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PART 04

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# PREFACE

This book is a compilation of the selected research papers received due to Call for Papers by the Alexis Foundation in July 2016.

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Lastly, we would like to invite comments, suggestions and guidance from various experts and readers about this book for improvements in future. The comments/suggestions can be mailed to us at info@alexis.org.in.

- **Editor(s)**

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## 1. CYBER-TERRORISM – CYBERSPACE, A TOOL FOR GLOBAL TERRORISM

Author(s): Shramana Dwibedi and Shivam Shukla

**ABSTRACT**

*Cyber-terrorism, an analysis of the word provides us with a clear meaning- to execute terrorist activities using cyberspace-computers and its aided technologies, primarily the Internet. The term is gaining prominence with the growing impact of abuse in the field of cyber technology, however in the absence of any prevailing laws in the Information Technology sector, most countries are failing to gauge the outcome of such attacks and regulate the same, in turn, endangering cyber and national integrity and security. Hence, a study to incorporate cyber-terrorism in the Information Technology laws of India becomes essential. The Internet has global access and is dynamic in its reach. Its user-friendly interface has encouraged terrorist organizations to make use of this mechanism, allowing them to realize their militant ideologies and conduct cyber-attacks on a global level causing widespread destruction to lives, property and resources. Cyber-terrorists are a threat to various countries as they are adept at hacking into protected computer systems, leaking valuable private data relating to a nation's security and defence. This paper shall focus on recounting and analyzing activities that constitute cyber-terrorism. The use of cyberspace is done not only to materialize terror attacks but also to spread radical ideologies over the Internet with an aim to recruit young minds (special focus on the Islamic State's influence over Indian youth) and to procure funding and financing for the militant groups. The role of cyber technology in facilitating terror acts in the modern day such as the Mumbai attacks of 26/11 and the controversial topic of the possible involvement of cyber-terrorism in the disappearance of the MH 370 shall also receive mention in this paper. How terrorist organizations are spreading their roots throughout the world over Internet communication shall also be analyzed. Cyber-terrorism can wreak havoc in the public domain if not brought under immediate check, and for this purpose, certain methods shall be advised in the paper to combat cyber-warfare effectively. India, therefore, has to along with other countries under the effective leadership of the United Nations devise legislations and special combat forces to fight cyber-terrorism on a united front.*

**Keywords:** Cyber-terrorism, Internet, Information Technology laws of India, Hacking, Nation's security and defence, Islamic State, MH-370, Combat cyber-warfare.

## DEFINING CYBER TERRORISM

[1]"Cyber terrorism is the convergence of cyberspace and terrorism. It refers to unlawful attacks and threats of attack against computers, networks and the information stored therein that are carried out to intimidate or coerce a country's government or citizens in furtherance of political or social objectives. Further, to qualify as cyber terrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injury, explosions, or severe economic losses would be examples. Serious attacks against crucial infrastructures could count as acts of cyber terrorism, depending on their impact."

[2]Dorothy E. Denning's attempt above at defining cyber-terrorism mainly talks about pure cyber terrorism that essentially deals with threats or attacks against a computer system with an aim of damaging its physical structure and its attached networks. This is done primarily to utilize the computer system as a tool, a weapon for destruction or to affect adversely the information stored on that particular computer system.

However, describing the elements of cyber terrorism is certainly more exhaustive than it appears. Hence, with an objective to assimilate the different aspects involved in this form of cyber warfare, other **notable definitions** of the same shall be seen.

[1] Cyber terrorism: The Logic Bomb versus the Truck Bomb, Dorothy E. Denning, Global Dialogue Vol 2 No. 4 Autumn 2000, Terrorism: Image and Reality

[2] Sarah Gordon, Cyberterrorism?, Symantec, available at https://www.symantec.com/avcenter/reference/cyberterrorism.pdf, Page 4 Para 3

- [3]**The United States Federal Bureau of Investigation (FBI)** defines cyber terrorism as, "The premeditated, politically motivated attack against information, computer systems, computer programs, and data which result in violence against noncombatant targets by sub-national groups or clandestine agents."
- [4]**The North Atlantic Treaty Organization (NATO)** in 2008 defined cyber-terrorism as, "A cyber-attack using or exploiting computer or communication networks to cause sufficient destruction to generate fear or intimidate a society into an ideological goal."
- [5]**The US National Infrastructure Protection Centre**, a part of the Department for Homeland Security defines it as, "A criminal act perpetrated through computers resulting in violence, death and/or destruction, and creating terror for the purpose of coercing a government to change its policies."
- [6]**James Lewis (Centre for Strategic and International Studies)** defines cyber terrorism as, "The use of computer network tools to shut down critical national infrastructure (such as energy, transportation, government operations) or to coerce or intimidate a government or civilian population."

All the definitions cited above, re-iterate one common factor i.e. the use of cyber-space as a medium to carry out terrorist activities.

[3]Dr. Mudawi Mukhtar Elmusharaf, Cyber Terrorism : The new kind of Terrorism (**April 08, 2004**), available at http://www.crime-research.org/articles/Cyber_Terrorism_new_kind_Terrorism

[4]Cyberterrorism Defined(as distinct from "Cybercrime"), available at http://resources.infosecinstitute.com/cyberterrorism-distinct-from-cybercrime/

[5] Supra 3

[6] Supra 3

Now, an analysis of the above definitions to present a thorough picture of cyber-terrorism is provided. An act so planned or achieved by an individual or a group of people, barred by law to create a fear in the public domain or cause actual destruction of property and loss of lives, can be called as terrorism. Such acts dominantly disrupt public peace and national security and an environment's natural setting. The use of cyber technology and its connected networking features, primarily, the Internet, in the different phases of a terrorist attack can be termed as cyber-terrorism.

Cyber terrorists are traditional terrorist organizations that exist for their subjective reasons. Most terrorist organizations have as their agenda Jihad- their understanding of Jihad is peculiar in its sense, they wish to establish a dominant Islamic Caliphate, a ruling religion over all other religions. They believe that an Islamic rule can be established by empowering the Muslim / Islamic population to carry out menacing destruction over places which refuse to accept Muslim domination. The sad part is that their idea of Jihad is actually a rigid autocratic rule, that these staunch terrorist leaders attempt to establish. Hence, the fight ensues between such organizations and anti-terror combating units such as various countries.

Technology is one of the strategic factors driving the increasing use of the Internet by terrorist organizations and their supporters for a wide range of purposes, including recruitment, financing, propaganda, training, incitement to commit acts of terrorism, and the gathering and dissemination of information for terrorist purposes. While the many benefits of the Internet are self-evident, it may also be used to facilitate communication within terrorist organizations and to transmit information on, as well as material support for, planned acts of terrorism, all of which require specific technical knowledge for the effective investigation of these offences.

**UNDERSTANDING THE REASONS BEHIND GROWTH OF CYBER-TERRORISM:**

With the evolution of man, scientific inventions have always progressed at an impressive pace. The concept of Internet is intriguing to terrorist organizations because of the facilities it provides.

i. **User-friendly interface:** Usage of computers and the Internet is a child's play. Equipped with a user-friendly interface, shortcuts and help taskbar that teaches the mechanism for using this technology, ample sources providing knowledge of the same are available in books as well as the web.

ii. **Possibility of Global Communication:** The Internet has given its users the scope of communication that can take place on a global level. Either by way of e-mails, or broadcasting features, people can connect with each other while residing even in the most remote places. Users can connect with others from any part of the world. All this has been facilitated by the features an Internet connection provides. The terrorist organizations use this feature to connect with other such groups or fresh recruits to plan out their terror attacks. This way of communication allows users to transcend physical state boundaries to connect with a wider audience worldwide.

iii. **Easy Access:** Creating an e-mail account or a Facebook or Twitter account is simple and involves certain guided steps. Such facilities come free of cost and hence, registering is easy. Also, there is no bar on the number of accounts that can be possibly made for an individual. In the absence of any such regulation, multiple accounts can be made in a very short period of time.

iv. **Faster communication:** Communication over phones and messaging happen instantaneously and hence, is a preferred mode of communication by the terrorists. Emails take a very brief period of time and are therefore much used. Such instantaneous modes of communication come in handy as information is received and sent very quickly.

v. **Secure method:** Communication happening over the Internet via emails and broadcasting are not lost in transit as in the case of traditional mail or post and are delivered to its desired receiver without any delay.

vi. **Encryption of Data:** Sites like Facebook and Twitter as part of their privacy scheme encrypt the information and data on their sites belonging to their users.[7] Encryption means to transform the data being transferred by their users into a form of code that cannot be easily deciphered. This is done to ward off hackers who wish to access, without authorization, the private information of other users. This feature makes it difficult for governmental agencies to track any information pertaining to terrorist activities being transferred over the Web. The Apple Company also provides strong encryption in its manufactured mobile phones. This feature allows terrorists to convey messages and terror plans and designs over the web without a fear of getting caught.

vii. **Sending Coded Messages:** The advancement of technology has seen excellence. One such mechanism is the art of coding and decoding. Terrorist organizations have developed their own coding methods, using the same, they transfer data to each other. Since, such coding schemes are alien to others, they fail to understand the hidden message which is realized only by the desired receiver. This method aids their increased need for security and privacy of the data being sent.

viii. **Applications (Apps):** Certain apps like Google Maps and Google Earth have preserved the locations of places in minute details and present them to users in the way of virtual maps. Such

[7] Vangie Beal, available at http://www.webopedia.com/TERM/E/encryption.html

an app is used largely by terrorists to get an idea about the location that they aim to attack. This helps them in planning and designing an attack.

## FOCUSING ON INDIA-A VULNERABLE POSITION

India is at a more serious threat of cyber-attacks than can be gauged for because of the following reasons:

i. **Dispute over occupation of Kashmir:** Dispute over occupation of Kashmir has often led the two neighboring countries of India and Pakistan into war. Terrorist organizations have taken this as an agenda to launch terror attacks on India repeatedly. Infiltrants from Pakistan have given effect to massive terrorist attacks such as the 26/11. These terrorist groups wish to widen the gap between the Hindus and the Muslims hereby, disrupting the harmony among them.

ii. **Potential threat from Bangladesh:** Bangladesh is a known hub of terrorist organizations that infiltrate into the Indian landmass illegally to carry out attacks. Often these attacks are a joint venture by terrorist groups from different parts of the world. A cyber- attack is a probable incident.

iii. **Inciting the Youth population:** India harbours a large youth population. Often terrorists incite the young over the Web by advertising their ideology and encourage them to execute an attack within India. Hence, India is not safe within.

iv. **Increased diplomatic relations between India and the USA:** The United States of America is on the hit-list of terrorist organizations for their pioneering attempts at combatting terrorism. India has always supported the USA in such schemes which have angered the militants.

Hence the **United Nations Office on Drugs and Crime (UNODC)** in collaboration with the **United Nations Counter-Terrorism Implementation Task Force** have prepared a report, **'The use of the Internet for terrorist purposes'** whereby they have highlighted the important role that Internet continues to play in sketching out terrorist activities.

[8]**Yury Fedotov, Executive Director (UNODC)** in the Foreword of the report has stated- The use of the Internet for terrorist purposes is a rapidly growing phenomenon, requiring a proactive and coordinated response from Member States.

Cyber terrorism involves different phases. Devising a terror attack employing cyber tools to facilitate the same may form the back bone of the definition of cyber-terrorism but it is definitely not the sole definition aspect of it.

[9]The **United Nations Office on Drugs and Crime (UNODC)** in collaboration with the **United Nations Counter-Terrorism Implementation Task Force** have prepared a vast exhaustive report by the name **'The use of the Internet for terrorist purposes'** whereby they have stressed on the different aspects or elements that also form a part of cyber-terrorism. The following have been discussed in details below:

1. **The role of cyber-technology in recruiting young minds:** Internet communication is used for:
    - Propaganda advertising using social media
    - Recruiting youngsters in the terrorist regime

[8] Available at http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf, Foreword
[9] Available at https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf,Pages3-8

- Inciting youngsters to join terror organizations

The above has been explained with a special focus on the Islamic State and India:

The ISIS has utilized cyber technology from its inception when they uploaded beheadings of hostages on the Web and continue to do so even today. [10]ISIS member Mohammad Shafi Amar (alias Yusuf al-Hindi's) gave effect to his terrorist propaganda by advertising about the organization on the web. Youngsters who liked his Facebook page would receive personalized messages from him where he would attempt to prejudice the person's brain to follow their radical tendencies. He would organize meetings via Skype chats with the young recruits under false identities.

In the year 2014, a Twitter account belonging to an ISIS member was tracked down to Bengaluru, India. This account belonged to 'Mehdi Masroor Biswas' by the account name- @ShamiWitness. This man was responsible for advertising the Islamic State agenda to the Indian youth by way of cyber social channels. He lured in young recruits by emphasizing on the concept of Jihad as perceived by the terrorist organizations. Sometimes, men from economically weaker sections are roped in by offering money to their families. A former National Security Advisor has opined that close to 100 Indians are engaged in the activity of publicizing the Islamic State propaganda with a purpose of attaining fresh recruits over cyber-space.

[10] Manoj Gupta, Revealed: How ISIS recruits and trains Indian youngsters for terror strikes (Feb 1, 2016, 8:51 pm), available at http://www.ibnlive.com/news/india/revealed-how-isis-recruits-and-trains-indian-youngsters-for-terror-strikes-1197835.html

Failed Attempt of Attacks- A threat of an attack, as a consequence of standing by the USA in its fight against the militants of the Islamic State, has already been received by India.

The Islamic State aims to unite terrorist organizations in Pakistan and Afghanistan to launch collaborative attacks on the USA and its allies in combating terrorist attacks. This is an open threat to India's security.

[11]A report published in the USA Today (reported by American Media Institute) states that a 32 page document in Urdu which was seized from a Pakistani citizen with connections in the Pakistani Taliban when translated in English states that preparations for an attack in India are underway.

[12]This threat was perceived prior to the event of Republic Day in India, 2016, 18 suspected ISIS terrorists were detained from all over the country by counter-terror raids conducted by intelligence agencies. The imminent attack that was thwarted off successfully was to attack Prime Minister Narendra Modi and disrupt the Republic Day parade.

2. **Communication over encrypted coded messages:** The various online sites such as Twitter and Facebook among many others use encryption as part of its privacy feature to achieve data

[11] PTI, ISIS preparing to attack India, likely to spark Indo-US confrontation: report (July 29, 2015, 8:50pm), available at http://indianexpress.com/article/india/india-others/isis-preparing-to-attack-india-spark-indo-us-confrontation-report/

[12] Arunoday Mukharji, Delhi on high alert over ISIS threat to Modi, Hollande during R-Day celebrations (Jan 22, 2016), available at http://www.ibnlive.com/news/india/delhi-on-high-alert-over-terror-attack-threat-to-modi-hollande-during-r-day-celebrations-1193019.html

security. The data that is transferred using these sites or the communications taking place are translated into a secret code described as encrypting. To get an access to such encrypted data, it is necessary to possess a secret key or password. This was done to ward off hackers from getting unauthorized access to users' accounts. However, this has been duly used by terrorist organizations to secure their own communication that often contains imminent terror plans and designs. They make use of such sites for communication throughout the militant domain in the world. Using these channels keep their data secure and private. The National Investigative [13]Agency had reported that the recruits of the Indian Mujahideen use proxy servers to hide their true geographical location and complex codes to communicate. They set up e-mail accounts that disappear if not accessed again within 24 hours of the first use. Riaz Bhatkal, an Indian Mujahideen terrorist has been known to run a hi-tech command centre from Karachi to establish links with other terrorist groups in Nepal, India, Sri Lanka, Bangladesh and the Maldives. They transform their messages in the form of certain codes that are only known within the terrorist organization so that they cannot be deciphered by the governmental security agencies,even if they are intercepted.

Obtaining finances to aid terror acts - Not only are terrorist attacks planned out or communicated via these channels, financing deals and arrangements are achieved and sponsors for such acts are gathered from different parts of the world by approaching them over Web communication. Hence, transaction deals take place via encrypted messages. Apple company provides this feature in its mobile phones.

[13] Anthony Cuthbertson, Are Isis hackers trying to destroy the internet?( December 16, 2015 12:56 GMT), available at http://www.ibtimes.co.uk/are-isis-hackers-trying-destroy-internet-1533332

[14]In the present situation, the US government is demanding weakened encryption of data by companies such as Facebook, Twitter and Apple so that they are able to efficiently track down terror suspects and get access to their transmitted data. A creation of a software that shall allow guessing of passwords of mobiles which are have been used by terrorists is being asked for, particularly after an iphone 5C used by a San Bernardino shooter was traced by the FBI but due to Apple's security measures, they could not break into the phone. However, the said companies refuse to budge from their stand as weakened encryption could mean losing the confidence of users in their privacy scheme.

3. **Creation of new androids to safeguard communication:** With the world's eye on Facebook and Twitter as sites used by terrorists to communicate propaganda, the ISIS has gone one step ahead by creating a new android app called [15]'Amaq Agency' that provides a more secure broadcasting feature with strengthened encryption mechanisms as compared to Twitter and others. This feature has been made available on mobiles too with an aim of carrying on protected communication and sharing of ideologies and terror plans. It has been made available for downloading post publicity through Twitter. However, after analysis by Ghost Security Group (a counter terrorism network), it has been seen that the app's encryption is not full-proof and is a failure. What is alarming is the attempt of ISIS to achieve such technical feats such as creating android apps to realize their menacing goals.The other terrorist organizations can also take a cue from the Islamic State.

[14] Facebook and Twitter back Apple in phone encryption battle with FBI, available at https://www.theguardian.com/technology/2016/feb/18/apple-fbi-encryption-battle-iphone-facebook-twitter-san-bernardino-shooting

[15] Pierluigi Paganini, Amaq, the new ISIS Android App for secure communications (Jan. 14, 2016), available at http://securityaffairs.co/wordpress/43578/intelligence/amaq-android-app.html

4. **Initiation of Technical Glitches: Denying service:** [16]DDoS (Distributed Denial of Services) is a mechanism which involves denying web service to the users. To achieve this, the targeted website must be overwhelmed in a certain way so that it is unable to show the required content as demanded by the user.

   In the recent DDoS attack on BBC's website which made it unavailable to users for hours, instead of the desired information appearing on the page, an error message could solely be viewed. This cyber-attack was not carried out by any traditional terrorist organization rather it was carried out by a group terming itself as 'New World Hacking'.

   Following the above logic, terrorist organizations hold the potential to execute such attacks on media houses, defence headquarters, Presidential building or the Prime Minister's Office. This shall lead to stalling of work. Also, surveillance systems can be affected in the same way. This will prevent surveillance, temporarily providing infiltrators with a chance to enter into foreign territories to execute attacks. This can be a serious threat as disabling systems can take place using cyber technology from any part of the world.

   Cyber security experts are of the opinion that the Amaq Agency app developed by the ISIS is responsible for a DDoS attack on 13 Internet root name servers that wholesomely support the entire Internet network. This attack perceived, to have been carried out between November 30 and December 1, 2015, is being seen as an ISIS backed attack. The app developed by them was used to flood the targeted servers with five million queries per second hereby, stalling the network.

[16] Mark Ward, Web Attacks (Dec. 09, 2010), available at http://www.bbc.com/news/technology-11957622

According to an assessment by the US intelligence officials, the terrorist organization Al Qaeda has the economic resources to recruit professional experts in the field of hacking and encrypting and decrypting. If experts are employed in this regard, not only by Al Qaeda but also other groups with similar ideologies, it is possible that DDoS attacks can hamper the electric grid of a country, its water delivery system, its defence sector as well as financial departments.

5. **Using communication technologies for communication purposes- The use of technology in implementing the 26/11 Mumbai terror attacks:** Cyber technology used in terror attacks does not always have to involve complex coding or decoding. It can employ simple day to day devices such as mobile phones as well. The 26/11 attacks in Mumbai was such an event where the terrorists communicated with each other over mobile phones. Using these, they devised the plot of attack and also used it while the attack was underway for communication purposes. The masterminds behind the attack followed its media coverage and kept the terrorists involved in the attack informed over the mobiles itself about any combat mechanism by the Indian government and army.

   The app termed as Google Earth was used by them to pre-acquaint themselves with the locations which they had targeted. Google Earth, which provides minutely detailed maps of locations around the world, came in efficient use to the terrorists who successfully obtained an idea about the location and whereabouts of their target places prior to the attack. This app facilitated their work.

6. **Usage of Private VoIP:** Cyber excellence by way of private Voice over Internet Protocol (VoIP) has helped or facilitated the communication mechanisms of terrorists. Terrorist

organizations often make use of VoIP for communication. [17]One such instance is that of Lashkar-e-Toiba (LeT, terrorist group) leader Zaki-ur Rehman Lakhvi who uses private VoIP to communicate via audio and video conferencing with other LeT cadres through his smartphone in spite of being in prison. [18]Private VoIP is used as they provide encryption of data being transferred during a phone call, audio or video call. Hence, these are termed as secure gateways which cannot be intercepted by intelligence agencies easily. The data being transmitted is present in an encrypted format and hence, cannot be easily decoded or understood by others. This increases the level of security and privacy of the data transmitted that cannot be obtained in an ordinary phone call.

7. **E-Mail Threats forwarded:** The Indian Mujahideen in the past has carried out terrorist attacks such as the May 13, 2008, Jaipur (Rajasthan) bombings, the July 25, 2008 Bengaluru (Karnataka) serial blasts, the July 26, 2008 Ahmedabad (Gujarat) serial blasts, the September 13, 2008 Delhi serial blasts, the Pune German Bakery blasts of February 13, 2010 and the Mumbai serial blasts of July 13, 2011. Before setting these plans into action, the Indian Mujahideen had sent e-mail threats about the future possibility of such events to media houses.
8. **Using cyber-capacity in facilitating traditional terrorist acts -Traditional terrorist activities and Cyber Technology:** Traditional terror acts like bomb explosions can be done using cyber technology too. A bomb in any corner of the world can be detonated using a computer controlled remote. Such devastations can be regulated or executed by computer systems.

[17] Cyber Terrorism: The Fifth Domain, Sanchita Bhattacharya, SOUTH ASIA INTELLIGENCE REVIEW Weekly Assessments & Briefings Volume 10, No. 48, June 4, 2012

[18] PRIVATE VOIP SERVER, available at http://www.securevoicegsm.com/private-voip-server/

**9. <u>The emerging concept of cyber-hijacks- Theory of Cyber-Terrorism in the disappearance of the MH-370</u>**

[19]British anti-terror expert Dr. Sally Leivesley has contributed to the theory of possible involvement of cyber-terrorism behind the MH-370 disappearance incident terming it as the world's first possible cyber-hijack. The said flight had vanished en route from Kuala Lumpur to Beijing on March 8, 2014. Exhaustive search for the flight yielded no positive result. The use of a mobile phone or a USB stick is being contemplated still. The mobile could be used to initiate signals that would have changed the plane's speed or led it to change its direction of path or a different altitude than aimed for. Using the flight's onboard entertainment system, it is possible for hackers to gain access to the flight's main critical system and create new instructions. It is possible to de-mobilize the plane's flight controls using such a sophisticated technical medium like a mobile phone and making it crash. Concluding this point, it can be well understood that such cyber-hijacks are now endangering flight security. Control over flights can be taken via cyber-hijacks and can be directed towards residential complexes or places of importance like the army headquarters, reputed hotels to gain control over hostages or large offices or sky-scrapers. All this is aimed at causing mass destruction and damage.

[19] James Fielding and Stuart Winter, World's first cyber hijack: Was missing Malaysia Airlines flight hacked with mobile phone? **(** March 16, 2014, 00:00), available at http://www.express.co.uk/news/world/465126/Missing-Malaysia-Airlines-plane-may-have-been-cyber-hijacked-using-mobile-phone

The 9/11 attacks involved flights crashing against the Twin Towers. Though this hijack was achieved manually, the same can now be done using the cyber-space and tools. Hence, this is a matter of grave concern and India might be forced to tackle such a situation any day.

**POSITION IN INDIA**

India has realized the impact of cyber warfare and has implemented certain standards apart from including it as a punishable offence in the Information Technology Act, 2000. There has been a considerable increase in the number of cyber- attacks on Indian computer systems over a period of the last three years. This has been all the more aggravated with the inception of 3G fast Internet services in 2009. Since these services have come into vogue, the number of web users has also increased. This has led to widening of the strength of the audience who are now exposed to terrorist ideologies over the Internet. The availability of low cost smart phones has deepened the trouble further as such phones, which run on android, support Internet features.

All this has forced the government to adopt a multi-pronged strategy to combat heavily increasing cyber- attacks. In this regard, the concern revolving around developing successful combat mechanisms was re-iterated on May 5, 2012, by P. Chidambaram (the then Union Home Minister) who addressed a meeting at the National Counter Terrorism Centre (NCTC) whereby he highlighted the modern form of warfare- cyber terrorism.

[20]"Cyber-crimes such as hacking, financial fraud, data theft, espionage would in certain circumstances amount to terrorist acts. Hitherto, we confronted terrorist attacks only in the physical space. Now,

[20] Cyber terrorism is bigger threat: Chidambaram on NCTC, (May 5, 12:49 pm), available at http://www.aninews.in/newsdetail2/story49428/cyber-terrorism-is-bigger-threat-chidambaram-on-nctc.html

there are terrorist threats in the cyber-space, which is the fifth domain after land, sea, air and space. Much of our critical infrastructure lies in cyber-space."

Chidambaram, hence, emphasized on the need to enforce strict security and surveillance in cyber-space and called it the fifth domain, that needs to be urgently secured from potential cyber-attacks.

**Prevalent Legislation**-[21]**Section 66-F of the Information Technology Act, 2000** describes the following

Punishment for cyber terrorism (1) Whoever,—

(A) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by—

(i) denying or cause the denial of access to any person authorized to access computer resource; or

(ii) attempting to penetrate or access a computer resource without authorization or exceeding authorized access; or

(iii) introducing or causing to introduce any computer contaminant,

and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under Section 70; or

(B) knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any

[21] Information Technology Act, 2000 Section 66-F

restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise,

commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life.

This proves that the attempt to combat cyber-terrorism is the driving force behind the inclusion of this provision in the above Act. The Indian Government is not ignorant of the cyber-attacks and threats which are on a rise in the whole world, some particularly aimed at India.

The Information Technology Act, 2000 in India should be enforced strictly to deter youngsters from becoming a part of such radical organizations and acts. Since, cyber terrorism has the potential to cause large scale mass destruction and loss of innocent lives, the ambit of acts under cyber-terrorism should be increased. Also an elaborate description of the acts constituting or falling under cyber-terrorism must be made using an amendment, so that the layman is aware as to what incidents shall lead to one committing a cyber-attack, so that one can in particular refrain from engaging in any such act.

[22]**Other combat mechanisms duly adopted are as follows:**

[22] NATIONAL CRITICAL INFORMATION INFRASTRUCTURE PROTECTION CENTRE (NCIIPC) (June 13, 2013) available at http://ecurrentaffairs.in/blog/national-critical-information-infrastructure-protection-centre-nciipc/

- A **National Critical Information Infrastructure Protection Centre (NCIIPC)** to be set up with an aim to create highly advanced upgraded security firewalls around the Internet networks so that they can prevent hacking of valuable information particularly related to the nation's economy , defence and security by terrorist organizations.
- A multi-agency **National Cyber Coordination Centre** to be set up to assess the authentication of multiple cyber threats that are received.
- A **Centre of Excellence in Cryptology**, the science of encrypting data, is being established at the Indian Institute of Statistics in Kolkata. This Centre has been set up with an aim to develop expertise in decrypting encrypted data that is the ability to decode coded information as transmitted over the web by terrorist organizations.
- As a follow-up to that, the government has set up three **cyber-forensic laboratories** in Bengaluru, Pune and Kolkata in association with software industry group NASSCOM. Nine more such laboratories are planned in partnership with state governments to be set up in near future.
- A **cyber crisis management** plan has been designed to deal with crisis situations like that of the 26/11 Mumbai attacks. As the attack can take place in any particular state, it is necessary to acquaint the state governments with the plan so devised. Hence, the state governments have also been made an integral part of the crisis management team.
- **CERT-In, or Computer Emergency Response Team (India)**, the nodal agency to deal with cyber- attack crisis is being formulated in small capacities to deal with specific sectors.

  The defence sector has already set up a CERT-In for itself. Railways and the power sector are also planning to have a CERT of their own. Such an endeavor empowers these sectors with ample power to tackle a cyber-attack on itself.

**RECOMMENDATIONS:**

1. Strict rules on obtaining new SIM cards: The communication among terrorists in the 26/11 Mumbai attacks have taken place via mobile phones, the sim cards for which were obtained with ease. Therefore, the procedure concerning obtaining new sim cards should require severe checking of identification proof of the person wishing to buy a new sim card. The authority to sell sim cards should only be vested with authorized mobile network companies. Any irregularity perceived in the identification documents of a person should be duly complained in the Police Station, initiating a verification of that person's identity.
2. The government should open helpline numbers and allow non-profit organizations to counsel youngsters who have become influenced by radical terrorist ideologies. Such counseling can return them to their original frame of mind. School teachers and professors in colleges and universities can be advised to instill nationalistic values in their pupils. Hindus and Muslims should be taught to live in fraternity and harmony. Young ISIS recruits from India who have fled back to the nation must not be looked down upon or ostracized; rather they should be inducted in the field of education. They can be provided with employment as well.
3. Online sites or posts belonging or uploaded by terrorist organizations respectively should be blocked almost instantaneously. The intelligence agencies must surf through internet networks and channels and social media for such content and block it. This must be done on a regular basis and hence separate units solely for this purpose must be instituted.
4. Since online social sites such as Facebook, Twitter and the Apple Company refuse to weaken their encryption strength and also do not allow governmental access to their users' records, these companies should be ordered to set up efficient units within the Company to keep a track of the kind of data that is being transmitted from one person to another. These teams should decrypt each and every data so transferred. However, all the data shall not be handed

over to the government. Only that data or particular information that has terrorist links or inciting content should be reported to the security agencies.

5. The government should set up more cyber-terrorism countering units that provide a strict surveillance over the web. Since, this crisis is on a rise, limited number of such units may fail to serve the purpose.
6. The strength of firewall security should be upgraded from time to time. Firewalls should be regularly checked for any vulnerability. This is essential as the Web is vast in its reach and magnitude.
7. Special units should be trained to decipher coding and decoding of transmitted data over the Web. Inventors should be encouraged to develop decryption mechanisms that can intercept and understand sophisticated data being communicated within terrorist organizations.

[23]Ban Ki-moon, Secretary- General of the United Nations, "The Internet is a prime example of how terrorists can behave in a truly transnational way; in response, States need to think and function in an equally transnational manner."

Emphasizing on the above factor, cyber-terrorism among other forms of terrorism takes place on a global level, transcending all state boundaries. To combat this crisis, which is not only plaguing India, but many other countries worldwide, a global legislation that will address cyber terrorism taking place throughout the world is required. For this purpose, formulation of a legislation by the United Nations, acceptable to different nations to combat cyber-terrorism could become useful.

[23] Available at http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf

The lack of an internationally agreed legislation on cybercrime and terrorism is leading to a failure in fighting terrorism effectively. If this international agreement can be successfully achieved, the nations who have signed the agreement could launch collaborative efforts to manage cyber crisis. In case of a massive attack such as the 9/11USA attacks and the 26/11Mumbai attacks, the countries could aid the country so affected with resources, combat equipment and medical aid. Also, nations could help by providing each other important intelligence inputs. In this way, cyber-terrorism can be successfully beaten on a united front.

## 2. OPERATION IRAQI FREEDOM: LEGALITY OF THE INVASION IN RETROSPECT

Author(s): Varsha Rao[24]

### ABSTRACT

*The Bush administration, in its September 2002 report to the Congress on national security, placed significant emphasis on the doctrine of 'pre-emptive self-defence' to lay the foundation for its invasion of Iraq. It cited the existence of weapons of mass destruction that could be employed against the United States in the wake of Al Qaeda's September 11, 2001 attacks. President Bush described Saddam Hussein's regime as a "grave and gathering danger" and an "outlaw regime" capable of providing WMDs to terrorist cells.*[25]

*Yet, when justifying the legal basis for its invasion of Iraq, the United States looked to the 1990 Security Council Resolution 678 wherein a coalition of states was authorised to repel Iraq from Kuwait and to restore peace and security in the area. Reliance was also placed on Resolution 687 which outlined the terms of the UN-mandated cease fire at the end of the 1991 Gulf War, and it was argued that Iraq's violation of the cease fire had the effect of reviving the earlier Resolution 678's authorization to use force.*

*In light of the release of the Chilcot report or the UK's Iraq Inquiry,*[26] *and further instances of US military action in the Middle East such as the launch of US airstrikes into Syria without the express permission of either the Syrian government and the UN Security Council*[27] *and the deployment of troops into Iraq since late 2014 to combat ISIS*

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[25] Brian Knowlton, *Saddam is 'grave and gathering danger': Bush exhorts UN to act on Iraq arms*, THE NEW YORK TIMES, Sept. 13, 2002, available at http://www.nytimes.com/2002/09/13/news/13iht-a1_19.html.

[26] *'Uproar' if Chilcot report not released within fortnight, says David Davis*, THE GUARDIAN, April 14, 2016, available at http://www.theguardian.com/uk-news/2016/apr/14/uproar-if-chilcot-report-not-released-within-fortnight-says-david-davis.

[27] Somini Sengupta, Charlie Savage, *US Invokes Iraq's Defense in Legal Justification of Syria Strikes*, THE NEW YORK TIMES, Sept. 23, 2014, available at http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?_r=0.

*insurgents, the arguments relied on by the coalition to invade Iraq ought to be re-examined. The war and occupation would go on to claim over one million Iraqi lives, decimate political institutions and infrastructure, ignite large-scale sectarian violence, and lay the groundwork for the influx of militants for the establishment of the Islamic State. The invasion of Iraq is one of the best examples of how the political milieu affects the law and the way in which legal documents are interpreted to suit the political needs of nations.*

## LEGAL BACKGROUND OF THE CONFLICT (1990-2003)

Although the United States capitalized on the fear of the American people in the wake of the 9/11 attacks by floating the doctrine of pre-emptive self-defence to employ military force against the threat posed by rogue elements, ultimately, when it gathered the legal basis for its actions against Iraq, it chose to rely on authorizations granted by Security Council resolutions.[28]

For the coalition involved in the Iraq invasion of March 2003, the war had begun fourteen years earlier with the invasion of Kuwait by Iraqi military forces on August 2, 1990.[29] Resolution 660 adopted by the Security Council condemned the invasion, labelling it a breach of international peace and security.[30] Iraq's declaration of a 'comprehensive and eternal merger' with Kuwait by way of annexation was held to be null and void,[31] and economic and trade sanctions were implemented to prevent the commission of grave breaches of humanitarian law and arm-twist Iraq into complying with its international obligations.[32] The right of Kuwait and its coalition partners to use force in individual or collective self-

[28] Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92(2) GEORGETOWN L.J. 173, 175 (2003), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1898&context=faculty_publications.
[29] Andru E. Wall, *Was the 2003 Invasion of Iraq Legal*, 86 INT'L L. STUD. SER. US NAVAL WAR COL. 69, 70 (2010), http://stockton.usnwc.edu/ils/vol86/iss1/6/.
[30] S.C. Res. 660, U.N. Doc. S/RES/660 (August 2, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/14.
[31] S.C. Res. 662, U.N. Doc. S/RES/662 (August 9, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/16.
[32] S.C. Res. 661, U.N. Doc. S/RES/661 (August 6, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/15; S.C. Res. 665, U.N. Doc. S/RES/665 (Aug 25, 1990), http://www.casi.org.uk/info/scriraq.html; S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/21.

defence was recognized, and the pursuit of a resolution explicitly authorizing the use of military force culminated in Resolution 678.[33]

Iraq was held to be in contempt of the Security Council due to its refusal to comply with past resolutions and was permitted one final opportunity, "as a pause of goodwill", to do so by January 15, 1991.[34] In the event that such implementation did not take place, member states cooperating with the Government of Kuwait were authorized to "use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".[35]

Iraq's refusal to withdraw from Kuwait before the given deadline saw the commencement of Operation Desert Storm. After six weeks of bombing and ground campaigns, Kuwait was liberated from Iraq on February 27, 1991.[36] The Security Council took cognizance of the letter by the Foreign Minister of Iraq that it would fully comply with the previous resolutions by releasing prisoners of war and third country nationals, among other actions.[37]

The ceasefire agreement was codified in Resolution 687 on April 3, 1991 wherein Iraq was expected to destroy and refrain from developing chemical and biological weapons, ballistic missiles, nuclear weapons or components and agree to on-site inspections. To ensure the containment of Weapons of Mass Destruction (WMD), a United Nations Special Commission (UNSCOM) was established in cooperation with the International Atomic Energy Agency (IAEA).[38] Later, in December 1999, the

[33] See *supra* note 5, at 71.
[34] S.C. Res. 678, U.N. Doc. S/RES/678 (November 29, 1990), http://www.casi.org.uk/info/undocs/gopher/s90/32.
[35] *Ibid*.
[36] John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 564 (2003), http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2746&context=facpubs.
[37] S.C. Res. 686, U.N. Doc. S/RES/686 (March 2, 1991), http://www.casi.org.uk/info/undocs/gopher/s91/3.
[38] See *supra* note 12, at 564.

UNSCOM was disbanded and replaced with the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC).[39]

Internal unrests in Iraq were brewing during this tumultuous period in response to the sectarian repression of Iraqi civilians, including those in Kurdish populated areas, and as a result, it led to the outflow of refugees across international borders, thus threatening "international peace and security in the region".[40] Further, Iraq was held to be in "material breach" of its obligations to cooperate with the Special Commission and the IAEA under the ceasefire provisions of Res. 687.[41] As pointed out by John Yoo, the Deputy Assistant US Attorney General during the Bush administration famous for having written the Torture Memos, Iraq had continued to behave in an adversarial manner towards UNSCOM inspectors in providing access to its inspection sites for years on end, thereby preventing them from fulfilling their mandate.[42]

In December, 1998, the inspectors were withdrawn and Operation Desert Fox was commenced to compel Iraq to cooperate with the UNSCOM inspection. On failing to do so for the next four years, the discourse at the time surrounded a paranoid idea that Iraq's obstructionist behaviours could be an indicator that the nation was developing weapons of mass destruction which it would supply to rogue elements and terrorist organisations.[43]

After the September 11, 2001 terrorist attacks on the World Trade Centre the Pentagon cemented this idea of suspicion and evoked military response by the United States in Afghanistan to combat

[39] S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999), http://www.casi.org.uk/info/undocs/scres/1999/99sc1284.htm.
[40] S.C. Res. 707, U.N. Doc. S/RES/707 (August 15, 1991), http://www.casi.org.uk/info/undocs/gopher/s91/24.
[41] *Ibid*.
[42] See *supra* note 12, at 565.
[43] Donald K. Anton, *International Law and the 2003 Iraq Invasion Revisited*, Presented at Australian National University Asia-Pacific College of Diplomacy (April 30, 2003), https://law.anu.edu.au/sites/all/files/news/ANU%20College%20of%20Law/ssrn-id2259980.pdf.

fundamentalist groups such as the Al-Qaeda and the Taliban, who – under the safe haven of "rogue nations" with potential to weapons of mass destruction – could remotely train operatives and lead deadly attacks on the American homeland.[44] The sentiment was echoed by President George W. Bush in his January 2002 State of the Union Address:

"*States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.*"[45]

In a final attempt to secure cooperation with Iraq, headlined by President Bush and the US, the Security Council passed Resolution 1441 in November 2002 requiring Iraq to allow the UN arms inspectors to resume their work, and ultimately, the demands were accepted by Iraq.[46]

Resolution 1441 recalled Resolution 678 and Resolution 687. It went on to afford Iraq "a final opportunity to comply" with its disarmament obligations state as the Council had determined that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including Resolution 687".[47] Resolution 1441 provided that Security Council was to reconvene immediately upon receipt of notice of Iraq's failure to comply "in order to consider the situation and the need for full compliance with all of the relevant Security Council resolutions…."[48] The Resolution concluded by recalling that the Council had repeatedly warned Iraq that it would face "serious consequences" as

[44] See *supra* note 12, at 565.
[45] George W. Bush, President of the United States, State of the Union Address (Jan. 29, 2002), http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm.
[46] See *supra* note 19, at 7-8.
[47] S.C. Res. 1441, U.N. Doc. S/RES/1441 (November 8, 2002), http://www.casi.org.uk/info/undocs/scres/2002/res1441e.pdf; *See also supra* note 19.
[48] *Ibid*.

a result of its continued violations, and the failure to observe enhanced inspections procedures under the UNMOVIC and IAEA would be taken to be a further material breach.[49]

Journalist Joby Warrick, in his account on the invasion of Iraq and the political turmoil leading to the establishment of the Islamic caliphate, draws attention to the events and rancorous debates leading up to the Bush administrations' decision to invade Iraq in his Pulitzer Prize winning book *Black Flags: The Rise of ISIS*. In late 2002, a United States diplomat – Laurence Foley – had been assassinated in Jordan. From the snippets of conversation in the possession of the National Security Administration (NSA), suspicion appeared to be centred on the al-Qaeda and on a Jordanian man who hadn't drawn much American attention to himself until this point – Abu Musab al-Zarqawi, the man would go on to lay the foundations of the Islamic State in Iraq.[50] Bush appointees began exerting pressure on the CIA to demonstrate a link between Iraq and al-Qaeda's September 11 attacks. Rumours were that Zarqawi had received funding by the al-Qaeda to set up a training camp in Western Afghanistan, and that at the start of the Afghan offensive in 2001, he had fled to Iraq and was believed to have received medical aid in Baghdad.[51] Further, US officials were intent on discovering a link between the development of chemical poisons by the al-Qaeda associated militant group – Ansar al-Islam – home to Zarqawi and several jihadis from Afghanistan and the Saddam regime, known for its proclivity for such chemical weapons.[52]

The aides of then-Vice President, Dick Cheney, were rumoured to have reacted negatively to a report submitted by the CIA all but demolishing allegations of operational ties between Saddam Hussein and

[49] *Ibid.*
[50] JOBY WARRICK, BLACK FLAGS: THE RISE OF ISIS, 60-74 (2015).
[51] *Ibid.*
[52] *Ibid.*

al-Qaeda.[53] Years later, in Cheney's written accounts, he insisted that there was, "no place more likely to be a nexus between terrorism and WMD capability than Saddam Hussein's Iraq."[54]

On February 5, 2003, Colin Powell made a presentation before the UN Security Council to make a case for the invasion of Iraq, claiming that Iraq harboured a terrorist network headed by al-Qaeda lieutenants and Abu Musab al-Zarqawi. He further suggested that by installing an agent in a senior position of Ansar al-Islam, Iraq effectively controlled the group. "What I want to bring to your attention today is the potentially much more sinister nexus between Iraq and the al-Qaeda terrorist network…. Iraqi officials deny accusations of ties with al-Qaeda. These denials are simply not credible…."[55]

The presentation was later described by Powell as one of the biggest blunders of his career attributed to weak intelligence gathering and wishful thinking by the Bush administration.[56] The speech is said to have been "an extraordinary performance, an artful rendering of a selective set of facts that favoured invasion."[57]

Such accusations in retrospect are enlightening if the conversation of the senior members of the Bush administration are recapitulated. The former President himself is guilty of making unequivocal statements to the American public, especially in his State of the Union Address on Jan 28, 2003.[58] In a speech given in Cincinnati in October 2002, Bush proclaimed that, "We've learned that Iraq has

[53] *Ibid*.
[54] *Ibid*.
[55] *Full text of Colin Powell's speech*, THE GUARDIAN, February 5, 2003, available at http://www.theguardian.com/world/2003/feb/05/iraq.usa.
[56] JOBY WARRICK, *supra* note 26.
[57] JOBY WARRICK, *supra* note 26.
[58] George W. Bush, President of the United States, State of the Union Address (Jan. 28, 2003), http://whitehouse.georgewbush.org/news/2003/012803-SOTU.asp.

trained al-Qaeda members in bomb-making and poisons and deadly gases. And we know that after September 11 Saddam Hussein's regime gleefully celebrated the terrorist attacks on America."

