragmatic and accommodative to future changes. Law and use of languages in Indian courts can be studied in the light of two heads *viz.* Languages in Subordinate Court and Languages in Higher courts.

Languages in Subordinate Court

The basic thrust and development of the language of the subordinate courts are to accommodate the linguistic interest of the people and language policy of the respective states. Provision relating to language of subordinate courts can be seen in the light of Civil Procedure Code, Criminal Procedure code and rules of practice and Official Languages Acts enacted by respective states.

Section 137 of Civil Procedure code permits continuance of pre-existing language practice of the subordinate courts subject to State Government's contrary direction. Section 137(2) of the code provides that the State Government may declare what shall be the language of any such court and in what character applications and proceedings in such courts shall be written. Several states have passed their Official Language Acts declaring State's official language as language of court in addition to English. Section 122[13] provides that the Practice of subordinate courts shall not violate the sprite of

[11]M K Sharma, *Law and Social Transformation* 43 (Allahabad Law Agency Publications, 1st edn, 2010).

[12]Formula from democrative perspective i) language base in culture: The gulf between people who knew English and those who did not know English obstructed the communicative links that are required for a democratic culture, which inter -alia , included court proceeding.

ii) an imposition of a language on unwilling people was anti-democratic, development of Hindi as a composite language based on vocabulary support from all Indian languages would make Hindi democratically acceptable to all the linguistic communities.

[13]General rule of High Court

Section 137 and also Article 350 of the Indian Constitution.[14] MP High court upheld[15] the competence of state to declare more than one language as official languages of civil courts. But in two cases,[16] the language policy in subordinate civil court veers between extremes of English only to Regional language only.

Section 137 Clause (3) of CPC provides that judicial writing other than in course of recording of evidence may be in English; but if any party or pleader is unacquainted with English, a translation into the language of court shall, at his request, be supplied to him. Rule 66 of Karnataka civil rules of practice authorises the presiding judge to employ interpreter when a witness gives evidence in a language not understood by court. On the whole, the legal regime governing language in subordinate courts has tended towards accommodating the claims of regional languages in addition to allowing use of English language as expedient in the background of appellate judiciary's language practice, multilingual situation and lack of adequate development of regional language.

Language in Higher Courts

Parliament has not enacted any law to allow Hindi to enter the portals of the Supreme Court. Article 348 (1) provides, "Notwithstanding any in the foregoing provisions of this part, until Parliament by Law otherwise provides all proceedings in the Supreme Court and in every High Court shall be in the English Language." Further, article 348 also provides that the authoritative tax of the bills, Act and delegated legislations passed or issued under the Constitution or by the Parliament or State Legislature shall be in English. Unlike the provisions relating to official language, no time limit is prescribed about substitution of English by Hindi or Regional Language. However, there is adequate flexibility for providing "Otherwise" by Parliamentary Law. In so far as language in High Court is concerned, State Law authorising use for Hindi or other official language of the State in the proceedings before the concerned High Court except at the stages of judgement or decree or order is permitted, subject to the previous concern of the President of India. It is significant that speedy legislative efforts without adequate equipment of the Regional Language can be stalled by the President.

In *Madhu Limaye v. Ved Murti,*[17] the Supreme Court refused to hear the petitioner personally in Hindi on the ground that doing so would be unconstitutional. Fact of the case is that one of the interveners insisted on arguing in Hindi in a Habeas Corpus petition before the Supreme Court. However, the counsel on the opposite side objected it on the ground that he could not follow Hindi. The Court suggested three alternatives: (i) that he may argue in English, or (ii) that he may allow his counsel to present his case, or (iii) that he may give written argument in English. The intervener did not accept the suggestions. The Supreme Court ordered that the language of the Court was English and

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[14]*Sarshwati Bai v. Allahabad Bank Ltd* AIR 1963 All 546; the contention was that petition submitted in English shall be rejected in view of rule that Hindi shall be the language of civil court in UP was rejected. The court's approach that article 350 is applicable to allow submission of petition in any language used in the union or state to be understood the contest of redressal of grievanceand cannot be stretched to use a language followed in distant part of the union which is unknown in the state it is sought to be used.

[15]*L. M.Wakhare v. State of MP* AIR 1959MP208.

[16]*Ramayee v. Muniyandi Konan,* MLJ Reports (1978) at 442 and Manjammav. S. M. Suryanarayana Rao (1985) 1 Kar LJ 104.

[17](1970) 3 SCC 739: AIR 1971 SC 2481; see also, V.N. Shukla, *Constitution of India* 660-61 (Eastern Book Co., Lucknow, VIII edn, 1990).

that the Court was forced to cancel the intervention in view of non-acceptance of proposal suggested by the Court. It appears, if the counsel on the opposite side and the Judge were able to follow Hindi, and written argument in English had been submitted, oral argument in Hindi by the interveners would have been allowed.

Another commendable method to get relief through public interest litigation by letter before Supreme Court has been initiated in Indian Languages.[18] The letter addressed to the Supreme Court in vernacular languages seeking redressal of grievance are translated into English by the Officers of the Court Registrar or by the Advocate who know the concerned language.[19] Thus multilingualism has made a thresh hold entrance in knocking the doors of the Supreme Court. With an evolution of the activists approach that for the purpose of Article 32 "Appropriateness of proceeding" is connected with the content of grievance statement rather than to its form, multilingual epistolary jurisdiction links people with the Court. This is welcome development an inevitable fall out of public interest litigation. In fact, article 350 confers an important right. An aggrieved person has the right to submit a representation for the redressal of any grievance to an Officer or Authority of the Union or State in any of the languages used in the Union or in the State, as the case may be. The scope of this article is to be determined in the light of remedial objective underline the Article and the spirit of equality, rule of law and principal of natural justice contemplated thereunder. It can be argued that the Supreme Court is also an "Authority" for the purpose of Article 350; that the Courts procedure are also be just. Fair and reasonable in view of the ratio in *P.S.R Sadananatham v. Arunachalam*[20] that reading article 348 in isolation from other constitutional values would be fallacious and hence, multilingualism shall be allowed at-least invoking the Courts jurisdiction. It is submitted, in view of Article 348, such an argument fails except in extra ordinary circumstances of grave and justice that is brought to the Court noticed by the letter addressed to the Court in Public Interest Litigation. It is notable development that at least in such special cases, multilingualism has registered a modest entry point.

While the official language Act deals with the language of the judgment, decree or order passed or made by the a High Court, Article 348(2) of the Constitution empowers, the Governor to authorise the use of the Hindi or the official Language of a State in proceedings in the High Court. In this context proceedings includes petitions, applications appeals, oral or written submissions and documents to be filed. This can be done by an order of High Court."

Only a few states (U.P., M.P., Bihar and Rajasthan) have enacted to permit the use of the Hindi in the High Court proceedings other than the Judgments, decrees or orders. In *Prabandhak Samiti v. JilaVidyalayNirikshak,*[21] the Allahabad High Court permitting submission of Writ Petition and affidavit in Hindi in Devanagari script by interpreting a statutory notification under Article 348(2). M.N. Shukla, J. for the Court observed, "it cannot be doubted that the proceedings of the Court functioning for the benefit of the inhabitant of any place must, on principle, be conducted in a language understood by them."

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[18] *Sunil Batra v. Delhi Administration.,* (1978)4 SCC 494

[19] Chief Justice E.S. Venkataramaiah mentioned his view with regard to the redressal before the SC, which is made in vernacular language.

[20] (1980) 3 SCC 141.

[21] AIR 1977 All 164.

The learned Judge pointed out the alluring character of language of the people ultimately by replacing language of the Court because of the due process component of language right in Court as evident from English Constitutional History. But this does not mean compulsion to avoid use of English altogether in the Courts proceedings. As was held in *Narendra Kumar v. Rajasthan High Court*[22] recognition of Hindi as official Language of Rajasthan High Court did not compel the court to render judgment only in Hindi because of permissibility to use English also in court proceedings and possibility of non-acquaintance of transferee judge in Hindi. Even in a Historic Judgment the Chief Justice of Bombay High Court, Justice M.C. Chaglain case of *Bombay Education Society v. State of Bombay,*[23] declared that English is an Indian language and in some sense more Indian than other Indian languages as the Constitution itself specified that the only valid version of the Constitution is the one in English. On the other, the observation of justice Desai in Judges case-I[24] in this connection are pertinent and observed:

"Both the judges and the lawyer failed to suitably revise the system to suit the needs of a republican form of government and egalitarian society with emphasis on socio-economic justice. We administer justice in a foreign language not understood by a very large number of litigants. If the litigants are present in court, he hardly understands what is going on. The judgment is written in foreign language and the seeker of justice hardly knows what has happened to his cause or controversy which he has brought before the court. In search of justice he is chasing a mirage in the process spreading his hard-earned fortune. That is the basic drawback."

Further in the case of *Dr. Amaresh Kumar v. Lakshmibai National College of Physical Education, Gwalior,*[25] the court observed:

"though India won its independence on 15th August, 1947, yet we could not overcome the mental slavery till today. It is well known that very little percentage of Indian population knows English, yet vested interest of majority of people who had advantage of being in higher post on account of knowledge of English, never wanted this Article i.e., Article 342(1) should came into force. They have a feeling of superiority an account of the knowledge of English. It is well-known that child learns the language of his mother and understand the same. On account of imposition of English majority having better knowledge cannot achieve the expected result on account of their failure to express or write their views in English had given an impression that we were still under the clutches of the British Rule with the result those, who have knowledge of English, yet less intelligent had become superior to majority of students who have little or no knowledge of English. With the result the language English as imposed in doing more harm in development of intellect of the child."

Recently, a very important issue has been raised before Supreme Court through PIL filed by an Advocate Shiv Sagar Tiwari, who claimed that using English as an official language in higher judiciary was "a legacy of the British rule" which should be scrapped.[26] The Department of Official Language in the Ministry of Home affairs filed its

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[22] AIR1991 Raj 33.

[23] AIR 1954 Bom. 468.

[24] *S.P.Gupta v. Union of India* AIR 1982 SC 149.

[25] AIR 1997 MP 48.

[26] The Indian express, available at: indianexpress.com/article/india/india-others/govt-against-hindi-as-official-language-in-higher-judiciary/ (last visited on 2/8/2016)

affidavit in response shooting down the idea of amending the Constitution to make Hindi the official language for conducting court in higher judiciary, and relied upon a report by the law commission in this regard.

Now the Issue that arises is that whether it is practical to use any language other than English as means to conduct business in higher judiciary. In a country which houses 780 languages out of which 122 are officially recognised and another 100 are suspected to exist,[27] is Hindi the ideal choice of language to be used in the higher courts?

Only 41.03% of Indian population speaks Hindi or languages similar to Hindi according to the 2001 census,[28] and nearly 60% of the Indian population did not speak Hindi. In such a country with such high amount of diversity in language Hindi as an official language in higher judiciary such as the 24 High courts and the Supreme Court would be a folly indeed.

The Part XVII of the Indian constitution lays down that "Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides - (a) all proceedings in the Supreme Court and in every High Court, (b) the authoritative texts- i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State, (ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and (iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State, shall be in the English language".[29]

It was rightfully observed in the Law Commission Report[30] that introduction of Hindi as a compulsory language in the Supreme Court and the high courts was not feasible and

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[27]David Lalmalswama, India speaks 780 languages, 220 lost in last 50 years survey, available at:

http://blogs.reuters.com/india/2013/09/07/india-speaks-780-languages-220-lost-in-last-50-years-survey/ (last visited on 2/8/2016)

[28]Bharti Jain, Nearly 60% of Indians speak a language other than Hindi, available at:

http://timesofindia.indiatimes.com/india/Nearly-60-of-Indians-speak-a-language-other-than-Hindi/articleshow/36922157.cms, (last visited on 2/8/2016)

[29]Article XVII, Chapter III-"Language of the Supreme Court, High Courts, etc." clause 348 at 176.

[30]Law Commission's 216th Report on "Non-feasibility of introduction of Hindi as compulsory language in the Supreme Court of India" has deeply gone into the views so obtained and has unanimously recommended that -(i) Language is a highly emotional issue for the citizens of any nation. It has a great unifying force and is a powerful instrument for national integration. No language should be thrust on any section of the people against their will since it is likely to become counter-productive. (ii) It is not merely a vehicle of thought and expression, but for Judges at the higher level, it is an integral part of their decision-making process. Judges have to hear and understand the submissions of both the sides, apply the law to adjust equities. Arguments are generally made in higher courts in English and the basic literature under the Indian system is primarily based on English and American text books and case laws. Thus, Judges at the higher level should be left free to evolve their own pattern of delivering judgments. (iii) It is particularly important to note that in view of the national transfer policy in respect of the High Court Judges, if any such Judge is compelled to deliver judgments in a language with which he is not well-versed, it might become extremely difficult for him to work judicially. On transfer from one part of the country to another, a High Court Judge is not expected to learn a new language at his age and to apply the same in delivering judgments. (iv) At any rate no language should be thrust upon the Judges of the higher judiciary and they should be left free to deliver their judgments in the language they prefer. It is important to remember that every citizen, every Court has the right to understand the law laid down finally by the Apex Court and at present one should appreciate that such a language is only English. (v) The use of English language also facilitates the movement of lawyers from High Courts to the Apex Court since they are not confronted with any linguistic problems and English remains the language at both the levels. Any survey of

added "no language should be thrust on any section of the people against their will since it is likely to become counterproductive".[31]

The law commission further observed that the use of language was not merely as a vehicle of thoughts for the judges but also formed an integral part of their decision making process and thus they should be left free to evolve their own preferred language for delivering judgments.

Another suggestion made in the PIL was that the 24 high courts should conduct their court in the regional language of their respective judicial territory. This advice lacked merit; Firstly because the Judges of the High court are frequently transferred from one part of the country to another, and it would be extremely difficult for the judges to discharge their duties efficiently if they were asked to deliver the judgement in a particular language which the judge may or may not be familiar with. It is highly impractical to think that the judge would know 22 different languages. Furthermore, Supreme Court is the highest seat justice in India and if Supreme court was to change its official language from English to Hindi, it would again be grossly unfair to citizens of the nation for non-Hindi speaking part of our country which again covers over 60%[32] of our population. Such parts of the country primarily include major portions of north-east India and South India.

As to the point raised in the PIL stating that the use of English language as an official Language in higher judiciary was a "legacy of the British rule", the petitioner called English to be a GulamiBhasha and stated that "Time has now come that language of the Supreme Court should be RashtraBhashaas defined under Article 343 of the Constitution and it has to be amended".[33] It has to be understood that there is no harm in carrying forward a British legacy if it helps in the smooth functioning of the Indian Judiciary and secondly while Article 343 of the constitution of India states that Hindi should be the language of business in the government it does not state that the same should apply to the Supreme court and the other High courts Article 348 clearly states that the official language would be English as far as higher judiciary is concerned.

Hon'ble court said that comments like those made by Mr. Shiv Sagar Tiwari are doltish at best. English is a language which united the diverse nation such as India and which in turn led to amalgamation of thoughts, ideas and perspective and thus in a way led to a feeling of nationalism among individuals during the freedom struggle of our great nation. English proved to be a uniting factor among people of different backgrounds and speaking different languages.

Even in today's times English comes to the rescue of millions of people all around the world who are in a place where they do not understand the regional language of the native. In such a condition again English helps them survive.

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the society in general or its cross-sections will clearly substantiate the above proposition which does not admit of much debate, particularly in the present political, social and economic scenario.

[31]The Indian express, available at: indianexpress.com/article/india/india-others/govt-against-hindi-as-official-language-in-higher-judiciary/ (last visited on 2/8/2016)

[32]David Lalmalswama, India speaks 780 languages, 220 lost in last 50 years, available at: http://blogs.reuters.com/india/2013/09/07/india-speaks-780-languages-220-lost-in-last-50-years-survey/ (last visited on 2/8/2016)

[33]Harshit Manaktala, The Supreme Court in pursuance of a PIL seeks to make Hindi as the official language of the higher judiciary, available at: http://lawlex.org/lex-bulletin/higher-judiciary-language/11152 (last visited on 2/8/2016)

Many people in India do not speak English and it would prove to be a challenge for them to represent themselves in the higher courts, but same is the case with Hindi. Similarly almost 60% of the population does not speak Hindi. In such a situation changing the language would not help at all rather it would prove to give undue advantage to some section of the society. Therefore rather than scrapping away English from the system, efforts should be made by the government and people of the country. That English should be taught as a compulsory language. This would not only help those individuals in India but also all over the world.

IV. CONCLUSION

Finally, it can be said that, except in few high courts, in major part of India regional language has made no entry in high court proceedings. Integrated judiciary, unified bar, unprepared position of regional languages and transferability of judges are some of the factors that continue to obstruct such changes. Language of the people as a language of the court may not be accepted as policy. Some remarkable endeavors have been made in some states to use regional language in court proceedings as much as possible. Till now, the extent of progress of non-Hindi states is not satisfactory because of inadequate infrastructure both physical and intellectual. The constitutional policy of gradually introducing people's language at the middle order and allowing the state about medium of language for subordinate courts can be made successful only by systematic planning and its sincere implementation. M. Chidambaram in his article titled as; "The Politics of Language Planning in Tamil Nadu" in E Annamalai, Language Planning[34] said that "since languages are social resources and constant constructs of the composite culture, bringing a change in the language use in court proceedings requires a planned action. Planning involves a deep analysis of goals, means and resources and coordinating them". Although the constitution has framed a plan about language use in court at various levels subject to legislative interferences, there are some other inevitable suggestions, which are as follows:

i. It is highly desirable to have more use of regional language at all stages of subordinate court's functioning.

ii. An obstacle for use of regional language in courts is lack of preparedness in the matter of availability of adequate legal literature in a regional language, readiness of lawyers to use regional language in pleadings and arguments, availability of infrastructural facilities like typewriters and stenographers in regional language.

iii. Lawyer should be well equipped with adequate training to promote the use of regional language in court through legal education.

iv. For the use of regional language in court, the promotion of encouragement, compulsion and motivation should be mandatory.

v. Role of legal literature and advocates is crucial in the administration of justice. There should be a big change in this regard.

vi. For the promotion of regional language, the three language formula which is derived from ministry of education should be followed. The formula involves knowledge of mother tongue, of Hindi and of English as language which maintains our contact with outside world.

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[34] CIIL (Mysore 1986) at 338-39.

REGULATORY FRAMEWORK FOR FOREIGN DIRECT INVESTMENT IN THE INDIAN TELECOM SECTOR AND ITS IMPACT ON THE TELECOM ECONOMY

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Shabana Shabnam**

Abstract

This research paper discusses and analyzes the regulatory framework that govern Foreign Direct Investment in the Indian Telecom Sector with an objective to highlight its impact on the growth and development of the Telecom Economy thereby making it a Techno-Legal paper in nature. The success or failure of every sector is judged by its economic contribution towards the country and Telecom Sector is no exception. Hence the Researcher has made an honest attempt to present a comparative analysis of various performance indicators of the Telecom Sector so as to give an insight into the scope and significance of FDI in the sector. Technological Advancements and Regulatory Reforms in Telecom Sector go hand-in-hand and therefore the Researcher has discussed various Regulatory Issues and Challenges that surround FDI in the sector. Through this Paper, the Researcher emphatically emphasizes on the urgency to create a harmony between FDI Policies and Technological Advancements in order to make the Indian Telecom Sector lucrative for FDI in future.

Key words

FDI Policy in India, Mobile Economy, Doing Business in India, Digital India, Indian Economy, and National Telecom Policies of India.

I. INRODUCTION

The Telecommunication Sector drives the output of an economy in two ways: Direct as well as Indirect. Direct Support comprises capital investments, production of goods and services, job opportunities and cross- border trade and commerce inter alia. Indirect contribution to an economy is reflected through growth in business efficiency, improved speed and quality of information provided, smooth and easy reach in telecom markets, efficient management of manpower and processes and introduction of new innovations.[1]

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[1]Frontier Economics, Contribution To The Digital Communications Sector To Economic Growth And Productivity In The UK 6 (Sept. 2011), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/77464/FE-Full-Report_digitalcomms_economicgrowth.pdf (last visited June. 10, 2018).

The Indian telecommunications sector, driven by advanced technologies, rising consumer demands and business competition, provides a huge scope and ambience for investments to Network Operators and telecom service providers. With the second largest subscriber base in the world with 1,146.49 million wireless connections,[2] the telecom industry is accelerating towards growth.

India has trounced the United States of America by becoming the world's second largest smart phone subscriber base with 299.24 million smart-phone subscribers[3] and that too when only one- fourth of its population is using smartphones. Since September 2015, 38 new cell-phone manufacturing units have been established in India, and many more are in line, which have intensified the manufacturing of mobile phones in the Year 2015-16 by approximately 90%[4] and which is still surging by leaps and bound.

Currently, the Indian mobile industry contributes 6.5% ($ 140 billion) to country's Gross Domestic Products (hereinafter referred as GDP) and has provided job opportunities (direct and indirect) to over 4 million people.[5] These figures are likely to multiply in the coming years. The latest GSMA Report predicts that by 2020, the Telecom industry is likely to add 8.2% to India's GDP and provide 800,000 more employments.[6] Similarly, with regard to unique mobile phone subscribers, India is predicted to go beyond 1 Billion subscriptions by 2020.[7] India will also witness a significant rise in adoption of LTE Technology with the number of LTE/ 4Gconnections calculated to touch 280 million by 2020 from just 3 million in 2015.[8]

The above figures clearly show that Foreign Direct Investment [hereinafter referred to as FDI] in the Telecom sector has helped India to achieve financial stability and growth. According to the International Monetary Fund, the Indian economy is the third largest economies in the World, in terms of Gross Domestic Product (GDP) based on Purchasing Power Parity (PPP) with the annual rise in GDP of 7.36% from 2011- 18.[9]

II. FOREIGN DIRECT INVESTMENT IN THE INDIAN TELECOM INDUSTRY

Over the past two decades, India has transformed from an agrarian economy to a service and industry based economy. This paradigm shift in the economy has enabled India to emerge as a global hub for information technology and communications. In the last 17

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[2]Telecom Regulatory Authority of India, The Indian Telecom Services Performance Indicators April- June 2018, at 13 (Oct. 3, 2018), available at:

https://www.trai.gov.in/sites/default/files/PIRJune03102018.pdf (last visited Oct. 10, 2018).

[3]Statistica, The Statistics Portal, available at: https://www.statista.com/statistics/467163/forecast-of-smartphone-users-in-india/ (last visited Aug. 30, 2018).