In a March 2003 interview on an American news channel, Donald Rumsfeld, the then Secretary of Defence, stated without qualification that, "We know where [the weapons of mass destruction] are. They're in the area around Tikrit and Baghdad and east, west, south and north somewhat."[59] An exchange with reporters after a cabinet meeting in June 9, 2003 – at a stage where there had been no discovery of WMDs in Iraq by U.S. search teams and Democrat senators were accusing the CIA of intelligence manipulation – hinted at the colossal predicament Bush had opened himself up to, "Iraq had a weapons program. Intelligence throughout the decade showed they had a weapons program. I am absolutely convinced *with time* we'll find out that they did have a weapons program [emphasis added]."[60]

## DISCUSSION ON THE SECURITY COUNCIL RESOLUTIONS AS LEGAL JUSTIFICATIONS

Article 2(4) of the United Nations Charter ("**Charter**") creates a peremptory norm of international law[61] from which states cannot derogate:[62] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[63] Further, Art. 2(6) authorizes the United Nations to ensure that non-members act in accordance with the Charter. The

[59] Faiz Shakir, *Rumsfield's Revisionist History: 'We Know Where the WMD Suspect Sites Are'*, THINK PROGRESS, May 26, 2006, available at http://thinkprogress.org/politics/2006/05/26/5528/rumsfelds-revisionist-history/.
[60] *Bush: 'Absolutely convinced' Iraqi WMD will be found*, CNN.COM, June 9, 2003, available at http://edition.cnn.com/2003/ALLPOLITICS/06/09/wmd.controversy/.
[61] See *supra* note 19, at 3.
[62] *Nicaragua v United States*, [1986] ICJ Reports 14, at para. 190.
[63] United Nations, *Charter of the United Nations*, 1945, Art. 2(4).

illegality of aggression under international law is a *jus cogens* norm.[64] For the use of force to be termed legal, two exceptions are provided for in the Charter under Chapter VII: Article 51 governing the right of individual or collective self-defence in the face of an actual or imminent armed attack, and Art. 42 under which a resolution passed by the UN Security Council authorizing the use of force is binding under international law. A third exception, although controversial, would be that of humanitarian intervention – the so-called Responsibility to Protect (R2P).[65] The claim of humanitarian intervention will not be taken up in the paper as at the time the case was being made for the invasion of Iraq, it was not a ground on which reliance was placed.

The paper will first deal with the arguments under Art. 42 arising out of the Security Council resolutions, followed by the doctrine of pre-emptive self-defence purported by the Bush Administration. A failure of the arguments presented by the Bush and Blair administrations to stand up against criticism would allow one to make a case for the crime of aggression against the leaders who created the blueprint and laidthe foundations for the invasion of Iraq.

There are mainly three justifications arising out of the Security Council resolutions relied on by those who were in favour of the invasion. Firstly, that Resolution 678 authorized not just the expulsion of Iraq from Kuwait, but also a broader use of force to restore international peace and security in the region. Secondly, that unilateral use of force by the United States on the material breaches of the ceasefire (Resolution 687) was permissible and the express permission of the Security Council was not required. Thirdly, that a second resolution explicitly authorizing the use of force by the coalition after

[64] *Belgium v. Spain*, [1970] ICJ Rep 3.
[65] Toby Fenwick, *In depth: Was the 2003 invasion of Iraq illegal?*, LIBERAL DEMOCRAT VOICE, Sept. 10, 2012, available at http://www.libdemvoice.org/in-depth-was-the-2003-invasion-of-iraq-illegal-30149.html.

Resolution 1441 was not necessary as the previous authorization (Resolution 678) had not been rescinded by the Council, rather it had been reaffirmed.

### A. BROAD WORDING OF RESOLUTION 678

The coalition's first argument was grounded on the belief that Resolution 678 did not only authorize the use of force to expel Iraq from Kuwait, but also a broader use of force to restore international peace and security to the region – to which a threat was posed by Iraq's material breaches of the conditions outlined in the ceasefire Resolution 687.[66] The Security Council unanimously found Iraq to be in material breach of the earlier resolutions in Resolution 1441, thus triggering Resolution 678's authorization to resume hostilities with Iraq and respond to the breaches of the ceasefire.[67]

It is possible that initially, the United States was not under the impression that Resolution 678 authorized anything more than coming to Kuwait's aid in the face of Iraq's aggression, but the subsequent creation of no-fly zones after the sovereignty of Kuwait had been secured couched in the legal justifications grounded in 678's authority to restore peace and security in the region, adjusted that expectation.[68]

Another objection to this argument is that only those "co-operating with the Government of Kuwait" were authorized by 678 in 1990 and the coalition involved in the Iraq invasion of 2003 did not possess Kuwait's cooperation or participation.[69] To counter the argument, the same logic of operational realities with the coalition taking repeated action against Iraq from 1990 to 2002 and enforcement of no-fly zones – actions that fell out of the scope of the strict protection of and cooperation with Kuwait

[66] See *supra* note 5, at 73.
[67] See *supra* note 12, at 567.
[68] See *supra* note 5, at 74.
[69] *Ibid*.

– has been relied on as such State practice received at least a tacit acceptance from the Security Council.[70]

John Yoo attempted to counter the objections posed by France, Germany and Russia that 678's authorization was extinguished in light of the disagreement of the Security Council members to the use of force in 2003 by arguing that the Security Council has utilized only two ways to end authorizations to utilize force – either by passing a resolution to that effect expressly terminating the authorization or by setting a time-limit on the authorization. Resolution 678 is not victim to these methods, either in the resolution itself or in subsequent resolutions like 1441.[71]

The counter-arguments to the coalition's case is twofold Firstly, it has been argued that the phrase in Resolution 678 "uphold and implement resolution 660 and all subsequent relevant resolutions" appears to refer to the ten resolutions specified in the preamble and not to resolutions adopted thereafter i.e. Resolution 687.[72] The authorization to "use all necessary means" to ensure the compliance of the above resolutions would come into effect only if Iraq failed to comply with the ten resolutions – which related to Iraq's withdrawal from Kuwait, Kuwaiti property and so on, and not weapons of mass destruction.[73]

Secondly, if for the authorization of force reliance is placed on the phrase "restore international peace and security in the area", then an argument could be made to encapsulate compliance with the WMD regime under 687 under the jurisdiction of the authorization.[74] The more plausible option, however, is that 'restore' was used to permit operations such as Operation Desert Storm to compel the expulsion

[70] *Ibid*.
[71] See *supra* note 12, at 567-68.
[72] See *supra* note 4, at 181.
[73] *Ibid*.
[74] *Ibid*, at 182.

of Iraq from Kuwait and to create buffer zones for the protection of Iraq's neighbours. Once the issue to "restore peace and security in the region" was addressed in 687, the previous "restore" language can be seen to have run its course.[75] The authority to use force under 678 cannot be reasonably used to overthrow a regime that failed to adhere to a WMD regime that didn't even exist when 678 was drafted and passed.[76]

In response to John Yoo's argument that the authorization of 678 was not expressly terminated by 687, one should turn to Resolution 686 – the provisional ceasefire resolution wherein the Council addressed the continuing viability of 678 for narrow purposes, "during the period required for Iraq to comply with" the eight Security Council demands listed. 686 envisaged a "definitive end to the hostilities".[77] One cannot argue that the use of force in 2003 was to ensure the fulfilment of unmet demands as the US theory focused on non-compliance of 687 and not 686.[78]

### B. UNILATERAL EXERCISE OF FORCE ON MATERIAL BREACHES OF CEASEFIRE RESOLUTION 687

The main argument of the coalition points out the difference between 'suspension' of hostilities and 'termination' of hostilities; unlike a peace treaty, a ceasefire or an armistice only suspends military action and did not terminate the state of war; any serious violations of the armistice gives the other party to denounce the ceasefire and resume hostilities without the express permission of the Security Council.[79] Andru Wall emphasizes the continuing nature of the conflict – though admittedly, low-intensity, between 1991 to 2003 in the form of firing of cruise missiles and bombs by coalition combat

[75] *Ibid*, at 183.
[76] *Ibid*, at 184.
[77] *Ibid*, at 189.
[78] *Ibid*, at 193.
[79] See *supra* note 12, at 569.

and reconnaissance aircrafts in response to Iraqi firing, establishment of no-fly zones, attacks by the coalition on air defence targets located in the no-fly zones, execution of Operation Desert Fox by President Clinton, and so on so forth – such unilateral use of force was not condemned by the Security Council.[80]

In counter, it has been argued that the unchallenged understanding before 687 was voted on – as announced – by India's representative to the UN was that "it does not confer authority on any country to take a unilateral action under any of the previous resolutions of the Security Council".[81] Sean D. Murphy accepts that a situation could have arisen where the Saddam regime would have had to be overthrown to contain the effect of material breaches of Iraq's obligations, however, leaving it to individual states to determine that such a situation has arisen is an abandonment of the enforcement norms created by the Security Council.[82]

Further, one cannot assign a definitive legal meaning to the term 'formal ceasefire' in Resolution 687 to mean a suspension of hostilities as opposed to a termination of the state of war. 686 and 687, seen together, form the relationship between an initial agreement for temporary cessation of hostilities and then the codification into a comprehensive final agreement for peace; there was no further expectation of a "peace agreement" following Resolution 687 – that was it.[83] Even if the word 'ceasefire' is viewed in a traditional sense, it would still not permit a unilateral exercise of force by individual nations as the agreement was "beyond the reach of the parties" and was between the United Nations – an international organization – and the defeated state.[84] In conclusion, the nature of an agreement

[80] See *supra* note 5, at 74-76.
[81] See *supra* note 4, at 195.
[82] *Ibid*, at 197.
[83] *Ibid*, at 200.
[84] *Ibid*, at 202.

imposed by the United Nations is not the same as a bilateral or multilateral treaty as unlike traditional treaties, the consent of a Member State is not required for the agreement to be legally binding on it.[85]

### C. FURTHER AUTHORIZATION POST-RESOLUTION 1441

Kofi Annan, the former Secretary General of the United Nations, in a Sept 16, 2004 interview for *BBC World Service* stated that from the United Nations Charter point-of-view, the invasion was illegal; there ought to have been a second resolution of the Security Council.[86] Although Res. 1441 had indicated that there would be consequences if Iraq did not comply with its obligations, it was up to the Security Council to determine what those consequences should have been.[87] Resolution 1441 had found Iraq to be in material breach of the ceasefire and afforded the nation a final opportunity to comply; however, a material breach did not automatically authorize the use of force against Iraq and required additional triggering mechanisms.[88]

On the other hand, the argument from the coalition propounds that not only did the US State Legal Department note similarities in the language of Resolution 678 and 1441, 1441 was itself an example of diplomatic finesse allowing members nations to take necessary action in the void created by political differences within the Security Council, especially considering that the 678 reference to the use of force had been left intact and not been revoked.[89]

Paragraph 4 of Resolution 1441 states that the submission of false statements or omissions and the failure to comply with the implementation of this resolution shall constitute a further material breach

[85] *Ibid*, at 203.
[86] *Iraq war illegal, says Annan*, BBC NEWS, Sept. 16, 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.
[87] *Ibid*.
[88] See *supra* note 5, at 77.
[89] *Ibid*., at 77; *See also supra* note 12, at 571.

and will be reported to the Council for assessment. In pursuance thereof, the Council would convene immediately in order to consider the situation and the need for compliance of all relevant resolutions.[90] UK's ambassador to the UN, Sir Jeremy Greenstock, in his explanation of vote (EoV) held that "There is no automaticity in this resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Council for discussion as required…. We would expect the Security Council then to meet its responsibilities."[91]

Such a view has been echoed, not only by the US representative to the UN John Negroponte, but also in a memo written by Attorney General Lord Goldsmith to the Prime Minister Tony Blair on March 7, 2003 and published by the press in April 2005.[92] Although, in his final advice to the government written on March 17, 2003, Lord Goldsmith took an unequivocal stance that the authority to use force against Iraq can be found in the combined effect of resolution 678, 687 and 1441, and that no further express decision by the Security Council would be required to authorize force, the earlier and longer memo - written ten days before the final opinion – states that Lord Goldsmith was of the view that the safest legal course would be to secure the adoption of a second resolution and that the reactivation of the authorization found in Res. 678 was predicated on whether there existed hard evidence of Iraq's failure to take the final opportunity to comply with the ceasefire; the views of the UNMOVIC and IAEA would, therefore, be significant in this regard.[93] The resignation of Elizabeth Wilmshurst, deputy legal adviser to the Foreign Office, on the ground that she did not agree with the official legal

[90] S.C. Res. 1441, U.N. Doc. S/RES/1441 (November 8, 2002), http://www.casi.org.uk/info/undocs/scres/2002/res1441e.pdf.

[91] *The Situation Between Iraq and Kuwait*, S/P.V.4644 (November 8, 2002), http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.4644.

[92] *Full text: Iraq legal advice*, THE GUARDIAN, April 28, 2005, available at http://www.theguardian.com/politics/2005/apr/28/election2005.uk.

[93] Simon Jeffery, *Lord Goldsmith's legal advice and the Iraq war*, THE GUARDIAN, April 27, 2005, available at http://www.theguardian.com/world/2005/apr/27/iraq.iraq2.

opinion provided and her assertion that an unlawful use of force on such a scale amounts to the crime of aggression along with the indication that Lord Goldsmith's view had been altered to bring it in line with the official view, threw the issue into a controversial light.[94]

Multiple observations may be made regarding Resolution 1441. Most significantly, nowhere is there an express authorization of the use of force against Iraq. The discussions and explanations of vote leading up to the resolution had made it quite evident that countries like Russia, China, Germany and France were not prepared to expressly authorize force in 1441 and instead, preferred to establish a two-stage process; they would have vetoed the resolution if it had contained any immediate authorization (explicit or implicit) of military action.[95] A two-stage process would have then required the Security Council to reconvene in the event of continued Iraqi non-compliance and further material breach and pass a second resolution expressly authorizing force against Iraq.[96]

Even though the explanations of vote show the UK and US agreeing that 1441 did not contain any "automaticity", they later maintained that no second resolution - the next step in the two-stage process – was necessary.[97] The assertion appeared to contradict their persistent, but unsuccessful, attempts to obtain a second resolution explicitly authorizing the use of force.[98]

[94] *Wilmshurst resignation letter*, BBC NEWS, March 24, 2005, available at http://news.bbc.co.uk/2/hi/uk_news/politics/4377605.stm.

[95] See *supra* note 19, at 8; United Nations, Dept. of Public Information, *Return of United Nations Inspectors, Without Conditions, is Key to Solving Arms Impasse with Iraq, Security Council is Told*, SC/7534, October 16, 2002; United Nations, Dept. of Public Information, *In Security Council Debate, United States, France, Russian Federation, Others Outline Positions on Possible Resolution Concerning Iraq*, SC/7536, October 17, 2002; United Nations, Dept. of Public Information, *Security Council Holds Iraq in 'Material Breach' of Disarmament Obligations*, SC/7564, November 8, 2002.

[96] *Ibid*.

[97] See *supra* note 19, at 3.

[98] *Ibid*.

**ANALYSING PRE-EMPTIVE SELF-DEFENCE IN LIGHT OF NEW FINDINGS**

Article 51 of the UN Charter continues to generate debate in the international fora regarding the trigger required to legally exercise the inherent right of self-defence in the face of armed attack. The argument for anticipatory self-defence through the use of proportionate force to repel an imminent attack finds its footing in the 1837 dispute over Great Britain's destruction of the US merchant ship *The Caroline* for aiding Canadian rebels[99] wherein self-defence was believed to have been justified when the necessity for action was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[100] The *Caroline* test created two principal requirements: that the use of force must be necessary because the threat is imminent and the pursuit of other peaceful alternatives is not a viable option, and that the response must be proportionate to the threat.[101]

It has been argued that the US did not explicitly characterize its military action as an exercise of the doctrine of pre-emptive self-defence against rogue nations with WMDs, and instead chose to claim legality for the invasion through Security Council authorizations.[102] However, the doctrine necessitates a deeper look as it formed a part of the justifications provided by the Bush Administration to the public as well as in its September 2002 report to the Congress on national security,[103] along with the

[99] *Ibid*.

[100] Letter from Daniel Webster, Secretary of State, to Lord Ashburton, August 6, 1842, *reprinted* in 2 John Bassett Moore, A Digest of International Law 409, 412 (1906); *See also* M. Ratner and Ors., *The United Nations Charter and the Use of Force Against Iraq*, LAWYERS AGAINST THE WAR, Oct. 2, 2002, available at http://www. lawyersagainstthewar. org/legalarticles/ratner. html.

[101] See *supra* note 12, at 572.

[102] See *supra* note 4, at 175.

[103] The National Security Strategy of the United States of America, The White House, Sept. 17, 2002, http://www.state.gov/documents/organization/63562.pdf.

US Congressional Resolution of October 2002 *Authorization for Use of Military Force Against Iraq Resolution 2002*[104] and in the US letter of March 2003 addressed to the Security Council.[105]

The restrictive school on self-defence in international law, referring to Article 51 of the UN Charter and customary international law, argues for a narrower interpretation that a right to self-defence doesn't exist without an armed attack, thus negating anticipatory self-defence. In the event of a possible attack, a state may prepare to *resist* such attacks.[106] In contrast, under the expansive theory, the customary right of anticipatory self-defence survives under Article 51 of the Charter and includes the use of force in anticipation of an attack in certain circumstances.[107] The subsequent arguments will examine only with the second school of thought and not the first as the US State Department has proceeded under the assumption that pre-emptive self-defence is a legitimate international law doctrine founded on customary law, thus basing its arguments on an expansionist idea, as indicated by John Yoo, then-deputy attorney general's paper discussing anticipatory self-defence.[108]

He chose to point out that opposition by US allies has ensured that no UN resolution has successfully been passed deeming its actions of anticipatory self-defence against Libya and Panama as violations of international law; further, the Security Council gave no formal response to missile strikes against Afghanistan and Sudan.[109] He reformulated the requirement of 'imminence' and held that the threat of WMDs after the Kuwait invasion had significantly increased with Iraq's demonstration of its

[104] United States, Cong. Senate, *Resolution Authorization for Use of Military Force Against Iraq*, 107th Cong., H.J. Res. 114 (2002), https://www.govtrack.us/congress/bills/107/hjres114.
[105] Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (Mar. 21, 2003).
[106] Leo Van den hole, *Anticipatory Self-Defence*, 19(1) AMERICAN UNIVERSITY INT'L L. REV. 69, 82-84 (2003), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1160&context=auilr.
[107] *Ibid*.
[108] See *supra* note 12, at 571.
[109] *Ibid*, at 573.

capability to use it and the force used was proportionate, in that it was limited to the destruction of Iraq's WMD facilities and the removal of the head of State with hostile intentions, Saddam Hussein.[110]

As a counter, it has been argued that even though the United States may have been correct under the expansionist viewpoint of self-defence under Art. 51 – which upholds anticipatory self-defence under customary law – in claiming that Saddam's history of unpredictability and the devastating potential of WMDs would fulfil the legal formulation set out in *Caroline*, the grounded reality of the situation demonstrated the danger of expanding the limitations as it would leave the doctrine fraught for abuse.[111] Intelligence leaks and news sources had indicated that the case for containment of WMDs in Iraq was "weak at best and totally fabricated at worst", and the Iraq invasion had – in fact – not lead to the promised discoveries.[112] Additionally, China, France, Germany, and Russia rejected the claim that there existed an imminent threat and chose to continue UN weapons inspections as established by Resolutions 687 and 1441.[113]

In the January 27, 2003 report submitted to the Security Council, Mohamed ElBaradei – director general of the IAEA – confirmed that no prohibited nuclear activities were identified during the inspections and that no evidence has been found to show that Iraq had revived its nuclear weapons program since its elimination of the program in the 1990s.[114] Hans Blix, head of the UNMOVIC at the time, in his briefing before the Security Council on February 14, 2003, while placing doubt on certain intelligence information announced by the US Secretary of State, Colin Powell, had affirmed Iraqi compliance with weapons inspections by citing the carrying out of 400 inspections without notice

[110] *Ibid*, at 574.
[111] Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilaterlism*, 34(1) CALIFORNIA WESTERN INT'L L.J. 23 (2003).
[112] *Ibid*.
[113] See *supra* note 19, at 5.
[114] Donald Nungesser, *United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16(1) PACE INT'L L. REV. 193, 216-218 (2004).

across 300 sites and the prompt access provided in all instances.[115] Powell went on to claim that the progress made by Blix and Mohamed ElBaradei, director general of the IAEA, was simply process and not substance, and that Iraq's recent steps "are all tricks that are being played on us."[116]

Although Hans Blix's earlier reports criticized Iraq for not permitting UNMOVIC and IAEA to interview key government officials and rebuked Iraq's misleading declarations pursuant to 1441 on the amount of its weaponry, in his later and more conclusive reports – such as those on February 28, 2003 and March 7, 2003 – he marked out positive development by way of Iraq's commitment to comply and stressed the on-going disarmament process,[117] with a request for more time to continue inspections. ("There were eight years of inspections and four years of no inspections, and now we have had a couple of months. And it seems to me a rather short time to close the door and say, this is it.")[118] The evidence before the Security Council divided its opinion with France Russia and China determined to provide UNMOVIC and IAEA with more time to conduct inspections while the US and UK lobbied to urge the Council to pass a resolution which would authorize military attack.[119]

However, what ultimately took place was a discordant echo of the statement made by Colin Powell before the media on March 6, 2003 – that the United States was ready to lead "a coalition of willing nations, either under United Nations authority or without United Nations authority, if that turns out to be the case,"[120] and on March 20, they did.

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[115] *Hans Blix's briefing to the security council*, THE GUARDIAN, Feb 14, 2003, available at http://www.theguardian.com/world/2003/feb/14/iraq.unitednations1.

[116] *UN report reinforces Security Council divisions*, CNN.COM, Feb 14, 2003, available at http://edition.cnn.com/2003/US/02/14/sprj.irq.un/.

[117] See *supra* note 90.

[118] John Tagliabue, *Threats and Responses: Discord; France and Russian Ready to Use Veto Against Iraq War*, THE NEW YORK TIMES, March 6, 2003, available at http://www.nytimes.com/2003/03/06/world/threats-responses-discord-france-russia-ready-use-veto-against-iraq-war.html.

[119] See *supra* note 90.

[120] See *supra* note 94.

## CONCLUSION

At the culmination of the invasion and the commencement of the occupation by US troops, John Yoo, in an article in the Legal Times, opined that it is not of significance whether Iraq did, in fact, possess WMDs in the end, but that at the time of the invasion, it appeared that Iraq posed a threat to national and international security, especially due to its obstruction of UN arms inspectors and threats of usage of chemical weapons.[121]

When Iraq crumbled into an unstable mosaic rife with sectarian violence in the wake of political upheaval, Donald Rumsfeld, the then-Defence Secretary's unfortunate remark laid bare the problematic attitude of the Occupying Powers, the impact of which Iraq has not been able to grapple with even now: "Think what's happened in our cities when we've had riots, and problems, and looting. Stuff happens! … Freedom's untidy, and free people are free to make mistakes and commit crimes and do bad things. They're also free to live their lives and do wonderful things, and that's what's going to happen here."[122]

These remarks by the senior members of the Bush administration only goes to reiterate the deduction one can make after pitting the arguments in favour of the invasion to the much stronger counter against it – that the policymakers would rather focus on the degradation of a 'rogue nation' instead of acknowledging fault and accepting blame. "Stuff happens" cannot begin to explain the subsequent atrocities such as the torture and inhuman treatment of detainees perpetrated by US soldiers and American intelligence forces;[123] executions without trial of 24 Iraqi civilians at Haditha in November

[121] John Yoo, *Why Iraq's Weapons Don't Matter*, LEGAL TIMES, Aug. 4, 2003.
[122] Greg Mitchell, *6 Year Ago: "Stuff Happens," Rumsfeld Said, Amid Chaos in Iraq*, THE HUFFINGTON POST, May 11, 2009, available at http://www.huffingtonpost.com/entry/6-years-ago-stuff-happens_b_185691.html?section=india.
[123] Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, available at http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

2005;[124] flagrant violations of the Geneva Convention by the exercise of 'sealing off' strategies in a bid to isolate insurgents by cutting off movement of food, water, medicines, electricity to the cities of Tal Afar, Samarra, Najaf and Falluja;[125] indiscriminate bombing and killing of civilians – only to name a few.

It is no wonder that current policymakers have come to realize the impact of the invasion on the creation of a hostile environment conducive for insurgent elements to build a nation of terror and destruction. In an interview, US President Barack Obama said, "ISIL is a direct outgrowth of al-Qaeda in Iraq that grew out of our invasion, which is an example of unintended consequences."[126] However, the qualifiers attached to their apologies are never-ending, case-in-point Tony Blair's statements before the publishing of the Chilcot report where he apologized for incorrect intelligence and for mistakes in planning and understanding the effects of the removal of the regime. He even admitted that there are "elements of truth" in the argument that the Iraq invasion is the "principal cause" of the Islamic State's rise. However, he still felt he made the right decision in supporting the United States' removal of Saddam Hussein by saying, "I find it hard to apologize for removing Saddam."[127] The Chilcot Inquiry or the Iraq Inquiry – a two million words long report investigating UK's involvement in the Iraq invasion – was published only in mid-2016 even though the hearings concluded in 2011, five years

[124] *Iraqi outrage over US Marine's plea deal in Haditha killings*, CNN, Jan 25, 2012, available at http://edition.cnn.com/2012/01/25/justice/california-iraq-trial/.

[125] *Attacks on Cities*, in WAR AND OCCUPATION IN IRAQ, GLOBAL POLICY FORUM, available at https://www.globalpolicy.org/component/content/article/168-general/37150-war-and-occupation-in-iraq-chapter-6-english.html.

[126] Dilly Hussain, *ISIS: The "unintended consequences" of the US-led war on Iraq*, FOREIGN POLICY JOURNAL, March 23, 2015, available at http://www.foreignpolicyjournal.com/2015/03/23/isis-the-unintended-consequences-of-the-us-led-war-on-iraq/.

[127] Nicholas Watt, *Tony Blair makes qualified apology for Iraq war ahead of Chilcot report*, THE GUARDIAN, October 25, 2015, available at http://www.theguardian.com/uk-news/2015/oct/25/tony-blair-sorry-iraq-war-mistakes-admits-conflict-role-in-rise-of-isis.

ago.[128] While the report did not pass judgement on the legality of the war, holding that it could be discussed only by a "properly constituted and internationally recognized court," it pointed out that the way the legal basis was dealt with was unclear, far from satisfactory and perfunctory at best.[129] Not only had the UK proceeded to participate in the invasion before peaceful options for disarmament had been exhausted, but then-Prime Minister Tony Blair had also deliberately exaggerated to the public and the Members of Parliament the threat posed by Saddam Hussein, with decisions being based on the flawed information provided by the British intelligence services whose evidence-collection procedure had been tainted by misguided assumptions.[130]

The conclusions arrived at only confirm the declassified Downing Street memo's allegations made by Sir Richard Dearlove, head of MI6 at the time ("[In Washington] there was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy")[131] and go on to remind us that in this era of political instability in the Middle East, unless the lessons of the Iraq War are kept in mind – in the words of Hans Blix – "there is nothing stopping this kind of tragedy from being repeated."[132]

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[128] Matt Broomfield, *Iraq War: MPs launch investigation into legislation which delayed Chilcot Inquiry*, INDEPENDENT, April 5, 2016, available at http://www.independent.co.uk/news/uk/politics/iraq-war-chilcot-inquiry-sir-john-chilcot-a6969046.html.
[129] *Chilcot report: key points from the Iraq inquiry*, THE GUARDIAN, July 6, 2016, https://www.theguardian.com/uk-news/2016/jul/06/iraq-inquiry-key-points-from-the-chilcot-report.
[130] *Ibid*.
[131] Fred Kaplan, *Reading the Downing Street Tea Leaves*, SLATE, June 23, 2005, available at http://www.slate.com/articles/news_and_politics/war_stories/2005/06/reading_the_downing_street_tea_leaves.html.
[132] Hans Blix, *Iraq War was a terrible mistake and violation of UN charter*, CNN, March 19, 2013, available at http://edition.cnn.com/2013/03/18/opinion/iraq-war-hans-blix/.

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## 3. BRICS: AN ANALYSIS OF THE BUILDING BLOCKS

Author(s): Vandana Menon[133]

**ABSTRACT**

*This paper attempts to understand the composition and influence of BRICS (Brazil, Russia, India, China, and South Africa) through its various dimensions and perspectives. The paper has been divided into six sections. Section I deals with the basic introduction and origin of BRICS. Section II has been divided into three parts-economic, political, and social dimension- and explores the organisation's internal and external dynamics. Section III delves into the recently launched New Development Bank, and probes into its principles, structure, and power struggle. Section IV aims to address the much speculated change in the world's polarity with BRICS being an alternating force to the hegemonic United States. Section V draws insights from the theories of International Relations and applies it to BRICS in contemporary world. Section VI gives the concluding thoughts of the author on the future impact of BRICS.*

### SECTION I

In 2001, the Chief Economist of Goldman Sachs, Jim O' Neil, coined the phrase BRICs in his paper- 'Building Better Global Economic BRICs' wherein BRIC stood for Brazil, Russia, India, and China. The acronym was a part of an economic modelling to forecast global trends over the next half century and the main finding was that the BRIC countries would play an increasingly important role in the global economy. In yet another paper in 2003, 'Dreaming with BRICs: The Path to 2050', he reinforced that over the next 50 years BRIC could become a major force in the global economy and postulated that by 2050 will outnumber the G-6. He also predicted that by 2050, BRIC will be the

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only industrialized/ developed economies among the six largest global economies (Singh & Dube, 2011, p.3).

His prediction was based on the fact that the world economy was drastically changing over the past half a century and these changes were already taking place in the BRIC countries, such as the boost in privatisation in Brazil in the 1980s to resolve the hyperinflation, and the new liberalisation policies introduced by India in the 1990. While Russia was focusing on strategically rebuilding itself after the disintegration of Soviet Union in 1990, China had come out unscathed from the Asian Economic Crisis of 1990s. It was assumed that the structural reforms in these countries would consequently sustain them and help develop institutions that would promote economic growth. (TISS, 2014, p.17)

According to Singh and Dube (2011), though the idea of BRICs stayed in the periphery from 2001-06, there were no efforts to formalise the group until September 2006. Ancillary to the 61st UN General Assembly in New York the Foreign ministers of BRIC had their first meeting together, followed by various subsequent meetings (p.6). On 16th June 2009, the leaders of BRIC met at in Yekaterinburg, Russia, and called for a "more democratic and multipolar world based on the rule of international law, equity, mutual respect, co-operation, co-ordinated action, and the collective decision making of all states", thus formalising BRIC as a Group (p.7).

According to the report by TISS (2014), in the third summit at Sanya, China in April 2011, South Africa was accepted as a full member of the group, that was henceforth known as BRICS (Brazil, Russia, India, China, and South Africa) (p.18). Although there was a significant economic gap between South Africa and the other BRIC countries, it was believed that South Africa's accession would promote development and enhance cooperation amongst various other emerging market economies as well.

## SECTION II

## PART I: THE ECONOMIC DIMENSION

BRICS was much appreciated on its handling of the financial crisis of 2008-09. The group rose from constituting 16% of world's GDP in PPP terms in 2001 to 25% in 2010. In the same decade, the countries collectively accounted for 40% of the global population and nearly 30% of landmass emphasizing the demographic significance of BRICS. The role played by trade, particularly after liberalisation, is said to be one of the key factors in promoting the economic growth of the countries (Singh & Dube, 2011, p.8). However, the scenario is not as picturesque today.

Brazil slipped back into recession in 2014 and is expected to have zero growth on an annual basis due to weak commodity prices, drought, and declining investment amongst other reasons (Boumphrey, 2015, para. 2). Brazil's economy in the third quarter contracted by 1.7%- a poor performance by any standard (Taborda, 2015) and is expected to contract in 2016 as well, complemented by an increase in unemployment and continuing high inflation. Russian economy is whirling around the dual impact of the drop in oil prices and the sanctions imposed by the western countries. The problems in Russia's economy have also impacted the global economy such as in Germany where the sharp fall in export to Russia is said to be an essential factor behind its near recession (Walker, 2014). Further, the International Monetary Fund (IMF) and Mr Neil support the need to ensure a credible rule of business law in Russia (as cited in Walker, 2014).

China's global slow-down since 2014 has had major global ramifications. According to Farrer (2015), China reached its six-year low with a growth rate of 6.9% in the third quarter. Prof Kenneth of Harvard University argues that if the Chinese growth collapses, the global fallout could be far worse than the one caused by a normal US recession (as cited in Walker, 2014). The falling Renminbi in the

first few weeks of 2016 caused havoc in the stock markets in China sending shockwaves around the world. This fall in growth has led to a reduction of confidence amongst investors in the Chinese economy (Boumphrey, 2016).The South African economy has also been predicted to grow at 0.8% in 2016 after being weighed down by uncertain policy gaps in infrastructure, and drought (Reuters, 2016, para.1).In this economic havoc, India has stood out as the best performer not only amongst the BRICS economies but also amongst all the large emerging economies. Being a major importer, India has been a beneficiary of the low commodity prices (Boumphrey, 2016), a contributing factor to its stable position through the economic crisis.

Recently, according to the report by TISS (2014), there has been a monumental increase in the intra-BRICS flow from $27.3 billion in 2002 to $282 billion in 2012. However, according to Pulipaka and Khanna (2014), China's figures show its blatant dominance in the Intra-BRICS trade. In fact, China is the largest trading source for Brazil, Russia, and South Africa ( Singh & Dube, 2011, p.17) and the second largest partner of India after United States (Workman, 2015).

## PART II: THE POLITICAL DIMENSION

While the main reason for coalition was the economic rationale that was based on a need for increased power in the Bretton Woods Institutions, the political dimension of the BRICS coalition cannot be undermined. (TISS, 2014, p. 19).

The BRICS nations have very few similarities apart from their aspiration of having greater say in global affairs. Unlike EU, BRICS is a heterogeneous group and lacks an ideological basis. For its formation. While India and Brazil are vibrant democracies, Russia's democracy is relatively young and is yet to completely disassociate with elements of its past. On the other hand, China remains a single communist state, and South Africa is a democracy dominated by a social democratic party

(Voronkova, 2015, p.88). With no definite normative agenda or a single unifying similarity, it is fascinating how a report by a western entity brought these nations together (Pulipaka & Khanna, 2014, p.1).

In fact, there is a clear power struggle with the BRICS economies. Brazil and India have a long-standing demand for a greater role in international affairs and aspire to gain the status of a permanent member in the UN Security Council (UNSC) (Voronkova, 2015, p.88). However, China has been vehemently against the expansion and though Russia has supported India, there has been no written agreement (Chaudhury, 2015). The relations between India and China are most controversial as both countries have serious unresolved historical conflicts. From the border disputes in Kashmir and Arunachal Pradesh to geopolitical issues in Asia and Indian Ocean, the two countries have wide differences even regarding Tibet (Voronkova, 2015, p.90). Hence, the struggle between the two countries about asserting their dominance in the Asia still continues.

There has recently been a strategic shift between China and Russia, bringing the two nations closer. According to Anita Inder Singh (2015), political and economic constraints of Russia –the low energy prices and the economic sanctions imposed by the West after the Crimea annexation has led to an increase in mutually benefitting gestures (para.4). In May 2014, a $400 billion gas deal went through where Russia would supply gas to China for the next 30 years (para.9) China became the first country allowed to buy Russia's most advanced aircraft missiles, S-400 (para.4) The harmonization of China's "One Belt, One road" with Russian brainchild "Eurasian Economic Union" at Ufa will call for greater diplomatic coordination and free movement of goods, services etc. (para.5). While this can pose as a possible threat to India considering China's closeness to Pakistan, it also opens up a possibility for a combination of Russia, China, and India. A rapprochement between India and China can lead to three global powerhouses coming together and benefitting all three economically and strategically.

According to Maini and Ramaswamy (2014), India and Brazil have a longstanding relationship. In addition to their r mutually supporting each other for a permanent seat in UNSC, Brazil was also amongst the first countries in Latin America to conclude bilateral trading agreements with India (para.3). Both countries are already partnering in various forums apart from BRICS such as BASIC (Brazil, South Africa, India, China), and IBSA (India, Brazil, South Africa) (para.5).

IBSA, a smaller association that exists within BRICS, was established in 2003 for the three emerging powers to debate and articulate on a variety of geopolitical and domestic issues. Unlike most alliances, IBSA is not based on geographical factors but situational factors (Stuenkel, 2011, para.2). While the cooperation between Brazil and South Africa is structured on South-South foreign policy, bilateral relations between India and South Africa remain limited due to the tariff barriers places by South Africa on its agricultural products (Voronkoya, 2015, p.20). However, according to Wenping (2011), China and South Africa share smooth bilateral relations, with China being South Africa's largest trading partner and major investor. Hence, their strong bilateral trade laid the foundation for South Africa's entry into BRICS (para.2)

**BRICS AND THE WEST**

Though there still exist fundamental differences between the BRICS countries, over the recent time there has been an identifiable unity amongst them. The most prominent being the rejection of the representatives from BRICS nations, in their joint communiqué, to exclude Russia from G20 as a result of the Crimea crisis. Also, Brazil, China, and India abstained in the UN General Assembly resolution that condemned Russia for its actions. The steps taken by BRICS undermined the West's attempts to alienate Russia (Stuenkel, 2015, para.10). India's disinclination to support any "unilateral measures" could also stem from the scepticism of West's hypocrisy, in supporting various coups

against democratically established governments such as Venezuela in 2002, Egypt in 2013, Ukraine in 2005 etc. (Stuenkel, 2015, para. 12). BRICS' unwillingness can also be a way to show its disapproval of the West using sanctions as a means of punishment every time they deem fit. Being victims themselves- Brazil in 1980s when it pursued nuclear enrichment and reprocessing technology; India after it conducted its nuclear tests; and U.S's tactics of threatening China with its rhetoric- BRICS were not ready to be pushed to the wall again (Stuenkel, 2015, para.16).

With all the opposing decisions being made by the BRICS, it is also important to accept its dependence on the West. At $590.4 billion, China's largest trading partner is the U.S. (Johnston, 2015, para.3). In fact, U.S is also India's top import partner at $42.7illion (Workman, 2015a), Brazil's and South Africa's second highest import partner (Workman, 2015b). Clearly, the U.S., for instance, has entrenched economic ties with the BRICS nations and it would be fair to say that all of them need the U.S

**PART III-THE SOCIAL DIMENSION**

Along with economic and political dimensions of BRICS, it is imperative to understand the social factors and the quality of life of people living the BRICS nations. According to the HDI (Human development Index) report published by UN development Programme (2015), Russia is ranked the highest amongst BRIC countries at the 50th position followed by Brazil at 75th rank, China at 90th position, and South Africa at 116th position, amongst the 188 countries (p.47). India ranks the lowest, holding a position of 130 (p. 48). It is evident from these reports that the economic propensity has not trickled down and the standard of living is particularly low in South Africa and India.

In light of the above information, according to the projections by United Nations, the average age of an Indian will be 30 years old in 2030 and will remain at approximately 35 till 2014. In 2020, when the average age in US is 37, Western Europe is 45, and Japan 48, India will be at its prime at 29 years

(as cited in BRICS, 2012). This demographic advantage is likely to be enjoyed by all BRICS countries when rest of the societies are ageing. With the rise in demand for skilled workers in the West, and the supply available with BRICS, it is essential they utilise this opportunity. (p.11)

Focusing on the cultural aspect of the BRICS countries, there is a lot of diversity amongst the countries with the difference in language, lifestyle, food habits, etc. However, according to Singh and Dube (2011), culture and tourism are two areas that are yet to be explored by the BRICS countries and remain a weak link in the overall cooperation between them. Tools such as culture and tourism can be used to further improve the diplomatic ties between the countries, increasing the integration of economies as well (Singh& Dube, 2011, p. 28).

## SECTION III: NEW DEVELOPMENT BANK

In the sixth BRICS annual summit held in Brazil the New Development Bank (NDB) was launched, backed by the all the five BRICS countries. While China bagged the location of its headquarters in Shanghai, India secured the appointment of the first president of the bank (Nataraj & Sekhani, 2014).

Basic Principles

The demand for financial assistance by the developing countries and emerging economies for their infrastructure projects was estimated to meet only 2-3%. NDB is primarily set up to finance the growing infrastructural needs, and realize sustainable development within BRICS and other developing countries. The bank has also set up a Contingency Reserve Arrangement of $100 billion to help countries challenged with short term liquidity pressure (TISS, 2014, p.24).

The launch of NDB is also said to be a counter to the Bretton-Woods Institutions. According to Rana (2013), in 1944, the United States, as the hegemon at that time, had a major role to play in establishing

multilateral rules including but not limited to those for finance and IMF (para.4). While this was indeed needed for financial stability, U.S. continued to control the reins of these institutions even much after. Theoretically, the percentage of quota each country holds should be based on the GDP size of the country (De-SáGuimarães, n.d, p. 12) However, the U.S and the European Nations were unwilling to share the percentage of quota and voting powers, despite the economic prosperity of the BRICS countries. The IMF's 2010 reforms were long delayed because the proposed package meant a decrease in participation power, which was much lesser for countries like USA, and United Kingdom and a steep increase for BRIC nations (De-SáGuimarães, n.d, p. 13). As late as in December, 2015 that the U.S. Congress ratified the reforms and "enhanced" the representativeness of countries like China (from 3.8% to 6. %) and India (from 2.3% to 2.6%) (George, 2016, para.1)

## STRUCTURE OF NDB

The finance ministers of the BRICS countries will be taking up the control as the Governing body of NDB. While the first chair of Board of Directors will be from Brazil, Russia will position the first Chair of Board of Governors. The bank allows membership to any country of the United Nations but the capital share of BRICS will remain at a minimum of 55%. The voting principle will not be based on the share of capital but on one country, one vote. Further, apart from the BRICS countries the voting rights will also be granted to countries from the South on a rotational basis (TISS, 2014, p.25). The bank intends to provide loans at fewer restrictions and not create stringent political conditions, compared to World Bank and IMF. The NDB is a major accomplishment in representation of emerging economies on international stage (Nataraj & Sekhani, 2014, p.2).

## THE POWER STRUGGLE

According to Wildau (2015), the NBD comes a month less than the launch of China's brainchild, Asia Infrastructure Development Bank (AIIB) which has similar aspirations of creating an alternative to

the West dominated institutions. With 57 founding members, AIIB will limit itself to Asia unlike NDB. While experts argue that BRICS bank can be imagined as a method for "for emerging markets with large trade surpluses to recycle those savings into productive investments in their own countries" it is crucial to keep the geopolitical tensions between the BRICS nations in mind. A reason for the four-year delay to begin operations of BRICS was negotiations regarding the location of the headquarters. The bank's presence in Shanghai is expected to boost the city's goal of becoming a global financial centre soon (Wildau, 2015).

The growing political and global influence of China is clearly underlined with the location of the New Development Bank. India's first turn to lead in every five-year tenure can also be taken as an indication of its importance in the BRICS groupings. According to Mallet and Crabtree (2015), India has appointed Mr KV Kamath, a pillar of the Indian cooperate establishment and the ex-chairman of India's largest private bank, ICICI. He is known for his consistently upbeat views on India's economic development even in times of mishaps. The power and prevalence of the role of Chain, being the biggest contributor and holding the highest shares, has also been probed in India.

NDB is all set to approve its first loan in April 2016, in the Chinese Currency Renminbi. However, there are various challenges the BRICS nations might have to face. According to Pulipaka and Khanna (2014), as speculated, the NDB lending loans to non-members in the future may result in an absolute difference in opinion due to variation in the values and principles that these nations share. While it is too soon to say how smooth the operations will run, Nation Development Bank is unquestionably the most significant achievement of the BRICS grouping.

## SECTION IV: A MULTI-POLAR WORLD

With the formation of the New Development Bank, there has been a substantial increase in the speculations regarding a shift from a unipolar to a multi-polar world, with the U.S and the BRICS nations being on either ends. While it would be fair to call the BRICS an emerging powerful economic bloc, an alternate to the U.S might be a stretch. This is explained by Pulipaka and Khanna (2014), who articulate the fundamental difference in the perception of a multi-polar world between the BRICS countries (p.1). While for Russia it is constructed around China, India's aspiration arises from the power of the growing dragon fringing on its territory. Away from wanting to create a multi-polar world, China is relentlessly pursuing the goal of becoming U.S' sole peer, in order to balance the U.S presence in Asia- Pacific and to become the sole dominant power in Asia (p.2).

A deeper look shows how China markedly overshadows its other peers. At $4 trillion, China's foreign exchange reserve is greater than Brazil, Russia, and India combined (Heydarian, 2014, para.). China's contribution in the CRA ($41 billion) is also way above other BRIC countries. Amusingly enough, the Sinologist Joshua Cooper Ramo calls the strategic deployment of methods of using soft loans and developmental aids to satisfy China's thirst for raw material as the "Beijing Consensus" (as cited in Heydarian, 2014, para.6). The dependence of the Brazil, Russia, India, South Africa on China is inevitable, with China being of one of their largest trading partners. For a group as disparate as BRICS and one country significantly outshining the others, becoming an alternate to the unipolar world seem quite improbable at the moment.

Another essential point argued by Brawely (2007) is that economic progress does not translate into military prowess and even if military weapons are being acquired by BRICS nations, it is aimed at countries within the group at this point (p.154). Also, the U.S has managed to limit warfare through

only conventional measures, by imposing the Non-Proliferation Treaty after the Cold War, in which its technology and experience are far superior to any of its "rivals" (p.156). It would take decades of investment for any of the countries to be on a level playing field (p.155). Therefore, with the military and economic advantage that U.S. clearly holds, it will take a generous amount of time for the BRICS countries to cause any major power redistribution (p.155).

## SECTION V: APPLICATION OF INTERNATIONAL THEORIES

The present theories of international relations are extremely varied in perspective. According to Hudda (2015), the Realism advocated by Kenneth Waltz and Hans J. Morgenthau believes that humans are intrinsically self-interest seeking beings and argues that the principle goal of every state is survival making power play the key. Keeping this is mind; it would be fair to label China's actions as massive threat to India's sovereignty. As confirmed by Stockholm International Peace Research Institute (SIPRI), China's military expenditure has increased by 175% in a decade (as cited in Hudda, 2015, para. 5) and its constant soft threats of sending troops into the Indian Territory can be interpreted as actions to gain more power. Considering the current scenario of Russia, the likelihood of it holding a neutral ground, or even covertly supporting China, in case of a war scenario stands a possibility.

According to Slaughter (2011), institutionalism propagates many assumptions similar to Realism but acknowledges the balance of power in international politics through co-operation on the basis of a rational, self- interest strategy. With this view, the BRICS nations are seen as a co-operative group being part of various multi-national organisations such as WTO, UN etc. There has been an increased role of all the countries in various global forums such as in the UN peacekeeping (Hudda, 2015, para.9). In fact, with India and China's increasing economic integration, similarity in opinion in major

issues such as climate change, and the recent launch of a bank together, the two countries seem to be in an extremely cooperative relationship.(cancel) According to SáGuimarães (n.d.), the institutionalist theory claims that states indulge in creating organisations with a view of benefitting from it in the future (p.4) as he argues that had the World Bank and IMF given BRICS a fair share of representation, the NDB would have never even been formed (p.7)

Liberalism establishes a view rather different from the two views above. According to Hudda (2011), liberalists are optimistic and believe that humans are fundamentally good. Its proponents like Kant emphasised on Perpetual Peace, I.e. state of nature is a state of peace, and how there is an absence of war in democracies. Since individuals and private groups are considered to be important, the ingrained trade relationship of the countries, within BRICS and the rest of the world to be reason enough to avoid conflicts. With constant increase in economic dependence due to the increase in trade and FDI (Hudda, 2011, para.7) there will also be an increase in regional integration making initiation of a war rather difficult.

It would not, however, be possible to discount the views of Samuel Huntington, who in "The Clash Civilizations" states that the source of international politics will not be economic or ideological, but cultural (Brooks, 2011, para.2). In a world that is increasingly becoming smaller, identities are becoming larger. With the absolute difference in the cultural heritage of the BRICS nations, blind faith in the idea of economic integration bringing peace many not be appropriate.

## SECTION VI: CONCLUSION

BRICS over the years has proved be an important economic bloc with sizeable influence in the market share. Whether it is the economic constrains or genuine interest in mutual benefit, here has been a noticeable rise in their cooperation levels. The launch of the New Development bank is indeed of

great significance to improve the South- South cooperation and to evolve as an alternate to the West dominated financial establishments. The success of the bank will be primarily based on risk management and cooperation between the countries.

However, it is essential to understand that their grouping was solely based on their economic progress compared to other countries at the time. The perception that BRICS is emerging to create a new world order is a rather far-fetched due to their current dependence on the West and the economic, socio-political turmoil within the group. The recent recession in Russia and Brazil, the historical border disputes between India and China, and the geopolitical significance of South Africa are only some of the reason BRICS shall not emerge as the guiding force of the global as of yet. The structural disparity between China and rest of BRICS members and China's clear domination begs the question of whether BRICS is moving towards a multi-polar world, or if it is becoming the "Beijing Consensus".

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## 4. UNCONSCIONABLE HANGING

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**ABSTRACT**

*The paper titled "Unconscionable Hangings" is regarding the issues in the execution of death penalty under the theme of "Aspects of Criminal Law and Social Control in India." This paper throws light on the reasons for abolishing death penalty and the various reforms that have to be brought about in the country for having an evolved system of human rights protection. In this paper the execution of death sentence has been discussed in the light of constitutionality, procedural impediments, inefficient exercise of clemency powers, political suppression and public opinion. It also looks at the global scenario and the stance of various countries as retentionists or abolitionists. The paper's main motive is to contribute, in any manner possible, towards the improvement of the judiciary and the prison system in the country and make it more reformative in nature for the convicts. Various instances has also been cited in the form of Supreme Court judgements where there has been miscarriage of justice, and also various other politically stimulated cases fanned by public opinion. This paper as a whole contains, from the historical development to the present scenario of this issue in the country. Therefore it is just a humble addition towards the already existing issue of abolishing death penalty with view of progress.*

***Keywords:*** Abolition, Constitutionality, Public opinion, Reformation.

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## INTRODUCTION

The issue of 'abolition of capital punishment' was for the first time ever, raised in the Legislative Assembly by Shri Gaya Prasad Singh on 28th January, 1931.[135] A motion for circulation was made, however, the motion was dismissed after the denial of the then Home Minister Sir James Crerar on various grounds. Undoubtedly the fight for this critical issue continues even today. Various developments have been witnessed, but the issue is still a legal quandary.

Over centuries capital punishment has been historically embedded and enforced in our society. In the old tradition, the concept of punishment was a retributive one. Its origin dates back to Eighteenth century B.C. in the code of King Hammurabi of Babylon. Retribution has an important role to play in awarding punishments but it cannot be reduced to vengeance. Death penalty does not conform to any constitutionally valid penal goal. Capital punishment is the practice for execution of persons guilty of offences like murder or other grievous offences. This action can be only taken by the state. Right from the ancient times, the capital punishment has been enforced in India for a number of offences. The penal code along with 23 other statutes, the Army Act, the Assam Riffles act, Defence of India Act being some among them, awards death penalty for certain offences. But now what is contended is that the capital punishment should be abolished. The 35th Law Commission Report of1967 submitted that capital punishment should not be abolished. The commission report was based on the conclusion that at this present juncture, India cannot afford the experiment of abolishing capital punishment.[136] The recommendation of retaining capital punishment was dependant on various factors that were pertaining to India at that point of time, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country. Nevertheless general

[135] www.deathpenaltyindia.com, NLUD Centre on Death Penalty.
[136] Law Commission of India, 35th report, 1967.

well-being, educational level, social and moral conditions have changed considerably. As a result, reflections are being seen in the latest Law Commission Report of 2015 which recommends abolishing death penalty. Evidences drawn from constituent assembly debates conclude that Dr.Ambedkar was personally in favour of abolition[137],

> *"I would much rather than having a provision for conferring appellate powers on the supreme court to whom appeals in cases of death sentences can be made, I would much rather support the abolition of death sentence itself. That is a more proper course to follow."*

The Indian penal provisions need a straight out revision. Law was never meant to be stagnant. It has to evolve with the changes in the society. Changes takes place gradually, but theyshould certainly. Evolution of law is an unavoidable aspect and this evolution survives because of an aura of historical legitimacy. And the law should evolve based on the intensity, nature and the effect it has on social stigma.

After the execution of Bhagat Singh, Sukhdev and Rajguru on March 23rd, 1931, the first execution post-independence was of Nathuram Godse and Narayan Apte in 1949 in the Mahatma Gandhi assassination case. Further, from 2004 onwards, 1303 death sentences have been awarded in ten years, according to the National Crime Record Bureau Prison Statistics Report. However, only three convicts were executed during this period. Dhananjoy Chatterjee in 2004, Ajmal Kasab in 2012 and Afzal Guru in 2013 followed by Yakub Memon in 2015.Judging from the figures, India has seen an execution free period for seven years. This discretion given to the courts in such cases assumes onerous importance, and its exercise becomes extremely difficult because of the irrevocable character of death penalty. In this extreme difficult situation, decisions are prone to err and precision cannot be

[137] Law Commission of India, 262nd report, 2015.

guaranteed. Even a slight room for error cannot be overlooked. And there are series of instances where there has been a gross error in the procedure and the life of convicts just becomes a puppet show in the hands of the authorities. Acts of gross negligence and political foreplay is one of the reason for calling for abolishing death penalty today.

The execution of death penalty in India is clouded by a series of issues. In addition to being constitutionally challenged, there are various procedural impediments in the execution of death penalty. The shift in the procedural law from stating 'special reasons' for not awarding death penalty to stating 'special reasons' for awarding death penalty, wherein it is stated as an alternate punishment in the amendment of 1973. The new code made death penalty an exceptional punishment in IPC and other statutes where CrPC applied. This shows the way towards which, the conclusion of this issue should be heading.

The first challenge to the constitutionality of death penalty came up in the 1973 case of *Jagmohan Singh v State of U.P.*[138] The petitioners argued that death penalty violated Articles 14,19 and 21 of the Indian Constitution. The death sentence, extinguishes along with life, all other rights that have been guaranteed under Article 19(1) (a) to (g), and an unreasonable denial of their rights are not in public interest. The discretion vested in the judges for deciding death sentence is uncontrolled and unguided for, violating Article 14. Because the law did not provide a procedure for considering the circumstances crucial to deciding punishment between life imprisonment and death sentence, it stands in violation of Article 21. In *Rajendra Prasad v state of Uttar Pradesh*[139] the court found itself confronting not the constitutionality of the death sentence, but that of the sentencing discretion. It stated that special reasons must be stated relating not to the crime alone but also to the criminal. Apart from a

[138] Jagmohan Singh *v* State of U.P (1973) 1 SCC 20.
[139] Rajendra Prasad *v* State of U.P (1979) 3 SCC 646.

few exceptions, by and large the convicts are feuding villagers, striking workers whom the society has hardened through its neglect and discrimination. While awarding death sentences in respective cases, the bigger picture is missed out on. The real essence of punishment, that of being deterrent and reformative, is completely ruled out.

The other strict issue with the execution of death sentence, is the process which is followed in the sentencing. Section 354(3) states, "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 judgement shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."[140] During initial stages, capital punishment was a rule for capital offences and life imprisonment was an exception. It was later in 1970's that life imprisonment became a substitute for capital punishment. The doctrine "Rarest of rare crimes" was first laid down in the landmark judgement of *Bachchan Singh v State of Punjab*[141] in the year 1980 where the Supreme Court restricted the use of death penalty to special offences characterised under the said doctrine, which would further mean that it would differ from case to case and is at the discretion of the judge. In *Bachchan Singh* the court adopted the "rarest of rare"[142] guideline in the decision of imposing death penalty and it remains a talisman ever since. The court said that the reasons for imposing or not imposing death penalty must include the circumstances of the crime and the criminal. This was the case where the court made a definitive shift in its approach to sentencing. The court also held that a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. "That ought not to be done save in the rarest of rare cases where the alternative option is unquestionably foreclosed."[143] But, the problem arises in application of this principle in further cases. This particular

[140] Section 354(3), the Code of Criminal Procedure, 1973.
[141] Bachchan Singh *v* State of Punjab (1980) 2 SCC 684.
[142] (1980) 2 SCC 684.
[143] Bachchan Singh *v* State of Punjab (1980) 2 SCC 684.

judgement has been held as a bad example in many other cases. This doctrine is still followed and is the latest development under the death penalty scheme that the country is witnessing. This doctrine was introduced for lending coherence to instances where death penalty will be attracted by balancing the aggravating and mitigating factors. However, this doctrine has been very widely misunderstood and one of the misapplied doctrines not only in public disclosure but also in judicial pronouncement in courts at all levels. This doctrine not only refers to the heinousness of the crime but also equally focuses on the mitigating factor. The alternative option being 'unquestionably foreclosed' indicates that the person is beyond reformation. Being the guardian of justice, is it justified to state that a person does not even stand a chance for reformation? Or assume that the State is not much interested in assuming liability of such criminals, and invest time or proper instrumentalities for their reformation. It is appropriate burden on the State to showcase the impossibility of reformation, and that the culprit has a fair chance to revert back to the crime. As judges seal the fate of the death row convict, the least they can do is explain the evidence before them which led to the conclusion that the culprit could not be reformed. If there is no such evidence, then there is a presumption of reformation, and the court must meet high threshold limit if it wants to override the presumption. And there are many judgements where the brutality of the crime has been taken as the indication of impossibility of reformation. To argue that the individual cannot be reformed because of the crime he has committed is perverse articulation of what was intended in *Bachchan Singh*[144]. The reasoning adopted in Sushil Kumar's judgement[145] raises serious concerns on the justice meted out to 22 individuals on the verge of their execution after their mercy petition was rejected by the president. In none of these cases did they have the benefit of enquiry into the possibility of reformation. After highlighting the brutality of their crime, in none of these cases did the State lead any evidence on reformation, and the court did not even ask

[144] Bachchan Singh *v* State of Punjab (1980) 2 SCC 684.
[145] Sushil Sharma *v* State (NCT of Delhi) (2014) 4 SCC 317.

for it. The most tragic aspect of death penalty in India is that we often have an image of the prisoner frozen in time. It is the image of the prisoner at the time of commission of crime and that is all what matters. There is no space in public and judicial imagination for the ill effects of long periods of incarceration. Some of them are the most trusted prisoners of the jail where they are lodged, some help in maintaining the records of the jail and in its administration, they even teach other prisoners about their work in the jail. But still there is an image of them committing a crime, ruling out the scope for their reformation and sending them back to the society. There should be no illusions that these 22 convicts were brought so close to their death without any court in this country paying adequate attention to the possibility of their reformation.

An inordinate delay of 11 years occurred in considering the mercy pleas of the death-convicts of Rajiv Gandhi assassination case with their pleas being ultimately rejected. This is just one of the incident which projects the unconscionable and arbitrary manner in which the mercy petitions are kept pending years on end. Procrastination on mercy petition is inhumane to the death row convicts. The final decision on mercy petition lies with the President, being the Executive Head. The discretion to grant, to remit, or to commute the mercy petition lies with the President. The government seems completely indifferent to the plight of these convicts. The Supreme Court has also recognized that any prolonged delay in the execution of death sentence can make the punishment, when it comes, degrading and inhuman. The psychological stress and trauma coupled with the solitary confinement creates a conflict called the "death row phenomenon'[146] which in itself is a cruel punishment. The convicts are constantly torn between hope and despair which gives immense emotional trauma to them and their families. And finally when the petition reaches the table of the President, the worst that can happen is the decision being influenced by political foreplay. The President or the Governor under 'Article

[146] See www.deathpenaltyworldwide.org death row phenomenon, last visited on 10.09.2016.

72'[147] and 'Article 161'[148] respectively do not work without the aid and advice of the Council of Ministers. Politics surfaces here. The Council of Minister would rather decide in their self-interests, leading to biased decisions suggesting that the decision can be influenced by powerful public opinion and dirty political calculations. A death row convict's life or death may not only depend on the ideologies of the government, but also on the personal views and belief system of the President.

Another important issue in this regard is the opinion of the general public. One would argue that general public opinion matters in making decisions which affect the population at large. But it can be seen in a way that government has the power to drive the public opinion towards stands of fairness, equity, dignity and justice which are constitutionally enshrined ends rather than follow the public opinion. The common public, most of the time is ignorant about the various façades of this subject . Anger, revenge, grief are usually the driving force among the common masses for supporting death penalty. But the justice system cannot afford to be swayed by this. "Leaders must show the way that how deeply incompatible is the death penalty with human dignity."[149] In India instances of sati, dowry prohibition, untouchability, child-marriage aretestament to the fact that government can change the deep rooted opinions of the public and has an obligation to do so when dignity and equality comes into question.

Drawing a picture of the global scenario, there are 140 abolitionist countries in total which have abolished death penalty in law or in practice. Countries like France and South Africa where state practices have shown that road to abolition is not always a function of public opinion. When the UN was formed in 1945 only seven countries had abolished death penalty, in contrary to today where the

[147] Article 72, Constitution of India.
[148] Article 161, Constitution of India.
[149] Moving away from the death penalty: Lessons from South-East Asia, United Nations Human Rights Commission 9 (2014).

number stands at 140[150]. While only a minority of country retains death penalty, the list include some of the populous country including India, China, Indonesia and the United States making a majority of the world population subjected to this punishment. Capital punishment has been regulated in the international human rights treaties one of the aspect of right to life as contained in the International Covenant on Civil and Political Rights ('ICPR'). With the second protocol to the ICPR the international community saw the first global instrument aiming towards abolition of death penalty. At present 168 states, including India, are parties to ICPR. The committee reviewed India's report in 1996 and recommended that India "abolish by law the imposition of death penalty on minors and limit the number of offences carrying death penalty to most serious crimes, with a view of its ultimate abolition.[151]" Many of the resolutions of the UN noted that a moratorium on the use of death penalty would contribute for the respect of human dignity and to the enhancement and progressive development of human rights.

Our apparent criminal justice system is not free from any kind of biasness or errors simply on the ground that they are executed by human beings. These are the primary factors that leave room for the death penalty sentence to be arbitrary and disproportionate. Another major problem in this country is politics, no doubt even regarding this matter. But apart from the very basic contention of life being the most cherished right under Article 21 of the Constitution, and that no one has the right to take it from an individual under any circumstances except procedures established by law, there lie more social and political problems and procedural problems contemporarily. In furtherance, abolishing death penalty straight out would not solve rather create many problems. Abolishing death penalty as in many countries like Australia, Denmark, Brazil, Norway, Italy right from the year of 1976 can give an insight

[150] See www.deathpenaltyifo.org. Death penalty Information Centre, Abolitionist and Retentionist Countries, Data accurate as on December 31, 2015 by Amnesty International. Last visited on 14.09.2016.
[151] Law Commission of India, 262nd Report, 2015.

to the way as to how they deal with the criminals by not awarding them death penalty.[152] The adverse situation our country is in right now demands for other reforms so as to abolish the impugned death penalty. Or abolishing it would rather bring about major reformatory goals to the Indian judiciary system.

Sometimes the heinousness of the crime is such that even the most righteous and reasonable of the people come down to vengeance which results in assertion of retention of death penalty. But death penalty, no matter executed in whichever form, the procedure will turn out be arbitrary for the mere fact that it is being conducted by humans. There are various factors which influence a particular decision and is prone to biasness. Focusing on retributive aspect of death penalty, the reformative aspect loses ground. And to argue that death penalty provides for a deterrent effect is vague and ambiguous. Because how far the murderers were deterred from committing the murder but for the capital punishment is difficult, if not impossible to conclude. As far as the present condition of this country is concerned, it is not a secret that the death penalty jurisprudence in this country, at all levels of judiciary is in shambles. The rich and the affluent politically backed people do not fall in this trap and mostly celebrate the failure of judicial proclamation amongst the foolish public. Justice Bhagwati in his dissenting opinion in *Bachchan Singh's case*[153] reasoned that, "the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape from its clutches." Numerous committee reports and Supreme Court judgements have recognised that the criminal justice system of this country is in deep crisis. The ill-equipped investigation system, the prison system being five star hotels for the politically fanned convicts, improper administration of the jails, inefficient prosecution, lack of legal

[152] See www.amnesty.org.uk, last visited on 15.09.16.
[153] (1980) 2 SCC 684.

aid, and above all lack of interest on the part of the state to invest in a proper and advanced rehabilitation programme for the convicts.[154]

The march of our own jurisprudence shows the developments in the procedures indicating where we have to head. From being in the minority pool of retentionist countries, we have to march towards being one of the abolitionist countries, demonstrating that evolving standards of human dignity and decency do not support death penalty. And retaining death penalty does not prove as an effective measure for avoiding insurgency, terror or violent crime.

[154] Follow up study of Released Offenders on their Reformation and Rehabilitation, Dr. Deepti Shrivastva (2010), Bureau of Police Research and Development, Ministry of Home Affairs, Government of India.

## 5. SURROGACY- ETHICAL AND SOCIAL ASPECTS

Author(s): Shubhra Shakya[155] and Dr. Bharath Kumar[156]

**ABSTRACT**

*Surrogacy is a mutual agreement between surrogate mother and commissioning parents. It is not a new concept but applied scientific knowledge and modern technologies made it a realistic option for many intending parents. Due to its socio-economic profile, India is one of the easy destinations in finding a surrogate mother for couples worldwide. Surrogacy started with a notion to provide perinatal care to infertile couples but soon after it turned towards profit making business. Wealthy couples and rich career oriented women, who don't want to take the trouble of carrying a pregnancy, often hire comparatively poorer women to bear their children. Although, assisted reproductive technology and its commercial implications may not lead to healthy consequences due to the chances of sex-determination, however, the significance of surrogacy cannot be denied and surrogacy remains an admissible alternative for married couples medically unfit for childbirth and seeking an offspring, not of a distant genomic constitution. Proper surrogacy arrangement could be achieved, not only, with strict laws and regulations, but also, a moral commitment is essential for the ease of all parties involved. Despite a legal infrastructure, surrogacy often fails to produce a complete benefit to a surrogate mother. There are many ethical issues associated with women involved in commercial surrogacy, i.e., exploitation for financial gain by their spouses and middlemen and commodification of their body. They may be coerced into accepting surrogacy by emotional pressure in case of altruistic surrogacy. There is a social constraint too as surrogacy is often referred to as reproductive prostitution- - baby trade, selling body parts and renting uterus. In India, the wage for surrogacy is comparatively less and a surrogate mother frequently faces problems in getting benefits. This article explores ethical and social aspects of surrogacy and also explains how surrogacy has resulted in exploitation of woman.*

**Keywords**- Surrogacy, infertility*, in vitro* fertilization, ethics, legal and social aspects.

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## INTRODUCTION

Surrogacy is a mutual agreement under surrogacy act, beneficial for all the parties. A 'surrogate mother' is a woman, who agrees to bear a child for another woman who is incapable or unwilling to do so herself for financial and/or compassionate reasons. The most common type of surrogacy is genetic surrogacy where a surrogate mother is genetically related to the child. Here a woman's egg is fertilized by the sperm of the commissioning father (the male partner of the couple desiring a child) by artificial insemination. The surrogate is the genetic mother of the child and commissioning mother takes over the role of social and legal mother. It is sometimes referred to as 'partial surrogacy' as a child is genetically linked with his father, but in the case of commissioning father being infertile, the sperm of a donor is used to fertilize the surrogate's egg, which is referred to as traditional surrogacy. Another form of surrogacy is gestational surrogacy or full surrogacy, where an egg is fertilized by *in-vitro* fertilization and is implanted into the uterus of the surrogate mother by using egg and semen obtained from commissioning parents or from anonymous donors. Surrogacy can be altruistic or commercial, depending upon whether the surrogate mother receives financial benefit for her pregnancy.

Technically, under the legislative agreement, surrogate mothers undergo insemination and continue the pregnancy and deliver the child to the second party and receive financial benefits as per the contract. With the increasing cases of infertility, worldwide surrogacy emerged as a hope for nearly 20% of married couple medically unfit for childbirth. Commercial surrogacy is legal in some countries like Ukraine and Thailand and states like California and Texas while it is illegal in England and in many states of the United States and Australia, Greece and Netherlands recognize only altruistic surrogacy. In contrast, countries like Germany, Sweden, Norway, and Italy do not recognize any surrogacy agreements. India has become a most-liked destination for surrogacy for desired couples from abroad because the cost of the whole procedure in India is much less than other developed countries. Modern

science and applied technology allow us to avail surrogate motherhood efficiently. Further, surrogacy enables fulfillment of the desire of parenthood in busy modern lifestyle. *In vitro* fertilization (IVF), embryo transfer and embryo freezing are common phenomena in the surrogacy network. Recent advancements in assisted reproductive techniques (ART) have extended surrogacy to a new dimension using multiple options including gestational and traditional surrogacy.

Humans, as most of higher animals, receive an equal genetic contribution from both the parents and hence surrogate mother contribution is not limited to only offering womb for embryo development. It is quite interesting to note, gestational surrogacy does seek merely uterus from the surrogate mother while traditional surrogacy allows both genetic and gestational motherhood. It is up to the intended parents and based on an agreement, to choose one of the options. It may be mentioned, maternal inheritance provides an option in modern surrogacy to minimize genetic abnormalities and disorders. It has been also established that maternal inheritance contribution is much higher than a male parent. Hence, speculating that offspring will be a complete biological copy of intended parents is not accurate in the case of traditional surrogacy. Even in the case of gestational surrogacy, offspring receives several phenotypes from a surrogate mother; addressing these points will provide an in-depth idea in choosing a surrogate option. Considering these facts allow revising legislations and surely minimize post maternal conflicts often seen with these events. Since surrogacy and practice of assisted reproductive technique largely depend on laws and legislations, hence regular reforms will add benefits for both intended parents and a surrogate mother.

## HISTORICAL BACKGROUND

Infertility remained a key problem and challenge since ancient times both in mythology and history. In fact, in Bible, and other religious documents there is an evidence for practices of surrogacy and there are biblical instances of a maidservant being requested by a barren wife to bear her husband's

child. However, in these instances, having a surrogate mother is entirely different from the current scenario and it was bound to a special group of people found medically unfit for childbirth. In modern times, surrogacy is transformed into a well-organized market worldwide generating billion dollars annually. The breakthrough was in 1944 when Professor John Rock at Harvard Medical School fertilized an egg with sperm outside of the uterus for the first time in history. In the subsequent years, sperm storage and cryopreservation techniques were developed. In the year 1978, Louise Brown, the first test-tube baby, was born in England and in 1980 Michigan lawyer Noel Keane wrote the first surrogacy contract. While in the year 1985, first successful gestational surrogate pregnancy was achieved. With the advancement in technology, especially ART, new dimensions opened up for infertile couples.

**Issues with surrogacy**

Similar to other bioengineering applications, several controversies and issues surround surrogacy. Among these, ethical issues regarding the exploitation of surrogate mother and autonomy of fetus remain the core challenge. Additionally, the legal scenario on surrogacy is quite fragile and mostly associated with malpractices especially in countries like India. Further, even in current times, also surrogacy, by and large, is considered an unnatural means of getting offspring and faces a kind of discrimination within the society. This paper concerns some of the ethical and social issues associated with surrogacy.

## ETHICAL ISSUES

The ethical discussion regarding surrogacy is centered on the main issue that there is exploitation of women. Fertilisation and embryology (Warnock Committee**,** 1984) regarded surrogacy as morally reprehensible for the reason that 'it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child'; and on the

deontological principle that people should not treat others as a means to their own ends. On the contrary, liberal individualists typically argue that the right to enter surrogacy arrangements is a part or natural extension of the right to personal autonomy. To prohibit or invalidate such contracts would be to violate women's right to self-determination and reinforce the negative stereotype of women as incapable of the full rational agency. But, the real picture reveals the bitter truth; a woman from deprived class has no right to take a decision about her own body. Being poor and illiterate, they are generally coerced into surrogacy by their husbands and surrogacy agencies to earn money easily. To induce anyone to undertake an employment without reasonable payment would certainly, in other fields, be regarded as exploitative. With surrogates, the reverse seems to be true and the payment of a fee to a surrogate seems to be the major factor linking surrogacy with accusations of female exploitation. An alternative to commercial surrogacy is 'compassionate family surrogacy', where any close relative accepts to carry a pregnancy to help an infertile couple at an altruistic level. However, there are chances of emotional exploitation in such surrogacy; sometimes a woman accepts pregnancy out of compassion under adverse conditions, which may risk her short-term or long-term health or even her life. It has been reported that often a surrogate mother is forced to undergo many pre-pregnancy and therapeutic medications by intended parents for satisfying their goal. This medical profiling might be beneficial for other parties (intended parents, surrogacy agencies) but pressurizing a woman for such medical examination surely violates her autonomy. With regard to the financial benefits to surrogate mother, according to mutual agreement/contract, benefits are only admissible once pregnancy successfully turns into childbirth. However, many unwanted complications may occur during pregnancy like a miscarriage, the birth of an abnormal child, stillbirth or neonatal death and surrogate mothers suffer to seek financial support from intended parents in such cases. One recent example concerns a woman found, during her second surrogate pregnancy, to be carrying a fetus with Down's syndrome. The commissioning couple would not continue support, and the surrogate mother

was forced to abort the handicapped baby. It is also seen that a man (the genetic parent) expects from his wife (the non-genetic parent) to raise the child as though it were her own. But vice-versa is not true, the mother (the genetic parent) assumes greater responsibility for the children, whereas the father (the non-genetic parent) feels less empowered to do so. Racism is another unignorable aspect of woman's exploitation in surrogacy. When a significant amount of money is invested, most couples want a good looking child and are ready to pay more to a fair, middle-class woman than a dark, poor woman. In some cases, there is considerably less possibility to have a natural childbirth (birth via vaginal canal), and opting surgery for childbirth could lead to additional health and post-surgery complications for a surrogate mother. Under these circumstances, surrogate mother faces problems both financially and physiologically. These issues could be part of written contract and agreement between intended parents and surrogate mother but reality is unpleasant; in most of the cases, surrogate mother was never informed of these unexpected complications by intended parents and or third party/middleman.

Surrogacy arrangements involve other parties (the child and commissioning parents) apart from the surrogate mother, and they might also be subjected to exploitation during or after pregnancy. Although surrogacy contracts vary, the heart of the arrangement is the promise by the surrogate to give up custody of the child and the promise of the other party to accept the child. If surrogate mother denies relinquishing the child, in such cases, sometimes couple who have commissioned surrogacy have to fight a long legal battle to get their child and experience severe mental trauma and financial loss in this process. The cross-border surrogacy leads to problems of citizenship, where children are denied nationality of the country of intended parents, and as a result, an Israeli gay couple had to undergo DNA testing to establish parentage or have a bleak future in an orphanage for the child. This raises another ethical issue related to surrogacy, the commodification of children which is a challenge

for child's autonomy. A child born after a surrogacy agreement may have up to five adults claiming parents' rights over him or her: the genetic mother (egg donor), the gestational or birth mother (surrogate), the commissioning mother; the genetic father (sperm donor), and the commissioning father. Conversely, the unwillingness of taking custody of a child from intended parents due to divorce or financial crisis leaves child's life in a threat. In almost all the cases, a physically unfit child is disowned by intended parents and has to spend his life in an orphanage. Generally, a surrogate mother establishes a bond with fetus during pregnancy, and at the time of handing over the child to commissioned parents, it may result in anxiety for the child as well as the surrogate mother and when the child was revealed about his/her identity, they suffer from adverse psychological disturbances in most of the cases.

Over the time, India has emerged as a favorite place for surrogacy and in the last one decade, the largest number of surrogacy cases were reported for intended parents not only from within country but largely from western countries. The reasons for increasing surrogacy within India are low wage for surrogate mother compared to western and europian countries, finding an ease with Indian legislations and laws constituted for surrogacy. Poor women often target surrogacy as an easy way for earning financial security on their own, by their spouse and or by the middlemen. In fact, in many developing nations including India, surrogacy translated into commercial business; physicians along with middlemen found it easy to manipulate regulations. To prevent commercialization of surrogacy, altruistic and not commercial surrogacy should be promoted. Laws should be framed and implemented to cover the gray areas and to protect the rights of women and children.

**SOCIAL ISSUES**

Pregnancy and childbirth are not simply individualistic acts, but also, and perhaps more importantly, social acts. It is a well-known fact that our identity and our function in societies are more determined by parental nurturing than our genetic makeup. Wet-nurses, nannies, childminders, and boarding schools are all surrogates for parental functions that we must consider as being inherently more valuable to the development of the individual than the initial uterine or even genetic origins. Why, then, has surrogacy caused us such a problem? Critics of surrogacy compare commercial surrogacy with prostitution. Undoubtedly, there are evident similarities between surrogacy and prostitution. Surrogacy, like prostitution, allows the use of a woman's reproductive function for the pleasure of others. Another similarity between surrogacy and prostitution is that a deep emotional or personal relationship is not required to be established, and in both cases, women charge money for physical service. Prokopijevic rightly points out, 'it happens every day that we trade money for services without forming a deeply personal or emotional relationship with each other.' On the basis of these grounds, surrogacy cannot be claimed as prostitution, despite having many similarities. An important social issue regarding children born out of surrogacy arrangements is that they found themselves in an exceptional position with regard to the rest of society, as they get an abnormal family (single parent, gay couples) to live with, which is significantly different from conventional family.

In Western societies, especially in the United States and the European Union, cases reported are quite low of having a social conflict with regard to agreements concerning surrogacy. However, in India where society largely is considered as economically feeble, these issues often rose on a different platform. A surrogate often faces the dilemma towards the social acceptance of the monetary considerations against surrogacy. Further, diverse ethnicities and traditions often disagree in hiring/renting womb for offspring. Additionally, orthodox and religious beliefs simply deny these

practices in many parts of the country virtually. The total fertility rate of India is 3 per woman, whereas, the fertility rate per woman is 2 in the United States. Moreover, it is to be noted that the rate of infertility in India is due to the lack of proper health care facilities and not because of biological reasons. A country that has a fertility rate of 3 per woman and the population of 1,241,491,960 is not in any need of promoting surrogacy.

In a society like India and many other nations, male children have more privilege over a female one in our society and hence intended parents often prefer a male offspring. This sex- selective surrogacy should be strictly prohibited. As the surrogacy involves implantation of multiple fetuses, the unwanted fetus is aborted during the course of development. Margaret Jane Radin (1995) states, 'The labor of bearing a child is more intimately bound up with a women's identity than other types of labor. The work of pregnancy is long term, complex and involves an emotional and physical bonding between mother and fetus'.

A surrogate should be asked to give full informed consent before she may act as a surrogate to prevent any legal or marital dispute. The surrogacy arrangement should provide minimum remuneration to a surrogate mother and should also provide financial support for the surrogate child, in case the commissioning couple dies before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child so as to avoid injustice to the child. A surrogate mother should not have any parental rights over the child and intended parents will be legally bound to accept the child irrespective of any abnormality. There should be proper medical and psychological screening of all the parties involved in a surrogacy arrangement to have a normal and healthy relation with each other. Strict regulation of commercial surrogacy is necessary for minimum risk of all the parties involved in surrogacy.

## PROSPECTS

Considering surrogacy as technological advancement in reproductive technology has had a profound impact on the way it is pursued in current times. Surrogacy, which is a multi-billion dollar industry in India, confronted by supreme court mentioning government to come up with precise regulations for ensuring the safe use of the technology. (Supreme Court, New Delhi, October 2015, March 2016, March 2017). The Union Cabinet of India has passed Surrogacy (Regulation) Bill, 2016, banning commercial surrogacy in India and only allowing biologically infertile couples to avail surrogacy (August 26, 2016). Though these concerns have come a bit late, but have surely raised hopes of unfertile couples to fulfil their desire of parenthood in an ethical manner. Social equality remains a key challenge for a surrogate mother in India and many other developing nations. The core issue in developing nations is poverty and illiteracy remains as primary drivers for commercial firms to find loopholes. Hence, in Indian Centre for Social Research- an Institution for the women and girls in India is working on a large scale to educate and provide in-depth knowledge about such issues (http://www.csrindia.org/). However, a lot of effort is required on an immediate basis to ensure social and health protection to surrogate mothers and rights of the child and commissioning parents in surrogacy arrangements.

## CONCLUSION

Surrogacy is imbibed with many ethical and social issues from the exploitation of women to commercialization and from the commodification of human body to its comparison with prostitution; nevertheless, it doesn't seem practical to prohibit surrogacy. Surrogacy cannot be ignored, and prohibition of it may create injustice to many people, yet it should be regulated for the benefit of all parties. India and several other developing countries are facing serious problems with increasing

number of homeless children and orphans; adoption could be a better option and socially accepted decision, providing home and parental care to these homeless kids rather than surrogacy. However, the importance of surrogacy cannot be challenged, though, there must be a fair procedure in hiring a surrogate mother and her willingness for contract/agreement. Financial benefits should remain subsidiary and assistance should be prioritized to surrogate's autonomy and medical care during and post pregnancy period. Social reforms are also essential, especially, a large-scale education for in-vitro fertilization and assisted reproductive technology. There is a need to resolve social inequality which will deplete the need to undertake surrogacy as a means of livelihood. A state regulation, particularly for commercial surrogacy, might reduce harm to all parties. A genuine informed consent, proper agreement and regular psychological screening by formal agencies can minimize the risk for both surrogate mother and commissioning parents, thereby enhancing the total ethics of surrogacy arrangements.