[4]Invest India, available at: https://www.investindia.gov.in/sector/telecom (last visited Oct. 13, 2018)

[5]GSMA, The Mobile Economy India 2016, available at: https:// www.gsmaintelligence.com/research/?file=134a1688cdaf49cfc73432e2f52b2dbe&download (last visited Oct. 13, 2018).

[6]Id. at 5.

[7]Id. at 4.

[8]Id. at 2.

[9]International Monetary Fund, World Economic Outlook (October 2018), available at: https://www.imf.org/external/datamapper/PPPSH@WEO/OEMDC/ADVEC/WEOWORLD/IND (last visited Oct. 13, 2018).

years, the telecom industry has received a total of US $ 30,029.84 million[10] as FDI equity inflow, making it the third highest sector attracting foreign investments .[11]

Given below is Table 1, which shows the Financial Year- Wise FDI Equity Inflows in the Telecommunications Sector from April 2001 to September 2017 and the fluctuating FDI inflows reflect the impact of liberalization, privatization, technological advancements and policy and regulatory framework on foreign investments in the telecom sector in India.

Table 1: Statement on Financial Year Wise FDI Equity Inflows[12]

From April 2001 to December 2017

Telecommunications Sector

Year	FDI in Rs million	FDI in US$ million
2000- 01 (Apr- Mar)	7841.59	177.69
2001- 02	39,384.61	873.23
2002- 03	9,077.31	191.60
2003- 04	3,978.40	86.49
2004- 05	5,411.01	118.33
2005- 06	27,514.50	617.98
2006- 07	21, 495.77	476.51
2007-08	50,995.61	1,260.70
2008-09	116,848.11	2,548.63
2009-10	122,696.62	2,539.26
2010-11	75,420.44	1,664.50
2011-12	90,115.26	1,997.24
2012-13	16,543.04	303.87
2013-14	79,872.83	1,306.95
2014-15	173,718.22	2,894.94
2015-16	86,373.81	1,324.40
2016- 17	374,351.59	5,563.69
2017- 18 (Apr- Sep, 2017)	389,260.97	6,083.80
Grand Total	1,690,899.67	30,029.84

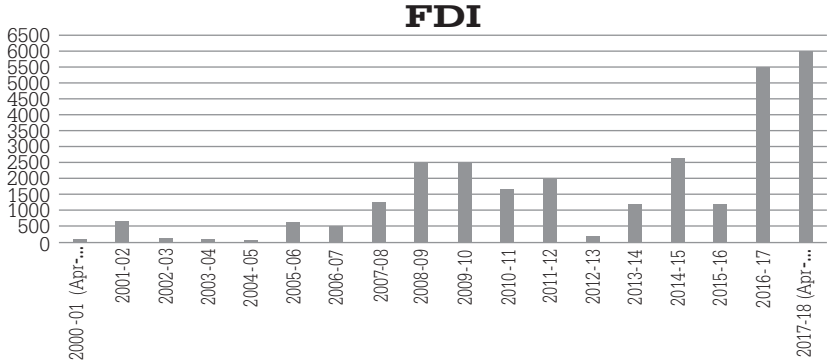
[10]Department of Telecom, Government of India, Statement on Financial Year Wise FDI Equity Inflows From April 2000 to September 2017, available at:

http://www.dot.gov.in/sites/default/files/2016_11%20FDI-%20Year-wise.pdf (last visited Oct. 13, 2018).

[11]Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Fact sheet On Foreign Direct Investment From April 2000 To December 2017, at 9, available at: http://dipp.nic.in/sites/default/files/FDI_FactSheet_23August2018.pdf (last visited Oct. 13, 2018).

[12]*Supra* note 10.

Chart 1: FDI Equity Inflows
From April 2001 to December 2017
In the Telecommunications Sector



From the above table it is clear that the Telecom Sector had witnessed unprecedented growth during 2005-10 due to the entry of new operators, reduction in mobile tariffs, sudden rise of advanced cellular mobile phones and deployment of 2G network across the country. This is evident from the fact that the wireless subscriber base witnessed a compound annual growth rate of 70 per cent to reach 315 million in the quarter ended September 2008[13] from 65 million in the corresponding quarter in 2005.[14] With Foreign Equity Inflow of US$ 2539.26 Million in the Year 2009- 10,[15] seventeen Wireless Service Providers[16] and twelve Wireless Operators[17] by March 2009, India was seen as one of the biggest telecom markets in the world. Furthermore, the Government of India cleared the air for foreign investors who were planning to enter the Indian telecom market by increasing the FDI limit for basic cellular services from 49 per cent to 74 per cent in 2005.[18] This change in FDI Policy encouraged the investors to acquire majority shareholding in Indian operators, thereby providing them control over the latter's operations.This also paved the way for aseries of acquisitions by foreign players, starting from 2007 onwards, when the UK-based Vodafone Plc acquired Hutchison Whampoa's stakes in Hutchison Essar. Whereby, Vodafone Plc acquired a 67 per cent stake from Hutchison Telecommunications International Limited for $11.1 billion in an all-cash

[13]Telecom Regulatory Authority of India, Government of India, The Indian Telecom Services Performance Indicators July- September 2008, at 4 (Jan. 13, 2009), available at: https://www.trai.gov.in/sites/default/files/Report13jan09.pdf (last visited Oct. 5, 2018).

[14]Telecom Regulatory Authority of India, Government of India, The Indian Telecom Services Performance Indicators July- September 2008, at 4 (Dec. 2005), available at: https://www.trai.gov.in/sites /default/files/report27dec05.pdf (last visited Oct. 5, 2018).

[15]*Supra* note 10.

[16]Telecom Regulatory Authority of India, Government of India, The Indian Telecom Services Performance Indicators January- March 2009, at 25 (July 13, 2009), available at: https://www.trai.gov.in /sites/default/files/ReportQEMar09.pdf (last visited Oct. 5, 2018).

[17]*Id.* at 27.

[18]Department of Industrial Policy And Promotion, Ministry of Commerce and Industry, Government of India, Foreign Direct Investment Policy 10 (April 2006), available at: http://218.248.11.68/industries/PDF/fdi_policy_2006.pdf (last visited Oct. 5, 2018).

transaction. Subsequently, Russia's Sistema, Norway's Telenor, UAE's Etisalat, the Bahrain Telecommunications Company (Batelco) and Japan's NTT DOCOMO made acquisitions which resulted in FDI inflows of Rs 51 billion and Rs 117 billion in 2007-08 and 2008-09 respectively. This was despite the fact that developed economies were facing a slowdown and global companies were reducing costs, which showed the potential of the Indian telecom market. The acquisition of equity stake by international players provided domestic operators the much-needed capital to expand operations and bid for spectrum in the auctions. However, the deceleration of foreign investments in the telecom sector started in the year 2010-11 when 3G spectrum was auctioned for the first time in India because after paying a whopping sum of Rs 67,700 crore, the telecom operators lacked funds to deploy 3G network in the country.[19] The telecom industry was still struggling to recuperate from this loss when the 2G Scam came like a tsunami that did not give any opportunity to the wireless cellular mobile industry to stand firm. The cancellation of 122 licenses on February 2, 2012, by the Supreme Court of India in the 2G Spectrum case[20] created an uncertain and unpredictable environment thereby highlighting the issues of corruption and faulty regulatory framework which further reduced foreign investments in the industry in the year 2012- 13. This called for an urgent need to introduce a comprehensive telecom policy to accelerate the growth of the Telecommunications Sector in India and therefore the Government introduced The National Telecom Policy- 2012 in May 2012. The following objectives of National Telecom Policy- 2012 supported FDI in the telecom sector -[21]

i. Provide affordable access to good quality telecommunication services to all citizens.

ii. Increase rural tele-density to 70 by the year 2017 and 100 by the year 2020.

iii. Give broadband-on-demand by the year 2015 and to reach the target of 175 million broadband connections by 2017 and 600 million by the year 2020 at minimum download speed of 2Mbps and provide higher speeds of at least 100 Mbps on demand.

iv. Encourage research & development, technological innovation and manufacturing at the national level

v. Give priority to domestically manufactured telecommunication products.

vi. Provide a simplified Merger & Acquisition regime in telecom service sector while maintaining a business environment for adequate competition and fair- play.

The above mentioned objectives of National Telecom Policy 2012 created an environment in the Indian Telecom Sector for attracting a good amount of FDI in India. In order to achieve the above objectives of National Telecom Policy 2012, the government

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[19]R. Sukumar, "Policy lessons from the 3g Failure" (Apr. 11, 2012, 1:48 PM), available at:
https://www.livemint.com/Opinion/FRQGcvIClZDzCS6EK0Cq4I/Views--Policy-lessons-from-the-3G-failure.html, (last visited June 27, 2018).

[20]Centre for Public Interest Litigation & Ors v. Union of India & Ors, W.P. C No. 423/ 2010, SC (India), available at: http://www.indiaenvironmentportal.org.in/files/2G%20spectrum.pdf.

[21]Department of Telecom, Government of India, National Telecom Policy- 2012, at 5-7
http://www.dot.gov.in/sites/default/files/NTP-06.06.2012-final_0.pdf (last visited Aug. 23, 2018)

allowed 100 per cent FDI (FDI) in the telecom sector on August 22, 2013,[22] to satisfy the key demand of the fund-starved industry. The FDI Policy of 2013 decided to increase FDI cap in telecom to 100 per cent from 74, up to 49 through automatic route and beyond that.[23] The government removed the FDI cap for the telecom sector in 2013 to provide an opportunity to foreign investors to gain complete ownership and control of their telecom ventures in India, and hence not being restricted by the funding capacity of their local partners. The liberalization of FDI regulations propelled the Telecommunications Sector towards rapid growth and made it stand as the third largest sector to attract FDI equity inflows in the Indian economy.[24]

In order to attract further investments in the country, the government also initiated 'Make in India' Programme in 2014, followed by 'Digital India' and 'Start up India' Programmes in the year 2015 and 2016 respectively. The major policy developments in the sector included spectrum auctions that earned huge revenues; the introduction of spectrum sharing and trading norms that allowed operators to procure a greater quantum of spectrum to improve services; approval of active infrastructure sharing guidelines; grant of licenses to virtual network operators; speedy implementation of the BharatNet project; and grant of payments bank licenses. However, it is pertinent to mention here that despite the introduction of such promising policy initiatives, foreign investments in the telecom sector fell by 54 per cent in the year 2015-16.[25] This was the result of divestments by foreign players due to unreasonably high spectrum prices in 2016 spectrum auction and entry of Reliance Jio who offered 4G services at lowest tariffs in the world. While realizing the existence of complex and complicated procedure for establishing businesses, the Indian Government, through the Union Budget 2017-18, laid down provisions for ease of doing business in India and took steps to move India towards double digit growth by reducing cap on foreign investments, enabling early dispute resolution and simplifying taxation laws.[26]

III. THE CONSOLIDATED FDI POLICY, 2017

The Department of Industrial Policy and Promotion drafts the FDI Policy in India which enumerates the sectors in which foreign investment is permitted along with the attached conditions and limits on various sectors. It also enumerates the sectors in which FDI is Automatic and those in which it requires approval of the Government of India. The Policy defines FDI as an investment by non-resident entities in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.[27]

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[22]Department of Industrial Policy And Promotion, Ministry of Commerce and Industry, Government of India, Press Note No. 6 (2013 SERIES), at 5 (Aug.22, 2013), available at: http://dot.gov.in/sites/default/files/pn6_2013.pdf (last visited Aug. 23, 2018).

[23]*Ibid.*

[24]*Supra* note 11.

[25]*Supra* note 10.

[26]Ministry Of Finance, Government Of India, Union Budget 2017-18, at 9, 14, available at:

http://indiabudget.nic.in/ub2017-18/bh/bh1.pdf (last visited Aug. 23, 2018).

[27]Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Consolidated FDI Policy 6 (Aug. 28, 2017), available at:

http://dipp.nic.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf (last visited July 2, 2018).

On August 28th, 2017, the Department of Industrial Policy and Promotion (DIPP) had issued the updated and revised FDI Policy, 2017 - 2018 (hereinafter referred to as the FDI Policy 2017). The FDI Policy 2017 incorporated various notifications issued by the Government of India over the past years. The Policy has introduced an improved and systematic procedure for Government approval for foreign investments through various amendments in the previous FDI Policy of 2016.

Given below is a list of various amendments introduced by the FDI Policy of 2017-

a. Abolition of the foreign investment promotion board (FIPB):The most significant amendment to the FDI policy has been the structural modification made through a notification dated June 5, 2017 issued by the Department of Economic Affairs confirming the abolition of the FIPB (the former government body authorised to approve proposals for foreign investments that sought government approval); and replacing it with the 'Foreign Investment Facilitation Portal' (FIFP), an administrative body to facilitate FDI applicants.

b. Specifying 'competent authorities' for various economic sectors: The FDI Policy 2017 defines and enumerates sector-specific administrative ministry / department as 'Competent Authorities,' empowered to grant government approval for foreign investments. The Department of Telecommunications (hereinafter referred as DoT) is the competent authority with regard to the Telecommunications Sector in India.

c. Establishing a 'standard operating procedure' (SOP) to process FDI proposals: The Policy has also introduced a Standard Operating Procedure that lays down a detailed procedure and time- limit for applications. The Policy also provided a list of 'competent authorities' for processing government approvals for foreign investments in India. Under this procedure, investors are supposed to make an application on the website of the Foreign Investment Facilitation Portal, along with the listed documents that include relevant charter documents, board resolutions, etc. The application is then forwarded to the concerned 'Competent Authority' and the Reserve Bank of India (for comments from a foreign exchange law perspective) within two days. Proposals requiring security clearance (in sectors such as telecommunication) shall also be forwarded to the Ministry of Home Affairs. The Competent Authority shall then process the complete proposal and convey the approval / rejection of such proposal to the applicant in the format prescribed under the SOP.

d. Provision for speedy approval to FDI proposals: In order to avoid unnecessary delay in approvals, consultation with the Department of Industrial Policy and Promotion has been made strictly need based so as to enable a systematic procedure and expeditious approval within 10 weeks. The FDI Policy 2017 also directs that the Competent Authority may only reject a proposal or stipulate conditions in addition to those listed in the FDI Policy 2017 / applicable sectoral laws with the concurrence of the DIPP.

e. Conversion of limited liability partnerships (LLPS): The FDI Policy 2017 also allows a Limited Liability Partnership, operating in those sectors where 100% FDI is allowed under the automatic route (i.e. without FDI-linked performance conditions), to convert into a company. Similarly, conversion of a company into a Limited Liability Partnership has also been permitted under the automatic route.

f. Issue of convertible notes by start-ups: The FDI Policy 2017 has introduced the issuance of: 'Convertible Notes' (instruments representing debt repayable at the option of the holder, or convertible into equity shares within 5 years from issue) by Start-ups to persons resident outside India; and Equity or Equity- linked / debt instruments by Start-ups to Foreign Venture Capital Investors.

Issuance of Convertible Notes is, however, subject to the following conditions: (a) Under automatic route, a Non-Resident may purchase Convertible Notes for approximately USD 39,500 or more in a single tranche and the consideration shall be received by inward remittance through normal banking channels or as otherwise permitted under the existing foreign exchange regulations applicable; (b) Start-ups established in sectors who seek government approval for FDI have been allowed to issue Convertible Notes only after an approval by the government; (c) Non-Residents can acquire or transfer Convertible Notes from or to persons residing in India or Non-Residents only by complying with the pricing guidelines under the Indian foreign exchange regulations; and (d) Start-ups issuing Convertible Notes must fulfil the reporting requirements as prescribed by the Reserve Bank of India.

IV. KEY INVESTMENTS IN WIRELESS MOBILE COMMUNICATION INDUSTRY IN INDIA FROM 2013- 2016

The decision of allowing 100 percent FDI in the Telecom Sector by the Government brought a new ray of hope for the sector and benefitting from this decision of the Indian Government, Vodafone Inc. was the first company to bring foreign investment in India. The British telecom major, Vodafone Plc on October 29, 2013 sought the Foreign Investment Promotion Board's (FIPB's) approval to bring in Rs 10,141 crore to raise its 64 per cent equity stake in Vodafone India to 100 per cent.[28] Vodafone's application to buy out its Indian subsidiary' partners came within two months of the government allowing 100 per cent foreign ownership in an Indian telecom company. It was the second foreign Telecom company to seek permission to do so, after Singapore's SingTel got the Foreign Investment Promotion Board's approval in October 2013, to buy Bharti Airtel's 9.9 per cent share in a joint venture for international long distance calls.[29]

During 2015-16, the major FDI deal took place between the U.S. based American Tower Corporation (ATC) and Viom Networks whereby the former acquired a 51 per cent share in the latter. Valued at Rs 76 billion, this was ATC's largest acquisition in India.

Earlier, in April 2015, ATC and KEC International entered into a deal whereby ATC acquired 381 telecom sites across Chhattisgarh, Meghalaya and Mizoram for $13 million. Another key deal in the telecom infrastructure segment was between E2 Energy Services and GTL Limited, in which the latter sold its operations, maintenance and energy management business for Rs 8.5 billion in a slump sale.

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[28]Business Standard Reporter, Vodafone to invest Rs 10,141 cr to raise stake in Indian arm to 100 %, Business Standard (Oct. 30, 2013, 2:17 IST), available at: https://www.business-standard.com/article/companies/vodafone-to-invest-rs-10-141-cr-to-raise-stake-in-indian-arm-to-100-113102901056_1.html (last visited July 1, 2018).

[29]Tele.net.in, Debt and Equity moves in the sector in 2013, Tele.net.in (Feb 12 2014), available at: http://www.tele.net.in/index.php?option=com_k2&view=item&id=14213:debt-and-equity-moves-in-the-sector-in- 2013&Itemid=61 (last visited Oct. 13, 2018).

In September 2015, UK-based New Call Telecom acquired public Wi-Fi provider Ozone Networks, which has the largest number of public and private Wi-Fi hotspots in India, for an undisclosed amount.

As on September 2016, Reliance Communications merged operations with telecom operator Aircel.

In April 2017, Japan- based NTT Communications acquired a Virtual Network Operator - International Long Distance (VNO-ILD) license in India. The license has enabled NTT Com to add Arcstar Universal One International Network Services in its brand. The company aims to use its ICT solutions to assist Indian enterprises and multinational corporations.[30]

Table 2 below presents the Key FDI Deals in India from 2013- 2018. The researcher has covered the deals from the Year 2013 because 100 percent FDI was allowed then that paved the way for new investments by foreign players.

Table 2: Important FDI Deals in India from 2013- March 2018.[31]

Foreign Collaborator	Country	Indian Company	FDI (USD/ Million)
Prime Metals Limited	Mauritius	Vodafone India	1,500.79
SingTel (2013)	Singapore	Bharti Airtel	660
Videocon Mauritius Energy Limited	Mauritius	Videocon International Electeonics Limited	719.76
Federal Agency For State Property Manage	Russia	Sistema Shyam Teleservices Limited	451.83
Telenor Asia Pte Limited	Singapore	Unitech Wireless Tamilnadu Private Limited	298.75
Telenor South Asia Investment Pet Limited	Singapore	Telewings Communication Services Private Limited	274.40
QIB Class	Mauritius	Bharti Infratel Limited	240.37
Axiata Investments 2 (India) Limited	Mauritius	Idea Cellular Limited	123.22
NTT Communications Corporation	Japan	Netmagic Solutions Private Limited	85.79
Qatar Foundation Endowment		Bharti Airtel	1260
Omega FII Investment Pvt. Limited	Singapore	Tata Sky Limited	53.89

[30]NTT Communications, NTT Com Acquires International Telecom License in India (Apr 25, 2017), available at: https://www.ntt.com/en/about-us/press-releases/news/article/2017/0425.html (last visited Oct. 13, 2018).

[31]IBEF, Telecommunications 29 (July 2018), available at: https://www.ibef.org/download/ Telecommunications-Report-July-2018.pdf,(last visited July 9, 2018).

Foreign Collaborator	Country	Indian Company	FDI (USD/ Million)
Tiger Global Eight Holdings	Mauritius	Hike Private Limited	50.80
Essel International Limited	Mauritius	Siti Cable Network Limited	48.17
International Finance Corporation	U.S.A	Tikona Digital Networks Private Limited	46.39
Anchor Investors (Total) 6 Investors)	Mauritius	Bharti Infratel Limited	32.59
Essar Telecom Limited	Mauritius	Agc Networks Limited	29.13
Network Digital Distribution Services FZ	UAE	Tata Sky Limited	23.77
Tower Vision Mauritius Limited	Mauritius	Tower Vision India Private Limited	23.71
EGN B.V	Netherlands	Orange Business Services India Network P, Global One (India) Private Limited	19.39
GS Investment Partnerrs (Mauritius) I Lim	Mauritius	Tikona Digital Networks Private Limited	16.17
South Asia Entertainment Holdings Limited	Mauritius	Sun Direct TV Private Limited	16.17
AGC Holdings Limited	Mauritius	Aegis Aspire Consultancy Services Limited	15.56
Bharti Softbank Holdings Pvt Limited	Singapore	Hike Private Limited	12.26
Droom Private Limited	Singapore	Droom Technology Private Limited	10.81
Vodafone International Holdings (2014)	U.K.	Vodafone India Limited	1,641
MTS (2015)	Russia	Reliance Communications	736.98
Augere Wireless (2015)	U.K.	Bharti Airtel	21.3
Orange S. A. (2016)	France	Bharti Airtel's operations in Burkina Faso and Sierra Leone	900
Telenor (2017)	Norway	Bharti Airtel	N/A (No Cash Deal)
Singtel (2018)	Singapore	Bharti Airtel	411.02

V. FDI IN WIRELESS MOBILE COMMUNICATION INDUSTRY- ISSUES & CHALLENGES

FDI in the Indian telecom sector dropped from $1.99 billion during April 2011-January 2012 to $93 million during the same period in 2012-13.[32] The industry, which was one of the major hubs for FDI, witnessed the biggest fall in such investments during this period. The uncertain regulatory environment regarding spectrum auctions and pricing, the one-time spectrum usage fee and retrospective amendments; intense competition; and low profitability inter alia, hindered the market growth around that period. Even the 'high subscriber base' factor of the telecom sector failed to attract investments.

According to the latest data from the Department of Industrial Policy and Promotion, the overall FDI (FDI) inflows into India rose by around 23 per cent, from Financial Year 2014-15 to 2015-16.[33] This was a result of stable macro-economic policy framework, a favourable investment climate and various initiatives taken by the government to improve the ease of doing business in the country.