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## 6. LEGITIMACY OF THE UNBORN: ISSUES AND CHALLENGES

Author(s): Jagriti Sanghi & Ajay Sharma*[157]

… Is it surprising that today we have become so morally blind (for wickedness blinds) that we save the baby whales at a great cost, and murder millions of unborn children?

-Alice Von Hildebran

**ABSTRACT**

*The legitimacy of the unborn child has been uncertain since its inception. This research paper is an endeavor, to explain and emphasize on the basic rights of the unborn child, with the help of the various statutes present in India and other countries. The war is between the woman and the unborn child; the mother demands the right to privacy and liberty and the unborn child demands the right to life. Thus, the bone of contention is whether the mother has a right to undergo abortion. The authors try to bring in light, the different aspects from morality to legality. The research paper endorses the valid and basic rights of the unborn child. The right to life of the fetus, has to be balanced with the right of the mother and rights of fetus should be protected from the moment of its conception. In this research paper, we have critically analyzed the Pre-Conception and Pre-Natal Diagnostic Act, 1994 and Medical termination Pregnancy Act 1971 (MTP) and suggested some guidelines. This research paper also aims to highlight the issues and challenges with respect to the modern techniques of family creation, which come closest to offering the advantages as sexual production (Artificial Reproductive Techniques with special reference to surrogacy). We are in need of a more humane approach to govern the ethical, social and legal shades of surrogacy. Most of the religions don't accept the modern biomedical technology, where a third party comes into being and they consider the child illegitimate. India is in need of a piece of legislation that can effectively address the various concerns generated by surrogacy. Union Cabinet has recently cleared the Surrogacy (Regulation) Bill, 2016.*

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*But the issue is that it puts a ban on commercial surrogacy (a lucrative business), which has been allowed in India since 2002.*

## INTRODUCTION

The first half of the paper, is based on the sub-themes of modern reproductive techniques and surrogacy. The increasingly emerging wide array of medical interventions, which are termed as Artificial Reproductive Techniques (ARTs) such as the use of IVF, Surrogacy Arrangements, Artificial Insemination by Donor (AID), Ovum Donation among others have enabled the infertile adults to meet their needs. ARTs shed light on modern techniques of family creation. These techniques have paved new path to parenthood. In India, a whole branch of medical tourism has developed on the surrogate practice. However, there are a number of legal, social and legal issues faced by the biomedical technology. After a thorough study on this particular area, certain guidelines will be formulated for the benefit of the beneficiaries.

The second half of the research paper, deals with the legal understanding of the unborn. In India, a century ago, the unborn child was considered as a legal person and still the Hindu succession Act, 1956 considers it as a legal person. Legal personality of natural persons begins at birth and extinguishes with the death of the person. This is as per the common understanding. But the problem arose when abortion had become legalized, not only in India but also in other countries (USA, UK). Half a century ago, abortion in India was treated as a crime for which the mother as well as the abortionist could be punished in all cases but, after the enactment of the legislations like the MTP Act, 1971, the abortion laws have been made very liberal. There are a large number of mothers, who are prepared to risk their lives in an illegal abortion, rather than carry that particular child to term. Since, there are several laws in India which deal with the unborn child, we will analyze and try to find out the solution to balance

the rights of the two parties involved. Also, rights of the unborn child in terms of ethical, moral and legal aspects will be brought into the limelight.

## SURROGACY AND THE UNBORN CHILD

### The Cradle of the World

Under ARTs 'Surrogacy' is defined in Black's Law Dictionary as "The process of carrying and delivering a child for another person." Couples with fertility impairments can have full genetic offspring, with the help of a gestational surrogate. In another kind of surrogacy known as traditional surrogacy, the surrogate mother is impregnated artificially with the sperms of the intended father. Surrogate mothers come to the rescue of those who are unable to conceive in the natural manner. Since 2002, law in India has not hindered couples seeking to add children to their families by way of surrogacy. India facilitates surrogacy manifestly for those, who wish to and who can afford the cost of the service. The operation of the market often reinforces the comparative disadvantages of adoption. Despite the expense, infertility treatment continues to be huge business. India has transformed into a favorable destination of fertility tourism. But at the same time, many questions of law and ethical issues are raised. However, these ethical issues are matters of debate. For a number of people, raising a family is the ultimate dream and therefore inability to have children, can prove to be a lot devastating for their future plans. In the quests for children, infertile couples approach India where commercial surrogacy is legalized. This process controls the prospective child's genes. Motherhood and ability to give birth to children is a gift by nature given to lucky women. Sharing this divine power that is mutually beneficial to all the parties involved, can be considered as the most appropriate thing to do.

**Wombs on Rent**

India offers the best in terms of medical advancement. Also, surrogate mothers are available in multitudes to provide the world class and cheap labour. But commercial surrogacy has always been a largely unregulated field. This lucrative industry is guided by the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, decided by Indian Council of Medical Research (ICMR) to provide desirable benefit of these newer technologies by skilled group of experts, at low and affordable health and economic cost.[158] However, the guidelines issued are repeatedly violated. To address the issues arising out of this grey area, there is an urgent need to push through a strong legislation to tackle the situation. However, surrogacy needs a more individual case by case attention and not a single blanket rule. Cheap medical facilities, advanced reproductive technological knowhow, along with poor socio-economic conditions and the absence of regulatory laws in India are what make India an attractive option for foreign commissioning parents.[159] The fee usually charged is around $25,000 to $30,000 in India which is approximately the one-third of that charged in developed countries like the USA. In light of the cases of surrogacy expanding at a galloping rate, rights of the commissioning parents have to be safeguarded; malpractices is to be eliminated and the industry has to be brought within the ambit of proper rules and regulations.

**Adoption v. Modern Reproductive Techniques**

To have one's own child, is a natural and irresistible desire, because it expresses a biological imperative. The resulting child in sexual reproduction, genetically related to the couple, nurtured in the utero of the biological mother, prenatal bonding, and etc. altogether points towards the advantage of the

[158] Bindu Shajan Perappadan, *A setback for surrogacy in India?* , The Hindu, November 29, 2015.

[159] *Ibid*

natural process. But if this sexual reproduction fails for a particular couple, they will turn to an alternative. The advancements in science have revolutionized medicine. One example being: Artificial Reproductive Techniques which come closest to offering the advantages as sexual production. ARTs are basically any fertilization involving manipulation and transfer of gametes/ embryos from the outside into the human body. These technologies offer biomedical parenthood to those couples who have exhausted the natural avenues to have a child of their own. From the 70s, ARTs have made women conceive and also enhanced the possibility of pregnancy. ARTs simply furnish a missing ingredient, whose non-existence prevents sexual reproduction. Plus, help in solving the problem of unwanted childlessness more efficiently than adoption. Further, a child thus born can be reared from infancy and presented to the world as their own, thereby replicating the parenting experience of those who give birth to offspring sexually. ARTs have changed the public face of family law. A real incident which shows how surrogacy arrangement (under ARTs) have changed the life of a couple: Mahima (name has been changed) and her husband used the last resort - a surrogate mother – to complete their family. Mahima, now 48, gives details as to how the painful and expensive in vitro fertilization treatment failed her four times since 1995 and how her venture to adopt caused a fury, after her in-laws found this out. That's when they decided to have a child through surrogacy.[160]

Standardized protocols are to be followed for the establishment and accreditation of ART Centers, in order to ensure quality of care. For the same reason, the draft legislation bill on ART Regulation in 2014 had acknowledged various aspects. Highlights being: a duly notarized contract with the prospective Indian surrogate mother have to be produced; couple to be married for at least two years

[160] Prabha Raghavan & Divya Rajagopal, *Double Whammy: What the surrogacy bill brings for India,* ET Bureau, September 03, 2016

to opt for surrogacy; surrogacy shall not be permissible to foreigners. But the draft was never tabled in the Parliament.[161]

**Sanctity of the Industry: Ethical and Social**

The biomedical techniques applied are very advanced in this modern age. Though not by natural procedure, majority of the people have no moral difficulty to accept it. ARTs maintain the integrity of family, as there is continuity between procreation and parenthood.[162] It is simply regarded as a medical technology to provide assistance to what could not be accomplished by natural sexual intercourse. The technique introduces a third party into the matrix of reproduction. Most of the religions don't accept the modern biomedical technology where a third party comes into being; According to them it doesn't make the child thus born one's own and is also looked down upon as **illegitimate.** Surrogacy is often regarded by many as the medium of exploitation of poor and vulnerable women in the name of noble work. A certain section of society frowns upon the process of surrogacy. Often times, gestational surrogate mothers get emotionally attached to the baby they carry throughout the pregnancy and find it hard to detach themselves from the child once it is born. Some people attribute it to be a luxury that is only available to the wealthy section of a society. Moreover, there are ethical considerations in informing the child about the surrogate mother. Also, the bitter truth reveals that the cross border surrogacy usually leads to the problems in determining the nationality, citizenship, motherhood and rights of a child. If we look upon the plight of the surrogate mothers, the situation is even worse. They have to guard themselves from any social stigma in their community. In case of adverse outcome of pregnancy, they are highly likely to be not paid for their labour. Unlike USA, India

[161] Appelton Susan Frelich, *Adoption in the Age of Reproductive Technology*, University of Chicago Legal Forum: Vol. 2004, Iss. 1, Article 13. Available at: http://chicagounbound.uchicago.edu/uclf/vol2004/iss1/13

[162] D Kharb, *Assisted Reproductive Techniques Ethical and Legal Concerns*, 4 the Internet Journal of Law, Healthcare and Ethics (2006). Available at: http://ispub.com/IJLHE/4/2/13110

is deficient of the provisions of legal counseling and psychological screening of the women. We are in need of a more humane approach to govern the ethical, social and legal shades of surrogacy.[163]

Surrogacy can be done in two ways: either the husband's sperm implanted into the vagina of the surrogate mother, or the fertilization is done externally in the lab by In vitro fertilization (IVF) and the embryo is put in the uterus of the surrogate. The surrogate mother is paid by the couple for renting her womb. The child, in this case inherits the genetic code of the contracting couple and the sanctity of marriage is maintained. But the surrogate motherhood is still the most controversial of the new reproductive techniques. Surrogacy involves a contract of sale between the two parties: married couple and the surrogate. Certainly, the most serious ethical issues relating to commercial surrogacy that arise are that it reduces children to objects of sale by putting a price tag on them; undermines the sacred institution of marriage and family life; tampers with the normal process of procreation. The surrogate mothers in India do not enjoy the same rights as the surrogates in the west. Some women, are most of the times pressurized into surrogacy, by their family members for want of money. Sadly, the basic human rights of these women are violated to a great extent. Unlike many other European countries that follow a single embryo implant, in India the surrogate can be implanted by five embryos according to the medical guidelines.

**Legal Conflict and Ambiguity**

The legal objections that are created from in vitro fertilization are that number of persons who can assert for parental rights extend to, the egg donor, the sperm donor, the surrogate mother, parents who raise the child. Further, if the couple divorces during the time in which the embryos are in storage,

[163] B.L. Chaudhary, *Assisted Reproductive Techniques Ethical and Legal Issues,* 34 Indian Acad Forensic Med. (2012).

legal issues and complications may arise as to the custody of the embryo. The spare embryos are sometimes discarded and since some religions believe that life begins at conception, it may be treated as abortion which is contrary to both law and ethics. *Baby Manji Yamada* v. *Union of India*[164], a surrogate child Baby Manji, of a Japanese couple who was involved in legal complexities of getting a visa for the child born in Gujarat. In the end, the Supreme Court of India came to the rescue by granting the custody of the child to her grandmother. A child who was born to a gay Israeli couple with the help of a surrogate in India had to pass through legal hassles for getting Israeli passport and other relevant documents, only after paternity (DNA) established that the baby born was of the couple, and the surrogacy practice was allowed in India. [165]

A child born using the advanced technology (ARTs) is presumed to be the legitimate child of the married couple having been born out of the wedlock and with consent of both the spouses with all the rights of parentage, support and inheritance. Oocyte /Sperm donor should have no parental status in relation to the child and their anonymity should be protected. The surrogate mother can cancel the contract only when it can be proved that it was not a valid contract as per Section 23 of Indian Contract Act. The contention that commercial surrogacy will transform India into a baby farming operation is baseless. A blanket ban on the aforementioned type of surrogacy is absurd rather it is ought to be guided by strict controls and measures where only need based surrogacy should be allowed.

**Crisis for the child born**

Commercial Surrogacy in India has always been an area which is marked by a fair amount of legal conflict and ambiguity. Further, the steps taken to curb the situation of the dilemma, misuse and

[164] *Baby Manji Yamada* v. *Union of India* , JT 2008 (11) SC 150

[165] Law Commission of India. August 2009. 228th Report on Need For Legislation to Regulate Assisted Reproductive Technology Clinics As Well As Rights And Obligations Of Parties to a Surrogacy.

exploitation are grossly inadequate. One still wonders at the lack of motivation to produce a piece of legislation that can effectively address the various concerns generated by surrogacy under ARTs. It has occupied the public's imagination with the terrains of ethics, morality and law still remaining ambiguous. There is an urgent need to question the rationale behind the "solutions" provided by the state in the Draft Bills and also recognize the isolated problems and dilemmas in the area of commercial surrogacy. The issues such as the citizenship status of the child and legal parentage of the commissioning parents still persist for want of a strong legislation. At present, laws across the various countries dealing with ARTs are highly inconsistent which potentially form the reason for citizenship crisis of the child born. Being non-statutory, the ICMR Guidelines are non-enforceable and non-justiciable in a court of law thus virtually non-adopted in practice. To establish the legality of the concept surrogacy, it is worthwhile to mention Article 16.1 of the Universal Declaration of Human Rights 1948 which inter alia, says that "*men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family*". The reproductive right of humans as a basic right is recognized by the Indian Judiciary also. For instance, in *B. K. Parthasarthi* v. *Government of Andhra Pradesh*[166], the Andhra Pradesh (AP) High Court upheld "the right of reproductive autonomy" of a person as a facet of his "right to privacy" and in consequence agreed with the decision of the US Supreme Court in *Jack T. Skinner* v. *State of Oklahoma*[167], which identified the right to reproduce as "*one of the basic civil rights of man*". The need of the hour is active legislative intervention which will facilitate the correct use of the ART technology.

[166] AIR 2000 AP 156

[167] *ex. rel. Williamson*, 316 U.S. 535 (1942).

**Latest Development**

Union Cabinet has recently cleared the Surrogacy (Regulation) Bill, 2016, to put an end to the exploitation of women, who are pressurized into becoming surrogate mothers for money. It allows altruistic surrogacy only for married infertile couples. It bans commercial surrogacy in India. Only Indian heterosexual couples, having been married for at least 5 years can opt for surrogacy. The surrogate child will have all the rights as that of a biological child. [168]

It is claimed that "altruistic surrogacy" has the least potential to be successful in India, where the needy and poor turn to this option to support their families. The option of carrying a child inside one's body to give joy to another woman and boost one's own financial situation has empowered some women to take up the activity. The ban will shut out an income earning opportunity for interested women. If they are able to do well to a childless family, and get remuneration for it during tough times, what's the harm in it?[169] Moreover, how many women will be actually ready to bear someone's child for altruistic reasons with no benefits? Thus, putting a blanket ban on commercial surrogacy is detrimental to both the beneficiary parties.[170] Moreover, religions should regard commercial surrogacy as a respectable business where it is done voluntarily.

[168] **Neetu Chandra Sharma, *Under the Assisted Reproductive Technology Regulation Bill, now foreigners can't hire wombs in India*, Indiatodayin, October 4, 2015.**

[169] Aditi Raja, *Surrogacy Ground Zero: Money, jobs frame another side of debate*, The Indian Express, August 26, 2016.

[170] **Tarang Mahajan, *(Mis) Regulation – the case of commercial surrogacy*, 12 Indian Journal of Medical Ethics (2015).**

**Possible Solutions for the Issues and Challenges**

The lack of pragmatic guidelines to regulate commercial surrogacy, which became legalized in India in 2002, forced many economically poor and illiterate women to be surrogates putting their lives at risk. The bill has proposed a fine of Rs. 10 lakhs and jail terms of up to 10 years for violations. Though many IVF specialists are ready to welcome the clearer guidelines for strict punishment, they have frowned upon a number of proposed restrictions, and some even believe that this Bill is an attempt to impose certain moral and religious ideals in a secular country.

To do justice to the full-fledged research done, the authors have made note of a few guidelines which can be taken into consideration while revisiting the 2016 Bill on Surrogacy.

*GUIDELINES*

- A statistical study should be made to determine the reasons as to why women representing certain sections of the society enter into this particular industry, and which state has the highest number of surrogate mothers. This data will help the government to formulate their welfare schemes for the target group.
- Awareness should be made among the women especially illiterate and economically backward sections about the perils involved or associated with pregnancy.
- Stringent punishment to be given to those who carry out the business of surrogacy unauthorised. Doctors and the clinic officials should face harsh consequences if found violating any rule(s) or regulation(s) made by the State.
- All the ART clinics in the country are to be registered and the clinics will have to maintain proper and complete records of surrogacy: minute information (family background,

educational qualification, financial status) about surrogate mothers and commissioning parents, and also the terms of the contract between the two.

- Remuneration given to the surrogate mothers should be at par with the international standards (such as in the US) to prevent exploitation of cheap labour in our country.
- Surrogacy agreements between the commissioning parents and surrogate mothers are at par with the contracts under Indian Contracts Act, 1872: Hence, a civil suit before a civil court should be filed under Section 9 of Civil Procedure Code for all disputes relating to the surrogacy agreement.
- Visa to foreigners to be given the status of "Medical" rather than "Tourist": list several provisions upon which acquiring the visa and leaving the country are conditional.
- A surrogacy contract should by all means take care of life and health insurance cover for surrogate mother.
- A specialized "Agency" should be created to look into the disputes that relate to nationality, parentage, issuance of passport, grant of visa to effectively deal with problems arising out of surrogacy.
- If the marriage of the commissioning couple breaks after going for surrogacy, but before the baby is born then also the child shall be regarded as the legitimate child of the couple.

## LEGALITY OF THE UNBORN CHILD

Now, this half of the paper will analyze the rights of the fetus, which is in the mother's womb through natural process. Legal personality of the unborn child has always been uncertain since its inception. Hence, the case law regarding the same has also been inconsistent. Legal personality of the general

person or natural person is different from the unborn child. Legality of natural person begins with birth and extinguishes with death.[171] W**hile analyzing the word 'person' in relation with the fetus as used in the Fourteenth Amendment[172], it is asserted that unborn children can indeed be considered as 'persons' within the reasonable interpretation of language and meaning of the Fourteenth and Fifth Amendments.** As there is no constitutional text explicitly and unambiguously holding unborn children to be, or not to be 'person', this argument is based on the "historical understanding and practice". It is seen that the structure of the Constitution has not confer upon the federal government a specifically enumerated power to deny "personhood" under the Fourteenth Amendment.[173]

Legal personality of the unborn is described in the law of torts. The common law did not recognize the unborn child as an entity capable of being wronged by another's tortious conduct.[174] In order to give the unborn child legal status, majority of the recent decisions which allowed a cause of action have employed a fiction that the unborn child or fetus is a 'person' at the time of prenatal injury.[175] In *Cooper* v. *Blanck*[176] the Court of Appeal heavily relied on Article 29 of the Civil Code[177] to legally

[171] This is as per general common understanding; though there is a strong difference of opinion, which may be taken as exceptions. (unpublished manuscript) (on file with Author)

[172] N.M.CONST. Amendment 14th of the U.S. Constitution which deals with citizenship in which the word 'person' is used

[173] *Roe* v. *Wade*, 410 U.S. 113 , 141-42 (1973)

[174] *Drobner* v. *Peters,* 232 N.Y. 220 N.Y., 133 (N.Y. App. Div.1921) N.E. 567 (1921). A common law view of the unborn child is found in BLACKSTONE COMMENTRIES 129-30. Perhaps this position was fortified in the minds of some judges by grave doubts that dependable proof of causal connection could be produced.

[175] *Bennett* v. *Hymers,* 101 N.H. 483 (N.H.1958), *Kelly* v. *Gregory* , 282 App. Div.542 (N.Y. App. Div. 1953) (1953)

[176] 39 So. 2d 352 (La. App. 1923, unreported till 1949 )

[177] Civil Code Art.29 ( 1870) ; " Children in the mother's womb are considered, in whatever relates to themselves, as if they were already born …"

recognize the unborn as a constructive 'person' and thus found him entitled to get cover for personal injuries under Article 2315.[178]

It is indirectly shown that the unborn child has been given a legal status as a 'person' in the law of torts. Here, the authors are of the view that if the person can file a suit for damages for the pre-natal injuries (the injuries caused in the womb) of the child then on the same logic the authors advocate to fully recognize the unborn child as a person. Also, it is suggested that India should have a specific legislation to permit wrongful death claims for death of an unborn child at any stage of development. This would introduce a change in the basic law.

**Abortion and Unborn Child: Indian and International Scenario**

Abortion[179] is one of the subjects that has always been discussed when we talk about the legitimacy of the unborn because in the modern world, the cases related to the abortion has increased to a great extent. In our research, we are trying to focus on the legal rights of the unborn child which co relate with abortion. Abortion is a controversial issue all over the world as everybody is in dilemma whether the mother has a right to terminate her pregnancy at any time she wishes or the unborn child has a right to life.

How can mother be *beta noir* of her child, especially of unborn child? She has right to motherhood but here the bone of contention is whether she has the right to undergo abortion. Here war is between

[178] same approach was taken under a similar provision of the California civil code in *Scott* v. *Mcpheeters*, 33 cal App, 2d 629, 92 p

[179] Abortion is the termination of a pregnancy by the removal or expulsion from the uterus a fetus or embryo resulting in or causing its death.

the mother, who demands right over her body and right to privacy, and child, who until now has not taken birth.

**India Penal Code 1860**

The Indian Penal Code which is the basic criminal law of the country keeping in view the religious, ethical, social and moral background of the Indian community has made abortion a criminal offence under sections 312 to 316 of IPC 1860.

> *Whoever voluntarily causes a woman with child to miscarry shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman be punished with imprisonment of either description for a term which may extend to 3 years or with fine or with both and if the woman be quick with child shall be punished with either imprisonment of either description for a term which may extend to 7 years, and shall be liable to fine,.*[180]

The words 'miscarriage' and 'unborn child' have not been defined in the code. But by the meaningful interpretation of the given sections in the IPC (312-218), we will find that causing miscarriage stands for criminal abortion and which is an offence under the code[181].

The Indian Penal code advocates in the favor of both the unborn child as well as the mother. No one can destroy the unborn child unless it is done for the purpose of preserving the life of the woman. The sections given in the Indian Penal Code criminalizes abortion and permits it only on the medical grounds in order to protect the life of the mother.

[180] See. Section 312 of the Indian Penal Code 1860

[181] Upendra Baxi, *Abortion and the law in India*, Journal of the Indian Law Institute,1986-87,Vol-28-29,Alice Jacob, New Delhi.

There was an inadequacy of the law in India to protect the illegal abortion until the passing of the Medical Termination of the Act 1971. India is one of the countries in the world which came with such a liberal law on abortion by enacting the MTP[182] Act 1971. It was estimated that before the enactment of the 1971 Act, as many as five million induced abortions were carried out in India every year, of which more than three million were illegal[183], but perhaps not even one percent prosecutions and convictions were successfully upheld.

MTP Act came with the objective of softening the law of abortion because before the enactment of the 1971 Act there was only one law which dealt with abortion and that was the IPC, 1860 and which was not at all sufficient to deal with this issue. The main objective of the said Act is elimination of the high incidences of illegal abortion and provision of the right to privacy to women.[184] This includes the right to space and to limit pregnancies[185], the right to decide her body.[186]

But at the same time, question arises on the ground of the constitutional validity of the 'right to life' of an unborn fetus. In India, right to life has been recognized under Art. 21 of the Constitution which reads that:

*"No person shall be deprived of his life and personal liberty expect according to procedure established by the law"*

[182]Stands as Medical termination Pregnancy Act 1971

[183] Madhav Menon,N.R. *Population Policy, law enforcement and the liberlisastion of Abortion : A Socio- legal Inquiry into the Implementation of the Abortion law in India,* 16 JILI 626 At 632-33 (1974) See Michel, Arnold E., *Abortion and International Law,* 22 Journal of family law 24(1981-82)

[184] The U.S. Supreme Court in the landmark judgment of the Roe v. Wade,41 USLW 4213 (1973) has upheld the right of a women to an abortion of the first three months of the pregnancy as being an element in the right to privacy given by the Fourteenth Amendment to the U.S. Constitution.

[185] Whether or not to bear children

[186] *H.L.* v. *Matheson,* US 398

The question which is raised here is that whether the unborn child comes under the ambit of the word "person" or not. According to Hindu Law, an 'unborn child' is a person for all people and is entitled to inherit the property of father. The Hindu adopts the principle that a child in the womb is a person in actual existence. The rights of such person relate back to the date of conception.[187] In the United States Code, it is given that, whoever is engaged in conduct that violates any of the provisions of law that are listed in subsection (b) and thereby causes the death of, or bodily injury to[188], a child, who is in utero at the time the act takes place, is guilty of a separate offense under this section.[189] The common law also considers the fetus as a person and confers the right to life to the unborn child. In common law procuring or attempting to procure termination of pregnancy before "quacking" was not an indictable (chargeable) offence[190]. They consider that the fetus or unborn child is a gift of God but the medical science and law have been a different opinion as they both work on the rational point and does not take in the feeling of the person. The right to life of the fetus has to be balanced with the rights of the mother. Right to life of the fetus should be protected from the moment of its conception. [191]

According to Dworkin, a fetus does not have interest before the third trimester[192]. It cannot feel pain until late in pregnancy, because its brain is not sufficiently developed then. The scientists have agreed that fetal brain will be sufficiently developed to feel pain from approximately the twenty sixth week.[193]

[187] See. Section 20 of the Hindu succession Act, 1956 which deals with the Right of child in womb.

[188] As defined in section 1365 of the United States Code.

[189] Section 1841 of the United States Code.

[190] W. Blackstone Commentaries, 129-30, E. coke. Institutes III50. The common law fixed the time of animation (vivacity) at the time of quickening when the fetus moved in the womb.

[191] Article 6(1) of the International Covenant on civil and Political Rights.

[192] *Ibid*. He says that 'not everything that can be destroyed has an interest in not being destroyed.'

[193] See. Clifford Grobstein. *Science and the unborn: choosing Human futures* (Basic books, 1988) p. 13

Still, there are so many jurists and scholars who advocate that the unborn child should enjoy the same protection as other 'person'.

In a January 2006 CBS News poll in the US, which questioned the personal feeling about "abortion", 27% responded that abortion should be permitted in all circumstances, 15% believed that it should be permitted , however must be subjected to greater restriction than it is now", 33% stated that it should be permitted only in certain cases such as incest, rape etc., 17% were of the view that it should only be permitted to save the woman's life, and 5% insisted that it should "never" be permitted. An April 2006 Harris poll on *Roe* v. *Wade* which made abortions up to three months of pregnancy legal, the question posed was whether the woman who wants abortion up to three months should be permitted to abort in all circumstances, some or no circumstances. To which 53% (the highest) said under "some" circumstances.[194] Here, people show human dignity towards the unborn child (Fetus), by considering the embryo to have the status of a legal person and the holder of fundamental rights. Thus, that would mean that the extinction of unborn life for any reason beyond the well-being of the upcoming life is generally illegal. The aim of this research paper is to highlight the legal, moral and social rights of the unborn child which the fetus should enjoy. The constitutional validity of the unborn child is in dilemma. In law an unborn child can be considered a person as such within the meaning of Art. 14, 15 and 21 and with several statutory rights such as right to inherit, to bring an action when born, for the damages caused in the pre-natal injuries

[194] Dave Andrusko, *Harris poll Shows Lowest Support for Roe v. Wade, in Decades,* http://www.nrlc.org/archive/news/2006/NRL06/HarrisPoll.html ( last updated September 5, 2016 )

At last, the authors would like to say that the right of the mother should be balanced with the right of unborn child and the specific legislation for necessary protection should be provided to the unborn child because one cannot destroy the fetus just for conferring a right to the mother. No fetus should be killed without any concrete and solid reason.

**Pre-Conception and Pre-Natal Diagnostic Techniques 1994: Litmus Test**

"Pre-natal" denotes anything which happens prior to birth. Techniques that are used for the diagnosis of any physical or mental conditions in a fetus are called as pre-natal diagnostic techniques or tests or procedures. These procedures involve the study of blood cells, any body fluid, or any tissue from a pregnant woman or the fetus. Also, it can be done through a visual image, for instance: ultra-sonography.

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 was enacted to provide for the regulation of the use of pre natal diagnostic techniques for the purpose of detecting any genetic or metabolic disorder(s) or chromosomal abnormalities or certain congenital malformations or any kind of sex linked disorders and for the prevention of the fraud, misuse or exploitation of such tests leading to female feticide; and for other connected matters.

The legislature was alarmed at severe imbalance and unevenness created in the male to female ratio as a consequence of rampant use of the prenatal diagnostic tests made to detect sex of the fetus and to terminate the pregnancy of the unborn child if found to be female. More than 15 million girls have been eliminated because of determination of fetal sex before birth over the past 25 years. Sex selection

was initiated in India as a method to control population growth.[195] Instead sex selection increased the cases of female feticide.

In 2000, the Supreme Court in its various judgments criticized the implementation of the PNDT Act 1994 and with disastrous outcomes in the 2001 Census (Child sex ratio in Punjab had dropped to 798 girls per 1,000 boys; approximately one in five girls eliminated before birth), created a national discourse. After that, the central government came with the amendment Act, 2002. The amended act is known as the Pre-Conception and Pre-Natal Diagnostic Test (PC-PNDT). Not only does the Act prohibit determination and disclosure of the sex of the fetus but also bans advertisement related to pre-conception and pre-natal determination of sex. All the technologies of sex determination which include(s) the new chromosome separation technique have come within the ambit of the Act. But if we discuss about this legislation in detail, it is observed that PC-PNDT is unable to prevent the sex determination tests and thus the declining sex ratio continues. After the amendment in the 1994 Act, there are a number of flaws which are directly proportionate to the decreasing number of girls.

The Act is not only in need of proper implementation but also in need of some very crucial fundamental changes. As we know, the act is challenged many a times on the ground of the constitutional validity and improper functioning of the act. In *Mr. Vijay Sharma and Mrs. Kirti Sharma v. Union of India*[196] : the PNDT Act is challenged on account of violation of Article 14 of the Constitution. There are a few sections in the Act which are totally vague and arbitrary like sections 2, 3A, 4(5) and 6(c) of the Preconception and Prenatal Diagnostic Techniques (Prohibition of sex

[195] The research published in the medical journal, Indian pediatrics , in 1975 (unpublished manuscript ) (on file with author)

[196] AIR 2008 Bom 29

Selection) Act, 1994 as amended by the prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment act, 2002.

**Loopholes in the Pc-Pndt Act**

The PC-PNDT has the relevant provisions to end sex determination but the problem is that it is not implemented effectively. This is manifest from the lamentable rate of conviction of the offenders. As per the data in 2013, only 143 people have been criminally held liable for conducting sex determination tests and medical licenses of just 65 doctors was suspended for the whole country since the enforcement of the PC-PNDT Act. Voicing concerns over the non-effective implementation of the PC-PNDT Act to prevent pre - natal sex determination tests, Delhi High Court has suggested that the central government should plug the loopholes in the legislation. The absence of clear rules and guidelines; vaguely spelled out terms of qualification, training and experience vital for operating a diagnostic clinic offering ultrasound tests, has resulted in unethical practices going unchecked; the ambiguity in defining the term sonologist under the PNDT Act, the growth of diagnostic clinics could not be effectively regulated the court observed.

In *Voluntary Health Association of Punjab (VHAP)* v. *Union of India and others* [197] the Supreme Court of India issued following guidelines for the effective implementation of the said Act.

The authorities should ensure that all genetic counseling Centers, Genetic Laboratories and Clinics, Infertility Clinics, Scan Centers etc. employing preconception and pre-natal diagnostic techniques should maintain all records and forms, required to be maintained under the Act and the Rules and the

[197] AIR 2013 SC 1571

duplicate copies of the same should be sent to the District Authorities, in accordance with Rule 9(8) of the rules.

In *Center for Enquiry into Health and Allied Themes (CEHAT)* v. *Union of India* case,[198] the Supreme Court expressing concern about the misuse of modern science and technology in preventing the birth of a girl child directed the concerned authorities to strictly monitor the activities of the ultrasound diagnostic clinics to prevent the illegal female feticide.

After the analysis on every aspect of the Act is reviewed, the act should be amended for the effective implementation because the said Act is now toothless on different aspects. The conviction rates under the Act is very less as aforementioned. The legislature can make provisions for members of the public / government to refer specific problems to the Central Supervisory Board[199] for its opinion within a reasonable period of time and to take specific and effective action in the case of an erring medical practitioner. It's a duty of a concerned government to enact and implement the law which shows the necessary political will and sensitivity to the women's problems.

## CONCLUSION

The work of this research paper was primarily the analysis of legitimacy of the unborn child. Whether an unborn child is a legal person or not. A part of the conclusion derived is that there is a big gap between the laws and judiciary in India as well as in other countries (USA & UK) which has created a confusion to arrive at a logical conclusion. The authors fully support the fundamental rights of the

[198] AIR 2003 SC 3309

[199] See. Sec.7 of The Pre-Conception and Pre –natal Diagnostic Techniques ( Prohibition of Sex Selection ) Act,1994

unborn. There is no meaning in conferring all the rights to the mother. Her rights to have a termination of pregnancy should be limited at any stage of development.

The authors advocate that the government of the concerned countries should come forward and make legislation and the law to be drafted must protect the unborn. The law should be impartial and hear the problem of both the mother and the unborn child. The legislation has to take care of the liberty of the mother as well as the unborn. Further, this paper also highlights the loopholes in the Pre-conception & Pre-Natal Diagnostic Techniques and suggests some suggestions which the Act is in dire need of. The authors have also highlighted the importance of the new technologies of reproduction with special reference to Surrogacy and made note of a few guidelines which can be taken into consideration while revisiting the 2016 Bill on Surrogacy in India.

## 7. SAFEGUARDING THE 'C' IN 'POCSO'

**Author(s):** Ayushi Kushwaha[200], Parth Chowdhery[201], and Tanu Shrivastava[202]

**ABSTRACT**

*India houses 400 million children but there is very little childhood. Gift to humanity, children suffer sexual abuses which is the most heinous crime imaginable. Ice creams, toys, crayons, paper boats aren't the only memories for some unfortunate children. Pain, tears, listlessness, suffering and silence are memories which haunt the sexually abused children.*

*Keeping in mind the drastic increase in sexual offences against children, it became incumbent upon the Parliament to introduce a stringent law, which covers every possible aspect of sexual offences that the Indian Penal Code 1860 failed to do. The time the Protection of Children from Sexual Offences Act, 2012 (POCSO) was enforced, there was already public outcry against the stark impunity with which offenders remained aloof from the Criminal Justice System. It was to curb grave and insidious crimes related to children and to ensure justice that the Act was enacted. The POCSO is a welcome piece of legislation as it categorizes sexual offences and related punishments on the basis of several factors, for example, nature of the act and professional/personal affiliations of the offender to the child victim. It provides a mechanism for agencies, directly or indirectly involved in the addressing and conclusion of the case, to establish systemic coordination and contribution among themselves, so as to develop a responsive system to the child victim. All of this, however, has been failing utility due to certain factors, which have tampered with the overall positive implementation of the Act. Even after incorporation of stringent provisions and mandatory procedural overhauling in the Criminal Justice System, justice remains oblivious to the child victim and his/her family. The objective to serve the paramount interests and ensure capacity development of the child is still a distant reality because of many impediments to the proper implementation of the Act.*

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*The main purpose of this study is to expose some of the nerve-wreaking facts relating to the sexual violence against children and extent of influence which POCSO Act had in past four years in safeguarding the children from heinous sexual crimes and punishing the child sexual offenders. The paper attempts to lucidly highlight on recognition of the POCSO Act and it sheds light on its substantive and procedural legal aspects which addresses some primary areas of concern, the issue of Child sexual abuse and encircling the scheme of child protection which has been adopted in India. The paper digs into the Indian legal aspects and lacunas relating to the POCSO, Act, 2012.*

Keynotes: POCSO, Sexual Abuse, Child Sexual Abuse, Multidisciplinary Approach, Legislative Reforms.

## INTRODUCTION

*"There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and that they can grow up in peace" –* ***KOFI ANNAN***

In India, a child is defined as "any person below eighteen years of age that constitute forty two percent of our population, largest in the world".[203] India is home to 440 million children out of 1.9 billion that comprises 27% of the world's total population. That is way more than the entire population of Canada, Mexico and USA put together. Statistics show that every fifth child is Indian.[204]

Children are the future directive force and are a precious human resource. It is therefore essential to assure them with an ambience where they can safely grow and develop. As children are more sensitive than adults they need a congenial and amicable environment to live in. Because of their vulnerability

[203] *POCSO: A Child Law in Oblivion*, **LAWYERS UPDATE**, http://lawyersupdate.co.in/LU/1/1279.asp (last updated Sep. 10, 2016).
[204] *Statistics*, **BRIDGIN**, http://bridgin.in/ (last updated Sep. 09, 2016).

and susceptibility they are affected the most by the actions and inactions of society and Government. The actual position in India is very bleak and alarming. India also accounts for the largest number of children in work, living in extreme poverty, abandoned by parents, living with disability, affected by armed conflict, abused by parents and care givers, malnourished, affected by HIV, marginalized and stigmatized. The crimes and exploitation against children are now a common occurrence, abominably on rise day by day resulting in their protection and rights being violated, under-recognized and under-reported. Their crestfallen plight demands urgent attention and safeguards on all fronts to have a meaningful existence, decent society and a bright civilization.[205]

In a 2013 report, 'India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes[206], the Asian Centre for Human Rights reported that "sexual offences against children in India have reached epidemic proportion".[207] In 2007 the Ministry of Women and Child Development carried out in concurrence with Save the Children and UNICEF research on over 12,000 children, which produced some shocking conclusions:

- About 2/3 of children are victims of bodily abuse.
- Over 50% of surveyed children have faced some sort of sexual abuse, and over 20% of them went through extreme forms of abuse.
- India has the world's largest number of sexually abused children; with a child below 16 years raped every 155th minute, a child below 10 every 13th hour and one in every 10 children sexually abused at any point of time.[208]

[205] *Id.*
[206] India's Hell Holes: Child Sexual Abuse in Protection Homes, Asian Centre for Human Rights, http://www.achrweb.org/press/2013/IND13-2013.html (last updated Sept. 11, 2016).
[207] *Id.*
[208] *Id.*

The situation becomes more saddening when Child Prostitution comes into picture. Child Prostitution is unbridled in India and nearly 1.2 million sex workers are below the age of 18 with about 40% underage girls being forced into prostitution on a daily basis.[209] With the 8 % increase in the flesh trade, India has become one of the prominent names in child prostitution.[210] Child prostitution in India does not come only in the form of a business but may involve cultural factors as well. For example, in parts of Maharashtra and Andhra Pradesh the practice of *Devadasis* is prevalent where young girls are married to a deity or a temple and plight is that the parents themselves force their young daughters into such marriages and these marriages occur before the girl has even reached her puberty. This practice requires these young children to become a prostitute for upper-caste community members. They are referred to as "*jogin"* and they are to serve the temple by singing, dancing and music but mostly they serve as temple prostitutes. Men of higher castes come and have sex with them for as little as 20 rupees.[211] These young girls are forbidden to enter into a real marriage. Such a practice comes with an inevitable outcome of mothers having children from multiple fathers, leading to abandoning of those children especially girls, who ultimately fall into the same quagmire as their mothers have.

Pinki Virani's Bitter Chocolate unveiled that child sexual abuse is not just concomitant with the lower income groups. It has been found that among children from middle and upper class, one out of four boys and one out of three girls, under the age bar of eighteen years, have suffered from some kind of sexual abuse. In spite of growing outrage in the country, the agony of the wretched victims continues to be unabated and glossed over. The family of the victim suffers equally, as

[209] Shilpa Khatri Babbar, *Child Welfare: A critical analysis of some of the socio-legal legislations in India*, 19, **IOSR-JOURNAL OF HUMANITIES AND SOCIAL SCIENCE**, 19 (2014), http://iosrjournals.org/iosr-jhss/papers/Vol19-issue8/Version-2/H019825460.pdf.
[210] *Id.*
[211] *Id.*

they are perturbed by the helplessness, confusion that follows the sexual abuse and are clueless about how to handle the outcome of the despicable crime.

The ministry of Women and Child Development advocated that this issue needs to be addressed by the introduction of a specific law to deal with this offence, which is stringent and easily interpretable. The Protection of Children from Sexual Offences Act (POCSO), 2012 was formulated in order to address the horrible crimes involving sexual abuse and sexual exploitation of children. The POCSO Act received the President's assent on 19th June 2012 and was notified in the Gazette of India on 20 June, 2012.[212] The act is applicable throughout the country except in the State of Jammu and Kashmir. The Criminal Law Amendment Act, 2013 amended the POCSO Act, 2012 (Section 29 of the Criminal Amendment Act, 2013 amended Section 42 of the POCSO Act and inserted a new Section 42 A into it.)

The POCSO Act is a landmark and a significant piece of legislation, being the first major step towards safeguarding and shielding children from sexual crimes in India. The Act is very unique as it requires all legal system actors to make their professional practice in consonance with the child psychology while dealing or interrogating with child victims of sexual offences. The Act mandates to train the police officials, Lawyers, judges, prosecutors, and doctors in discerning children's vocabulary, developmental maturity and psychology in order to create child friendly environment and put age-appropriate questions before them, to assess and evaluate the value of their statements, and helping them in getting justice. Many hope that this act will be able to fill a long-felt gap in the legal system and will produce a systemic response to the issue. If efforts are not made, many young lives shall be compromised.

[212] *Id.*

**POCSO: A LEGISLATIVE ATTEMPT TO CREATE A RESPONSIVE MECHANISM**

The Preamble of the POCSO states-

"AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child.."

India is a party to the Convention on the Rights of the Child, which prescribes certain common guidelines regarding the rights of the children and directs the party-nations to enforce these rules in domestic legislations. Art. 3(1) and Art 12 of the same Convention incorporate two principles, which the legislative makers have clearly enunciated in the Preamble of the POCSO: the best interests of the children and the evolving capacities of the children. These principles value the interests of the child as paramount and make utmost emphasis on the evolving capacities of the child, which reflect the need of varying levels of protection, and participation based on age and maturity that can inform approaches to restitution, rehabilitation, compensation, satisfaction, and guarantee of non-repetition.[213]

[213] S. Marie Miano, *Toward a Child-Oriented Approach to Reparations: Reflecting on the Rights and Needs of Child Victims of Armed Conflict*, **PRAXIS THE FLETCHER JOURNAL OF HUMAN SECURITY**, 28 (2013), http://fletcher.tufts.edu/Praxis/~/media/Fletcher/Microsites/praxis/xxviii/article2_miano_ChildReparations.pdf.

The Act is conceptualized on the ground that handling of sexual offences against children does not merely involve investigation and judicial conclusion of the facts. 'Sexual Offences against children' has far more ramifications upon the victims, who are children. Children are vulnerable to sexual exploitation because of their "sense of immortality, mobility, naiveté, lack of worldliness and savvy necessary to staying safe"[214] and emotional support, all of which falls prey to abominable predators lurking everywhere. Their biological and social vulnerabilities require active attention to them from every agency directly or indirectly involved in the handling, investigation, and conclusion of the sexual offences cases. Hence, a multi-disciplinary approach is imperative.

A Multi-disciplinary approach is essentially a reference to activities involving the efforts of individuals from various disciplines. These efforts are "disciplinary-orientated and, although they may impinge upon clients or activities dealt with by other disciplines, they approach them primarily through each discipline relating to its own activities."[215] It is a method of involving multiple agencies and promoting a new understanding of the subject at hand.

In cases of sexual offences against children, a multi-disciplinary approach is essential primarily to establish an effective response system that will naturally reinforce people's confidence in the legal system. Such approach will ameliorate the response of care givers and the criminal justice system to young vulnerable victims, as the trauma and stigma attached to the offence, and post-offence activities leave the child-victim scarred forever unless sensitively dealt with. Such approach fosters well-coordinated and extensive investigation that emphatically takes into consideration stakeholders in such cases: law enforcement, prosecution, and child protective services. This is done to ensure that a

[214] *Victim-Oriented Multidisciplinary Responses to Statutory Rape: Training Guide*, **U.S. DEPARTMENT OF JUSTICE**, 2 (2000), http://www.ovc.gov/publications/infores/statutoryrape/trainguide/victimoriented.pdf.
[215] Jan-Rickard Norrefalk, *HOW DO WE DEFINE MULTIDISCIPLINARY REHABILITATION*?, 35, **J. REHABIL. MED.,** 100, 100 (2003).

definite conclusion to the investigation is reached and that there is minimal "additional trauma to the child victim."[216]

The current situation of Indian criminal Justice system is a sorry affair, considering the inefficacious "lack of communication and coordination, mistrust, turf issues, lack of resources, and failure to see the importance of these cases lead to fragmented services rather than a coalition of agencies"[217] coming together in a multi-agency, community-wide approach to handling these cases. There exists a shocking absence of substantial coordination and communication among the authorities involved in child sexual abuse cases in India, leading to precarious results, for example, marked underreporting of sexual offences against children. In order to safeguard the interests and developing capacities of the children, as envisaged in the Preamble of the POCSO, it is crucial that every agency involved in handling of these cases is responsive to the needs of the child-victim, steered towards healing of the child and ensures prevention of secondary victimization of the child.

The POCSO does not specifically state a multi-disciplinary approach however, on various occasions it has incorporated certain provisions that facilitate interaction and coordination among multiple agencies and has promised a friendly approach towards the child-victim. The POCSO Act, 2012 is a comprehensive law enacted for the provision of child protection from sexual offences, keeping in mind the importance of "safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation, and speedy trial of offences through designated Special Courts."[218]

[216] *Forming a Multidisciplinary Team to Investigate Child Abuse,* **U.S. DEPARTMENT OF JUSTICE**, 2 (Mar., 2000), https://www.ncjrs.gov/pdffiles1/ojjdp/170020.pdf.
[217] Victim-Oriented Multidisciplinary Responses to Statutory Rape, *supra* note 9, at 2.
[218] *Model Guidelines under Section 39 of The Protection of Children from Sexual Offences,* **MINISTRY OF WOMEN AND CHILD DEVELOPMENT**, 4 (Sept., 2013), http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf.

In Chapters V-IX, the Act fairly attempts to bring an effectively responsive procedural mechanism.

1. REDEFINING RESPONSIBILITIES OF POLICE OFFICERS AND MAGISTRATES

In any criminal justice system, there exists a hierarchical arrangement of actors that perform distinct functions and roles. On the ground level, Police officers and Magistrates are major agencies of action.

The Act provides that "any person, including a child with an apprehension that an offence under this Act is likely to be committed or has knowledge that such offence has been committed, shall provide information to either the Special Juvenile Police Unit or the Local Police"[219] who shall make necessary provisions for children in "need of care and protection within twenty-four hours of the report'[220]. The said Act shoulders the Police with the responsibility of treating the case and the victims with significant sensitivity.

Section 24 mandates that the police officer shall record the statement of the child "at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector."[221] The Ministry of Women and Child Development, in its 'Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012', laid down certain guidelines, which provided for a friendly, less-suggestive setting for recording of the statement of the child. The more comfortable a child is, the more information he is likely to share. Also, children may be too embarrassed to share intimate details when they believe that others can overhear what they

[219] *Id.*
[220] The Protection of Children from Sexual Offences Act, 2012 § 19 (5).
[221] *Id.* at § 24 (1).

are saying. As far as possible, interviews should be conducted in a safe, neutral and child-friendly environment.[222] Additionally, the police officer must ensure that he/she is not in uniform, the child is not detained in police station in night, the child's identity is protected from media exposure, and the child is not brought in any contact with the accused.

Patently, the Act is steered towards making police officials adopt a sensitive approach rather than their usual, aggressively styled approach. The police officer has to ensure that the child is comfortable throughout recording of the statement and in case the child needs special attention, whether due to mental or physical, it is incumbent upon the police officer, under section 26, to seek assistance from an interpreter or translator.

Although more provisions are needed to make police officials more sensitive to the child-victim, the provisions already contained in the Act are welcoming. Indian police system is infamous for its high-handed methods of handling cases, thus such provisions mandate the police officials to consider child sexual abuse cases with great deliberations and sensitivity.

Similarly, as far as Magistrates are concerned the Act mandates certain considerations to while handling a child-victim. Though these are mere procedural considerations, they nevertheless are needed to prevent further victimization of the child.

Under Section 26 of the Act provides that a magistrate shall record the statement "as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence."[223] Any person with whom he or she is comfortable with is an important consideration, as it would assure the child that he or she has not done anything

[222] Model Guidelines under Section 39, *supra* note 16, at 9.
[223] *supra* note 18, at § 26.

wrong or is being punished. 'as spoken' means that a Magistrate must record exactly the same statement as spoken by the child and must not meddle with it due to grammatical or technical necessities. The statement should be understood, as it is, as children lack a profound vocabulary especially when explaining difficult situations. It is important to realize that "young children have little or no concept of numbers or time, and they have limited vocabulary and may use terminology differently to adults, making interpretation of questions and answers a sensitive matter."[224] It is for this purpose Sec. 26 (2) provides that the magistrate can seek assistance from an interpreter or a translator, whoever is necessary.

2. SPECIAL COURTS

Keeping in mind the sensitive character of and the imminent necessity to settle child sexual abuse cases, the legislation provides for establishment of special courts, which would particularly deal such cases and ensure expediency.

Chapter VII of the Act lays down provisions for establishment of Special Courts for trial of offences under the Act, keeping the best interest of the child as of paramount importance at every stage of the judicial process.[225] Such courts shall "complete the trial, within a period of one year from the date of taking cognizance of the offence"[226]. Speedy trial and Justice are two desirable outcomes that shall alleviate the misery of the child.

The Act, in unambiguous terms, expresses the intention of the legislature to reform the judicial proceedings amicably inclined towards the child and its welfare. Therefore, Chapter VIII lays

[224] Model Guidelines under Section 39, *supra* note 16, at 16.
[225] The Protection of Children from Sexual Offences Act 2012, **CHILDLINE INDIA**, http://childlineindia.org.in/The-Protection-of-Children-from-Sexual-Offences-Act-2012.htm (last updated Sept. 8, 2016)
[226] *supra* note 18, at § 35.

down guidelines to be mandatorily observed by the Special Courts, incorporating the essence of the Preamble that a child's interest is paramount.

Police stations, courts, hospitals and social service offices are typically not very child friendly locations and can magnify the child victim's unease. It is well known that high levels of stress can preclude optimal expression by the child victim. The latent messages to the child victim conveyed in certain locations can also reinforce some harmful misconceptions.[227] The said Act, therefore, provides for Special Courts that conduct the trial in-camera and that the 'identity of the child is not disclosed' The child may have a 'family member, a guardian, a friend or a relative, in whom the child has trust and confidence' present at the time of testifying and can call for assistance from an interpreter, special educator, or other professional while giving evidence; further, the child is not to be called repeatedly to testify in court and may testify through video-link rather than in a courtroom.[228] It is imperative that secondary victimization in any form or manner is minimal thus, the Act clearly lays that courts must keep in mind the interests of the child. He or she must not be forced or repeatedly questioned, or else it would develop unhealthy thoughts and unwanted guilt in the child.

THE CENTRAL GOVERNMENT, THE STATE GOVERNMENT(S), AND THE MEDIA

While the Act restricts media intervention during the investigation and trial of the offences under the Act with the purpose of protecting the child's right to live with dignity and privacy, the media will still, under the authorization of the Central and respective State Governments,

[227]Bragi Guðbrandsson, *Towards a child-friendly justice and support for child victims of sexual abuse*, **COUNCIL OF EUROPE**, 90 (2010), http://www.coe.int/t/dg3/children/1in5/Source/PublicationSexualViolence/Gudbrandsson.pdf.
[228] Model Guidelines under Section 39, *supra* note 16, at 5.

play a major role in popularizing the provisions of the Act. The purpose is to maximize public awareness about the Act that covers almost every form of sexual offences against children. Thus, it is the sense of urgency and want of public awareness that the legislators have brought a three-tier interaction among three major agencies of public welfare and development, the Central government, the media, and the State governments.

Sec. 43 emphasizes upon the importance of giving publicity to this law through media including the "television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians"[229] aware of the provisions of this Act' and that "the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act."[230]

THE NATIONAL COMMISSION/THE STATE COMMISSION FOR THE PROTECTION OF CHILD RIGHTS

Sec. 44 lays down the establishment of the National Commission and the State Commission for the Protection of Child Rights under respective Sec. 3 and 17 of the Commissions for Protection of Child Rights, 2005 (hereafter 'Act 2005'), which aims to "provide speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto"[231].

Sec. 3 of the Act 2005 provides for the constitution of the National Commission for the Protection of Child Rights. The Commission shall consist of a Chairperson, having done

[229] *supra* note 18, at § 43.
[230] *Id.*
[231] The Commission for Protection of Child Rights, 2005.

"outstanding work for promoting the welfare of children"[232] and 6 other members, out of which minimum 2 should be women, having experience in the field of education, child health, juvenile justice, etc. On the state level, the State Commission for the Protection of Child Rights shall be constituted under Sec. 17 of the Act, 2005 that incorporates similar constitution.

The functions of the commissions shall be primarily to safeguard the interests and rights of the child. A commission shall "examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights"[233] and recommend measures for their effective implementation'; inquire into violation of child rights; undertake periodical studies in related matters; spread awareness about child's rights and perform other functions, as mentioned under Sec. 13 of the Act 2005. The commission shall also undertake supervision on the implementation of the provisions of the POCSO.

There exist major inclusions in the POCSO that ensures or at least attempts to ensure that each agency involved in such cases responsibly and mandatorily perform its functions and give special attention to the victim. The POCSO, through an expansive coverage of possible sexual offences against children and procedural reformation, has sufficiently removed many loopholes that were present in other laws on sexual offences against children. However, some of its provisions as well the poor implementation of the Act raise eyebrows.

## POCSO: STRONG LAW, POOR IMPLEMENTATION

It was public outcry that compelled the Parliament to legislate upon India's one of the most detestable problem, Child Sexual Abuse, and draft a comprehensive, rigorous and effective law that will bring to

[232] *Id.* at § 3.
[233] *Id.* at § 13.

book offenders of sexual abuse against children. It was on 20 June 2012 the Protection of Children from Sexual Offences Act became enforceable.

The Act lays down some of the most stringent punishments for sexual offences against children and covers vast range of sexual offences. It lays down harsher punishments for those offenders, who come under particular categories, as mentioned in the Act. With the purpose of safeguarding the interests and developing capacities of the children, the Act appends certain mandatory legal obligations upon the Central Government, the State Government, the media, and the commission. Sadly, such an Act is incapable of effective enforcement due to weak implementation.

Section 43 of the Act imposes obligations upon the Central Government and every State Government to ensure that the provisions of POCSO are given extensive publicity through media at regular intervals. Additionally, the officers of the Central Government and the State Governments and other concerned agencies/persons are periodically given training on the implementation of the provisions of the Act. Thus, raising public awareness is an integral part in the process of implementation of the Act. However, neither the public officials nor the common person knows much about the POCSO. Worse, many may even do not know whether such Act exists in the statute book.

A survey titled 'The awareness of Protection of Children from Sexual Offences Act, 2011' reported that the "survey conducted on 'advocates, police officers, prosecution officers and member of the child welfare committee revealed that 60% of them are not aware of some important provisions of the Protection of Children from Sexual Offences (POCSO) Act, like right of children to free legal aid"[234]. Worse, the ignorance of the healthcare system towards the laws is egregious. Under Section

[234]Priyangi Agarwal, *60% officials unaware of POCSO provisions,* **THE TIMES OF INDIA**, http://timesofindia.indiatimes.com/city/bareilly/60-officials-unaware-of-POCSO-provisions/articleshow/46962046.cms (last updated Sept. 11, 2016).

357-C of the Code of Criminal Procedure, 1973 and 27 of the POCSO, no sexual assault survivor must be denied medical treatment, whether in private or government hospital. Any registered medical practitioner can conduct examination of a survivor. However, the blatant lack of knowledge about these statutory provisions has rendered healthcare system an ineffective support system to the victims.

Considering the sad affair of implementation of the POCSO, the Supreme Court in the case of *Re. Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India & Ors.*[235] held that the lackadaisical attitude of the governments has left it with no option with the court but to initiate contempt of court proceedings. The Supreme Court held:

> "*Although the affidavits have been filed indicating that the State Commissions have been established yet we find that such establishment is only on paper. In many States, Chairman of the Commission has not been appointed and in some other States even Members have not been appointed. This apart, necessary rules and regulations have also not been framed. This, in our opinion, would be sufficient justification for this Court to take a serious view and initiate appropriate proceedings for contempt of court against the defaulting States and the Union Territories.*"

The current status of the implementation of the POCSO has taken a back seat, as the government itself is uninterested in the improvement of the POCSO mechanism, especially the judicial mechanism. Section 28 of the Act provides for the establishment of Special Courts that shall hear and conclude cases falling under the Act. Still, there is a blatant dearth of Special courts. An RTI reply has revealed that there is no designated court in Delhi to exclusively try offences against children under the POCSO Act. The reply, furnished in response to an RTI query by advocate Gaurav Bansal and now part of court records in Delhi High Court, reveals that special courts set up to try crimes against children

[235]2013 (15) S.C.A.L.E. 430 (India).

under POCSO are burdened with cases of human rights violations and cases under SEBI, MCOCA and TADA[236]. Those states, which have established special courts, have not paid enough attention to their reformation. Despite being a stringent legislation, it invites great misuse especially in cases of sexual relationship between minors or a minor and a major. Since any person under the age of 18 is presumed to be incapable of giving consent, most of the consensual activities between minors or a minor and a major are considered sexual assaults or rapes. Now that POCSO is enacted, families of such minors misuse the application of the Act and allege rape. This is done to safeguard the 'honor of the family', as sexual relationships without or beyond marriage is morally forbidden. Such misuse attributes misconceptions and stigma towards the innocent party, which has been wrongly accused of a heinous crime. The High Court of Karnataka, while admitting a petition, rightly observed that 'the mere recitation of the provisions of either POCSO Act or the SC & ST Act, by itself would not lend the colour of a heinous crime having been committed merely by the said fact[237]' However, in reality, the society is unwilling to restrain from judgmental dispositions and therefore, misuse of law is a serious concern.

A 2013 judgment of the Delhi High Court rejected the plea of police and Delhi Commission for Women (DCW) that POCSO Act provides for absolute prohibition on teenagers or adolescents from indulging in any type of sexual relationship. Additional Sessions Judge Dharmesh Sharma said,

"*I am afraid, if that interpretation is allowed, it would mean that the human body of every individual under 18 years is the property of State and no individual below 18 years can be allowed to have the pleasures associated with one's body,"*

[236] Abhinav Garg, *No dedicated court for POCSO cases*, **THE TIMES OF INDIA**, http://timesofindia.indiatimes.com/city/delhi/No-dedicated-court-for-POCSO-cases/articleshow/47980845.cms (last updated Aug. 8, 2016).
[237] Sri Madhu v. The State Of Karnataka, 2014 (12) S.C.C. 419 (India).

Though the decision invited dissent from the Women and Child rights activists, it brings attention back to one of the most fundamental issues in Indian Legal system. It is principally a moral issue whether committing to consensual sexual relationship when a minor is right however; the issue has major impact upon the discharge of justice. It is high time the Parliament acknowledged that there is marked escalation in the number of sexual offences against the children and increase of false complaints under the POCSO and other related laws. If the above issue is not urgently decided upon, it will continue to deliver unfair ramifications.

Unfortunately, India is home to one of the largest cases of sexual offences against children. Strong laws would be futile if they are not equally strong in implementation. This would, however, only happen if there exists due cooperation among various agencies and effective mechanism for enforcement of the laws.

## CONCLUSION

POCSO is an exigently welcomed piece of legislation, recognizing nearly every known form of sexual abuse against children and having greater coverage and wider scope. Its significance is inevitable from the very fact that it is a child friendly process, which reforms the criminal justice system to suits the special needs in child sexual abuse cases. The Act brings different actors of the State such as the judiciary, police, and child protection machinery, who are responsible for overseeing deliverance of justice for a sexually abused child. By working together, they can provide the child victims with opportunities to obtain justice for un-fateful crimes committed against them, to rehabilitate and help in rebuilding their life and future.

The Act is particularly stringent on sexual offenders and appends punishments for variable terms, depending upon the category of crimes under which the case falls. The punitive measures incorporated

in the Act are imprisonment for variable terms, which may include a penalty for on reparation on account of the miseries the child victim had went through or for the rehabilitation purpose. The distinguishing attribute that one can attach to POCSO is its deterrence value, which emanates not only from the harshness of its punishments but also the favorable environment created for children and families to report crimes and cope with the vagaries of the trial stage.

The act defines exclusively the crime of sexual offences against children and takes into account India's international obligations by virtue of being a signatory to the United Nations Convention on the Rights of the Child. However, the poor implementation of the Act has posed serious questions. Though POCSO is a comprehensive law, there is a strong need to ensure its effective implementation and creation of awareness amongst officers and all other stakeholders. Only then we can bridge the chasm between law and society and adopt a sociological approach to law wherein state and non-state actors like NGOs can be involved for effectuating the legal spirit.

Successful implementation of any law requires proper understanding and its systematical application in securing social dignity of and justice to children in India. Let us hope that the Act fulfils its main objective of safeguarding innocent children from heinous sexual abuses and protecting their future interests so as to ensure a well secured 'Young India'.

# 8. A COMPREHENSIVE ASSESSMENT OF UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) WITH RESPECT TO MARITIME ISSUES IN THE INDIAN OCEAN REGION

Author(s): Chennu

## INTRODUCTION

Throughout history, there has been a struggle for dominance over free access to resource areas like land, sea, air, space, etc. There have been numerous conflicts and several disagreements regarding the sharing space of these areas. Ever since continued efforts have been made to govern these areas under an international legal framework aimed at peaceful and equitable usage of these resources.

Among these resource areas commonly referred to as 'Global Commons', maritime domain has been considered as one of the important commons. From time immemorial, it has been the conduit of world trade and commerce. In present times, with over 90 % of world trade being sea borne, the maritime domain has gained even more salience. Most of the countries and the largest economies of the world are becoming increasingly dependent on the maritime resources for sustainable growth and prosperity. As a result, there is an emerging security scenario in which different states are competing for a dominant space. The challenges to maritime security are posing serious consequences to the national security of the states. This has forced intergovernmental organisation to set up a legal platform to govern the seas for international use.

An important contribution to the good governance at seas is the formation of The United Nations Convention on the Law of the Seas (UNCLOS). It is considered as the Constitution of the Seas as it is a comprehensive document enumerating the legal guidelines to international security at seas. It was signed in 1982 that resulted from the third United Nations Conference on the Law of the Sea

(UNCLOS III) and became effective from 1994. It is aimed at maintaining peace, justice and progress of all the peoples in the world. It encompasses the rights and responsibilities of a state regarding the use of the oceans, navigational rights, territorial demarcations, maritime zones, and mining of resources, environmental issues and marine safety among other provisions. It is an important body of law to resolve the disputes amicably and preserve the resources from unwarranted exploitation.

In this context, the growing importance of the Indian Ocean Region (IOR) due to abundant resources, particularly energy resources transit through the Sea Lines of Communication (SLOC). They pass through narrow chokepoints and are vulnerable to attacks. Safety to navigation and cooperative mechanisms to tackle security issues has become necessary. These issues could be addressed by UNCLOS. UNCLOS could play a vital role to maintain good governance at sea, particularly the Indian Ocean and it littoral states. The challenges that are threatening the interests of the states in the IOR could be resolved under the ambit of UNCLOS.

## ORIGIN AND EVOLUTION OF UNCLOS

The oceans have been subject to exploitation of resources by mankind from time immemorial. The oceans considered as one of the important global commons have been a major source for growth and sustenance of life on earth. The human race has been dependent on oceans for various purposes.

The seas primarily served as a source of food to the people, especially to people of the coastal regions. However, the rise of seafarers representing different nations explored the seas and discovered other natural resources. In their quest for new resources nations sought to expand their sphere of influence for free and uninterrupted access to those resources. This led to larger ambitions to gain dominance and control of the seas. It gave rise to conflicts among the nations. The question of who does the ocean belong to and whether it is international territory available for free use by all was raised.

Since no single state could claim sovereignty or jurisdiction over the seas, assured access to the resources of the seas became paramount. In this context, the principle of 'freedom of the seas' came into existence. It has been considered as the emergence of international law of the seas.

"A principle put forth in the seventeenth century essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none".[238]

The nations had only limited control over the seas. They had sovereignty only on a particular area. The resources in that area were meant for their national use only. The extent of territorial waters was largely based on "cannon shot" rule. The reach of cannons on the shore determined the area over which the nations could exercise their right. "Thus, the 3 nautical mile (nm) limit of the territorial sea resulted from the "cannon shot" rule".[239] This became the boundary demarcation of the territorial seas.

"This idea of the oceans beyond territorial waters being a realm in which no single nation can claim sovereignty was first articulated by Dutch legal scholar Hugo Grotius (1583-1645) in his book Mare Liberum (The Freedom of the Seas)".[240]

In the 19th century, the principle of the freedom of the seas was further articulated by Alfred Thayer Mahan in his work "The Influence of Sea Power upon History". The concept of sea power laid emphasis on freedom of oceans, economic prosperity and security of the oceans for overall

[238] *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, ON OCEANS & LAW OF THE SEA, UNITED NATIONS, (Mar. 8, 2015), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#HistoricalPerspective.
[239] *History of the Maritime Zones Under International Law* ON OFFICE OF COAST SURVEY, NOAA, (Mar. 8, 2015), http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html.
[240] Marko Babic, *Examining Challenges of Global Commons*, (Mar. 8, 2015), http://www.academia.edu/1041715/Challenges_of_the_Global_Commons.

development. It was even part of the 'Fourteen Points' address made by the then American President to the American Congress, prior to World War I.

"Since World War II, the advancement in maritime technology, expanding maritime trade, growing value of offshore energy, minerals, and living resources collectively led to a breakdown of the centuries-old division of the ocean of three-mile territorial seas under coastal state authority and the high seas."[241]

This provided an impetus for nations to lay claims on offshore resources beyond their territorial seas. This generated a host of issues regarding the territorial demarcation, authority to have access to offshore resources, disputes over sovereignty of the resources. Countries started asserting rights over offshore resources regardless of the law of the seas. The advancement in technology had allowed the countries to exploit off shore resources which were once inaccessible. They laid claims beyond the 3 nm boundary. The countries in order to protect their local resources from transgression by other countries started expanding their claims of sovereignty and challenged the traditional 3 nm demarcation. The first country to challenge the doctrine of the freedom of the seas was the United States.

"On September 28, 1945, President Harry S. Truman signed what has become commonly known as the Truman Proclamation."[242] According to the proclamation the US claimed sovereignty to the Outer Continental Shelf (OCS) and its resources. It claimed the right to establish conservations zones in high seas contiguous to its coasts.

[241] Caitlyn Antrim, *International Law and Order: The Indian Ocean and South China Sea*, (Mar. 8, 2015), http://www.stimson.org/images/uploads/research-pdfs/IOR_chapter5.pdf.
[242] Daniel Hollis, *United Nations Convention on the Law of the Sea (UNCLOS)*, 1982, (Jun. 22, 2010), http://www.eoearth.org/view/article/156775/.

Soon after US laid claims on the sovereignty of the continental shelf, other countries followed suit. Argentina also started claiming the continental shelf resources and the water column above it, Ecuador, Chile and Peru asserted rights over 200 nm zone in order to protect its biological resources and the Arab and Eastern European countries laid claims over the 12 nm territorial seas. This fractures the current doctrine governing the seas. There was a growing need for a better framework to continue good governance at sea.

Therefore, UNCLOS was signed to promote equitable rights, secure resources, protect sovereignty and maintain good governance at sea.

United Nations Convention on the Law of the Sea (UNCLOS) was adopted in 1982 as a result of the Third United Nations Conference on the Law of the Sea (UNCLOS III). It is based on the four Geneva Conventions on the Law of the Sea adopted in 1958. They are the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf.

**UNCLOS I (1956-1958)**

After the recognition of the conflicts that resulted in ineffective regime, 86 nations participated in the United Nations Convention on the Law of the Sea in Geneva which is commonly referred to as UNCLOS I which resulted in four convention as mentioned above.

The Convention on the Territorial Sea and Contiguous Zone established right of sovereignty and rights of passage via territorial sea. It established the extension of 12 nm from the baseline as the contiguous zone. However, the convention did not set standards for the limits on territorial sea.

The Convention on High Sea established access to landlocked state, banned the slaves transport, recognised piracy, safety and rescue protocols, national duty to prevent pollution and rights to laying undersea cables and pipelines were established.

The Convention on Fishing and Conservation of the Living Resources of the High Seas established that coastal nations had the right to protect living ocean resources and when the fleets left the territorial sea then the nations were required to establish conservation measures. It also recognised the need for dispute resolution measures.

The Convention on the Continental Shelf established that submarine cables or pipelines to be laid and maintained, navigation, fishing, scientific research and the competition of the coastal nations governance was established. It also included the governance of delimitation and tunnelling. It also produced Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes which provides for dispute resolution through arbitration or conciliation.

**UNCLOS II (1960)**

There were unresolved issues even after UNCLOS I. The need to deal with these issues resulted in the UNGA calling for a second United Nations Convention on the Law of the Sea known as UNCLOS II. The members met in the early 1960s. Their agenda was mainly to settle the issue on the breadth of territorial sea and setting the limits for fisheries. Although these two resolutions were adopted by the conference, the members did not come to a general consensus.

**UNCLOS III (1973-1982)**

Several conventions have been held by the United Nations regarding the law of the seas. But there was no consensus on the broad issues confronting the United Nations General Assembly (UNGA).

The growing concerns of states exercising their right in the seas compelled it to come up with a framework that would enforce stringent laws to govern the issues at sea. This was largely triggered by the Maltese Government way back in 1967 where the ambassador of the Malta, Arvid Pardo impelled the UNGA to recognise the resources of the ocean bed as common heritage of mankind. It is considered as the biggest diplomatic negotiation in history as it forced the UNGA to set up a special committee to address the peaceful use of the ocean floors for resources. This committee became a commission and the membership of the commission became 86 from the original 35. The UNGA convenes a conference and asks the commission to do the preparatory works on the issues of the law of the seas. The first session of the conference was held in 1973 in New York. The conference met from 1973 to 1982 and worked on four commissions which resulted in UNCLOS. Finally, "the Conference adopted a text composed by 320 articles divided in 17 Parts, complemented by 9 Annexes (88 Articles) and 4 Resolutions all which form an integral part of the Convention" [243] resulting in the present UNCLOS. UNCLOS was first signed in December 1982 but it came into force in November 1994. Nearly 166 countries have ratified the UNCLOS Agreement.

## SIGNIFICANCE OF UNCLOS

With the evolving security scenario in the maritime domain, there is a growing need for a security framework to govern the seas to ensure peaceful use and sustenance of the seas. Oceans serve a lot of purposes to humankind ranging from food, resources, minerals, energy, environment and ecology to safe navigation and transport of materials from one place to another.

[243] L. Ortega Lemus, *Brief Outline of the History and Development of the Law of the Sea*, (Mar. 8, 2015), http://www.academia.edu/1193093/Brief_Outline_of_the_History_and_Development_of_the_Law_of_the_Sea.

The numerous threats emanating from the maritime domain are a great cause of concern for the security of the oceans. Particularly the Indian Ocean which has become the locus of maritime trade. Most of the global sea-borne trade is concentrated in the Indian Ocean Region. The security of its abundant resources and access to those resources has become paramount. The dependency of trade for economic reasons makes the oceans an important global common. The dependency on food for the livelihood by man and animals requires that the health of the oceans is maintained.

Apart from getting access to resources and safeguarding them from external threats, supply of those resources to different parts of the world also has to be considered. The countries involved in such activities should ensure, safe passage of ships to transport the materials. It should ensure the security of sea lines of communication through which the materials are transported. The major chokepoints in the world through which major energy resources, particularly oil and gas are transported have been located in the IOR. Indian Ocean, the third largest after Pacific and Atlantic has gained salience due to these reasons and also with the centre of gravity shifting from the west to the east.

In this context, no one country would be able to maintain the security of the oceans and since it is one of the global commons, no one country can exercise sovereign rights and have jurisdiction over the seas. Therefore, countries decided to come together and form a common law for the seas. Their efforts resulted into UNCLOS which would be required to safeguard their interests in the seas and maintain good governance through the common body of law of the seas.

## ROLE OF UNCLOS IN ADDRESSING MARITIME ISSUES IN IOR

Oceans are important for economic welfare of the nations. Global commerce is heavily dependent on the oceans. Global commerce is concerned with ferrying of commercial goods and services, guarding

submarine cables and pipelines for secure transmission and transportation of information and materials, arranging access to hydrocarbon resources and providing energy in the form of wave, wind and tidal power, trawling, offshore mining and drilling and seabed exploration with the help of new technologies.

The new technologies have been disturbing the ecosystems in the oceans. They have been responsible for the deterioration of the ocean health. For instance, the commercial trawlers have been scraping the sea floor, commercial ships have been producing carbon based emissions, and extraction of resources using scientific deep sea exploration techniques have been polluting and impacting the marine environment.

These are issues related to environment and the effect of commercial interests in the ocean that have been affecting the environment. They are also resulting in climate change issues having larger ramifications for the natural environment. These issues have to be addressed by the mankind enjoying the benefits from the oceans.

However, oceans are not just restricted to commercial activities. They are not just source of profits that serve the national interests of the nations. There are other issues that the nations have been confronting. These issues have an impact on the political independence, sovereignty and territorial integrity of the nations. The security of the nation states has been challenged by issues such as transnational crime, piracy, maritime terrorism, drug trafficking, illegal migration that occur in the waters. But these constitute only the non-traditional aspects of security issues. There are traditional security threats like dispute over marine boundaries, trespassing of foreign vessels harming the security of the coastal states, naval expansions projecting the naval power of a nation undermining the security of the less powerful coastal states, etc.

The above issues are prevalent in the IOR. Role of UNCLOS as well as other international and regional security initiatives has been emphasised. The organisations have formed separate body of law to address the security issues. These organisations are consistent with the provisions of the convention of UNCLOS. An efficient application of these legal bodies would depend on the cooperation of the littoral states and the extra-regional states to abide by the legal provisions of the Convention for effective implementation.

The major issues could be explained as follows:

**Securing commercial shipping**

Commercial shipping is very lucrative for the nations. But it is not devoid of safety and security challenges. Maritime ship accidents and attacks on the commercial ships have been frequently occurring in the IOR. The security of shipping fleet has become essential for the stability of the world economy.

In this regard, "International Maritime Organization (IMO) provides security guidelines for ships through the Convention on the Safety of Life at Sea."[244] They aim at preventing the maritime accidents and govern the safety of the shipping containers. International standards of navigation and the equipment such as satellite communication to locate the ships have been utilised by the organisation.

**Confronting Illicit Trafficking**

Indian Ocean in addition to being a highway for legal maritime commerce, facilitates trafficking of drugs, small arms and light and humans. The UN has made attempts to curb such illicit activities through UN Convention on Transnational Organized Crime. Indian Ocean is home to one of the two

[244] *The Global Commons Regime on Issue Brief* ON COUNCIL ON FOREIGN RELATIONS, (Jun. 19, 2013), http://www.cfr.org/oceans/global-oceans-regime/p21035.

main areas of drug trafficking in the world, the Golden Triangle. The security of the littoral states is being threatened by such crimes. The UN oversees illicit trafficking through UN Convention on Transnational Organized Crime.

**Combating Piracy**

Piracy was rampant off the coast of Somalia until 2011. It is part of the Indian Ocean Region. But from 2012 onwards there is a sharp decline in the number of piracy attacks. It can be attributed to the continuous efforts undertaken by the international community. International mobilisation and naval patrols could reduce the number of piracy attacks. However, the threat of piracy shifted to Nigeria and Indonesia due to the policing of piracy. Countries from around the world and the regional organisations stepped up their efforts to combat piracy. UNCLOS along with International Maritime Bureau and Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia helped in curtailing the pirate attacks in the Indian Ocean Region.

**Reducing Marine Pollution and Climate Change**

The developments in the coastal area, pollutants from the land, exploration and exploitation of the seabed minerals and resources, pollution from shipping vessels have been depleting the marine environment. The UN Environment Programme (UNEP) Regional Seas Program along with UNCLOS and IMO have been established to keep a check on the pollution of the marine environment.

Climate change is another important element that is exacerbating the marine environment. "As the world warms, oceans absorb increased levels of carbon dioxide, which acidifies the water and destroys wetlands, mangroves, and coral reefs—ecosystems that support millions of species of plants and

animals."[245] Recent reports on climate change have suggested that by 2050 ocean acidity could increase by 150 per cent. As a result, melting ice have been raising the water levels which increase the salinity of the water and flood communities. In the IOR, Maldives is under the threat of being completely submerged as it is the lowest country in the world.

**Policing Sustainable Fisheries on High Seas**

Every nation has a right to regulate fishing in their EEZ. But in the high seas the waters are international waters where nations do not exclusive jurisdiction over the fisheries in that region. There is a significant amount of depletion in the IOR due to large-scale illegal fishing. In this regard, UNCLOS and UN Fish Stocks Agreement (FSA) regulate the illegal, unreported, and unregulated (IUU) fishing.

**Maritime Terrorism**

There is a high degree of threat from maritime terrorism to the sea lines of communication in the IOR. The major chokepoints in the region have been threatened by the insurgent activities and terrorists activities. The nexus between the pirates and the terrorist organisations have raised concerns for the security SLOCs. If the straits are even blocked for a day then it would cripple the global sea-borne trade and have negative ramifications on the global economy.

[245] Id.

## UNCLOS AND MAJOR POWERS

### INDIA

India is considered as one of the "original signatories of the UNCLOS."[246] India ratified UNCLOS in June 1995. India has had a legislation on the maritime zones before it could became a signatory to UNCLOS. It is known as The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976. It reflects the provisions laid down in UNCLOS. Later, it came up with the Department of Ocean Development which was created in July 1981. It has been dealing with implementation UNCLOS provisions in India. The Ocean Policy Statement was issued by India in 1982 to control, manage and utilize internal resources of the seas and develop technologies to harness the resources. India has signed several bilateral, regional and international treaties to uphold the principles of UNCLOS to maintain good governance at sea. India is considered to be committed to the peaceful resolution of maritime disputes through legal mechanisms such as UNCLOS. The settlement of Bangladesh-India maritime boundary dispute is a testimony to this fact.

India has faced maritime boundary demarcation and sovereignty issues in the Indian Ocean. The most recent one has been the Bangladesh and India sea boundary dispute which was settled on 07 July 2015 by the Hague-based Permanent Court of Attribution (PCA). Since both the countries are party to the convention, it is required on their part to adhere to the provisions and the decisions thereof taken in order to peacefully resolve the issue.

The ruling of the international court was in favour of Bangladesh which resulted in awarding "an area of 19,467 sq. km, four-fifth of the total area of 25,602 sq. km disputed maritime boundary in the Bay

[246] *Rule of Law* ON PERMANENT MISSION OF INDIA TO THE UN, GOVERNMENT OF INDIA, (Apr. 18, 2015), https://www.pminewyork.org/pages.php?id=1967.

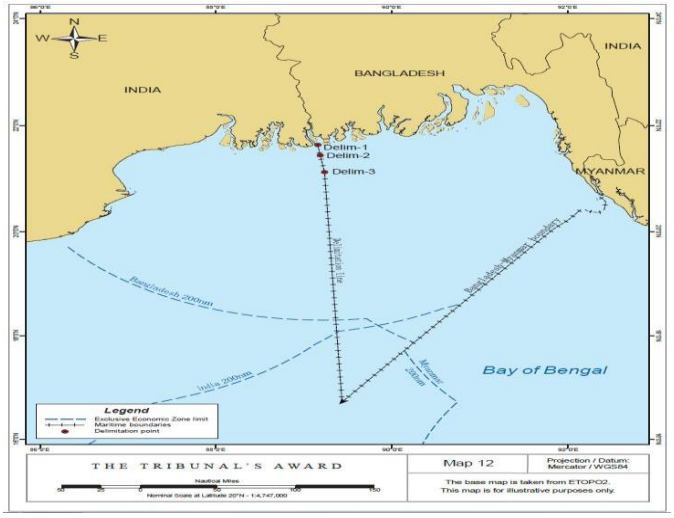
of Bengal with India."[247] The boundary was delimited and a grey area using an equidistance method of demarcation as shown in figure 3 and figure 4 respectively. The EEZ and the continental shelf were delimited where "Bangladesh had a potential entitlement to the continental shelf but not an EEZ while India had a potential entitlement to both."[248] The sovereign rights of the parties were delimited in the continental shelf only. India's sovereign rights in the EEZ in superjacent waters was not delimited. The countries could exercise their rights under the Convention on this basis with due regard to the rights of each other.

This settlement has been considered as a landmark decision as both the parties accepted the award. The peaceful and amicable settlement demonstrated the development of maritime international law and the success of UNCLOS in addressing the maritime disputes. This case has been acknowledged as an example which reflects the importance of international law. Especially at a time when there are numerous maritime disputes that have been affecting the peaceful use of the sea, such cases could highlight dispute management through peaceful legal mechanisms.

[247] Rupak Bhattacharjee, *Delimitation of Indo-Bangladesh Maritime Boundary* ON IDSA COMMENT, (Aug. 19, 2014), http://www.idsa.in/idsacomments/DelimitationofIndo-Bangladesh_rbhattacharjee_190814.html.

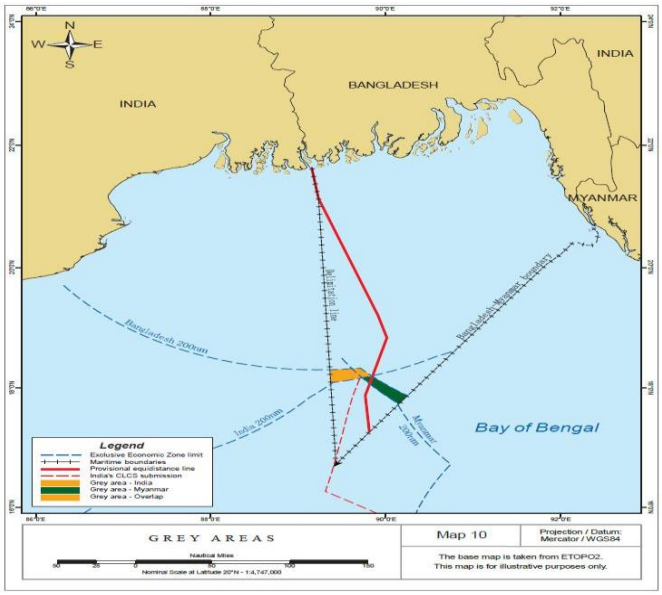
[248] ***UNCLOS Annex VII Tribunal decides Bangladesh-India Maritime Boundary Dispute*** **ON ARBITRATION NOTES, (2014), http://hsfnotes.com/arbitration/2014/07/15/unclos-annex-vii-tribunal-decides-bangladesh-india-maritime-boundary-dispute/.**

**Figure 3**




Source: *UNCLOS Annex VII Tribunal decides Bangladesh-India Maritime Boundary Dispute* ON ARBITRATION NOTES,(2014), http://hsfnotes.com/arbitration/2014/07/15/unclos-annex-vii-tribunal-decides-bangladesh-india-maritime-boundary-dispute/.