However, the telecom sector including radio paging, cellular mobile and basic telephone services witnessed a 54 % decline in foreign investments, from Rs 2894.94 billion to Rs 1324.40 billion[34] during the same period. Despite a significant rise in the overall foreign investment equity, foreign investors have been reluctant in investing in the Indian telecom sector as there is still ambiguity on certain legal cases. For instance, the Vodafone retrospective tax issue has remained unresolved despite several discussions between the government and the operator. Second, the constant friction between the Telecom Regulatory Authority of India and operators over spectrum auction and pricing, quality of services, call- drops and net- neutrality inter- alia has created an uncertain and unpredictable policy environment.

The Indian Telecom Sector has been facing several issues and challenges with regard to FDI which have been discussed below:

High Corporate Taxation Regime

In India, the Corporate Income tax rate is a tax collected from companies incorporated in India. Its amount is based on the net income earned by the companies while running their businesses during a financial year. Revenues from the Corporate Tax Rate are an important source of income for the Government of India. Under the Income- Tax regime, a resident company is taxed on its worldwide income whereas a foreign company is taxed only on income that is received in India, or that accrues or arises, or is deemed to accrue or arise, in India.

Table 3 below shows the Corporate Income Tax (CIT) and other Taxes applicable to an Indian company as well as a Foreign Company for the Tax Year 2018- 19:

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[32] *Supra* note 10.

[33] Department of Industrial Policy and Promotion, Ministry of Commerce And Industry, Government of India, Factsheet on Foreign Direct Investment From April 2000- June 2018, at 4, available at: http://dipp.nic.in/sites/default/files/FDI_FactSheet_23August2018.pdf (last visited Oct 13, 2018).

[34] *Supra* note 10.

Table 3: Corporate Income Tax Rate for Indian and Foreign Companies for the Tax Year 2018/19.[35]

Income[36]	Rate of Corporate Income Tax%					
	For Turnover up to INR 2.5 Billion		Other Domestic Companies		Foreign Companies	
	Basic	Effective[37]	Basic	Effective	Basic	Effective
>10 Million INR	25	26.00	30	31.20	40	41.60
10 Million-100 Million	25	27.82	30	33.38	40	42.43
< 100 Million	25	29.12	30	34.94	40	43.68

Table 4: below shows the Corporate Income Tax (CIT) and other Taxes applicable to an Indian company as well as a Foreign Company for the Tax Year 2018- 19:

Table 4: Corporate Tax Rate by Country as in December 2018[38]

Country	Corporate Income Tax Rate (%)
India	34.61
China	25
Indonesia	25
United States	21
Russia	20
United Kingdom	19
Singapore	17.77

From the above Table it is clear that the Corporate Tax in India is the highest amongst G20 countries which discourages foreign investments. Apart from this, the Telecom Companies have to pay the cumulative levies (other than corporate tax) of around 33% in comparison to other countries like 22% in China, 20% in European Union and 17% in the United States. Such high taxations put immense pressure on cash flows and discourage telecom companies to invest further.[39]

[35] PWC, India:Corporate- Taxes On Corporate Income (July 2, 2018), available at: http://taxsummaries.pwc.com/ID/India-Corporate-Taxes-on-corporate-income (last visited Aug 23, 2018).

[36] Surcharge is payable when Total Taxable Income exceeds INR 10 million.

[37] Effective Tax Rates include Surcharge and Health and Education Cess.

[38] Trading Economics, List Of Countries By Corporate Tax Rate- G20, available at: https://tradingeconomics.com/country-list/corporate-tax-rate?continent=g20 (last visited Oct 14, 2018).

[39] Hemant Joshi, "Cumulative Levies Cumulative levies of 33% for Indian telcos putting operators under pressure: Deloitte, ET Telecom", (Jan. 24, 2018, 14:38 IST), available at: https://telecom. economictimes. indiatimes.com/news/cumulative-levies-of-33-for-indian-telcos-putting-operators-under-pressure-deloitte/62633690 (last visited Oct. 14, 2018).

Ambiguous Duties And Tax Regime

In addition to this, ambiguous, unreasonable and complex Basic Custom Duty (BCD) on telecom equipment contradicts the Make in India and Start-up India programmes of the government. For example, an import duty is charged for various products according to the 'Eight Digit HS Codes', which are universal codes. Since these codes have not been harmonized in India as per international standards, import of Telecom equipment becomes a highly complicated and tedious task. Import of 'Telecom Products' fall under Code 8517 which includes "Import duty on Telephone Sets including Telephones for Cellular Networks or for other wireless networks; Other Apparatus for the Transmission or Reception of Voice, Images or Other Data Including Apparatus for Communication in a Wired or Wireless Network (Such As A Local Or Wide Area Network), Other Than Transmission Or Reception Apparatus Of Heading 8443, 8525, 8527 or 8528."[40] However this definition does not include all telecom equipment within its purview. For example, a 'Diplexer' falls under HS Code 85177090 under 'Others Category'-on which no import duty was charged before 2018[41] but as per the new Tariff rules issued on February 2, 2018, a 15% import duty has been levied on the above code.[42] Such ambiguities in the provisions create hindrances in ease of doing business. Till the time the Government provides domestic manufacturing facilities, through strong supply chain for these equipment in India, such goods should be exempted from levy of Custom duties.

Furthermore, high GST rate that varies from 0 to 28% also adds on to the financial burden on telecom companies and since the rate of tax on inputs is higher than the rate on output services it creates blockage of credits and adds to the financial burden on telecom companies. Hence the Government should try to reduce the GST in telecom sector to 18 percent. Although the amalgamation of taxation regime across Central and State Governments and across sale of goods and services is a great step but one loophole in it is that the Central Government still withholds the residuary taxation powers. Entry 97 of List I of Schedule 7 to the Constitution provides for "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists"[43] gives residuary taxation power to the Government. In order to make GST successful it is imperative that the Central Government resists from levying taxes through its residuary legislative powers in Entry 97 of List I.

To further reduce the tax levies the Government should clarify tax treatment of spectrum fee that has been charged for years prior to financial year 2016-17 to permit depreciation of tax thereon.

Since cellular mobile towers are fixed to the ground, they are often regarded as fixed assets and subjected to property tax. Property tax rate on cellular towers varies among State Governments, Municipal Corporations and Municipalities. The Central government should introduce uniformity in property tax rates amongst various States and municipal authorities.

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[40] Central Board of Indirect Taxes and Customs, Customs Tariff as on February 2, 2018, Chapter 85 Section XVI, at 771 (2018), available at: http://www.cbic.gov.in/resources//htdocs-cbec/customs/cst1718-010718/Chapter%2085.pdf (last visited Oct. 14, 2018).

[41] *Ibid.*

[42] *Ibid.*

[43] *Constitution of India,* 1950; Art. 246, Seventh Schedule, List I, Entry 97.

Low Average Revenue Per User (ARPU)

Despite consolidation that has brought down the number of Telecom operators from seventeen to just three to four major players, the Average Revenue Per User for wireless mobile services is still declining. According to the latest report by the Telecom Regulatory Authority of India, the Average Revenue Per User for Quarter ending June 2018 was the lowest in last seven years.

This is the result of Reliance Jio's entry into the wireless mobile industry with highly competitive pricing of mobile tariff plans into the Indian wireless mobile industry. It is an irony that despite a 120 percent rise in Data- Usage,[44] the ARPU has slumped to the floor with INR 69[45] in June 2018 as compared to INR 104 in December 2016.[46] In order to bridge this gap, it is imperative that the Government perceives Wireless Mobile Communication Industry as a Strategic Industry and provides monetary relaxation to Network Operators thereby creating a fine balance between Customer's satisfaction and Operators' Profits. The Government must set- aside multiple taxes and levies like spectrum usage charges to promote sustainable growth of the network operators.

Given below is Chart 2 which shows the Wireless Mobile ARPU for GSM Services from the year 2010 to June 2018.

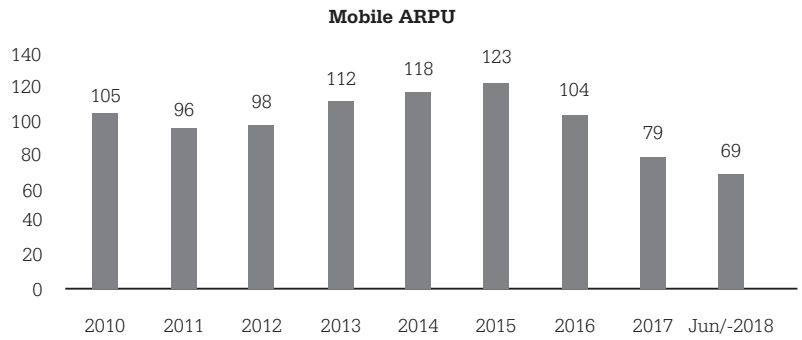

Chart 2: Wireless Mobile ARPU for GSM Services from 2010- 2018.

High Debts On Telecom Operators

The Indian wireless cellular mobile industry is price sensitive with a subscriber- base that is dominated by 94%prepaid subscribers[47] that too with the lowest voice and data rates in the world.[48] In addition to this, the entry of Reliance Jio, who is capable of

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[44]Cellular Operators Association Of India, COAI Annual Report 2017- 18, at 38

https://www.coai.com/sites/default/files/Annual%20Report%20COAI%202017-18.pdf (last visited Oct. 9, 2018).

[45]*Supra* note 2, at 49.

[46]Telecom Regulatory Authority Of India, The Indian Telecom Services Performance Indicators October-December 2016, at 44 (Apr. 7, 2017), https://www.trai.gov.in/sites/ default/files/Indicator_Reports_Dec_16_07042017.pdf(last visited Oct. 9, 2018).

[47]Hootsuite, *Digital In 2018,* at 101 (Jan. 2018), https://hootsuite.com/pages/digital-in-2018 (last visited Oct. 9, 2018).

[48]*Supra* note 44, at 25.

providing integrated wireless communication services at lower costs forced other Operators to reduce tariffs thereby putting pressure on their revenues. Apart from this, irrationally high spectrum costs, unreasonable penalties, and higher goods and services tax has put Indian Wireless Network Operators under an exorbitant debt of INR 4.6 Lakh Crore on revenues of under INR 1.8 Lakh Crore.[49] This has resulted into higher cost of doing business and has negatively affected the foreign investments into the industry.

High Spectrum Costs

Spectrum cost in India is one of the highest in the world. Price of spectrum in India runs around "25 times costlier than the countries such as U.S., France, Singapore, Germany, Spain and Sweden."[50] By issuing spectrum licenses to Network Operators for 20 years, government policies force them to bear heavy network roll-out costs without providing them sufficient time to earn revenue from the CAPEX and OPEX costs. From 2010 to 2016 the Indian government has earned around INR 3,51,200 crores through six spectrum auctions. However, the high cost of spectrum in India has led to a digital divide between urban and rural India thereby affecting the wireless mobile penetration in the country as the operators are reluctant to invest in network deployment resulting in underutilization as well as misutilization of the valuable spectrum.

No Ease Of Doing Business In The Wireless Mobile Communication Industry

According to the latest World Bank Report, India ranks 100th in Ease of Doing Business amongst 190 countries.[51] Although the Government has taken several steps to improve ease of doing business by enforcing the Indian Telegraph Right of Way Rules, 2016; simplifying grant of licenses/ approvals/ SACFA clearances issued by the Wireless Planning Commission through online portal;liberalizing Spectrum Trading and License Renewal/ Migration processesinteraliayet the Telecom Operators do not seem to be satisfied with the implementation of these rules because the local municipal bodies and Panchayats do not follow the rules framed by the Central Government and create obstruction in network roll- outs.

The non-implementation of Right of Way rules has also impacted the 'Digital India Programme' of the Government which aims at bridging the Digital- Divide through last mile connectivity in remote villages. At present, around 55,600 villages do not have an access to mobile communication services.[52] This was because network deployment in such areas was not commercially possible for the Operators as they were already under huge debts after paying exorbitant spectrum costs and unreasonably high penalties, taxes and levies.

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[49]KPMG, Accelerating Growth And Ease Of Doing Business, at 4 (Aug. 2017),

https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/08/Accelerating-growth.PDF (last visited Oct. 10, 2018).

[50]Gary Kim, "2000mhz Of India Mobile Spectrum Up For Auction In 2016", in Business Model, Internet Access, Mobile, News, Spectrum (May 22, 2016) http://spectrumfutures.org/2000-mhz-of-india-mobile-spectrum-up-for-auction-in-2016/

[51]World Bank, Doing Business Report 2018: Reforming To Create Jobs, 15th Edition, at 4,

http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full Report.pdf (last visited Oct. 10, 2018).

[52]Deloitte and Assocham India, Digital India: Unlocking The Trillion Dollar Opportunity 11(Nov. 2016), available at: https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-digital-india-unlock-opportunity-noexp.pdf (last visited Oct. 10, 2018).

The Ease of Doing Business Policies of India also contradict the Start-Up India Programme of the Government because the Start-Up firms are deprived of the opportunity to participate in public projects as they fail to fulfil the pre-requisites of a Tender that asks for high turnover and experience which they are unable to meet. Furthermore, financial assistance should be provided to such firms at a low interest and the government should take steps to relax the financial compliance rules for them.

VI. CONCLUSION

Every cloud has a silver lining and the Indian wireless mobile communication industry is no exception because despite the above- discussed challenges, India is now the world's second largest smartphone market after the U.S. and aims to have nearly 674 million connections by 2020.[53] Over the coming four years, two- thirds of the global subscriber growth will be coming from Asia alone and it is note-worthy that India is going to account for nearly 40% of the total global subscriber- growth which calls for huge scope for foreign investments into the industry.[54]

Going forward, growth opportunities in the rural voice and data services will also drive future investments in the wireless mobile communication industry, provided the government addresses the regulatory challenges facing the sector. Given that network operators are struggling through falling revenues and high debt, the industry looks at FDIas a key contributor to meet the sector's investment targets of USD 100 billion as enshrined in the National Digital Communication Policy- 2018.[55] In coming years, the Global Telecom Market will be dominated by data and the wireless mobile industry will accelerate towards 5G, Internet of Things (IoT) and Artificial Intelligence (AI). The scope of FDI is also evident from the fact that India now ranks 1st in terms of mobile data consumption in the world i.e.1.5 billion GB mobile data/ month, which has placed it ahead of China & U.S.A put together.[56] The Indian wireless mobile communication market has witnessed a paradigm shift in data consumption with 4G traffic capturing 82% share of total data traffic with a Year on Year growth of 144% in mobile data usage in December 2017.[57] Moreover, Video Streaming contributes to 65- 75% of mobile data traffic which indicates towards a huge scope for new Over The Top (OTT) Players in India.[58] In the coming years, 5G will be able to support the development of 100 Smart Cities in India thereby fulfilling the vision of the Digital India Programme by creating a robust Digital Communication Infrastructure. Hence, by bringing policy reforms on key issues, FDIs can spearhead the wireless mobile industry in achieving the objective of socio- economic empowerment of the citizens of India as envisioned in the National Digital Communication Policy- 2018.[59]

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[53]GSMA, India's Digital Promise 4 (February 2017), available at: https://www.gsmaintelligence.com/research/?file=3028cb1c974129780e058bef9d640a02&download (last visited Oct. 10, 2018).

[54]*Id.* at 5.

[55]Department of Telecom, National Digital Communication Policy- 2018, at 10, available at:

http://www.dot.gov.in/sites/default/files/Final%20NDCP-2018_0.pdf (last visited Oct. 10, 2018)

[56]Nokia, India Mobile Broadband Index 2018, at 5 https://onestore.nokia.com/asset/202016, (last visited Oct. 10, 2018).

[57]*Id.* at 4.

[58]*Id.* at 3.

[59]*Supra* note 55.

ACCESS TO MEDICINES AS AN ELEMENT OF RIGHT TO HEALTH: WITH SPECIAL REFERENCE TO PHARMACEUTICAL PATENTS IN INDIA

Nazim Akbar*

Abstract

The controversy between patent protection on one hand, and its relation to the accessibility and affordability of drugs on the other, is more critical than any other branch of Intellectual Property in the contemporary global debate. The TRIPS Agreement has made it obligatory for all member states to provide patent protection for pharmaceutical products and processes. The introduction of product patents in Indian pharmaceutical regime viewed as an international healthcare tragedy by millions suffering globally from life threatening diseases as a large number of them were getting benefitted from low cost drugs manufactured by the Indian generic drug manufacturing sector. This paper critically analyses the existing situations prevalent in India with respect to access to medicine. The author has dealt with the aspect of access to medicine as a human right and to what extent the medicines are "available, affordable and acceptable." This paper explores the present Indian legal system protecting the right to health by enabling the access to medicines. Lastly, the author has elaborated "the challenges with respect to the access to medicines in India" and subsequently, the author has given the suggestions to address the issue.

Key words

Pharmaceutical Patents, Access to Medicines, and Right to Health.

I. INTRODUCTION

"One third of the world's population still lacks access to essential drugs while in the poorest parts of Africa and Asia, over fifty percent of the population does not have regular access to the most vital essential drugs."

-M. Scholtz[1]

The foundation of human existence is not only ruled by science but also by 'law' as it plays a principal role in designing the social order. All the aspects of human existence are channelized through the portals of law. According to Kelson, "the Constitution as a grundnorm lies at the apex of the pyramid through which each law obtains its

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[1]M. Scholtz, *International Trade Agreements and Public Health: WHO's Role,* Conference on Increasing Access to Essential Drugs in a Globalized Economy Amsterdam (Nov., 1999).

significance."[2] As per D.D. Basu; "Constitution of India envisages a society wherein equality and justice have been engraved in the moral and legal attributes of the people."[3] Socio-economic rights are enshrined in the Indian Constitution and enjoy the same significance as is enjoyed by the civil and political rights.[4]

Access to medicines has always been a critical issue and it became exceptionally disputable after the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) was finalized in 1995. There is a list of causes that contributes to the lack of accessibility to essential medicines. Especially, the single most material cause is the exceptionally high prices of drugs, which puts some of the most essential medicines entirely out of the reach of substantial population living in the developing countries.

The introduction of product patents in Indian pharmaceutical regime viewed as an international healthcare tragedy by millions suffering globally from life threatening diseases as a large number of them were getting benefitted from low cost drugs manufactured by the Indian generic drug manufacturing sector.[5] The introduction of patent to pharmaceutical sector, apart from addressing private interest, established the concern for public interest in the form of health care concern. However, it could not achieve the desired outcome as it caused rising in the existing prices of drugs. The fourth ministerial conference, held in 2001 in Doha, Qatar adopted a declaration with respect to the public health related aspect of TRIPS. The declaration spelled out the stand of the agreement and empowered nations to take necessary measures for the protection of public health. This was a principal milestone in the evolution of the access to public health as it essentially put the right to health above the concerns of the protection of individual property.

Winnie Byanyima[6] opined that, "the access to medicines is not just a poor country problem. The high price of drugs is crippling healthcare systems across the world. Millions of people are suffering and dying because the medicines they need are too expensive." Health is a basic human right, necessary for the enjoyment of many other rights, particularly the right to development and inevitable for living a life with dignity. The attainment of the right to health is also a primary goal of State's policies and programs, regardless of its economic, social, cultural, religious or political background. The deprivation of medicines causes immense and avoidable suffering such as ill health, pain, fear, loss of dignity and life.[7] Improving access to existing medicines could save millions of lives each year.

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[2]Hans Kelson, *The Pure Theory of Law and Analytical Jurisprudence* 55(1) *Harvard Law Review,* 44-70 (1941).

[3]Durga Das Basu, *Indian Constitutional Law,* 445 (Kamal Law House, Kolkata, 2011).

[4]Uday Shankar and Saurabh Bindal, *Socio-Economic Rights in India and Financial Crisis,* Paper Presented at University of Leipzig, Germany (2011).

[5]Janice Mueller, "The Tiger Awakens: The Tumultuous Transformation of India's Patent System and the Rise of Indian Pharmaceutical Innovation", 68 U. *PITT. L. REV.* 495 (2007).

[6]Executive Director of Oxfam and a member of the High-Level Panel on Access to Medicines, UN.

[7]The Montreal Statement on the Human Right to Essential Medicines (2005); Marks, S. (ed.), *Health and Human Rights: Basic International Documents,* Harvard: HUP (2006).

II. PHARMACEUTICAL PATENTS IN INDIA AFFECTING THE ACCESS TO MEDICINES

In 1957, the Government of India delegated Justice N. RajagopalaAyyangar Committee[8] to look into the matter of amendment of the Patent Law and provide recommendations to the government regarding the same. After two unsuccessful amendments in 1965 and 1967, the Patent Act was passed in 1970 and the greater part of the provisions of the 1970 Act were brought into effect on 20th of April 1972 with publication of the Patent Rules, 1972.

By 1970, foreign pharmaceuticals dominated almost 70% of the residential market and charged among the most elevated drugs costs in the world. Because of developing general public health concerns, the Indian government passed the Patent Act, 1970, which in a single killer blow disposed of all product patents on drugs.[9] Section 5 of the Act banned pharmaceuticals from acquiring product patents on their drugs, implying that pharmaceuticals could look for just process patent that are for the most part simple for other organizations to design around.[10] India evolved a standout amongst the most powerful generic pharmaceutical businesses in the world, and national Indian firms caught an extensive swath of the domestic market share of the overall industry some time ago held by outside firms.[11] However, in 1995, India joined the World Trade Organization (WTO), reinforcing its stature as a dependable and trustworthy trade partner in the international economy. As a result, India needed to amend its Patent Act, 1970 in 1999, 2002 and 2005.[12]

Since the passing of Patent Act, 1970 to the year 1995, India didn't recognize product patents for pharmaceuticals.[13] Due to this advantageous situation, Indian pharmaceutical industry was able to churn out innumerable generic drugs, demonstrating India as one of the principal generic drug manufacturers in the world.[14] India's domestic pharmaceutical industry, which was non-existent at a time, has transformed into a global manufacturer of generic drugs by providing access to medicines with lower cost.[15] However, in the year 2005, because of its obligation under the TRIPS agreement, 1995, India was forced to amend its patent law to render product patent protection to pharmaceuticals and also it extended the period of protection from years to 20 years.[16]

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[8]Justice Rajagopal Ayyanger Committee Report, 1959.

[9]Patent Act, 1970, Section 5 excludes patents on "substances intended for use, or capable of being used, as food or as medicine or drug."

[10]*Supra* note 9.

[11]Mueller, *Supra* note 5 at 515.

[12]ShamnadBasheer, India's Tryst with TRIPS: The Patents (Amendment) Act, 2005, 1 *Indian J.L. Tech.* 15-17 (2005).