**Figure 4**




Source: *UNCLOS Annex VII Tribunal decides Bangladesh-India Maritime Boundary Dispute* ON ARBITRATION NOTES,(2014), http://hsfnotes.com/arbitration/2014/07/15/unclos-annex-vii-tribunal-decides-bangladesh-india-maritime-boundary-dispute/.

There are other maritime issues which have violated the maritime regulations of India giving rise to maritime security concerns. The presence of the armed vessels close to its waters has challenged India's sovereign rights. The 2012 incident of the Italian marines shooting down two Indian fisherman and the AdvanFort ship arrest reflect the assertion of sovereignty made by India over its coastal waters. The issue central to both of these cases was jurisdiction over the coastal seas, vessels and the crew. The nature of claims were different as nature of the incidents were different. A comparison between the incidents bring out the following differences. First, the Italian marine were agents of the states representing the Italian Government whereas the AdvanFort was a private vessel acting under a company's direction. Second, the Italian incident came under an area of maritime law which has been covered by codified and customary international law, whereas the AdvanFort ship was accused for violating Indian regulations only.

A careful examination of both the incidents brings out the applicability of Indian maritime regulations and provisions of UNCLOS.

The Italian incident involved an Italian oil tanker, Enrica Lexie. It was sailing from Singapore to Egypt and was guarded by Italian marines. The marines, off the coast of Kerala opened fire on an Indian fishing boat killing two fishermen. The two shooters were arrested and the vessel was escorted by the Indian Navy to an Indian port. At state court level a trail was held and a settlement of paying the families of the deceased in return for the dismissal of the case was to be reached. However, the Supreme Court of India intervened and stated that Kerala high court did not have the jurisdiction. The trail would have to be conducted at the national level.

India and Italy grappled over the jurisdiction issue with UNCLOS to state that their home court had jurisdiction. According to article 97 of "Penal jurisdiction in matters of collision or any other incident

of navigation"[249] of UNCLOS grants authority to the Italian ship. On the contrary the Indian Solicitor General argued that other incidents of navigation was a narrow definition. "Since the Italian marines deliberately fired on the fishing boat, a criminal act, there was no accident, and thus article 97 was inapplicable."[250] He argued on the premise of the S.S. Lotus precedent. A French ship collided with Turkish vessel, killing some of the Turkish crew. In this case the Turkish ship was given jurisdiction on appeal to the Permanent Court of Justice. The court found that the national identity of the Turkish vessel determined appropriate jurisdiction. The Indian court also rejected sovereign immunity claimed by Italy. This incident has been grappling with the interpretation of the national law, public international law, UNCLOS, Suppression of Unlawful Acts against Safety of maritime Navigation and Fixed Platform of Continental Shelf Act among other applicable laws.

The Seaman Guard Ohio ship was seized by India on the basis of two laws. The ship was carrying arms and ammunition without a license through Indian territory and it had purchased fuel without any authorization which is against the maritime rules of India.

"Under article 33 of UNCLOS, a coastal nation has authority to prevent and punish infringement of "customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea jurisdiction."[251] According to India's Essential Commodities Act and India's Arms Act, the violations are punishable under these laws. The question of jurisdiction is clear unlike the Italian ship case.

These issues have exposed the grey areas of the provisions of UNCLOS. The interpretation of laws case by case has been questioning the universal applicability of the provisions on certain issues.

[249] n. 7, pp. 59-60.
[250] Noah Black, *Criminal Jurisdiction over Maritime Security in the Indian Ocean*, ON CORNELL INTERNATIONAL LAW JOURNAL ONLINE, (2013), http://cornellilj.org/wp-content/uploads/2013/11/Black-Criminal-Jurisdiction-Martime-Security-final.pdf.
[251] Id.

**CHINA**

China is signatory to UNCLOS. It has ratified UNCLOS in December 1982. China has maritime disputes in the South China Sea and the East China Sea. It has sovereignty issues over the islands in the seas and their adjacent waters. There are four groups of island in the South China Sea which are claimed by China, Taiwan, Vietnam, Philippines, Malaysia and Brunei. Although China has ratified UNCLOS and it is required on part of China to adhere to the provisions of UNCLOS. But the sovereignty assertions made by China in the disputed areas are challenging the authority of UNCLOS. The stance taken by such powers makes the legal mechanisms ineffective to the extent of non-adherence to the provisions of the Convention.

**USA**

USA is not a signatory to UNCLOS. It has been opposing "the regime for deep seabed mining, which requires transferring mining technology and redistributing mining royalties to less developed member states."[252]

At present there is an emerging debate as to whether US should ratify UNCLOS or not, especially in the context of the maritime disputes in the South China Sea and East China Sea. Ratifying the Convention has become an important barometer for US to safeguard its interest in the Pacific. The deliberations on this issue in the US have been urging it to become a party to the Convention.

The perception of the major powers and their adherence to the provisions of the Convention becomes important for the successful implementation of the laws. If the major powers do not respect the legal framework then it would set a wrong precedent to the other countries. It might be encourage them to

[252] Christopher Mirasola, *Why the US should Ratify UNCLOS: A View from South and East China Seas*, (Mar. 15, 2015), http://harvardnsj.org/2015/03/why-the-us-should-ratify-unclos-a-view-from-the-south-and-east-china-seas/.

lay claims that could be inconsistent with UNCLOS. This would pose challenges to good governance at sea.

## CONCLUSION

UNCLOS has established a new order for the oceans that promises the stability required to protect sovereignty, national security, promotion of trade, commerce and development and safeguarding of the marine environment.

It provides for rights and obligations of the states within various zones that define the oceanic waters, provides for collective responsibilities and processes of conflict resolution through various organisations.

UNCLOS, with more than 30 years of existence has been able to provide a framework within which parties to the convention can claim sovereignty over specified zones, safeguard its interests, protect its territorial integrity and political independence and ensure world peace and stability in the global commons.

However, the implementation and abiding by the Convention has become difficult in the recent past. The maritime boundary disputes, particularly the South China Sea Dispute has been challenging the effectiveness of UNCLOS. Since US is not a party to the Convention there are opinions in the international community that there is a leadership vacuum and also being outside the framework is more beneficial than being a member of UNCLOS is being debated. It is believed that China would exit from the Convention and this could provide political cover to other members to disagree on certain issues of UNCLOS. This would weaken the maritime order and could be detrimental to coastal states, maritime powers abiding by the legal provisions and the trading states who have their stakes in the Indian Ocean Region. It has been considered important for US to ratify UNCLOS to bring about

semblance in the maritime order. Since Indian Ocean Region do not have serious boundary disputes unlike the other oceans, the regulation of UNCLOS would be useful for effective resolution to the disputes. The threats of non-traditional character will remain a challenging factor for the implementation of UNCLOS in the Indian Ocean Region. UNCLOS may require revision or adoption of new regulations to keep up with the changing pace of the maritime domain and the changing nature of threats threatening the security of the maritime domain.

## 9. JURISPRUDENTIAL ANALYSIS: SANGEET V. STATE OF HARYANA [2013 (2) SCC 452]

Author(s): Rahul Jajoo[253]

**ABSTRACT:**

*The research paper deals with analyzing the stand of Indian judiciary with respect to the death penalty prescribed in 11 sections of the Indian Penal Code. The paper also tries to analyze the penal punishment from the view point of various jurisprudential schools and the requirement of death penalty in the present scenario wherein India has signed various conventions which also talk about a blanket ban over the penal punishment of death penalty. This paper also answers the question often raised i.e. is our Indian society ready to accept this blanket ban keeping the fact in mind that we imbibe the quality of revenge from the very inception and in our formative years because the environment we live in has been constructed in such a way where the child willingly or unwillingly ends up catching this feeling for aiming for a revenge for a wrong done to him or his family. All these aspects have been dealt in the light of the landmark judgment of Sangeet v. State of Haryana (2013 (2) SCC 452).*

### BRIEF FACTS

The facts of the case are that the appellants A1 (Ramphal), A2 (Sandeep) and A3 (Narender) were found guilty of the murder of the deceased D1 (Ranbir), D2 (Bimla), D3 (Seema) and D4 (Rahul). Thus, the accused were charged u/s 302/307/146 of the Indian Penal Code, 1860 and Sec. 449/149 of the Arms Act, 1959. The appellants had come before the Hon'ble Supreme Court against the order of Death Penalty by the Hon'ble High Court of Punjab and Haryana. The major contention from the side of appellants were that the appellants went to the house of the deceased family in order to kill them because they were under the impression that the family had done some black magic on A1's Son

[253] B.Com LL.B. (Hons.), Institute of Law, Nirma University

who died as a consequence of the same and hence he planned for revenge along with A2 and A3. In furtherance of the act of revenge by the appellants, A3 had blown of the upper portion of the head of the deceased D4 and accused A2 had shot Seema and burnt the lower part of her body so as to destroy the evidence related to sexual harassment of the lady.

Thus, the question before the Hon'ble Supreme court was that weather a balance must be drawn by the Judges between the aggravating and mitigating circumstances of the crime while using their discretion over the matter of sentence of the accused.

## DECISION BY THE HON'BLE SUPREME COURT AND ITS JURISPRUDENTIAL OUTLOOK

The trial court in the present matter had found out that the act of the appellants was brutal in nature, the type of injuries sustained by the deceased and from the fact that the complete family tree was chopped off it could be concluded that the act was of the Rarest of rare category. The Trial Court Judge considered the landmark judgments of *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 and *Machhi Singh and Ors.* v. *State of Punjab*, (1983) 3 SCC 470 hence, passing the order of Death penalty only after confirmation of the High Court of Punjab and Haryana.

The High Court of Punjab and Haryana upheld the decision of the trial court on the grounds of pre-mediation, cold bloodedness and cruelty of the appellants and also the use of weapons unhesitatingly and indiscriminately.

The Hon'ble Supreme Court had a dissenting opinion from the subordinate courts and thus held that:

- There is a need to revisit the landmark judgment of *Bachan Singh* v. *State of Punjab* wherein the learned Judge had approached the case by the route of aggravating and mitigating

circumstances[254] but the court in the present matter was of the view that aggravating factors relate to the crime and mitigating factors relate to the criminal, hence a parallel cannot be drawn between the two and, hence the court denied to endorse the same.

- The court also held that while deciding the matters related to death penalty looking at the crime as well as the criminal becomes equally important and the trends have shown us that pronouncingthe death penalty has become more judge centric than principle centric.
- It is not possible to standardize and categorize crimes in order to award death penalty as done in the landmark judgment of *Macchi Singh and ors.* v. *State of Punjab.*[255]
- The court also interpreted the ambit of Sec. 432 of CrPC and said that Remission u/s 432 can only be granted if the sentence is for a definite time period and such remission can only be of additional nature apart from the ones already prescribed in the jail manual.
- If in case there arises a situation where in awarding death penalty would not stand correct and awarding life imprisonment would not do justice with the victim, the selection of life imprisonment is not completely ruled out.
- Hence, the Hon'ble Supreme Court turned the judgment of the High Court and converted Death penalty into Life Imprisonment.

## TREND OF DEATH PENALTY IN INDIA

Before analyzing the judgment of the Hon'ble Supreme Court jurisprudentially, it becomes very important for us to look at the trend of awarding death penalty in India. The first ever death penalty in independent India was given to Nathuram Godse and Narayan Apte in the Mahatma Gandhi

[254] 2 SCC 684 (1980).
[255] 3 SCC 470 (1983).

assassination case in 1949 and, thereafter, we have witnessed a plethora of cases discussing the Death Penalty. But the major discussion over death penalty was done by the Law Commission of India in its 35th report published in 1967 which stated that Law Commission is of the view that hanging a victim should be replaced by something which is less painful and more humane when compared to the death penalty.[256] The interpretation of Death penalty started from *Jagmohan Singh* v. *State of U.P.*[257] which was decided on the interpretation of unimpeded CrPC and the judges had to give a reason for not awarding the death penalty which implied that initially death penalty was given a priority over life imprisonment and then came the Judgment of Bachan Singh[258] which laid down the doctrine of 'Rarest of Rare' to be applied while deciding the matters of death penalty which was later applied by the Supreme Court in Macchi Singh.[259] And also a standardization and categorization of offenses for awarding death penalty was done which was avoided in both Bachan Singh and Jagmohan. Next case which again brought this issue of death penalty in limelight was *Mithu* v. *State of Punjab*[260] which had struck down Sec. 303 of the Indian Penal Code for being unconstitutional and violating Art. 14 and 21 of the Constitution. With changing time the punishment of death penalty has taken a great turn from being a priority to being an exception and now, before awarding the sentence of death penalty it is important to look at the background of both i.e. the crime and the criminal.[261] The apex court has witnessed lack of consistency in deciding the cases with same circumstances and found that opposite decisions have been given in similar situations raising the doubt that weather the doctrine of Rarest of Rare is being applied at the discretion of Judges or in its true sense.[262] The Law Commission in its latest Report

[256] Law commission of India, *35th Law Commission Report, 1967*, available at http://lawcommissionofindia.nic.in/1-50/Report35Vol2.pdf.
[257] 1 SCC 20 (1973).
[258] *supra* note 1, at 4.
[259] *supra* note 2, at 5.
[260] SCR (2) 690 (1983).
[261] Swamy Shraddananda (2) v. State of Karnataka, ¶ 27, 13 SCC 767 (2008).
[262] *Id.*

over death penalty recommended that death penalty shall be abolished for all the Criminal offenses apart for terrorist activities and waging war.[263]

Thus, this can be concluded that the trend in India towards death penalty has diluted and we are moving towards a stage where we would be ruling out death penalty completely but this speed is subjected to the tolerance level of the Public of this nation.

## JURISPRUDENTIAL OUTLOOK ON THE JUDGMENT

The judgment given by the Supreme Court i.e. converting the death penalty into life imprisonment stands correct from the point of view of Natural School. The theory of natural law believes in the fact that there are certain moral principles which exist and are easily discoverable and the law is only valid when it is in consonance with the natural law and is placed below the natural law.[264] If we look at our Constitution it gives space to the natural law in the form of Fundamental Rights and Specifically Arts. 14, 19, 20 and 21. Art. 20 of the Constitution read the principles of natural justice '*nemo iudex in causa sua*' and '*audi alteram partem*'. Also the fundamental rights granted to us under Art. 21 are unalienable rights which cannot be taken away under any circumstances

In the present matter the Death Penalty was reduced to Life Imprisonment and the court observed that while penalizing a person with capital punishment, we must look at the background and the circumstances of both the crime and the criminal which were earlier negated by the Indian courts till the case of Bachan Singh,[265] and the only focus was laid on the circumstances of the murder and not the murderer. The decision considers the principle of looking at the circumstances of the criminal and

[263]Law Commission of India, *262nd Law Commission report*, 2015 ¶ 7.2.4, available at: http://lawcommissionofindia.nic.in/reports/Report262.pdf.
[264] NK JAYAKUMAR, LECTURES IN JURISPRUDENCE 115 (3d ed. 2015).
[265] *supra* note 1, at 4.

the conditions in which he is born and brought up, thus complying with the theory of natural law which accepts the existence of moral principles.

Thomas Aquinas a philosopher of natural said was of the idea that human laws are variable and keep on changing with time and place, and the work of human law is to further common good without interfering with the natural law.[266] Looking at the idea of Death Penalty from this perspective and the evolutions made by the capital punishment in Indian context, we can arise at a platform from where we can say that the human law i.e. the law over capital punishment has evolved by and for a lot from the 35th Law Commission Report which found itself in a situation where the law commission found itself in a situation of helplessness owing to the fact that nothing could be done to remove the death penalty by way of hanging until some other advancement in science is not made which gives a less painful death[267] to the accused, to special reasons to be assigned for not giving death penalty in Jagmohan[268] to 'Rarest of Rare Doctrine' in Bachan Singh,[269] and standardization and categorization of offenses for capital punishment in Macchi Singh.[270] The Supreme Court has also recognized the arbitrary and discretionary use of power by judges to assign the death penalty, which is wrong as per the principles of natural law which say that natural law finds it roots in the nature of humans and thus, assigning death penalty arbitrarily would be against the natural law doctrine.

**DWORKINIAN APPROACH**

Looking at the judgment in the instant matter we can say that the approach to arriveat thedecision was a bit influenced by the 'Ruling theory of Law' containing two parts. First, that law comprises of

[266] *supra* note 11, at 7.
[267] *supra* note 3, at 5.
[268] *supra* note 4, at 5.
[269] *supra* note 1, at 4.
[270] *supra* note 2, at 5.

rules decreed by the institutions and second, that the theory answers the question of the purpose that should be served by law.[271] Since in India we follow the reformative approach towards the punished, this is inherent purpose of the law we have in India, and in the instant matter the capital punishment was reduced to life imprisonment, thus upholding the principle of reformation. According to Dworkin, every principle has certain weight assigned to it and when there is a unavoidable conflict between the two principles, the one with more weight and dimensions over the other ought to follow[272], thus looking into the present matter the principles of Rarest of Rare,the circumstances of the murderer, and after looking into the matter holistically, the Hon'ble Supreme court decided to assign more weightage to the latter. Moreover, Hercules (the character created by Dworkin as a person who is the best authority to approach for justice because of his holistic approach before delivering the same) decides the disputes after carefully examining the history, the nature, the object and existing rules[273] and the same approach was adopted by the bench of Mr. Justice K.S. Radhakrishnan and Mr. Justice Madan B. Lokur and thus, commuting capital punishment to life imprisonment.

## JURISPRUDENTIAL OUTLOOK OF THE JUDGMENT FROM POSITIVIST SCHOOL OF LAW

The positivist school approaches the matters from the point of view of what is mentioned in the statute and sidelines the moral values and principles. At the inception of the society, we humans had collectively transferred our powers in the hands of a common identity or institution which gave it the right to use measures to make the citizens comply with the idea of common good of all and harm to none, and the ones who deviated from this idea of common good had to face the sanctions issued by

[271] Ronald Dworkin, *Taking rights seriously*, HARVARD UNIVERSITY PRESS, FIRST EDITION (1977).
[272] *Id*.
[273] *supra* note 18, at 8.

that institution.[274] This gave birth to the concept of State, and the reason why the State stands above the citizens. The Indian State has the power to take away the right to life of a person as per the procedure established by law, but this provision in the Constitution of India has to pass through various tests and the sole reason for these breakers in the path of justice is that the Indian state believes in the idea of reformation which can be established by the presence of Art. 72[275] and Art.161[276] in the Constitution of India and section 354(3)[277] of Criminal Procedure Code (CrPC), and hence has passed a large number of judgments wherein the death penalty given by the High Court has been commuted to life imprisonment. In the present matter of Sangeet[278], the judges have raised the question over the circumstances of the appellants A1, A2 and A3 which gives us the idea that we are strong believers of reformation and also, since we know that positivists lay down a strong base of legal structure on the precedents , the precedents which have been accepted as the authority in the present matter have also drawn the rational to promote the idea of reformative theory, and that the fact that every person can change and until proven by the prosecution beyond reasonable doubt that there is no scope for any change in the attitude of the accused, the courts shall avoid to pass the capital

[274] Social Contract Theory.

[275] Power of President to grant pardons, etc, and to suspend, remit or commute sentences in certain cases (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence(a) in all cases where the punishment or sentence is by a court Martial;(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;(c) in all cases where the sentence is a sentence of death(2) Noting in sub clause (a) of Clause ( 1 ) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

[276] Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

[277] Language and contents of judgment. (3) 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.

[278] 2 SCC 452 (2013).

sentence.[279] And on these precedents which are a part of positive law, the ratio decendi of Sangeet was of the idea that capital punishment should be reduced to life imprisonment.

## CONCLUSION

The 262nd Law commission, 2015 suggested that looking at the global take on abolition of death penalty as a penal punishment, the law commission is of the idea that the death penalty in India shall also be abolished for all the penal offenses apart from waging war against the state and against any terrorist activity.[280]

I am of the view that Law Commission is correct in pointing out that with the changing time we shall also amend our laws and add up to the inherent rights of the people like right to life, and with the changing trend towards more focus on violation of human rights, we must take a step forward to support this change because right to life is a fundamental right which is inalienable and is inherent in any society and any civilization.

The only exceptions which stand apart in the above view are:

1. Terrorist activities: Since the terrorist activities end up in disrupting the mechanism and the idea of development of a State. Indian State, though quasi federal, propagates the idea of nationalism, and this idea of nationalism, running from J&k in the north to Kaniyakumari in the South, adds to the sense of belongingness of the people towards the notion and idea of a State. Terrorism is a necessary attack on the idea of nationalism which is a direct attack on the idea of State. Therefore, the attempt to demolish this concept of

[279] B.A. Umesh v. Registrar General High Court of Karnataka, ¶ 34, 3 SCC 85 (2011).
[280] *supra* note 10, at 4.

State, is an attempt to hamper the idea of growth and also attacks the notion of a society, since it is because of a State that a prosperous society exists.

2. The second exception is of waging war against the State. Now this concept again attacks the very idea of the existence of the State, because by waging war against the state, one is trying to demolish the concept of State by the means of violence.

These two exceptions are interlinked in a way that both waging war and terrorist activities try to demolish the concept of State and the very idea of nationalism which are the basic pillars of existence of society, and when either of the one is demolished, the other one remains of no use. Thus, carving out these two exceptions from the idea of abolishing the death penalty becomes very important looking into present day scenario.

Now about the judgment, according to me, the judgment given by the Supreme Court is appropriate in the sense that we cannot opt for capital punishment just because of the fact that the society demands death penalty, as in the case of Nirbhaya. We need to understand that what society demands need not be rational all the time because of presence of emotions of humans which are inherent in nature, and this is one of the criticisms of historical school.

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2. 262nd report of Law Commission of India, 2015.

# 10. ARRESTING CRIMES OF AGGRESSION: CONTOURING THE CONDITIONS, BATTLING CRITICS AND PUNISHING ITS AUTHORS

Author(s): Raavi Mehta

## ABSTRACT

*Strenuous efforts have been put in contouring all dimensions and elements of the crime of aggression, listing illustrative acts and circumscribing the classes of individuals who can be made victim of it but still a comprehensive definition answering fundamental questions has not been propounded. The prevalent definition fails to address the contemporary acts of aggression which is germane for its future applicability and does not orient itself to the contemporary concerns and hybrid wars which are prevalent in modern warfare. The new wars cannot be comprehended in conventional terms and therefore, a new definition must be postulated which is versatile in covering conceptual advancements.*

*National boundaries must disappear while prosecuting a person accused of such a crime. It is not just a human rights concern but also an issue which transcends state borders and assumes global dimensions. The time is ripe to write this new chapter in the history of international crime but with utmost coherence and pragmatism. This article is organized as follows. It commences with elaborating the elements of the crime of aggression and further critics on them. It addresses different dimensions in its definition and fuels the existing debate on its implementation. It further elucidates upon how to prosecute this crime and explains the trade–off of jurisdictional power between UNSC and ICC. The conclusions and recommendations are in the last part.*

## INTRODUCTION:

With the genesis of 21st century, the international community has been confronted by a serious question whether to exonerate political or military leaders from the liability of the crimes of aggression or to make them criminally accountable for such acts by laying down strict international norms? A

decade long discussion over this led to the adoption of the definition of crime of aggression[281] which provides that using armed force by one state to another against their regional integration, political autonomy or independence and where the intensity or character of the act is expressly conflicting to the Charter of United Nation is understood to be an act of aggression.[282] Planning, preparing, initiating or waging of a war of aggression is a crime under international law as incorporated in the Nuremberg Charter in 1945.[283]

We have embraced the new definition under which any political or military pioneer can be made liable for crime of aggression, if he practices control and his act blatantly infringes the United Nations Charter. However, this crime is not prosecutable until 2017.[284] After 2017, the ICC will have a different jurisdictional framework and its exercise will depend on the type of crime committed before observing the nationality of the accused and the domain over which the crime has occurred. It is equivocal whether aggression should be characterized as the prime crime. But it is irresolute whether positioning the reality of violations as per categories or taking into account a case-by-case evaluation of the pertinent facts is a beneficial activity.[285]

The Rome Statute in 1998[286] recorded the crimes of aggression as one of the gravest violations which is under the jurisdiction of the courts and the Review Conference of Rome Statute[287] in 2010 amended

[281] Review Conference Of The Rome Statute Of The International Criminal Court, Kampala, 2010
[282] Rome Statute of International Criminal Court , Article 8 *bis*, (it includes appropriation of territory, military occupation and massive invasions using power, military barricades of ports or bombardment without approval of Security Council)
[283] Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter, 8 Aug. 1945, Art. 6 (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing, Also refer Article 4 of UN charter.

[284] Review Conference Of The Rome Statute Of The International Criminal Court, Kampala, 31 May – 11 June 2010, Article 15 *ter*
[285] The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, 1 June 2001, Appeal Judgement, (para.367)
[286] Rome Statute of International Criminal Court, Article 5(2)
[287] *Supra*, Note 4

the Statute to incorporate meaning of crimes of aggression and brought it within the jurisdictional power of the courts. Also, the International Criminal Court (ICC) nations harmonized and reached to a conclusion laying down the conditions for prosecution of the acts of crimes of aggression. These amendments gave United Nation Security Council (UNSC) the paramount power to decide whether an act constitutes to be a crime of aggression and provides that only state pioneers and authorities with enough power to engage the state's strengths into forceful activity can be culprit of this crime. Numerous States came to a consonance in the Review Conference in Uganda; ergo a tradeoff between the definitions adopted in the Rome Statute and the UN Charter was observed.

## CRITIQUING THE DEFINITION:

A decade of disagreement and inapplicability indicates that the definition of crimes of aggression is still incomplete and ambiguous. It fails to address the contemporary acts of aggression which is germane for its future applicability and does not provide for situations where the perpetrator is from outside the state. Aggression confers individual criminal liability and therefore, is not an issue among different states. But this does not necessarily means that the architects of this crime cannot be from outside the state. As seen and observed, perpetrators is a composition of state and non–state actors and to avoid irregular outcomes for future, extending the definition to cover attacks carried out by parties outside the state becomes imperative.

The inability to keep new wars from occurring is because of the misconception created by traditional types of wars. This accentuates the burning question as to whether such a definition can be applied on contemporary wars that take place now. These new types are identified as 'new wars' and are fought between various combinations of state and non-state parties in an attempt to attain dominance over the population of other territory. The current definition does not orient itself to the contemporary

concerns and hybrid wars which are prevalent in modern warfare and international community. The new wars cannot be comprehended in conventional terms and therefore, a new definition must be postulated which is versatile in covering conceptual advancement.

Further, the definition mandates the State's involvement in validating the happening of the crime of aggression. Unless the State gives substance to its occurrence, the act of aggression cannot be prosecuted by any court. The role of State gets highlighted when the demarcation line between act of aggression and crime of aggression is crystal clear. Arising of criminal liability over an individual is contingent on the exhibition of aggression by the State, which makes the whole framework unjust.

In an endeavor to battle against impunity for engaging in aggressive wars, the widely praised leap forward in achieving a consensus on the definition of crime of aggression could be viewed as an unnecessary inclusion to the ICC's jurisdiction. Unless it is seen that the inclusion of crime of aggression in the International Statutes can have positive impact on international community, we must refrain from such an inclusion. Rethinking and redefining this term to expressly incorporate non-state parties as prospective authors of crime of aggression is equally needful.

## PROSECUTING AGGRESSION: JURISDICTION AND APPLICABILITY OF LAW

There are three types of domestic prosecution that can arise on the occurrence of crime of aggression. A State could indict its own nationals. Secondly, a State with no genuine association with such a crime could prosecute under absolute universal jurisdiction. Though, such an arrangement can bring about intense political issues. Lastly, one State can impute blame to another State for the crime of aggression. However, this is likely to sabotage peacemaking endeavors to resolve disputes, dissuade States from undertaking certain military forms of philanthropic involvement and even weaken the ICC's authenticity and reliability.

The modern jurisdiction theories provides for two prominent branches: Conditional and Absolute jurisdiction. Universal jurisdiction would allow States or Organizations at international levels to assert jurisdiction over an individual accused of committing the crime of aggression notwithstanding his nationality, nation of residence or other connection with the entity prosecuting him. Violations arraigned under universal jurisdiction are contemplated to be against humanity and are excessively despicable, making it impossible to endure jurisdictional arbitrage.

The Kampala Conference concentrated on providing a separate jurisdictional regime in the view of voluntarism, state assent and a higher threshold for prosecuting over the authors of this crime. This was reflected in various measures adopted which had critical ramifications for the exercise of domestic jurisdiction. Domestic legal frameworks cannot enjoy the same jurisdictional parameters as other ICC violations. In this way, crime of aggression will have its own jurisdictional framework.

To prosecute crimes for aggression effectively, absolute jurisdiction over such crimes must be given to the State through domestic legislation. It is because when the domestic legal system will come in terms with the international community, it can end impunity for abusers of human rights. But the view to adopt an absolute universal jurisdiction through domestic legislation would create a situation of conundrum where the States would prosecute human rights violators at the option of Judges or prosecutors, as echoed by many critics. The possibility for political misuse of international criminal law expands rapidly as the notion to exercise absolute universal jurisdiction becomes more popular and prominent. These difficulties can only come to an end when all the countries obligate to act together to make space for new transformative improvements in global criminal law.

**TRADE-OFF OF JURISDICTIONAL POWER BETWEEN UNSC & ICC:**

ICC included crime of aggression under its jurisdiction in 2010 but the decade long debate on jurisdiction is still relevant and continues. ICC which has the power to exercise jurisdiction over genocide, war crimes and crimes against humanity must be made competent to try cases of armed aggression after its definition and conditions are clearly laid down. It suffices for present purposes to note that the trigger mechanism for the ICC's jurisdiction over aggression remained a key sticking point jeopardizing the adoption of the aggression amendments.[288] Permitting aggression to be tried the same as the other three prominent crimes can help to maintain the decisions of the International Military Tribunals of Nuremberg.[289] As a consequence of empowering an international court to prosecute the authors of aggression, the need for trade off between the powers of ICC and UNSC comes into the picture.

One of the most enduring grievances to the ICC is the trepidation that proceedings can be spurred by political objectives as opposed to a genuine longing for justice. ICC is still in its embryonic stage and is striving to establish itself and this makes it the most inappropriate time to centralize the power to prosecute such a sensitive and new crime of aggression in their hands. Whereas, entrusting UNSC with the power to make final decision must be regarded as *fait accompli*. The real question is whether a dependent political body, having the colossal veto power to shield themselves and their allies, should have the power to prosecute one of the gravest violations of international law?[290] When the role of

[288] Gillett, Matthew, The Anatomy of an International Crime: Aggression at the International Criminal Court (January 31, 2013). Available at SSRN : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209687
[289] Also confirmed by the UN General Assembly in 1946
[290] Second Thoughts on the Crime of Aggression Andreas Paulus, The European Journal of International Law Vol. 20 no. 4, EJIL 2010, available at http://www.ejil.org/pdfs/20/4/1939.pdf

UNSC is restrained to just determining whether such an act has occurred and to shield the state parties, it serves the purpose.

The ideal framework which covers the entire spectrum of aggression will not bestow broad powers of jurisdiction to any international court or organization. The UNSC's exclusive right to make determinations about this crime is an autocratic power which must be denied. There must be an arrangement which makes lawfully possible for the General Assembly or the ICC to make such determinations where UNSC fails to do so. Conforming absolute power on any institution to determine and confirm the act of aggression is fatal for development on the international front. Also, there are strong contentions that inter-state communities need to cooperate to address difficulties confronting universal criminal law and the ICC. Equipping all such institutions with balanced powers can save the international community and end this impunity. Combining efforts of UNSC and ICC can reduce the persisting disagreement between different territories and thereby, aid the prosecution processes.

**POWER ENTRUSTED WITH UNSC:**

The definition of this crime is built on the UN Charter system and it provides that if an armed conflict has been sanctioned by UN, then it fails to be constituted as a crime of aggression. The power to give assent to such acts manifests the paramount and extensive role which UNSC plays in setting this framework in action. Being an independent body, ICC may sometimes find itself in conflict with the UNSC's decisions because of this supreme power of approval it is vested with. Also, it does not provide as to which party is responsible to disprove UNSC's approval for armed conflict. Critics argue that there is a probability that such sanctions may be a result of States' intervention, political

motivation or diplomatic pressure and hence, entrusting UNSC, alone, with such a prime power of authorization may be discriminatory.

If the UNSC neglects to make a determination, the ICC prosecutor is approved to start an investigation *suo motto* or upon a request made by the ICC state party. The UNSC can impede or terminate such an examination at any stage for 12 months.[291] Non-state parties don't fall under ICC purview when the prosecutor starts investigating and the States which are party to the convention can exclude themselves from such a jurisdiction by presenting a declaration of non-acceptance to the court.[292]

**CONCLUSIONS & RECOMMENDATIONS:**

The work to define the crimes of aggression has continued even after the establishment of the ICC under the Rome Statute. It is undeniable that such considerable efforts have strengthened the understanding of the crime of aggression and the necessity to punish this crime. Strenuous efforts has been put in contouring all dimensions and elements, listing illustrative acts and circumscribing the classes of individuals who can be made victim of this crime but still a comprehensive definition answering fundamental questions has not been propounded. The demand of the hour is to have a definition which aims to impact both the aspects i.e. individual liability and state responsibility, thereby serving the interest of mankind. We are half way through in this odyssey to make the definition exemplary but our arduous efforts will only be justified when a robust definition is installed. Since the efficacy and sanctity of law is based upon its enforcement mechanism, not just installing but implementing the provisions in true spirit is called for. The reasoning of prohibiting aggression must

[291] Rome Statute of International Criminal Court, Article 16
[292] Rome Statute of International Criminal Court, Article 15 *bis*, Article 15 *ter*

be borne in the mind of government and other concerned authorities in order to dissuade perpetrators for pursuance of peace and harmony. It is one such appalling crime which poses a serious threat to the world community as a whole and for which the state has a rationale and moral duty to institute legal proceedings against any person responsible for it. No place should be a safe haven for a person committing such a reprehensive crime.

Extending the definition to include use of threat and force by non–State actors would make the definition relevant and eloquent. The most feasible solution is to have both domestic and international statute books to provide for the punishment of this crime. Where the involvement of only State actors is established, then the accused must be prosecuted by the national courts under domestic Legislation. Where participation of non–state actors is seen, then international courts must have jurisdiction to try such individuals in compliance with the international laws. Such a synthesis of domestic and international laws is the panacea for all the crimes prevalent at international level.

National boundaries must disappear while prosecuting a person accused of such a crime. It is not just a human rights concern but also an issue which transcends state borders and assumes global dimensions. Sometimes, implementing these provisions of international law into domestic Legislations of a country is also necessary to fulfill its purpose. The new challenges brought in by this crime must be responded by international laws and institutions as we orient ourselves to the whole new range of contemporary concerns in worldwide affairs. The international law is yet to witness developments on this front but the time is ripe to write a new chapter in the history of international crimes but with utmost coherence and pragmatism.

# 11. CONTRIBUTION OF WOMEN IN THE MAKING OF INDIAN CONSTITUTION

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## ABSTRACT

*The Constitution of India, contains the core principles on which the state machinery has been built and hence, is representative of the aspirations of the citizens of the country. The history of the making of this Constitution is thus, also a battle of ideologies and a triumph of a certain vision of a nation, over other competing visions. It is however, important to understand that the idea of a nation-state envisaged in the Constitution is not that propounded by one group, it is an idea that evolved with time and debate due to the complex intermingling of the values projected and protected by various individuals and representative groups. In spite of the amalgamative nature of this vision, the history of the Constitution has been largely hegemonic. The role of women, both, as individuals and as an interest group has been ignored in most discourses on the making of the Indian Constitution.*

*This paper attempts to revive the voice of women in the history of the making of the Indian Constitution, as a group whose role has been trivialised in majoritarian discourses. It first analyses the claim, that the women members of the Constituent Assembly were representative of the population of women of India. It then looks at the contribution of women, in the making of the Indian Constitution both, in terms of their individual contributions, as well as their contribution when they are viewed as being the representatives of the interest group of the "women in India."*

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## INTRODUCTION

"*India's founding fathers and mothers established in The Constitution both the nation's ideals and the institutions and processes for achieving them.*"[294]

- *Granville Austin*

For a very long time (in spite of its constitutional claims at being non-discriminatory), India ignored the role and in fact, the very existence of the "founding mothers" of its Constitution. While the "founding fathers" and their influence on the Indian Constitution has been eulogised in almost all works dealing with the constitutional history of India, the "founding mothers" continue to remain only shadow figures whose roles are presumed to be limited, to fulfilling the majoritarian leadership's promise of a representative law-making body. In a history which attributes all the ideas behind the Constitution of India and its vision for creation of the Indian nation to a handful of men, this paper seeks to analyse the role of women in the making of the Indian Constitution.

The contributions of women to the making of the Indian Constitution, range from deciding the forms of democratic institutions[295] and elections,[296] to determining the powers and functions of the President[297] and the Parliament to securing minority rights.[298] Hence, it is difficult to quantify or describe the contribution of women members in its entirety. This paper likewise does not claim to capture all the contributions which have been made by these women, but only analyses their role in creation, modification and adoption of Fundamental Rights in The Constitution (hereinafter 'FRs').

[294] Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, 1 (1972).
[295] Statement of G. Durgabai, Vol. XI CONSTITUENT ASSEMBLY DEBATES 886 (November 24, 1949).
[296] Statement of Annie Mascarene, Vol. VIII CONSTITUENT ASSEMBLY DEBATES 953 (June 15, 1949); *See* Statement of Begum Aizaz Rasul, Vol. IV CONSTITUENT ASSEMBLY DEBATES 974 (July 31, 1949).
[297] Statement of Begum Aizaz Rasul, Vol. VIII CONSTITUENT ASSEMBLY DEBATES 192 (May 20, 1949).
[298] Statement of Begum Aizaz Rasul, Vol. VII CONSTITUENT ASSEMBLY DEBATES 305 (November 8, 1948).

The theme of FRs has been chosen for analysing the contributions of women in the Constituent Assembly (hereinafter 'women members') because of two main reasons. *First*, concern for various FRs appears to be a recurring theme in the speeches of the women members. *Second*, often while dealing with FRs the women members raised concerns unique to women thereby 'seemingly' representing the "voice of the women."

At this juncture, it is important to clarify two things which the choice of theme does not imply. *First*, this choice does not imply that the contribution of women members was limited only to FRs, nor does it downplay (in terms of quality or quantity) their contribution to other parts of the Constitution. *Second*, the author also does not seek to imply that women members were simply representatives of the population of women but, that they were amongst other groups also "supposed to be" representatives of the population of women. In spite of these justifications for the choice of theme, the decision to deal with their contribution to the limited extent of FRs remains a limitation of the paper allowed by the personal discretion of the author to determine the scope of her paper.

Apart from the limitation in terms of choice of theme, this paper also measures or assesses 'contribution' in a limited way. It is not the author's claim that the entire contribution made by the women members in the drafting and adoption of the FRs has been mapped in this paper. Indeed such a claim would be very ambitious, given the extensive debates that surrounded FRs. This paper only analyses the contribution of women, by looking at the changes that they themselves introduced or attempted to introduce in the FRs part of The Constitution, and does not look at their involvement in the debates initiated by the other members or their opinions or stance on the changes proposed or amendments introduced by the male members. This is not to take away the value that these women added to the general debate surrounding FRs nor does it imply that they did not participate in the debates (related to FRs) which were initiated by others. Indeed a true assessment of their role would

take a more holistic view, than the limited construction of 'contribution' adopted by this paper. The reason this limitation seemed inevitable was, because widening the scope of the paper to deal with the stance of women on all topics, their contributions to all debates, the votes given by them on all issues and their opinion on all matters would amount to summarising the entire (or at least a substantial portion of) CAD from the lens of its women participants. Such a project, desirable and comprehensive as it may be is also very ambitious. Given the limited scope of this project and the lengthy discussions surrounding FRs, where everything ranging from the terms of the debate to individual stance, kept evolving with changing circumstances, such an undertaking in the length of a paper may develop strong trivialising or pigeon-holing tendencies. Instead this paper looks at those issues within the FRs debate in the CAD which seemed to be most important to the women members as is indicated by the level of their involvement in these debates. In such a paradigm, it would not be wrong to say that the paper does not look at the contributions of women members in its entirety, but looks at the most important contributions of women members, the test for what constitutes "important" being what the women members took an initiative in introducing and discussing in the Constituent Assembly.

The aim of this paper is twofold. *First*, to study the background of the women members of the Constituent Assembly (hereinafter 'CA') and the manner of their election to the CA. *Second*, to understand the contributions made by the women members of the CA in the framing, modification and adoption of the FRs in the Constitution.

The objective of the paper is to facilitate an understanding of the constitution making process not as an exercise undertaken by one individual or a group of individuals but as a culmination of the efforts of a representative body in which women had an important role to play.

**ELECTION AND BACKGROUND**

While the Congress initially wanted the CA to be elected on the basis of adult suffrage, the Cabinet Mission rejected this process as being cumbersome and slow. Instead, they suggested election of members of the CA by members of provincial legislatures and the Princely states and not through direct election.[299]

Following the Cabinet Mission Plan[300], the Congress high command adopted the policy of letting the provincial machinery select its own members, who they wanted to send to the CA. However, it made certain exceptions to this policy, by issuing directions to the Congress Working Committee in the provinces, to ensure that persons of exceptional ability were selected and that the minority community was justly represented. Although the Cabinet Mission Plan did not contain specific provisions for representation of minorities, the initiative of the Congress High command brought Parsis, Anglo-Indians, Indian Christians and also women, into the Assembly under the "General" category. Amongst women, the Congress Working Committee recommended the names of Sarojini Naidu, Hansa Mehta and Rajkumari Amrit Kaur.[301] It is however, unclear whether recommendation of these names was driven by the need to ensure representation of women in the CA or because of the "exceptional ability" that these women possessed or a combination of both.