[13]AntaraDutta, From Free Entry to Patent Protection: Welfare Implications for Indian Pharmaceutical Industry, 93 *Rev. Econ. & Stat.* 160, 162 (2011).

[14]Mueller, *Supra* note 5 at 514-515.

[15]William Greene, The Emergence of India's Pharmaceutical Industry and Implications for the U.S. Generic Drug Market, 2-3, Office Econ. U.S. Int'l Trade Comin'n Working Paper No. 2007-05-A (2007).

[16]Basheer, *Supra* note 12.

TRIPS established certain unambiguous requirements. Patents must be conferred for inventions in "all fields of technology." Subject to limited exceptions[17] and need to last no less than a quarter century.[18] A few different prerequisites are ambiguously characterized; nevertheless, nations have had some flexibility in characterizing the specific contours of the TRIPS requirements. In the 2005 Amendment to the Patent Act, India brought product patents on pharmaceuticals into effect by just repealing Section 5 of the Patent Act. However, the 2005 Amendments likewise contained various access friendly policy levers, or "TRIPS flexibilities," that the Indian generics industry could bring forth to negate brand-name and bring generics to the market, regardless of reintroduction of product patents.

III. RIGHT TO HEALTH: INDIAN LEGAL FRAMEWORK

Henry Sigerist[19] has rightly observed that health is one of the goods of life to which man has a right; wherever this concept prevails, the logical consequence is to make all the measures for protection and restoration of health to all and the same becomes a public function of the State.

According to Black's Law Dictionary, health means, "freedom from pain and sickness, the most perfect state of animal life and natural agreement and concordant disposition of the parts of the living bode."[20] Health is defined as an ideal condition and an important social and political good[21] and also is "the state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity."[22] The Preamble of WHO further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic and social condition."[23] Therefore, the human right to health means that everyone has the right to highest attainable standard of physical and mental health, which includes access to all medical services.

Under the Constitution of India

Article 21[24] (Part III, Fundamental Rights) of the Constitution of India, 1950 casts an absolute obligation on the State to life. The Supreme Court of India has time and again categorically emphasized that Article 21 also includes, in its ambit, the Right to Health.[25]

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[17]TRIPS Agreement, Article 27.

[18]TRIPS Agreement, Article 33.

[19]Ravi Duggal, Operationalizing Right to Healthcare in India, available at http://www.usitc.gov/publications/332/working_papers/EC200705A.pdf. (last visited on 31 Aug. 2016).

[20]MallikaRamchandran, The Right to Health and the Indian Constitution, 1 *Delhi Law Review* 1 (2004).

[21]G.R. Lekshmi, Access to Healthcare: Problem and prospects, *Cochin University Review* 271 (2007).

[22]Preamble of the WHO Constitution.

[23]WHO Factsheet No. 31, Right to Health.

[24]"Protection of life and personal liberty: No person shall be deprived of his life and personal liberty except according to procedure established by law."

[25]*Parmanand Katara v. Union of India,* (1989) 4 SCC 286; *Kirloskar Bros. Ltd. v. ESI Corpn.,* (1996) 2 SCC 682; *State of Punjab v. Mohinder Singh Chawla,* (1997) 2 SCC 83; *Paschim Bengal Khet Mazdoor Samity v. State of W.B.,*(1996) 4 SCC 37.

Article 47[26] (Part IV, Directive Principles of State Policy) of the Constitution of India also stresses on the improvement of public health and government has an obligation to regulate the prices of drugs and medicines so that they are available to the citizens at affordable prices. Thus, the policy makers must bear in mind that providing "right to health" is their constitutional obligation.

Under the Patent Act, 1970

India joined the WTO in 1995, it became subject to the agreement on TRIPS, which requires it, among other things, to restore product patents on drugs by a certain date. The 2005 Amendment of Patent Act did just that, additionally it also incorporated various provisions, called "TRIPS flexibilities," and intended to decrease the blow regarding access to affordable drugs. The fundamental TRIPS flexibilities, creating access to affordable drugs, are:

Evergreening of Patent: Section 3(d)

The most disputed provision, and the most astounding source of concern for the pharmaceutical sector, is Section 3(d) of the Patent Act. Section 3(d) is the principal provision of the Indian Patents Act regarding patent eligibility. Additionally limiting the extent of patentability, particularly for pharmaceutical inventions, Section 3(d) states that a patent may not be granted for:

The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.[27]

Thus, in India, patent law bars minor enhancements on medications, basically prohibiting evergreening. In effect, a drug patent holder may not restrict or prevent competition from generic manufacturers by baselessly extending the patent term.[28] The Supreme Court of India in *Novartis AG v. Union of India,*[29] by holding the right to health of its people as paramount, ruled that Section 3(d) serves as an additional bar for drugs to clear in order to prevent "evergreening," the practice of making trivial changes to an existing product simply to extend the patentee's exclusive rights over the product. One of the core issues of the case is whether, under Section 3(d) of the 2005 Amendment, the final version of Gleevec enhances the "know efficacy" of the previous form of the drug. Novartis contended that Section 3(d) was immaterial to the case, but the court didn't find this argument persuasive. Therefore, in India, patents are granted only to those pharmaceutical products that have altogether upgraded the "efficacy" of the product.

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[26]"Duty of State to raise the level of nutrition and the standard of living and to improve public health: The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement ofpublic health as among its primary dues and, in particular, the State shall endeavor to bring about the prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health."

[27]The Patents (Amendment) Act, 2005, No. 15, Section 3(d).

[28] Inderjit Singh Bansal, *et al., Evergreening: A Controversial Issue in Pharma Milieu,* 14 J. Intellectual Property Rights, 299-300 (2009).

[29](2013) 6 SCC 1.

The Novartis case is important because it highlighted that its no longer acceptable to the global public that hundreds of millions of people are denied access to life-saving drugs, because of monopoly pricing, adversely affecting their right to health.

Compulsory Licensing: Section 82-94

The WTO established the TRIPS agreement to strike a balance between protecting patent holders and giving the public access to inventions. The agreement included a provision for compulsory licensing[30] that would permit a government to allow someone else, usually a generic manufacturer, to produce a drug without the explicit consent of the patent owner. Although TRIPS defined certain qualifications for issuing compulsory licenses, countries retained broad discretion over when to grant compulsory licenses and how to establish adequate remuneration. The Doha Declaration,[31] enacted in 2001, was intended to clarify some of the confusion about compulsory licenses but instead left the adequate remuneration language untouched.[32]

The Indian Patent Act provide that an application for the grant of compulsory license can be made only after three years from the date of the grant of patent unless exceptional circumstances like national emergency or extreme emergency can be used to justify the grant of a license on an earlier date. Three broad grounds for the grant of compulsory licenses are: i) Reasonable requirements of the public with respect to the patented invention have not been satisfied; ii) The patented invention is not available to the public at a reasonably affordable price; & iii) The patented invention is not worked in the territory of India. The Patent Act sets out the circumstances under which "reasonable requirements of the public" would not have been met.[33]

In *Natco v. Bayer Corporation*[34] India's Controller of Patents granted a compulsory license to Natco over Bayer's Naxavar drug. This move was taken to achieve access to medicines for the protection of right to health.[35]

Shamnad Basheer,[36] has pointed out that "I think compulsory licensing is the way forward… In the entire debate about patents, this is the middle path."

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[30]TRIPS Agreement, Article 31.

[31]The Doha Declaration recognized that member nations should not strive to uphold the TRIPS Agreement at the expense of the nations' public health. The clarification embodied in the Doha Declaration resulted from an increasing concern over public health problems affecting the developing and least-developed countries.

[32]The Doha Declaration did try improving access to some drugs by allowing counties to use their power issue compulsory licenses to support the production of generic drugs for export. However, the effort has proven to be insufficient and leaves the current system of state by state policy making relatively untouched.

[33]RicadoMelendex-ortiz& Pedro Roffe (eds.), *Intellectual Property and Sustainable Development Agenda in A Changing World* 106 (Edward Elgar Publishing Ltd., Massachusetts, 2009).

[34]*Bayer Corporation v. NatcoPharma Ltd.,* Order No. 45/2013.

[35]Vikas Bajaj & Andrew Pollock, India Orders Bayer to License a Patented Drug, N.Y. Times, March 12, 2012, available at: www.nytimes.com/2012/03/13/india-overrules-bayer-allowing-generic-drug.html. (last visited on 15.12.2017).

[36]He is a Professor at West Bengal National University of Juridical Sciences.

Revocation of Patent: Section 66

Section 66[37] of the Patent Act enables the central government to revoke a patent where it is observed to be mischievous to the State and prejudicial to the public. The government of India has revoked just two patents so far, *i.e.,* evocation of Agraceru's Patent in 1994 and Revocation of Avasthagen's Patent in 2012. Section 66 works as a remedial provision and the government is considered as the adjudicating authority which guarantees that public interest is given more priority than individual interests.

Bolar Provision: Section 107A(a)[38]

The Bolar exemption is very relevant to the Indian scenario as it plays a crucial role in protection of major part of the population in India that is suffering from deadly diseases. The Bolar provision gives an exception from patent infringement to the generic manufacturers from utilizing and importing patent drugs for the sole purpose of R&D, so that they will be ready with their generic version to get regulatory approval before the patent on that product expires.

Section 107 (b) of the Act implies that "importation of patented products by any person from a person who is duly authorized under the law to produce and sell or distribute the product, shall not be considered as an infringement of patent rights." For instance, an MNC acquires a patent on a pharmaceutical product in India and, furthermore, offers a similar product more economically outside of India, say Somalia. A third party who purchases a product from the patentee, or its agent, in Somalia and imports it into India for re-sale then they would not be liable for infringement of patent. This result is consistent with the traditional view of international exhaustion as one in which the patentee has obtained its "reward" by th first sale anywhere in the world.

IV. CHALLENGES WITH RESPECT TO ACCESS TO MEDICINES

Development of Medicines: Needs R&D

Intellectual property law and policy has a notable connection with the promotion of R&D for primary health needs and access to affordable essential medicines.[39] Where primary health needs are not effectively tackled by existing medicines, the right to access to medicines imposes a duty upon the States, parties to the ICESCR,[40] to take required measures to ensure R&D for new medicines addressing primary health needs.[41] The

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[37]Where the Central Government is of the opinion that a patent or the mode in which it is exercised is mischievous to the State or generally prejudicial to the public, it may, after giving the patentee an opportunity of being heard, make a declaration to that effect in the Official Gazette and thereupon the patent shall be deemed to be revoked.

[38]Certain acts not to be considered as infringement: For the purpose of this Act - (a) any act of making, constructing, using, selling or importing a patented invention solely for uses reasonably related to the development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product; shall not be considered as an infringement of patent rights.

[39]Report of the High Commissioner for Human Rights, Para 30.

[40]The International Covenant on Economic, Social and Cultural Rights.

[41]*Supra* note 39 at Para. 31.

diseases which aren't given much attention by the pharmaceutical companies, due to the poor purchasing power of people as well as less number of patients, are called 'Neglected Diseases,' such as, Leishmaniasis (Kala-azar), Onchocerciasis (River blindness), Chagas disease, Leprosy, Schistosomiasis (Bilharzia), Lymphatic filariasis, African trypanosomiasis (Sleeping sickness) and Dengue fever. Malaria and Tuberculosis are also often considered to be neglected diseases.[42] Such diseases, in spite of the fact that they are seriously disabling and life-threatening, attract inadequate R&D. the pharmaceutical companies invest more on marketing and promotion than on R&D. it is interesting to note that many of the pharmaceutical companies don't even have their own manufacturing plants and thereby they are involved in third party manufacturing.