When the CA was finally formed, it consisted of 299 members, out of which 15 were women. While all members contributed to the Constitution making process, their involvement was not to the same degree. Granville Austin identified 21 members who were closest to the affairs of the CA and hence,

[299] Bipan Chandra *et al*, INDIA AFTER INDEPENDENCE: 1947-2000, 5 (2000).
[300] B. Shiva Rao, THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS, Vol. II 208, (Subhash C. Kashyap ed., 1967).
[301] Bipan Chandra *et al*, *supra* note 6, at 5.

were instrumental in the making of the Constitution.[302] Amongst these 21 members, features the name of only one woman drafter, Mrs G Durgabai.[303] Unlike Granville Austin's segregation, this paper analyses the contribution made by all women members (if at all) to the framing of FRs and does not seek to grade these contributions.

However, before undertaking a study of the contributions made by the women members, a preliminary understanding of their background as well as the interest groups they represented, might be helpful in understanding whether they can lay claim to being the representatives of the population of women in India. Political affiliation, category, province, religious affiliation, educational background and career have been chosen as the six primary indicators to study the background of the women members.

The information on some of the women members is incomplete or missing since not all their lives have been well-documented. However, the available information on the women members has been documented in the form of a table in Annexure A.

The following observations can be made on the basis of the information that has been represented in Annexure A:

1. Out of the fifteen women members, fourteen belonged to the Congress and one to the Muslim League which reinforces Granville Austin's idea of the CA being a one-party body.[304]
2. Out of the fifteen women members, twelve identified themselves as Hindus, two as Christians and one as a Muslim. Amongst the Hindu women members most were Brahamanas. There was only one Dalit woman drafter.

[302] Granville Austin, *supra* note 1, at 21.
[303] Granville Austin, *supra* note 1, at 341.
[304] Granville Austin, *supra* note 1, at 8.

3. The provinces which found the maximum representation in terms of women representatives in the Constituent Assembly were United Provinces or 'UP' (5), Madras (3) and Bengal (2). Bombay, Orissa, CP, Travancore and Cochin and Bihar had one women representative each. None of the other provinces or Princely states sent any woman as their representative.
4. Most of the women members were well-educated individuals from affluent backgrounds who grew up in privileged families (either political or professional class families). None of them were first generation learners and most of them came from families that had already produced male social reformers or freedom fighters or politicians.
5. All the women members were married to prominent public figures, who were directly or indirectly associated with the struggle for independence, or were prominent in the public life post-independence.
6. All women members had a background in social activism and advocating women's rights. Most of them were educators and administrators (that is, they had been involved in administration even prior to becoming members of the Constituent Assembly).

The objective behind making these observations is not to downplay the variety that these women added by their presence in the Constituent Assembly, but to question the heterogeneity of the women members as a class in itself. The women members (even though they represented different provinces) formed a part of a homogenous group, that of, the "educated elite". It is not contended that there did not exist diversity of opinion or interests within the group of women members. The contention is that, they were not truly representative of all the women in the country but mostly representative of only a section of women (the 'educated elite women'). Their perspective thus was necessarily "external", even when they advanced the problems faced by the most oppressed women in the society.

A possible exception to this might be Mrs Dakshayani Velayudhan who being the only Dalit woman in the CA had life experiences quite different from those of the other women.

For the purpose of carrying out its functions, the CA formed thirteen committees for formulating provisions on specific themes which were to be covered by the Constitution. Women found representation in four of these committees: Steering Committee (G. Durgabai),[305] Finance and Staff Committee (Rajkumari Amrit Kaur),[306] Ad hoc committee on the National Flag (Sarojini Naidu)[307] and Advisory Committee on FRs, minorities and tribal and excluded areas (Rajkumari Amrit Kaur, Hansa Mehta).[308] These committees were responsible for making reports on these themes in terms of the provisions which should be included under each theme. Since none of these committees except for the Advisory committee dealt with the issue of FRs (which is of relevance to this paper), the analysis done in the next chapter extends only to the proceedings in the Advisory committee and the discussion thereafter in the CA surrounding FRs.

[305] Resolution for the appointment of Steering Committee (Constituent Assembly), January 21, 1947, *in* B. Shiva Rao (Vol I), *supra* note 7, at 483.
[306] Resolution for the appointment of Finance and Staff committee (Constituent Assembly), December 23, 1946, *in* B. Shiva Rao (Vol I), *supra* note 7, at 477.
[307] Notification on the appointment of ad hoc national flag committee (Constituent Assembly), June 23, 1947, *in* B. Shiva Rao (Vol I), *supra* note 7, at 491.
[308] Resolution for setting up of the Advisory Committee (Constituent Assembly), January 24, 1947, *in* B. Shiva Rao (Vol II), *supra* note 7, at 56.

## CONTRIBUTION TO FUNDAMENTAL RIGHTS

Bipan Chandra and others, have proposed a framework, which explains the making of The Constitution in five stages.[309] *First*, committees were formed which were asked to submit reports on basic issues. *Second,* B.N. Rau, the constitutional advisor, prepared an initial draft on the basis of these reports and his own research into the constitution of other countries. *Third*, the drafting committee chaired by Dr B.R. Ambedkar presented a detailed draft constitution which was published for public discussion and comments. *Fourth*, the draft constitution was discussed and amendments were proposed. *Fifth*, the Constitution was adopted.[310]

The contribution of women members to the FRs chapter, in The Indian Constitution is being studied using this framework. The contribution made by the women members is limited to the first, fourth and fifth stage since there was no women member on the Drafting Panel.

Any systematic study of the contributions made by the women members by deliberately searching for overarching common themes in their speeches when there exists none and any attempt to pigeon-hole their ideas to show the existence of a common 'woman's voice' would be an exercise more in imagination than in accuracy. Hence, this paper studies their contributions under two categories: *first*, "changes proposed in the Advisory committee" and *second*, "changes proposed outside the Advisory committee." The first category is a corollary of the first stage whereas the second category is a corollary of the fourth and fifth stages.

[309] Bipan Chandra *et al*, *supra* note 6, at 41.
[310] Bipan Chandra *et al*, *supra* note 6, at 41.

**CHANGES PROPOSED IN THE ADVISORY COMMITTEE**

The Cabinet Mission's statement of May 16, 1946 stated that the Constituent Assembly should constitute an Advisory Committee to determine the rights of citizens, minorities, and people from tribal and excluded areas.[311] On January 24, 1948 a resolution, setting up the Advisory Committee appointed fifty members to the committee including two women members, Rajkumari Amrit Kaur and Hansa Mehta.[312] The Advisory committee then created sub-committees for determining the various rights. Both Rajkumari Amrit Kaur and Hansa Mehta were a part of the FRs sub-committee and the Minorities sub-committee.[313] It is this Advisory committee which is important for our study of the first stage of Constitution making.

One of the most important contributions of the women members was, in the realm of the right to freedom of religion. Rajkumari Amrit Kaur and Hansa Mehta were amongst the first, to raise the concern that an absolute freedom of "religious practise" might invalidate legislation prohibiting practices, which are considered to be 'social evils', but which nevertheless have the sanction of religion, such as, the Sati Abolition Act, the *Sarda* Act and the Widow Remarriage Act.[314] Further, existence of such an absolute right would make it impossible to enact legislation, to eradicate existing social evils, such as *purdah*, child marriage, polygamy, unequal laws of inheritance, prevention of inter caste marriages, dedication of girls to temples, etc.[315]

In order to remedy this situation, they made two proposals. *First*, they proposed that "free practice of religion" be substituted with "freedom of religious worship." The term 'practice' being much wider,

[311] Cabinet Mission's Statement, May 16, 1946, ¶ 20, *in* B. Shiva Rao (Vol I), *supra* note 7, at 483.
[312] Resolution for the formation of Advisory Committee (Constituent Assembly), January 24, 1948, *in* B. Shiva Rao (Vol II), *supra* note 7, at 483.
[313] *Id*, at 65.
[314] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), March 26, 1947, *in* B. Shiva Rao (Vol II), *supra* note 7, at 121.
[315] Letter from Rajkumari Amrit Kaur to B.N.Rau (undated), *in* B.Shiva Rao (Vol II), *supra* note 7, at 146.

than the term 'worship' would allow the religious denominations, the scope to argue against abolition of any socially regressive practise which has the sanction of religion whereas the term 'worship' would protect only individual religious beliefs and practices, thereby reducing scope for misuse.[316] *Second*, they suggested that the right to freedom of religious practise, be made subject to "public order, morality or health" and to the other FRs.[317] The first suggestion was not accepted but the second suggestion was incorporated in the Draft Report and finally in The Constitution.[318] Incorporating the second suggestion, allowed the government to restrict freedom of religion on certain grounds and provided adequate protection to social legislation thus, ensuring that the objective of even the first suggestion was achieved.

Another important contribution of Rajkumari Amrit Kaur and Mrs Hansa Mehta, was in the field of abolishing forced labour. The sub-committee of FRs while abolishing forced labour had decided to create an exception for "*compulsory service under any general scheme of education*" or "*conscription for military service*."[319] Rajkumari Amrit Kaur and Hansa Mehta, fiercely opposed compulsory labour of any kind and conscription for military services.[320] It was mainly due to their efforts, that the abovementioned two exceptions were removed. However, compulsory service for public purpose continues to remain an exception to the prohibition of forced labour.[321]

Rajkumari Amrit Kaur was also responsible for introducing the right to freedom of education (in Part B of the FRs which later became the Directive Principles of the State Policy). She introduced the

[316] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), April 14, 1947, *in* B. Shiva Rao (Vol II), *supra* note 7, at 161.
[317] Letter from Rajkumari Amrit Kaur to B.N.Rau (undated), *in* B.Shiva Rao (Vol II), *supra* note 7, at 146.
[318] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), April 14, 1947, *in* B. Shiva Rao (Vol II), *supra* note 7, at 161.
[319] Draft report of the sub-committee on Fundamental Rights, April 3, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 137.
[320] Minutes of the meeting of the sub-committee on Fundamental Rights (Constituent Assembly), March 27, 1947, *in* B. Shiva Rao (Vol II), *supra* note 7, at 124.
[321] Art. 23, INDIAN CONSTITUTION, 1950.

provision which required the State to provide education for all children till the age of 14 years within a period of 10 years from the coming into force of the Constitution.[322]

The original clause dealing with equality of opportunity, in matters of public employment, prohibited discrimination in appointment to public offices on various parameters but 'sex' was not one of the prohibited markers. Introduction of 'sex' as a prohibited marker can be attributed to Rajkumari Amrit Kaur.[323]

Apart from the aforementioned four changes (which were discussed and accepted), there were several other suggestions made by Mrs Mehta and Rajkumari Amrit Kaur, which were never seriously discussed or were rejected by the Advisory committee. They proposed introduction of a FR which prohibited any impediment to the marriage between citizens based merely on difference in religion. They justified this by explaining that inter-religious marriages in India (at that time) require one of the spouses to convert or to leave the country, in order to get married which disadvantages those couples who choose to stay in India and retain their religion or are unable to go abroad to solemnise their marriage due to financial constraints.[324] This proposition was never seriously considered by the sub-committee on FRs.

They had also expressed their dissent with the specific form, in which the Uniform Civil Code (hereinafter 'UCC') had been included in Part B of the FRs (non-justiciable) in the Draft Report of the Sub-committee. They believed that introduction of UCC in the country should be guaranteed to

[322] Letter from Rajkumari Amrit Kaur to B.N.Rau (undated), *in* B.Shiva Rao (Vol II), *supra* note 7, at 146.
[323] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), April 21, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 263.
[324] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), March 28, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 162.

the Indian people within a span of 5 to 10 years similar to the guarantee of free and compulsory education within a span of 10 years.[325]

Mrs Hansa Mehta proposed prohibition of child marriage to be made a fundamental right. However, this proposition was nipped in its bud by the other members who decided to discuss the matter as a part of non-justiciable rights.[326]

Apart from the two types of suggestions or amendments discussed above (the ones which were accepted and the ones which weren't), a third kind of propositions also deserve mention. These are the creative suggestions which were either never taken up for discussion, or weren't seriously debated, and were brushed aside in the CAD or the proceedings of the Advisory Committee. Rajkumari Amrit Kaur (along with K.M. Munshi and Sardar Harnam Singh) proposed, that the power to impose reasonable restrictions on FRs through suitable laws should vest only with the Union government and not with the State government.[327] She also suggested that the non-justiciable rights (or the Directive Principles of State Policy as they are called today) contain a clause prohibiting the carrying of arms except for the purpose of killing animals dangerous to life and crops. Knowing fully well that her suggestion received no support she insisted on raising it and recording it in the proceedings of the committee as it formed a part of her conception of a non-violent state and society.[328]

Another interesting issue arose in the proceedings of the Minority committee while discussing the right to freedom of equality. Rajkumari Amrit Kaur proposed that the following proviso be added to the right to freedom of equality: "*Nothing herein shall prevent separate places of public resort being exclusively*

[325] *Id*, at 162.
[326] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), March 28, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 162.
[327] Minutes of the meeting of sub-committee on Fundamental Rights (Constituent Assembly), March 24, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 116.
[328] Letter from Rajkumari Amrit Kaur to B.N.Rau (undated), *in* B.Shiva Rao (Vol II), *supra* note 7, at 153.

*reserved for women*." The object of this proviso was to allow the State to create separate public institutions solely for women.[329] This proposition was met with widespread opposition. However, the most striking thing about this incident is not the issue being discussed or its opposition but the sharp responses that it drew from some members of the Advisory committee. Selected excerpts have been reproduced below:

K.M. Panikkar: "*Discrimination for women means discrimination against men. If you have a park solely for women, being a public place or a public resort paid for from public funds, it will be considered illegal…. When you say that no discrimination shall be made on the ground of sex, it also means it should not be discriminated against men. . . .* "

R.K. Sidhwa: "*What is it that women want? If they want equality of rights we are here for equality of rights. Do they want this plus special right, besides the equality of rights? I am not clear as to what they want.*"[330]

The issue raised by Rajkumari Amrit Kaur was after this discussion brushed aside. However, these few instances of failure to push the changes they wanted doesn't reduce in value those propositions and changes that they had successfully introduced in the Report of the Advisory Committee and which then went on to find a place in the Indian Constitution.

## CHANGES PROPOSED OUTSIDE THE ADVISORY COMMITTEE PROCEEDINGS

This category coincides with the fourth and fifth stages of the framework suggested by Bipan Chandra and others. This category deals with the changes and amendments, which were proposed to the FRs outside the Advisory Committee, that is, in the debates surrounding the discussion of the Draft

[329] Minutes of the meeting of the Advisory Committee (Constituent Assembly), April 21, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 219.
[330] Minutes of the meeting of the Advisory Committee (Constituent Assembly), April 21, 1947, *in* B.Shiva Rao (Vol II), *supra* note 7, at 257.

Constitution and the Final Constitution. This section like the previous one deals with both successful and unsuccessful amendments and suggestions.

Shrimati G. Durgabai moved an amendment seeking to increase the scope of the exemption under the right to freedom of religion. She proposed and successfully moved an amendment to increase the ambit of a provision which exempted laws that opened religious institutions to people of all classes from being invalidated due to the operation of the right to freedom of religion.[331]

The provision in the FRs chapter which prohibits religious instruction in State funded schools can be attributed to Shrimati Renuka Ray. She introduced an amendment to the existing clause which clarified the position that no educational institutions maintained by the State shall impart religious education and that nobody shall be compelled to attend religious instruction in any educational institution aided by the State. This was a clarification to the earlier provision which seemed to imply that denominational instruction may be provided in State institutions.[332]

Mrs Purnima Banerjee proposed an amendment to the provision dealing with religious instruction in public schools maintained out of state funds. She wanted the state to control the curriculum of religious instruction in all public schools to ensure that they are "*in the nature of elementary philosophy of comparative religions calculated to broaden the pupils' mind rather than such as will foster sectarian exclusiveness*." According to her the objective of maintaining communal harmony and sectarian unity justified state interference even in those educational institutions which were not maintained out of public funds.[333] She also proposed an amendment to the provision dealing with discrimination in public institutions

[331] Statement of G. Durgabai, Vol. VII CONSTITUENT ASSEMBLY DEBATES 828 (December 6, 1948).
[332] Statement of Renuka Ray, Vol. V CONSTITUENT ASSEMBLY DEBATES 350 (August 30, 1947).
[333] Statement of Purnima Banerjee, Vol. V CONSTITUENT ASSEMBLY DEBATES 350 (August 30, 1947).

and extended its scope. The amendment prohibited discrimination in not just State institutions but also in State funded institutions.[334]

She also moved important amendments to the provision dealing with rights of the detainee which would have had the impact of reducing state discretion in the matter of preventive detention had it been passed. She introduced an amendment to ensure that detainees under preventive detention could not be detained beyond a period of six months and that they must be produced before the magistrate within a period of fifteen days. She also moved an amendment for payment of maintenance allowance to the dependants of a detainee under preventive detention.[335] Although none of these provisions found place in the Constitution in the same form as had been proposed by Mrs Banerjee yet they sparked the debate on the extent of state's discretion in preventive detention thereby increasing the rights and remedies available under preventive detention.

The above discussion shows that the women members played an important role in the drafting of the FRs in the Indian Constitution not just in the second stage (as part of the Advisory committee drafting FRs) but also in the final stages (fourth and fifth stage) by actively engaging in the discussion surrounding almost all FRs and proposing amendments to the same.

## VISION OF THE INDIAN SOCIETY

While there existed diversity of opinion and vision within the women members four common strands can be picked to understand what they had envisaged for an ideal Indian society.

1. Right to Equality and Freedom: Right to equality and right to freedom were crucial to their idea of a just and progressive society. While freedom was important to them (as is seen in

[334] Statement of Purnima Banerjee, Vol. V CONSTITUENT ASSEMBLY DEBATES 366 (August 30, 1947).
[335] Statement of Purnima Banerjee, Vol. IX CONSTITUENT ASSEMBLY DEBATES 1510 (September 15, 1949).

their opposition to any form of 'forced labour' or inter-religious marriages or rights of detainee under preventive detention), yet 'equality' remained the more important of the two concepts. It is possible that their exposure to gender biases helped them understand that in a society which works on dynamics of dominance, freedom without equality would result in domination of the weak. Hence, they argued for equality not just in principle but in practise accompanied by restrictions on freedoms if needed for realisation of an equal society. This can be seen in the stand that they took against an absolute freedom of religious practices.

2. The 'women' question: Apart from this, they were also at all points of time aware of the existing gender biases and attempted to ensure that the Constitution did not perpetuate these gender biases. Their stance on child marriage, UCC, discrimination on the grounds of sex, etc. shows their commitment to creation of a non-discriminatory society.
3. Empowering through education: While the women members strived for equality, freedom and non-discrimination, they realised that true human liberation can only be through education and that no matter how egalitarian the laws are people cannot avail benefits under this law unless education empowers them to do so. Hence, they took an active interest in the field of education and emphasised the State's role in spread of secular progressive education.

## CONCLUSION

Subject to the disabilities introduced by the two limitations outlined in the beginning of the paper, the analysis done in this paper, leads to two major conclusions. *First*, the women members of the CA cannot lay claim to representing the "women of India", as they belonged to a largely homogenous class, that of the 'educated elite women' and did not possess the kind of heterogeneity which would

have made them representative of the aspirations of the entire population of women of India. This argument stands even if it be argued that this socio-economic homogeneity was a feature of the entire CA, and not just the women in the CA. *Second*, in spite of which interest group they represented (that is, independent of the first conclusion) the women members made significant contribution to the drafting, modification and adoption of FRs in the Indian Constitution and their role in the CA was not merely token presence for "supposedly" being the women's voice. The significance of their contribution has been highlighted by emphasising their role in the introduction and shaping of what are even today considered some of the most important FRs. For instance, their role in giving shape to the right to freedom and the right to equality or the right against discrimination which form part of the "Golden Triangle"[336] shows the importance of their contribution. Even in cases where the changes they introduced did not get accepted, they successfully raised important concerns which for certain issues continue to remain relevant in contemporary times.

[336] Minerva Mills v. Union of India, AIR 1980 SC 1789 (Supreme Court of India).

**ANNEXURE A**

BACKGROUND INFORMATION ABOUT WOMEN MEMBERS OF CA

| S. No. | Name | Political affiliation[337] | Category [338] | Province [339] | Religion (Caste) [340] | Educational Background | Career |
|---|---|---|---|---|---|---|---|
| 1. | Mrs Ammu Swaminathan | Congress | General | Madras | Hindu (Nair) | Informal education at school. | Freedom fighter, social activist, member of Rajya Sabha.[341] |
| 2. | Mrs Dakshayani Velayudhan | Congress | General | Madras | Hindu (Dalit) | BA and Teacher's Training Certificate, Was also the first dalit woman to | Educator, politician, Dalits right activist/ reformer.[343] |

[337] Rajya Sabha Secretariat, *Selected Speeches of Women Members of the Constituent Assembly* (2010), *available at* http://rajyasabha.nic.in/rsnew/publication_electronic/Selected%20Women%20Speech_Final.pdf (Last visited on May 9, 2016).
[338] *Id*.
[339] *Id*.
[340] Granville Austin, *supra* note 1, at 347-353.
[341] Pooja Bhulla, *15 Women involved in shaping the Indian Constitution*, *available at* http://www.dnaindia.com/lifestyle/report-online-exclusive-15-women-involved-in-shaping-the-indian-constitution-1956415 (Last visited on May 9, 2016).
[343] *Id*.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | hold a degree[342] | |
| 3. | Mrs Durga Bai | Congress | General | Madras | Hindu (Brahman) | B.A. (Hons), M.A. (Pol Sc)[344] | Advocate, Freedom fighter, Educationalist, Social reformer, parliamentarian[345]. |
| 4. | Mrs Hansa Mehta | Congress | General | Bombay | Hindu (Brahman) | Baroda University, London[346] | President of AIWC (All India Women's Conference), educationist, writer, reformist[347] |
| 5. | Mrs Malati Choudhary | Congress | General | Orissa | Hindu (Brahman) | Educated in Santiniketan [348] | Freedom fighter, educationist, social activist.[349] |

[342] *Id*.
[344] *Durgabai Deshmukh, available at* http://www.indianpost.com/viewstamp.php/Color/Light%20Blue/DURGABAI%20DESHMUKH (Last visited on May 9, 2016).
[345] *Id*.
[346] Pooja Bhulla, *supra* note 48.
[347] Pooja Bhulla, *supra* note 48.
[348] *Malati Choudhury, available at* http://www.nuaodisha.com/eminet_personalities/Malati-Choudhury.aspx (Last visited on May 9, 2016)...
[349] *Id*.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 6. | Mrs Sucheta Kriplani | Congress | General | UP | Hindu (unknown) | Indraprastha College and St Stephen's College.[350] | Lecturer, freedom fighter, delegate of India to the UN, parliamentarian (first woman chief minister of India)[351] |
| 7. | Mrs Vijayalakshmi Pandit | Congress | General | UP | Hindu (Brahman) | Educated at home and in Switzerland. [352] | Political leader, diplomat, freedom fighter, Cabinet minister (in independent India), Indian ambassador to Moscow, Washington and Mexico, Indian representative to the UN Human |

[350] *Sucheta Kriplani: Indian Freedom Fighter*, *available at* http://www.indianetzone.com/2/sucheta_kriplani.htm (Last visited on May 9, 2016).
[351] *Id*.
[352] *Vijaya Lakshmi Pandit*, *available at* http://www.encyclopedia.com/topic/Vijaya_Lakshmi_Pandit.aspx (Last visited on May 9, 2016).

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | | Rights Commission.[353] |
| 8. | Mrs Purnima Banerjee | Congress | General | UP | Hindu (Brahman) | B.A.[354] | Freedom fighter, administrator.[355] |
| 9. | Mrs Kamala Choudhary | Congress | General | UP | Hindu (-) | - | - |
| 10. | Begum Aizaz Rasul | Muslim League | Muslim | UP | Muslim | - | Deputy President of Legislative Council (after independence), Minister for Social Welfare and Minorities, President of Indian Women Hockey Federation, writer.[356] |

[353] *Id*.
[354] Pooja Bhulla, *supra* note 48.
[355] Pooja Bhulla, *supra* note 48.
[356] *Begum Kudsia Aizaz Rasul*, *available at* http://www.indianetzone.com/11/begum_kudsia_aizaz_rasul.htm (Last visited on May 9, 2016).

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 11. | Rajkumari Amrit Kaur | Congress | General | CP | Christian | Higher education in England[357] | Cabinet minister for Health (in independent India), President of All India Women's Conference.[358] |
| 12. | Mrs Sarojini Naidu | Congress | General | Bihar | Hindu (Brahman) | King's College, London and Girton College, Cmabridge.[359] | First female President of INC, first woman Governor of India, poet, freedom fighter[360] |
| 13. | Annie Mascarene | Congress | NA | Travancore and Cochin Union | Christian (Catholic) | MA (History and Economics) from | Freedom fighter. |

[357] *Rajkumari Amrit Kaur, available at* http://rrtd.nic.in/rajkumari.html (Last visited on May 9, 2016).
[358] *Id*.
[359] *Sarojini Naidu, available at* http://www.culturalindia.net/leaders/sarojini-naidu.html (Last visited on May 9, 2016).
[360] *Id*.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 14. | Mrs Leela Roy | Congress | General | Bengal | Hindu (Kayastha) | Bethune College, Calcutta, University of Dhaka (M.A.) | Freedom fighter, social rights activist, woman's rights activist.[361] |
| 15. | Kamla Chaudhari | Congress | General | Bengal | Hindu (-) | - | - |

[361] *Remembering Leela Roy*, *available at* http://www.subhaschandrabose.org/remembering-leela-roy (Last visited on May 9, 2016).

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# 12. DIFFERENT FORMS OF TERRORISM: A DESCIRPTIVE STUDY TO FIND SIGNIFICANT COUNTER MEASURES

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## ABSTRACT

*As the number of incidents of terrorism has increased to a significant level, the whole world is concerned about the issue. Comparing it to past, the situation of violence, instead of getting reduced, has increased further. Thus, due to this increase, the leaders in different International and National events state the high need to adopt a strategic counter terrorism policy and also insist other nations to join hands and curb terrorism with each other's cooperation. The paper first discusses the definition of terrorism taken from different view point and hence analyse the meaning of terrorism. Then the paper through a descriptive study of forms of terrorism gives a suitable analysis and elucidation about the various ways in which terrorism can exist in the world. In this the forms are subdivided according to two main bases which are as follows. First is on the basis of reason behind the act of terrorism which further deals insolvency as one reason behind terrorism and the ideology as another. This deals an explanatory study of State terrorism, Religious Terrorism, Political Terrorism, Separatist Terrorism. Second is on the basis of the kind of methodology adopted in order to curb terrorism. This deals with a descriptive note on Bioterrorism, Nuclear Terrorism and Cyber Terrorism. On the basis of this the paper further gives different suggestions which should be implemented according to the form of terrorism and the scenario. Thus the paper by giving importance to the need to find a better solution describes the forms of terrorism as a major aspect.*

***Keywords:*** *Definition of terrorism, Disturbance of National Security, Forms Of Terrorism, State terrorism, Religious Terrorism, Political Terrorism, Separatist Terrorism, Bioterrorism, Nuclear Terrorism and Cyber Terrorism Counter-Terrorism Approaches, War on Terrorism*

[362] BA. LLB (Hons.) student at Rajiv Gandhi National University of Law, Patiala (Punjab)

## INTRODUCTION

The very beginning of 2016 started with a terror attack in Pathankot Airbase on Jan 2 which killed 7 personnel showing the continuation of terrorism. It even continued when the whole world got the news of Brussels Airport Attack by ISIS terrorist group in March. It still continues when India moans for its soldiers in the Uri Terrorist Attack which happened in September 2016. Thus, the situation has still remained the same when compared to such activities of the past like , World Trade Centre attack in New York or the attack in Taj Hotel in India. Last year too, Paris faced this devastating challenge when a series of bombing took place in various different places in the city. In a report by Global Terrorism Index deaths in 2013 have increased to 80% which is the highest level ever. The acts ultimately challenge the National Security of the country. Thus there arises a big need to develop better strategy as an initiative to counter terrorism. For this a deep study of terrorism and different objectives and methods of terrorism is required. At the present time, unlike law dealing with any other offences such as murder, theft, etc there is no law which gives a clear and standard definition of terrorism. Hence there is a need to elucidate the meaning of terrorism which distinguishes it from any other offence, so that the courts can perform a better procedure and decision making to charge the penalty and the punishment from the perpetrators of the offence. Moreover, today with the advancement in technology, enhancement of knowledge and development of a viewpoint or ideology, terrorism exists in various forms depending upon the criteria of distinction taken. Hence, in order to reduce terrorism a requisite amount of knowledge of those forms is required so that the governments of one or more country can adopt a better counter-terrorism strategy depending upon the form of terrorism taking place. A good study and analysis also hints about the terrorism risks associated with a place so that to make public and government more aware of the activities that are likely to happen in that place and hence determine the degree of necessity required to adopt counter-terrorism measures in that place.

## 1. DEFINING TERRORISM

From a common person's perspective, the answer would be given with an expression of fear and anger. He would define terrorism as a violent act by a person or a group which destroys everything of a man. It leaves the man with a loss of his family, his property and his livelihood. Thus the word itself brings a fear of experiencing a loss in the future and an anger of the plaque faced by people due to such activities. Thus for a common man terrorism is something he would always want to avoid in his lifetime. However, the analysts and academicians would define terrorism in a more specific and less compassionate way.

Terrorism in simple and obvious terms is an act to terrorise. However, the authorities define terrorism as a violent act to put the public in fear and hence achieve its target of spreading their ultimate motive.

The CIA issued a special report in 1976 and defined terrorism as "the threat or use of violence for political purposes when such action is intended to influence the attitude and behaviour of a target group wider than its immediate victims, and its ramifications."[363]

US state Defence Department defines terrorism as an "unlawful use or threatened use of force or violence against individuals or property to coerce or intimidate government or societies to achieve political, religious or ideological objectives."[364]

Thus the problem lies in the fact that it cannot be defined in any provision in law, therefore there is no universally accepted or standard definition on Terrorism. However, law of some countries or government organisation define it so that to give a slightly better idea of the term.

[363] 31, Sharif M. Shuja , *Terrorism—A Special Problem: National or Transnational?*, 107, (Pakistan Institute of International Affairs,1978).

[364] Gus Martin, *Essentials of Terrorism: Concepts and Controversies*, 8 (SAGE Publications, 2013).

The U.S law defines it as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[365]

UNSC resolution 1566 recalls that "criminal acts, including acts against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism." [366]

Thus, terrorism is an unlawful or violent use of force which arises fear and terror amongst people. Hence, terrorism is an act which involves not only the victims who suffer but also includes the people who learn about such acts and thus are affected byfear. This is the strategy of violence they commit, which is basically to draw attention of the public, government and the world and tell the ultimate aim. Hence the actual targets of terrorists are not the few people who get largely affected by the attack, but the billions of people watching such acts through different modes. Fear can be induced in many forms. It can be a fear of physical threat and killing, or a fear of losing money due to negative changes in economy, or it might be a fear to lose sensitive government data or any other threat. Hence this is a strategy of arising fear and terror so that the objective and ideology of the group are heard by the whole public.

[365] FBI Official, *Terrorism 2002/2005*, Federal Bureau of Investigation, (August 8, 2016 9 pm) www.fbi.gov/stats-services/publications/terrorism-2002-2005.

[366] UN Official, *UN Security Council Resolution 1566, Terrorism (Oct 2004)*, Council on foreign Relation(October 8, 16 8.40pm), www.cfr.org/international-organizations-and-alliances/un-security-council-resolution-1566-terrorism/p11223).

Thus in short there are three essentials of terrorism and these are violent act, inducement of fear amongst people and coercion to implement their objective. Thus due to the objective, terrorism which is taken as an atrocious act might be a justified action if objective is good. It can take place against the oppression and exploitation by a person or a group who in most of the cases affect the decision making process. Terrorism in their view would be an effective way to get the things done when their voice is unheard due to exploitation and dominance of the majority or the persons in power. For example According to British government Chandra Shekhar Azad, who was a freedom fighter for Indians, was a terrorist. Thus, Terrorism has been described as "both a tactic and a strategy; a crime and a holy duty."[367] Thus the interpretation depends upon the point of view of the person. Due to this, a supporter of terrorism would be of the view that terrorism is a way to pursue extreme goals which the officials have failed to implement. Hence the popular phrase among them is "one man's terrorist is another man's freedom fighter." On the contrary to this, a victim of a terrorist act might view the people as criminals who should be punished with the most violent punishment in the world. Thus whether the terrorism is an act to be punished and to be reduced depends on the perspective of the people.

Due to all this, if terrorism happens for a good reason or for a society, an emotional side and a positive outlook can be generated for the people involved in terrorist activity because it has an objective for the welfare of people. However because it adopts an unlawful method and cause violence in a country hence it is cited as a crime. Most country in the world have efficient and organised system which helps a group to achieve their objective and aim if they are good for the public. Hence the method used to

[367] By Daniel Bingel, *Turning the Other Cheek*, 43(Xlibris Corporation, 2013).

induce fear is unlawful and hence not justified at all. And so, The Indian law defines terrorism accordingly. It defines terrorism as

"Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss ."[368]

Hence it can be stated that terrorism is use of violence by adopting different methods to put people in a fear so as to coerce the government or the population to do according to their ideology.

## 2. FORMS OF TERRORISM

The definition of Terrorism itself depicts about the ideology or aim of the group and the use of different kinds of methods to cause violence. Hence it paves the way for different forms of terrorism. Terrorism persists in various forms depending upon these two aspects. First is the kind of reason behind that act and second is the type of modus operandi adopted for that action. While the former deals with the objective of the group which is closely dependent upon their ideology existed. The method or way of doing the act to terrorise and cause fear which is dealt by the later aspect.

On the basis of reason behind terrorism there are various other forms of terrorism. One of which is Pathological terrorism, which is the act of use of violence for the sake of joy or psychological

[368] Terrorist and Disruptive Activities Act, 1987, No. 28 of 1987, Act of Parliament, 1987.

satisfaction. Thus the person terrorise because he enjoys watching the people's suffering and fear because of that act.

Then are the forms of terrorism which involve a clear objective as a reason behind that act. That aim can be either good or it can be bad for the public. This distinguishes between Political and Criminal Terrorism. The justified acts of violence are the main goal of Political terrorism. Hence the terrorist become freedom fighter because the activity is for the benefit of people. This is completely divergent to the view of criminal terrorism whose acts have various other aims but the main reason behind that act is their own greed.

### 2.1 On the basis of Objective

#### 2.1.1. State Terrorism

When terror is used as a weapon by the government in order to control its people, it is called as state terrorism. This kind of terrorism is systematically regulated because it is the well organisation of state which is behind it. So in this the state actually orders to perform such activities.

Governmental or "State" terror: Sometimes referred to as "terror from above", where a government terrorizes its own population to control or repress them.[369] These actions usually constitute the acknowledged policy of the government, and make use of official institutions such as the judiciary, police, military, and other government agencies. Changes to legal codes permit or encourage torture, killing, or property destruction in pursuit of government policy.[370]

[369] *State Sponsored Terrorism*, Terrorism Research, (October 7, 8 pm), http://www.terrorism-research.com/state/.
[370] Igbaekemen Goddy & Umar Shehu Usman, A *Purview into the Historical Development of Terriorism in Nigeria*, IISTE,2014,1.

Whereas a similar but not same kind is state sponsored terrorism in which state supports another terrorist groups. It is when government provides supplies, training, and other forms of support to a non-state terrorist organization. Other forms of support include place for base, documentation in personal identity (like passport) and economic transaction and purchase of weapons.

An example of state sponsorship is the Syrian government's support of Hamas and Hizballah in Lebanon. Syrian resources and protection enable the huge training establishments in the Bek'aa Valley. On a smaller, more discreet scale, the East German Stasi provided support and safe-haven to members of the Red Army Faction (RAF or Baader Meinhof Gang) and neo-fascist groups that operated in West Germany. Wanted members of the RAF were found resident in East Germany after the fall of the Berlin Wall in 1989. [371]

**2.1.2 Religious Terrorism**

It is Terrorism which arises out of religious grievances and ideologies. Religious terrorism is particularly dangerous due to the fanaticism of those who practice it and their willingness to sacrifice themselves for the cause. Hence religious terrorism is "for the religious or political reasons, a religious group, organization, government or individuals attacks their religion or other religions and use violence against the innocent civilians or property." It is the one of the most prevalent form of terrorism since last few years.

According to Global Terrorism Index 2014, key points to be noted are:

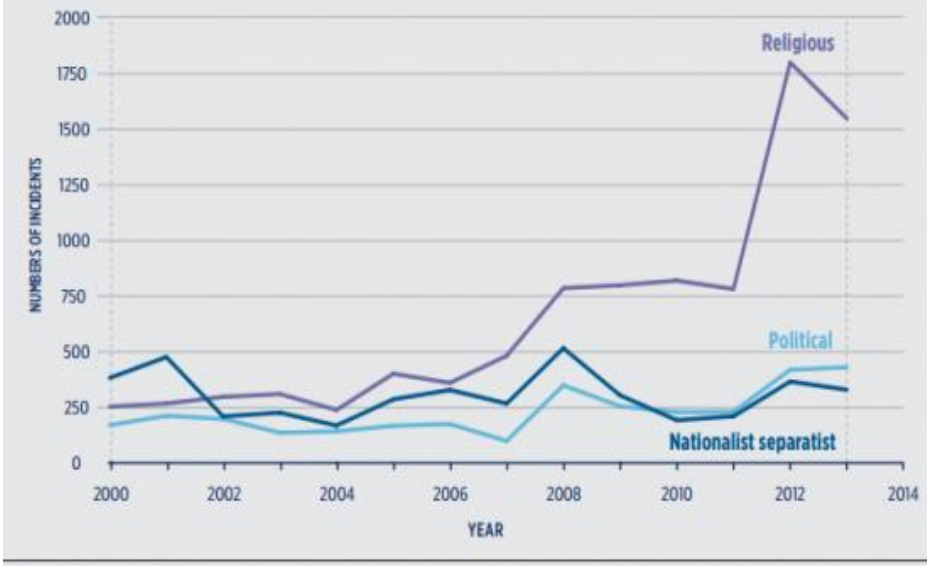
[371] Christopher C. Harmon, *Terrorism Today* (Frank Cass Publishers, London: 2000), 200.

- Religion as a driving ideology for terrorism has dramatically increased since 2000. Prior to 2000 nationalist separatist agendas were the biggest drivers of terrorist organisations. Over the past 14 years there has been a large increase in religion as the motivator for terrorist activity
- Grouping over 350 of the most active organisations in the world into either religious, political or nationalist separatist groups shows that religious organisations have seen the largest rise in activity over the period
- The majority of claimed deaths from terrorist attacks, 66 per cent in 2013, are claimed by only four terrorist organisations; ISIL, Boko Haram, the Taliban and al-Qa'ida and its afliates. Variations of religious ideologies based on extreme interpretations of Wahhabi Islam are the key commonality for all four groups
- Before 2000, it was nationalist separatist terrorist organisations such as the IRA and Chechen [372]rebels who were behind the most attacks. The number of incidents from nationalist separatist groups has remained relatively stable in the years since while religious extremism has grown.

[372] Institute for Economics & Peace , global terrorism index,2014, (October 8 2016, 8 pm), http://www.visionofhumanity.org/sites/default/files/Global%20Terrorism%20Index%20Report%202014_0.pdf.

**FIGURE 12** TRENDS IN TERRORIST GROUP IDEOLOGY, 2000-2013

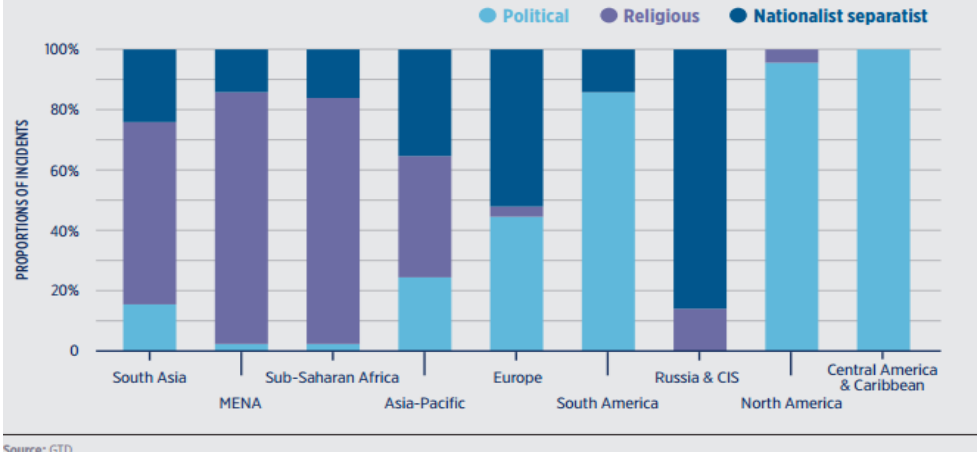
Religion as a driving ideology for terrorism has dramatically increased since 2000. However, in 2000 Nationalist Separatist movements were more prominent. Political and National Separatist movements are still significant in 2013 but have seen little change in activity over the period.




Source: GTD Note: Only 358 of the most active terrorist organisations have been classified in this analysis. Therefore, the number of incidents will not match the total numbers shown in previous figures.