Quality of Medicines

It is the duty of the State to guarantee that the medicines of good quality are available throughout its jurisdiction. Thus, effective medicine regulation is required to ensure the safety, efficacy and quality of medicines available in public and private sector, as well as the accuracy and appropriateness of medicine information available to health professionals and public.

While the safety and quality of medicines is a problem in India, the magnitude of the problem is much greater, as the poor quality medicines may be the only ones to reach the poor. Many of the anti-malaria drug samples failed quality control tests, while more than half of anti-retrovirals didn't met the set standards. The Central Drugs Standard Control Organization (CDSCO) of India has inadequate capacity to regulate the medicines market. The inadequacy of such an authority is clearly inconsistent with the right to the highest attainable standard of health. In the absence of a standard medicines regulatory system, the Indian Medical practitioners depend upon the reputation of those pharmaceutical companies who have exhibited their devotion to quality over the time. Moreover, once a manufacturer obtains a license, after quality check, there is no criteria for further quality check of medicines.

In India, the actual problem is not only about the expensive branded medicines versus cheaper generics but it is also about the quality medicines versus suspect quality medicines. The Medical Practitioners have come to trust certain companies and their brands over time. Therefore, it is difficult for them to shift this trust to generics, manufactured by unknown companies. Also, inmany of the cases, the alleged generics are also marketed and promoted with a brand name - the sole difference being that these brand names are not that extensively promoted and publicized. Moreover, if the Medical practitioner prescribes a medicine with its pharmaceutical salt name, then in all probability, the pharmacist will dispense it with another branded generic drug of dubious quality.

As the discussion about the affordable medicines gets overshadowed by drug safety, it is suggested to have a glance at the findings of a recent report on substandard and spurious drugs by the National Institute of Biological for CDSCO. The report established that branded medicines are in no way assurance of quality.

[42] *Supra* note 23 at 8.

Reliable System for the Supply of Medicines:

Whether it goes for a supply system that is public, private or mixed, a State has a legal duty to make sure that there is an authentic, dependable, efficient and transparent mechanism for the supply of quality affordable medicines.The supply mechanism should be accustomed to prevalent needs, get good value for money, reduce waste and prevent corruption. Most importantly, it must be designed to assist those living in destitute and remote areas, as well as to do urban classes.[43] As half of the medicines, prescribed by the government medical practitioners, are not available in the pharmacy of such government hospitals, given the fact that the medicines available in the government pharmacy are cheaper than the private pharmacies. Therefore, the customers are bound to rely on private pharmacist for such prescribed medicines.

Price Control in India

India is among the countries with the highest Out of Pocket expenses (around 67% as per NSSO 68th Round 2011-12) on health care. Expenditure on drugs constitutes over 67% of out of pocket expenditure. As per WHO study estimates, "about 65%of the Indian population lacks regular access to essential medicines." It creates an inconsistency in itself because of the fact that India is one of the largest manufacturer and supplier of the generic medicines to the world.

The Drug Pricing Control Order (DPCO) is the main regulatory system which controls the prices of medicines in India and is controlled and monitored by the National Pharmaceutical Pricing Authority (NPPA). DPCO are issued for enabling the government to declare a ceiling price for essential and lifesaving medicines (as per prescribed formula) so as to ensure that these medicines are available at a reasonable price to the general public. The latest DPCO was issued on 15.05.2013. Under the DPCO 2013, the prices of only those medicines that figure in the National List of Essential Medicines (NLEM), are monitored and controlled by the regulator, the NPPA. However, the pharmaceutical companies in order to exclude their medicines from the DPCO add any chemical entity which is not covered under DPCO to the existing medicines covered under DPCO. This results in rise of the price of medicines due to the exclusion from the purview of DPCO, even though such addition of chemical entity doesn't enhance the efficacy of such medicines. For instance, Cefixime, an antibiotic used for bacterial infection, is covered under DPCO 2013, with a price capping of Rs. 7.90. The pharmaceutical manufacturer named Cadila added Lactobacillus, which is available in the market at Rs. 0.40/- as a finished product, to Cifixime and sells a new finished product in the name of Symbiotik with an MRP of Rs. 32.82.

The entire issue of cheaper generics is based on the premise of measurable and enforceable assurance about quality through bioequivalence tests and other globally mandated parameters. To ascertain the quality of medicines, the Indian Medical practitioners have to depend upon the reputation of companies like Cipla, Sun and hundreds of others who have displayed their devotion to quality over the time and become trusted names in the eyes of Medical practitioners and patients.

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[43]Paul Hunt & Rajat Khosla, "The Human Right to Medicine" 8 *International Journal on Human Rights* 88 & 106 (2008).

Responsibility of the State:

The CESCR[44] sets out four elements of the right to health that have to be ensured; that is, all health care facilities, goods and services, including medicines, shall be - i) available in sufficient quantity within the State party; ii) accessible to everyone without discrimination, economically as well as physically; iii) acceptable culturally and in light of medical ethics; & iv) of good quality."[45] States, therefore, are required to resort to a variety of economic, financial and commercial incentives in order to influence research and development into specific health needs. In short, States not only have a duty to ensure that existing medicines are available within their territory, they also have the responsibility to take reasonable to take reasonable measures to ensure that there is dire need to develop new medicines and accordingly make them available.[46]

States have the duty to respect, protect and fulfill the right to access to medicines as they have with regard to other rights.[47] The duty to respect requires the State to refrain from action that interferes with the right to access to medicines. The duty to protect obliges the State to ensure that third party doesn't hinder the access to medicines. The duty to fulfill compels the State to embrace suitable legislative, administrative, budgetary and other measures towards the attainment of the access to medicines.[48] For instance, State is required to avail requisite information on essential medicines.[49]

The government of India came up with its National Health Policy, 2017 and planned to improve the Public Sector Capacity for manufacturing the Essential Drugs and Vaccines[50] and to stimulate innovation and new drug discovery as required to meet health needs.[51] But the actual situation shows something different and raises an alarm. The latest survey shows that the government of India spends only about 0.6-0.7% of its annual GDP on R&D, which isn't going t fulfill its duty making the medicines available, affordable and acceptable with good quality. Moreover, the status of the Central Public Sector Enterprises (CPSEs) is also not showing good picture. There are five CPSEs under the administrative control of the Department of Pharmaceuticals. Out of these five PSUs, three viz. Indian Drug & Pharmaceuticals Limited (IDPL), Hindustan Antibiotic Limited (HAL) and Bengal Chemicals & Pharmaceuticals Limited (BPCL) are sick and referred to Board of Industrial & Financial Reconstruction. Rajasthan Drugs & Pharmaceuticals Ltd. (RDPL) has also reported losses since the year 2013-14. Karnataka Antibiotic & Pharmaceuticals Ltd. (KAPL) is the only profit making CPSE.[52]

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[44]United Nations Committee on the Economic, Social and Cultural Rights.

[45]CESCR, GC No. 14, Para. 12.

[46]Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* 130 (Ashgate Publishing Ltd., 2015).

[47]UN Commission on Human Rights Resolution on "Access to medication in the context of pandemics such as HIV/AIDS, TB and Maleria," (April 16, 2004) 2004/26, Para. 7.

[48]*Supra* note 45 at para. 33, 36 and 37.

[49]*Supra* note 46 at 131.

[50]National Health Policy, 2017, Para. 20.

[51]*Id.* at Para. 25.2.

[52]Annual Report 2016-17, Ministry of Chemicals & Fertilizers, Department of Pharmaceuticals, Government of India, p.63.

Responsibility of Pharmaceutical Companies and Non-state Actors:

Companies constitute powerful global actors in the current world order.[53] in relation to access to medicines, the efforts to give more precision to the scope of pharmaceutical companies' human rights responsibilities was started by the first special Rapporteur on the Right to Health. The Special Rapporteur has prepared the Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines.[54] The preamble of these guidelines affirms that pharmaceutical companies, including innovator, generic and biotechnology companies, have a human right responsibility in relation to access to medicines.[55]

Under the right to health, States are required to allow for participation of NGOs, civil society groups, community groups and the business sector in the evaluation of indicators and benchmarks of access to medicines. The Declaration of Alma-Ata also stresses the import of civic society participation in health policy decision making. These stake holders both have responsibility under the right to health and enjoy the right to active and informed participation on decisions bearing on their health. Meaningful accountability also requires processes that empower and mobilize ordinary people to become engaged in political and social actions. Thus, State has crucial obligations to cultivate environment that allow groups and individuals to enjoy their right to participate and that encourage key stakeholders to fulfill their duties to improve access to medicines.

V. CONCLUSION

The sustenance of human life is the primary duty of the State, as propounded in the most basic conception of the social contract theory of State formation. Patenting in the context of access to medicines has become a grave issue, which was exacerbated when a number of countries has to introduce strict patenting provisions under TRIPS which resulted in a large section of the world population not being able to access medicines at affordable prices.

No doubt Pharmaceutical patent creates hindrance in the right of people as to access to medicines but in India, the actual factor which is barring the access to medicines is not the patented medicines but the generic medicines. As, in India, the consumption of generic medicines is much more than the patented one. Although, the generic medicines in India are cheaper as compared to other parts of the world, however, the purchasing power of Indians is quite less which results in non-affordability of medicines. As per the latest NSSO survey on healthcare, conducted in 2014, medicines emerged as a principal component of total health expense 72% in rural areas and 68% in urban areas. For a country with one of the highest per capita out-of-pocket expenditure on health, even a modest drop in drug prices will free hundreds of households from the widespread phenomenon of a medical poverty trap.

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[53]Justin Nolan, "With Power comes Responsibility: Human Rights and Corporate Accountability", 28 *The University of New South Wales Law Journal,* 581 (2005).

[54]Report of the Special Rapporteur on the Right to Health, (Aug. 1, 2008) UN Doc.A/63/263.

[55]*Ibid.*

The conduct of the pharmaceutical companies has emerged as one of the challenges to access to medicines as an element of the right to health. The pharmaceutical companies charges100-400 times extra of the actual manufacturing cost of a medicine which results in higher prices for consumers and higher profits for the pharmaceutical companies. Moreover, the role of NPPA while fixing the prices of essential medicines through DPCOs is also questionable to some extent.

The role of the government in this scenario is also significant. Although, the government of India, on one hand came up with National Health Policy 2017 in which it assured an increase in the health expenditure (Centre and State together) from the existing 1.15 to .5% by 2015 but same assurance didn't find any reflection in the budget, 2018.[56] Instead of spending at least 1% of the GDP as proposed by the draft National Health Policy document, the provisions for heal in Union budget presented by Finance Minister, has reduced allocation to 0.29% of the GDP from 0.32% last year.

Further, challenge to the access to medicine in India has increased due to lesser investment on R&D as well as no focus on manufacturing the essential drugs in CPSUs. Moreover, the government of India by imposing high GST rates has contributed to the bundle of impediments to the access to medicines under right to health. Medicines remain overpriced and unaffordable in India. In a country mired in poverty, medical debt remains one of the biggest factor for keeping millions back into poverty.

[56]Indian Express, The Idea Page (last visited on Feb. 3, 2018).

Dehradun Law Review

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