**FIGURE 13** TRENDS IN REGIONAL TERRORIST IDEOLOGIES, 2000-2013

Religious ideologies as a motivation for terrorism is not a global phenomenon. While it is predominant in Sub-Saharan Africa, MENA and South Asia, in the rest of the world terrorism is more likely to be driven by political or nationalistic and separatist movements.




Source: GTD

Thus, the number of incidents of Religious Terrorism has strongly increased. But as far as the proportion of such incidents around the world is concerned large deaths due to this form happened in some part of the world like Sub Saharan, Middle East and North Africa and South

Asia, in other part like America, Caribbean, Russia and Europe other form Political and Separatist movement remain prevalent.

### 2.1.3 Political Terrorism

Political terrorism is used by one particular faction to intimidate another who is the one in power. Although government leaders are the ones who are intended to receive the ultimate message, it is the citizens who are targeted with violent attacks. [373] For this the terrorist use other unlawful acts like bombing, taking hostage, assassination, etc. Through such acts the group give their objective and also threaten the population that anyone can become a victim of terrorism at any time and thereby try to achieve their political goals. Thus Political terrorists desire to create a long term atmosphere of fear, coercion and intimidation in the community.[374]

For example The most violent of all, the 9/11 attack in World Trade Centre's Twin Towers and The Pentagon by Osama Ben Laden's Al Qaeda. The reason for that attack was that the group didn't have enough power to destroy the military of the U.S.A so by attacking the symbols of the country's prosperity and power, the Al-Qaeda could promote widespread fear which would support their political and religious goals in the Middle East and Muslim World. This is the only way they can gain enough power to fufilltheir political goals.

### 2.1.4 Separatist Terrorism

[373] MA SAulawa, *Terrorism in Nigeria: An Overview of Terrorism*,IJBEL,Jan 1 2016, 2.
[374] Paul Wilkinson, *Characteristics of Political Terrorism*, Terrorism and the Liberal State, London: Macmillan, l986(October 3 2016,10:30pm) http://www.unl.edu/eskridge/cj394wilkinson.html.

The separatists work to divide a state and hence create a new state. The group might be a discriminated group who want to emerge by being fragmented from the other group. There are a variety of motivations for any separatist movement.

Resentment of another cultural group can emerge, seen in economic or social elements.

Protection from ethnic cleansing, genocide, or outright discrimination can also be a strong motivation for a separatist movement. Separatist movements can also ensure the preservation of one culture's unique traits, including language, religious practices, and other elements that can be so easily lost. [375]

The most prominent example is the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, The group whose ultimate goal wasto separate themselves from the ethnic majority of Sinhalese. Thus, being among the most dangerous and deadly extremists, the Tamil Tigers hadindulged in suicide bombing, women in suicide attack, murdered about 4000 people alone in 2006-08, assassinations . According to the analysis of Global Terrorism Index 2014, more than 50 percent of terrorist incident in Europe happened because of separatist terrorism.

## 2.2 On the basis of Modus Operandi

### 2.2.1 Bioterrorism Terrorism

Bioterrorism is the intentional or threatened use of viruses, bacteria, fungi, or toxins from living organisms to produce death or disease in humans, animals or plants to accomplish political or social objectives[376]. These biological or biochemical substances are called as

[375] Brian Beary, *Separatist Movements :A Global Reference*, CQ Press(2011).
[376] Fong I, Alibek K, *Bioterrorism and infectious agents*. New York, NY: Springer Science & Media, Inc. (2010).

biological agents. These agents spread through air, water or food or through sexual contact..[377] Although these agents are naturally found but the modification so as to make them resistant to a particular medicine or to use its dangerous effect to harm people and hence generate terrorism.

> For example When Robert Stevens, a photo editor at The Sun tabloid in Boca Raton, Florida, died from anthrax on 5th October, fears of biological terrorist attacks escalated.
>
> A short time later, five more Florida based employees were tested for exposure to the bacteria, meanwhile three more people weretreated with antibiotics for anthrax in New York,.[378]

the attacker used the weapon of biological agent, i.e. anthrax through postal envelops.

> "The local, civil and governmental response was quick but the common man was confused and scared. In spite of best efforts, the authorities didnot achieved any success in identifying the exact source of this threat."[379]

Thus the terrorists became successful in not only achieving theiraim but also remained unidentified. Further, "a methodical weapon research and development terrorist center existed, involving some scientists with modern equipment. It was highly unlikely that an individual... with a strong background in microbiology, could produce five grams of purified

[377] J.V. Borrelli, *Bioterrorism: Prevention, Preparedness and Protection*,1-5, (Nova Science Publishers, New York) (2007).
[378] Reporter BBC, *Global Biological Fears*, BBC World Service, (6 October 2016, 8 pm) http://www.bbc.co.uk/worldservice/sci_tech/highlights/011015_chemical.shtml.
[379] Ajay Lele, *Bio-Weapons: The Genie in the Bottle*, 131-48 (Lancer Publishers) (2007).

anthrax spores with fine particles sizes."[380] Hence the group used science in order to terrorise cities of United States.

Other substances like, Botulism or haemorrhagic fever, Small pox virus, etc can also be used as biological agents by the group.

Today there is a latest threat of generation Ebola virus as a weapon of terrorising because of its tremendous devastating effect. "Although disease has always been a serious threat to international security, it cannot be combated with sabres or rifles and generals have historically assumed that the prevention and control of illness lies beyond the ambit of national defence."[381] Thus people who might frequently come under the influence of Ebola virus should receive investigation.[382]

### 2.2.2. Nuclear terrorism

The concept of nuclear terrorism is possibly the least understood of all dangers emanating from nuclear weapons. This is simply because no terrorist group is known to have developed, obtained, or deployed nuclear weapons. Thus the happening of such events remain improbable. But due to advancement in technology and the era of computer learning in which each individual can learn whatever they wish to, there lies likeliness of use of nuclear science to fulfil the aim of terrorism. Nuclear Terrorism includes "Acts of violence and destruction performed by non-state actors where the means applied are nuclear explosive devices – or threats of such actions – with the purpose of inflicting destruction, creating a condition of

[380] *Ibid.*
[381] Diamond J, *Guns Germs and Steel: The Fates of Human Societies*,480,( New York WW Norton, 1999).
[382] McNeill W, *Plagues and Peoples*, (Anchor New York.1999).

fear, getting attention, blackmailing, installing instability, and to affect an audience beyond the victim(s) directly targeted."[383]

However, even though the concept of nuclear terrorism and its incident remain unprecedented but the risk associated has not diminished. "The threat of nuclear terrorism is no longer a 'hypothetical worry; it is an ongoing reality"[384]

Thus strategic military counter attack is not sufficient enough to restrict such activities. The organisation would need a team of scientists and researchers in that area. This can be done by contacting the scientists and engineers. Hence an increase in contacts can be expected. Protecting such contacts can be one of the strategies. Other strategy includes, special control of sites both official and proxy, which restrict in giving the information through sites. **2.2.3 Cyber Terrorism**

In the wake of recent crimes like Hacking, Stealing and leaks a new breed of terrorism has emerged. Thus cyber-terrorism includes unlawful acts of disruption of network, destroying personal data by Malware, hacking and leaking of government information. The main target behind such acts is the population and hence the government. This distinguishes Cyber-Terrorism from Hacking. While main reason behind Hacking is personal gains or economic gains or ego of hacker, Cyber Terrorism generates terror and causes long term problem to an individual and to the government.

A renowned expert Dorothy Denning defined cyber-terrorism as "unlawful attacks and threats of attack against computers, networks, and the information stored therein when

[383] Olav Njalstad, *Nuclear Proliferation and International Order : Challenges to Non Proliferstion Treaty*, (Roulteldge Plc), 110.
[384] The Nuclear Threat Initiative an Project on Managing the Atom, Belfer Center, "*Nuclear Terrorism FAQ*" The Washington Post, September 26 2007.

done to intimidate or coerce a government or its people in furtherance of political or social objectives".[385]

Similar but more descriptive definition is given by the Federal Bureau of Investigation, it explains Cyber Terrorism as "The premeditated, politically motivated attack against information, computer systems, computer programs, and data which result in violence against non combatant targets by sub-national groups or clandestine agents".[386]

For example, in 2014 and 15 ISIS leaked many videos of killing and beheading, etc through an unknown websites. These videos spread to almost all the population of the world using Facebook or Whatsapp. And the motive was fulfilled when a significantly large population was put in fear of terror of being faced by such attacks. Thus through statements in its videos, the group's fighters spread their motives of Global Jihad and also specified the names of the country that will face such threat because of their intervention.

The main reason which intimidates terrorist to use this form though it requires exceptionally intelligent hackers, is its inexpensive nature, hidden identity and inability to be tracked, IT being a big store house of secret information, etc.

In their paper, Jimmy Sproles and Will Byars said: "By the use of the internet the terrorist can affect much wider damage or change to a country than one could by killing some people. From

[385] Serge Krasavin, *What is Cyber-terrorism?*, Computer Science Research Center, (October 12 2016, 5.55 pm), http://www.crime-research.org/library/Cyber-terrorism.htm.
[386] Ushie Henry Ekpe, *The Impact of Terrorism (Including Cyber Terrorism) and Threats of Terrorism in International Business(Or Nation State)*,3, JIRAG,35,38 (2013).

disabling a country's military defences to shutting off the power in a large area, the terrorists can affect more people at less risk, than through other means".[387]

In spite of all the nuances faced by IT technology, there is no such great Cyber Terror Attack faced by the world. What the world has faced are the Cyber Crimes which had no political or ideological purpose. Hence they cannot be taken under the ambit of terrorism. However the terrorist group still use the method of Cyber Terrorism by leaking videos and threatens the world to face the consequences if the ideology is shown disrespect. Due to this, there is likeliness that such acts will happen in the future.

## 3. DIFFERENT COUNTER TERRORISM APPROACH

In order to maintain the national security of a country, there is a need to adopt a war on terror by adopting different counter terrorism strategy. These approaches vary with respect to two aspects, i.e. different kind of standpoint of the terror group and the different types of form of attack taken place.

According to the Global Terrorism Database Political, Religious and Separatist Terrorism are the major prevalent forms which exist in the reality today. Hence accordingly the respective counter measure should be to stop the main root cause of terrorism. That is, the government can adopt significant policies depicting its concern of providing solution to the problems which are among the ideology of the terrorist group. This helps the revival of faith towards the government by those people who could be influenced by the terrorist group. However, this is more of a hypothetical measure, whose success depends upon the situation and psychology of people. But a more responsive counter measure would be a stricter check in government building or other Symbols of Prosperity in a country where there is huge likeliness of Political Terrorism, that is in the countries which constantly face such

[387] Mudawi Mukhtar Elmusharaf, *Cyber-terrorism*, Computer Science Research Center, ,(October 12 2016, 8 pm), http://www.crime-research.org/articles/Cyber_Terrorism_new_kind_Terrorism.

attacks because terrorist want a government to regret for a decision taken against their interest or want. Unlike Political Terrorism the measure for Religious Terrorism is different. For this a strategy should be taken to stop the spread of that religious radicalisation. Special check in the places is required where the majority of the people residing belong to that religion which is a target to be terrorised. Moreover, spread of terrorism by radicalising the youth should be reduced. For this, the kind of method used fortaking Computer Technology as an instrument for Religious Terrorism has to be obstructed. Cyber Terrorism lies as a main form which makes use of computer as a method to radicalise people, which is done through hacking and taking contacts, using it to spread religious ideology. Thus by stopping Cyber Terrorism, the youth can be prevented from being radicalised and used as an instrument of intelligence behind such acts. Similarly, the measure to counter separatist terrorism can be given by suitable analysis of the situation. For instance, the spreading of idea of a separate nation by using terror as a weapon needs to be prevented. Again this can be prevented by spread of such ideology and providing a more responsive check when incidents leading to strength of their ideology of separation become likely to happen.

By and large, the various techniques which should be taken by the government or the intelligence agencies in order to stop or reduce the incidents of terrorism, are the ones adopted to resist the spread of the ideology which leads to terrorism and fails the methods taken to radicalise the people.

The second kind of strategic planning which can be used to reduce terrorism is by reducing funding of the organisation. Again an analysis of various countries can find the form of terrorism existing in that place and hence the strategy adopted and that too to get funds. For example, Narco Terrorism use drug trafficking as a main source of funding. An agency can easily destroy a terrorist group by destroying the funding of that group. After all it is the money which can buy anything including a scientist's intelligence, violent weapons, leaked information, cyber geeks, etc.

> Piazza (this issue) analyzes counternarcotics strategies as a proactive counterterrorism strategy to limit the illicit drug trade as a means of financial support for the activities of some terrorist groups. The flourishing of the drug trade in weak states also can undermine security, thereby providing terrorists with fertile ground for their operations... Piazza formulates three hypotheses that relate the drug market to terrorism. These hypotheses are based, in part, on standard microeconomic theory – e.g., higher drug prices yield larger revenues owing to inelastic demand, and these enhanced revenues finance more terrorist events... Enders et al.'s (2011) division of GTD-collected terrorist events into domestic and transnational terrorist incidents. For both types of terrorism, increases in the wholesale prices of opiates and cocaine resulted in more terrorist incidents. [388]

Hence a way could be to stop drug trafficking and hence the funding of the organisation. Other forms of terrorisms based on mode of operation like Bioterrorism, Nuclear Terrorism and Cyber Terrorism have not taken place with such a huge violence and terror so as to give paradigm strength to adopt a significant counter terrorism strategy. However as the studies reveals of the dangers of likelihood of this kind of terrorism in the future, the approaches to reduce the risk of danger could be taken. Like special attention should be given to the scientists, engineers and other technicians to prevent them from being radicalised. A greater awareness can help to prevent the flow of their knowledge towards the group. The skilled professionals of technology should be aware of the future offers about the group and how dangerous it can become if such offers were accepted.

Overall the other strategy to reduce risk of terrorism is a more general and obvious one, but it is important to make use of that strategy seriously. This is the use of proper analysis which will pre-

[388] Todd Sandler,, "The Many Faces of Counterterrorism: An Introduction" (2011). Published Articles & Papers. Paper 151. http://research.create.usc.edu/published_papers/151.

determine the probability and type of attack, and hence use the measure of security check more vigilantly. At the end is the analysis which makes any approach a major success. Learning about the forms is one of such analysis. So as to enhances its strategies as given above.

The 9/11 Commission Report, the National Commission on Terrorist Attacks Upon the United States (2004) called for a major overhaul of US intelligence, so that such spectacular terrorist acts could be avoided through better collection and analysis of intelligence information. Thus there is a need for every agency to analyse the terrorist group's ideology through previous attacks and reports which give a hint about the targets, and hence deploy suitable measure like the one adopted at present[389]

To utilize INTERPOL resources effectively, member countries need to connect to the Mobile INTERPOL Network Database (MIND) or the Fixed INTERPOL Network Database (FIND). MIND/FIND offers an integrated solution for participating countries to check people, motor vehicles, and travel documents at border crossings and elsewhere in a systematic and speedy manner. Given the need of MIND/FIND to facilitate international cooperation in the INTERPOL-assisted fight against international crime and terrorism, it is puzzling that only 28% of INTERPOL's members have installed this technology.[390]

It is required for the countries to join in such policy and hence adopt a united counter-terrorism approach because it not only challenges the national security of one country but also puts other country in fear of security failure of their country. Hence by adopting such measures the War against the acts of terrorism will mark its beginning which will rise a new dawn of World Peace and Harmony.

[389] See *supra* note 26.
[390] *Ibid.*

## 4. CONCLUSION

To conclude terrorism has remained as a major threat to the overall national security of a country. It is used to induce fear among the general public by using heinous, atrocious and blatant acts. Through the past example of the Pathankot attack, the Twin Tower attack, the attack in Paris, etc, it not only hurt the victim but also caused huge terror among the people and the government due to the failure of its National Security. Thus to end such acts, appreciable strategy to curb the activities of terrorist group is required. This is done by a deep study and analysis of reasons of terrorising, kind of method used, way in which the counter strategy can be adopted to prevent such acts in the future. Thus the various forms of terrorism give the probability of happening of similar form within a place and hence develop respective method to curb terrorism. After facing the incidents of Paris attack in November 2015, Brussels Airport Bombing in March 2016, and the most recent for India being the terrorist attack in Uri in mid-September 18, 2016, the government of all nations are urging for a great need for the implementation of counter terrorism approach and a coalition of all nations to curb terrorism together. If proper strategies are adopted, then there is a likeliness of beginning of a War which will be the War against Terrorism.

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# 13. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN PROSECUTING THE ISIS

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## ABSTRACT

*This paper attempts to establish that the atrocities committed by the Islamic state of Iraq and Syria (ISIS) in the pursuance of its political goals are sufficient grounds to bring the organization to justice at the International Criminal Court("Court"). First, the paper shall elaborate upon the jurisdictional limitations placed on the operations of the Court and explain the process of initiating a prosecution at the Court This section of the paper shall dwell into understanding the preconditions the ICC has to fulfil before exercising its jurisdiction and shall also examine the different means of triggering the jurisdiction of the court along with this, this section of the paper shall also elaborate on the standard of proof or the burden (reasonable basis to proceed) that is to be established at the relevant stage of the proceedings and establish as to how this burden can be discharged in light of the facts. Second, the paper shall elucidate upon the international crime of Crimes against Humanity and explain the contextual elements that constitute the crime. The paper shall also attempt to establish that in light of the facts, the contextual elements are satisfied, constituting a valid ground to charge the ISIS under for international crimes. The paper shall specifically discuss the fact that the state like features of the non-state organization ISIS is a deciding factor regarding its culpability under Article 7. After examining the facts in juxtaposition with the lex lata (law as it stands), this paper shall submit that the ISIS can indeed be prosecuted, and if not prosecuted then at the very least be investigated for committing Crimes against Humanity in contravention to Article 7 of the Rome Statute and to realise this culpability, owing to the hindrance posed by the jurisdictional requirements, the Security Council of the United Nations needs to take charge of the situation and institute an investigation into the matter.*

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## 1. LIMITATIONS TO JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT.

### 1.1 Preconditions to the exercise of jurisdiction

Prior to discussing the mechanism available to trigger the jurisdiction of the International Criminal Court ("ICC"), it is imperative to understand the circumstances that need to subsist for the Court to exercise its jurisdiction. Such circumstances are enumerated in Article 12 of the Rome Statute of the ICC ("Statute") titled 'Preconditions to the exercise of jurisdiction.'[393] Article 12 comprises of three clauses which lay down:

a. Any state that becomes a party to the Statute accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5. [394]

b. In the event that a situation is referred to the court by a state party or is investigated by the prosecutor *proprio motu,* the Court shall exercise jurisdiction over the crimes committed on the territory of the state party or the crimes committed by the nationals of a state party. [395]

c. A declaration can be lodged by a state that is not party to the Statue accepting the jurisdiction of the Court in a particular situation, following which, the state is accepted to cooperate with the Court.

The Republic of Iraq (Iraq) and The Syrian Arab Republic (Syria), are not parties to the Statute. Therefore, it is evident that the court cannot exercise jurisdiction over the said nations under Article 12(1) and Article 12(2) owing to the fact that the two nations are not parties to the Statute.

[393] Rome Statute of the International Criminal Court art. 12, Jul. 17, 1998, U.N.T.S 2187.
[394] *Id.*, Article 12(1).
[395] See supra note.1, Article 12(3).

Therefore, the precondition to the exercise of jurisdiction by the Court is contingent on Iraq and Syria lodging a declaration under Article 12(3), accepting the jurisdiction of the Court. However, owing to the political situations in the two nations, obtaining a declaration under Article 12(3) seems improbable. In the words of the ICC's prosecutor Fatou Bensouda, '*the prospects of my office investigating those most responsible, within the leadership (with reference to the ISIS) appear limited.*' [396]

In light of the limitations placed by Article 12, on the exercise of jurisdiction by the ISIS, there remains only one available avenue for the Court to exercise its jurisdiction.

### 1.2 Exercise of Jurisdiction

The exercise of jurisdiction by the Court is elaborated upon in Article 13 of the Statute. Article 13 enumerates three ways in which the jurisdiction of the Court can be triggered:

a. In the event that a crime occurs in the territory of stateparty or by a national of a stateparty, the situation can be referred by a state party to the Office of the Prosecutor (OTP) for opening an investigation.[397]

b. The prosecutor can initiate an investigation in respect of any crime that is committed in the territory of a state party or by a national of state party.[398]

c. A situation in which a crime within the jurisdiction of the Court has been committed can be referred to the OTP by the Security Council (SC) acting under Chapter VII of the Charter of the United Nations.[399]

[396] The Guardian, *The ICC has no jurisdiction to prosecute Isis despite 'crimes of unspeakable cruelty,* https://www.theguardian.com/law/2015/apr/08/icc-no-jurisdiction-prosecute-isis-despite-crimes-unspeakable-cruelty (last updated Apr 08, 2015).
[397] See supra note 1, Article 13(a).
[398] See supra note 1, Article 13(c).
[399] See supra note 1, Article 12(b).

The distinction between the triggering of jurisdiction as under Article 13(a), 13(c) and 13(b) is that under Article 13(b), the SC is not bound by the territorial and personal jurisdiction limitations laid down by the Statute. In other words, the SC can refer a situation to the OTP regardless of the fact whether or not a state is party to the Statute or not.

Under the relevant circumstances where Iraq and Syria are both non party states to the Statute, the only available avenue to the OTP for initiating an investigation is a SC referral under Article 13(b). Jurisdiction under Article 13(c) of the Statute was triggered for the first time in the situation in Darfur, Sudan. [400] In the particular case, the SC determined that 'the situation in Sudan continues to constitute a threat to international peace and security'.[401] Pursuant to this referral, an investigation was opened in June 2005 and Sudan's President Omar Al Bashir was charged by the ICC for the crime of genocide. However, neither of the warrants of arrest issued against him were enforced.

Triggering the jurisdiction of the Court under Article 13(c) requires that the SC must be 'acting under Chapter VII of the Charter of the United Nations.'[402] Chapter VII of the Charter of the United Nations refers to actions to be taken with respect to threats of peace, breaches of peace and acts of aggression and enables the SC to take both military and non-military action towards maintaining peace and preventing acts of aggression.

With respect to the situation of the ISIS, as per the United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCR), it has been reported that from 1 May to 31 October 2015, at least 55,047 civilians

[400] International Criminal Court, *Situations under Investigation,* https://www.icc-cpi.int/pages/situations.aspx (last viewed Oct 10, 2016).
[401] S.C Pres. Statement 2005/60 (Feb.1, 2005).
[402] William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute 298 (2010).

have suffered in Iraq, with 18,808 people killed and 36,245 wounded.[403] Owing to the fact that there persists a civil war in Syria, obscurities arise regarding the total number of civilians killed by the ISIL, but it is estimated to be around 1366 for the year 2015.[404]

Further, an estimated 1,200 people outside Iraq and Syria have been killed in attacks inspired or coordinated by the ISIL.[405] The ISIS has been involved in terrorist attacks around the globe in the USA, France, Bangladesh, Egypt, Malaysia, Belgium, Turkey and many more nations.[406]

In light of these aforementioned atrocities, it is evident that the SC's mandate under Chapter VII is called upon to act in accordance with the Charter and ensure that the existing threat to world peace and security is resolved at the earliest. A resolution passed by the SC to open investigation in the nations of Iraq and Syria is certainly under the mandate of the SC under Chapter VII.

### 1.3 Reasonable Basis to Proceed

For a situation to be investigated by the OTP, it is essential that there is a reasonable basis to proceed with the investigation of the situation.[407] The standard of the reasonable basis to proceed is a pre-requisite for SC and state parties referrals too.[408]

The 'reasonable basis to proceed' test is the lowest evidentiary standard provided for in the Statute. The conclusion reached by the prosecutor is not needed to be conclusive or comprehensive at the stage of authorisation of investigation.[409] The requirement is limited to

[403] United Nations Assistance Mission for Iraq – Human Rights Office http://www.ohchr.org/Documents/Countries/IQ/UNAMIReport1May31October2015.pdf (last viewed Oct. 10 2016).
[404] I am Syria, *Death Count in Syria,* http://www.iamsyria.org/death-tolls.html (last viewed Oct. 10 2016).
[405] New York Times, *How many people have been killed in ISIS Attacks around the world,* http://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world.html?_r=0 (last viewed Oct. 10 2016).
[406] *Id.*
[407] See supra note 1, Article 15(3)
[408] See supra note10 at 321.
[409] Situation in the Republic of Kenya, Case No.ICC-01/09 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya. (Mar 31, 2010).

arriving at a sensible or a reasonable justification that a crime falling within the jurisdiction of the court has been committed.[410]

For crimes falling within the jurisdiction of the court, there has to be a reasonable basis to conclude that any of the crimes enumerated in Article 5 to Article 8 of the Statute have been committed. Since this paper is limited to Crimes against Humanity, the authors shall subsequently establish that the acts of the ISIS fall within the ambit of Article 7 (Crimes against Humanity).

Further, it is required that the temporal jurisdiction of the Court must be satisfied. The Court is empowered to prosecute crimes committed after 1st July 2002 and post the date of ratification by a nation that becomes party to the Statute subsequent to 1st July 2002 (date of entry into force).[411]

The attacks of the ISIS against religious and ethnic groups, the politically motivated attacks, sexual and gender-based violence, recruitment and use of children and the human rights violations in ISIL controlled areas, as reported by United Nations High Commissioner for Human Rights[412] lead to the reasonable conclusion that there may be a possibility of Crimes against Humanity being committed by the ISIL. Further, Prosecutor Bensouda believes that there may be instances where the ISIL fighters have committed Crimes against Humanity.[413]

This view is backed up by the UNAMI report which states that *'the ISIL continues to commit systematic and widespread violence and abuses of international human rights law and humanitarian law. These acts may, in some instances amount to… crimes against humanity'* [414]

[410] *Id.*
[411] See supra note 1 Article 11.
[412] Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so called Islamic State in Iraq and the Levant and associated groups, A/HRC/28/18 (Mar. 13, 2015).
[413] See supra note 4.
[414] See supra note 11.

Further, the acts of the ISIL that are to be investigated are committed from a period of 2014 to 2016 and therefore the temporal jurisdiction requirements are fulfilled.

### 1.4 Synopsis on jurisdiction

In light of the aforementioned submissions, the authors conclude, with respect to jurisdiction that:

a. In the event that Iraq and Syria are to become parties to the Statute or submit a declaration under Article 12(3), accepting the jurisdiction of the Court, the Prosecutor can exercise territorial and personal jurisdiction over the ISIL fighters and open an investigation against them.

b. However, if the nations in question do not become state parties or submit the requisite declaration, the SC, acting under Chapter VII can refer the situation to the Court, which nullifies the territorial and personal jurisdiction requirement that limit the OTP.

c. In the event that the SC is to authorise such an investigation, there is a reasonable basis to proceed with an investigation in light of the facts at hand which can culminate into a successful prosecution.

## 2. CRIMES AGAINST HUMANITY

### 2.1 Brief Introduction

The international crime of Crimes against Humanity is one whose development in customary international law has not been orderly. This crime first received recognition in the Nuremberg Charter in 1945. Since then, the crime has been enlisted as an international crime in the Statute

of the International Criminal Tribunal for the Former Yugoslavia[415], the Statute of the International Tribunal for Rwanda[416] and the Rome Statute of the International Criminal Court.[417]

The inclusion of Crimes against Humanity as an international crime has been viewed as a successful implementation of human rights law into international criminal law.[418]

Article 7 of the Statute holds special significance as it was the result of multilateral negotiations between 160 countries. As a consequence, Article 7 elaborates in detail upon acts that fall under the ambit of Crimes against Humanity. Further, the definitions provided are of a more inclusive nature, owing to the following positive developments in the law, which were earlier regarded as disputed areas in the application of Crimes against Humanity:

a. Article 7 conclusively lays down that there is no nexus between an armed conflict and the commission of Crimes against Humanity. In other words, Crimes against Humanity can be committed in both times of conflict as well as peace time.[419] This was a requirement by the Statute of the International Criminal Tribunal for the Former Yugoslavia

b. Article 7 eliminates the requirement for a discriminatory intent for acts to constitute Crimes against Humanity.[420] The Statute of the International Tribunal

[415] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, May. 25, 1993, U.N.T.S 280. *.Article 5, ICTY Statute.*
[416] Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, U.N.T.S 1717. *.Article 3, ICTR Statute.*
[417] See supra note 1, Article 7.
[418] See supra note 10.
[419] See supra note 10.
[420] Darryl Robinson, Defining "Crimes Against Humanity" at the Rome Conference, The American Journal of International Law, 5 (1999).

for Rwanda required that acts be committed pursuant to a discriminatory intent to be construed as Crimes against Humanity.[421]

c. Article 7 also makes it clear that Crimes against Humanity can be committed by both state and Non-state actors. However, there are certain criteria that non-state organisations must fulfil in order to stand for prosecution for Crimes against Humanity, which will be subsequently discussed in the paper.

**2.2 Contextual elements**

Article 7, along with the Elements of Crime, enumerates, in an exhaustive list what acts constitute Crimes against Humanity. However, it is not merely the commission of a said crime, for example Murder, which is included in Article 7(1) (a) of the Statute, which amounts to Crimes against Humanity. For such acts to escalate to the level of an international crime under the Statute, they are to be committed in a certain context. The elements of this context (labelled as the contextual elements) are contained in the chapeau of Article 7 and are included after each crime as explained in the Elements of Crime.[422] The contextual elements are as follows:

a. The acts must be committed as part of a widespread or systematic attack.

b. The attack must be directed against any civilian population.

c. The perpetrators must have knowledge of the attack.

The term 'Attack directed against any civilian population' has received further explanation in Article 7(2) (a), which for better understanding will be included as a separate contextual element in this paper.

[421] Id.

[422] International Criminal Court https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (last viewed: Oct 10 2016).

d. The acts mentioned in Article 7 (1) (a) to Article 7 (1) (k) must be committed pursuant to or in furtherance of a state or organisational policy. The acts will constitute an attack provided the course of conduct is such that there is a multiple commission of the acts enumerated in Article 7(1).[423]

It is imperative to remember that this paper discusses the authorisation of an investigation into the acts of the ISIS. At this stage, the matter will be termed as a 'situation' and not a 'case'. Therefore, there are no identified perpetrators. In light of this, the contextual element of knowledge cannot be discussed. However, the nature and acts of ISIS when paralleled with the contextual elements and their established tests clearly demonstrate that there is a reasonable basis to proceed with an investigation, which shall be further discussed in the paper.

**2.3 <u>Widespread or Systematic Attack</u>**

Due emphasis is laid on the fact that the requirement of the attack being widespread or systematic is a disjunctive one. Therefore, it is sufficient to establish that an attack was either widespread or systematic in nature. The rationale behind this provision was to *'exclude isolated or random acts from the notion of Crimes against Humanity.'*[424]

The term widespread concerns itself with the magnitude of the attack. It has been construed as the 'the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.'[425]

The term 'systematic', refers to the 'organised nature of the acts of violence and the improbability of their random occurrence.'[426] For satisfying the test of 'systematic', the

[423] See supra note 1, Article 7(2)(a).
[424] See supra note 17.
[425] See supra note 17.
[426] See supra note 17.

International Tribunal for Rwanda, in the case of *Prosecutor v Akayesu*, laid down a four point test, which is as follows:

a. Being thoroughly organised.

b. Following a regular patter.

c. On the basis of a common policy.

d. Involving substantial public or private resources.[427]

Another test was laid down by the International Criminal Tribunal for the Former Yugoslavia, in the case of *Prosecutor v Blaskic,* which is as follows:

a. A political plan or objective.

b. Following a regular pattern.

c. Large-scale or continuous commission of crimes.

d. Implication of high-level political and/or military authority.[428]

In light of the ICC recognising that Crimes against Humanity can be committed by both state and Non-state actors, the implication of state political authority or military authority is now irrelevant.

It is important to understand that the entire attack, that is the conduct of the organisation in question must be widespread or systematic in nature and not the individual acts.

In light of the aforementioned legal provision and tests, the authors submit that:

a. As stated earlier, the ISIS has been involved in acts such as murder, rape, extermination (to be determined at later stage should investigation be authorised) in the nations of Iraq

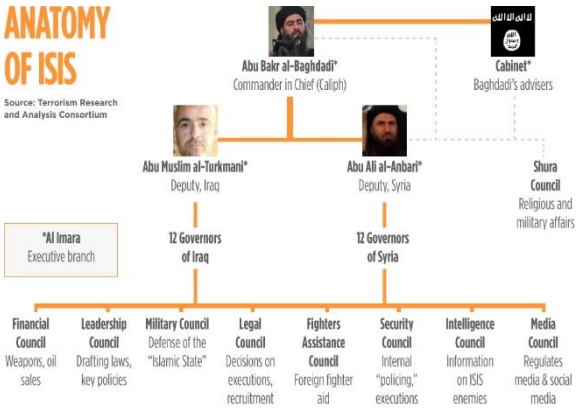
[427] See supra note 17.
[428] See supra note 17.

and Syria and across the globe. The ISIS has been responsible for the death of – people in Iraq, - people in Syria and near 1,200 around the globe. Further, the acts have been committed frequently in a period of two years.[429] In these circumstances, it is evident that the attack amounts to a widespread attack as it is massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.

b. In the event that this submission is not considered to be a reasonable basis to proceed, the ISIS carries out pursuant to its policy of establishing a caliphate in the Middle East with Abu Bakr al-Baghdadi as the caliph. Further, the ISIS is funded by proceeds of the territories occupied by it, from alleged private donations from Gulf nations and other sources such as kidnapping for ransom. Also, the ISIS is an extremely well organised entity with a well-established chain of command. The acts carried out by the ISIS are pursuant to top level planning and are not random or isolated acts. The military council, headed by Abu Ahmad al Alwawani is comprised of three members who plan the field operations and supervise the military commanders.[430] In light of these submissions, it is evident that the ISIS attacks are indeed systematic as they are carried out on the basis of a common policy, they are carried out in an extremely organised manner, with private resources, following a common pattern.

The authors submit that from the activities of the ISIS, there is reasonable basis to proceed with an investigation on the ground that there is either a widespread or a systematic attack.

[429] See supra note 13.
[430] Jerusalem Center for Public Affairs, *The Structure of the Islamic State (ISIS),* http://jcpa.org/structure-of-the-islamic-state/ (last viewed: Oct 10, 2016).




*Organisational structure of ISIS*

## 2.4 Attack directed against any civilian population

The term attack directed against any civilian population receives full explanation in the Elements of Crime. In addition to being a course of conduct involving multiple commissions of the acts, an attack is also required to be committed pursuant to a state or an organisational policy which actively promotes or encourages such an attack against a civilian population.[431] An attack is not limited to a military attack. It is a broader term which encompasses 'a campaign or operation carried out against a civilian population'[432]

The term civilian is to be interpreted in light of the definition entailed in the Additional Protocol I to the Geneva Conventions of 1949, which is accepted as Customary International Law as a population predominantly comprised of those people who are not actively engaged in hostilities.[433] Such a view was also upheld by the Court in the case of *Jean-Pierre Bemba Gombo.*[434] The civilians must be the primary object of the attack.[435]

[431] See supra note 30.
[432] See supra note 17.
[433] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international Armed Conflicts (Protocol 1) art. 50(1), Dec. 17, 1978, 1125 UNTS 3.
[434] See supra note 17.
[435] See supra note 17.

However, the term population does not entail that the entire population in a given geographical area was attacked. It suffices to demonstrate that enough individuals were harmed as a result of the attack to satisfy the Court that the attack was directed against a civilian population and not a 'limited number of people.'[436]

In light of the aforementioned legal provisions, the authors submit that the acts of the ISIS amount to 'attacks directed against a civilian population'. To illustrate the same, the authors rely upon the ISIS atrocities committed against the Yazidis community. A United Nations-mandated human rights inquiry report has confirmed that the acts of the ISIS against the Yazidis amount to Crimes against Humanity.[437]

The ISIS has been involved in subjecting the community to killings, sexual slavery, enslavement and other such inhuman acts with a view of causing sever bodily and mental harm to people belonging to the Yazidi community. Further, the forcible transfer of the Yazidis from the Sinjar region is another illustration of the brutality of the ISIS against the community. The ISIS is alleged to have separated boys older than the age of 12 from women and kill them in the event that the refuse to convert. Women and children have been sold in slave markets and are often involved in sexual slavery too. The report also confirms that the ISIS undertakes operations to ensure that such conditions of life subsist which prevent the birth of Yazidi children.

The authors submit, that after assessing the atrocities conducted against the Yazidis, it can be conclusively stated that,

[436] See supra note 17 Kenya.
[437] UN News Centre, *UN human rights panel concludes ISIL is committing genocide against Yazidis,* http://www.un.org/apps/news/story.asp?NewsID=54247#.V7TFtSh942w (last viewed: Oct 10, 2016).

a. There is a multiplicity of acts which constitute Crimes against Humanity (such as murder, enslavement, rape, forcible transfer of population, sexual slavery) which are carried out against the Yazidi community.

b. The people attacked contain men, women and children who are civilians and are not taking part in any active hostilities. The attacks are specifically targeted against the Yazidi community and are of such a nature that conclusively provide evidence for the fact that the attack is not against a 'randomly selected number of individuals'. The Yazidi community is the primary object of the attack.

c. Lastly, it is submitted that the attack is carried out pursuant to an organisational policy of the ISIS which shall be further elaborated upon in the paper in the next section.

Therefore, it is evident that the acts of the ISIS, in the scenario of the Yazidis constitute an attack directed against any civilian population. There is a reasonable basis to proceed with an investigation to prosecute the ISIS for such crimes.

(Please note that the atrocities against the Yazidi community has been used as an illustration and a foundational ground to establish a reasonable basis to proceed with investigation. The scope of the paper or the proposed investigation is not limited to the atrocities committed against the Yazidis.)

### 2.5 State or Organisational Policy

Article 7 (2) (a) states that the attack that is alleged to constitute Crimes against Humanity is to be committed in pursuance of or in furtherance of a state or an organisational policy to

commit such an attack.[438] The Court has held that the term 'state' is self-explanatory,[439] however, the term 'organisation', in light of Article 7 has been debated widely.

While Professor M. Cherif Bassiouni, the chair of the Rome Conference drafting committee is of the opinion the term 'organisation' excludes state-like actors, who exercise control over territory and carry out acts constituting crimes over the population residing in these areas[440], Professor Schabas opines that the term 'organisation' is inclusive of entities that act like state, although not formally recognised as such.[441] The authors submit that the approach taken by Professor Schabas is in the spirit of the Statute. This opinion is backed by the Pre-Trial Chamber II which said that had the drafters intended to exclude non-state actors from the ambit of 'organisation', the term would not have been included in Article 7(2) (a).[442]

To establish that the ISIS fall within the ambit of the term 'organisation' under Article 7, the authors shall rely upon three different tests, which are as follows:

a. Test laid down by the Court in the cases of Katanga and Bemba.
b. Test laid down by the majority judgment in the Kenya Authorisation Investigation.
c. Test laid down by Judge Kaul in his dissenting opinion in the Kenya Authorisation Investigation.

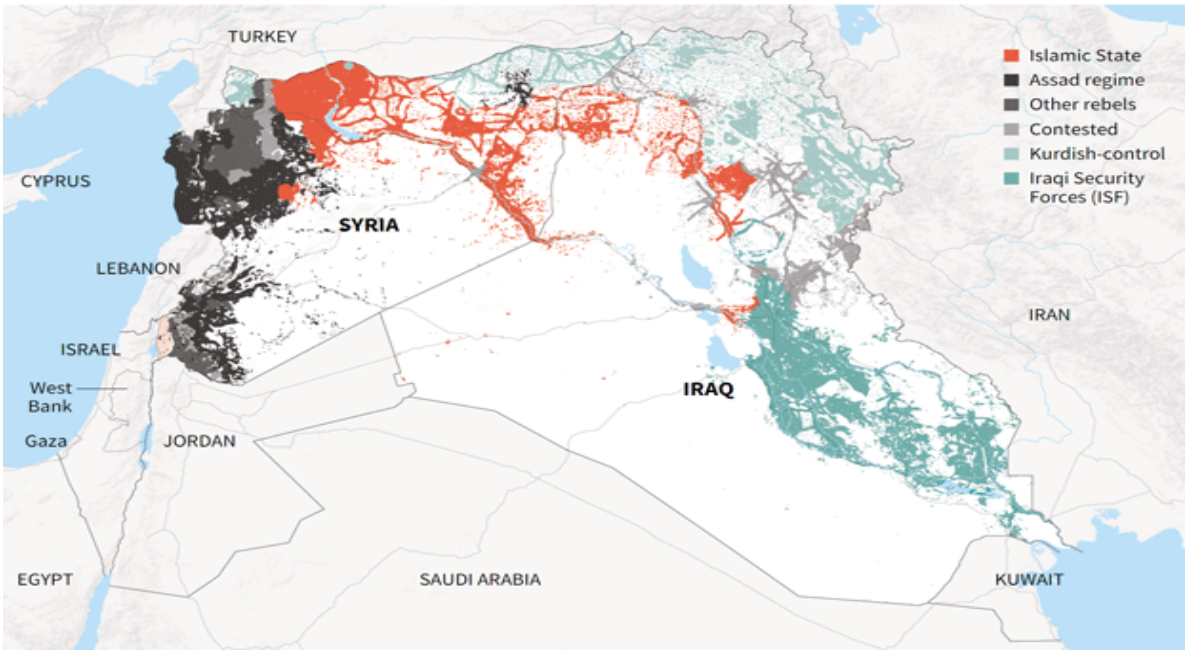
2.5.1 Test laid down by the Court in the cases of Katanga and Bemba:

The tests laid down in the Katanga and Bemba judgement require that:

[438] See supra note 1 Article 7(2) (a).
[439] See supra note 17.
[440] See supra note 10.
[441] See supra note 10.
[442] See supra note 17.

a. The policy can be made by either a group of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population.[443]

b. Such a policy does not need to be formalised, that is, there is no necessity for such policy to be explicitly stated. [444]




*ISIS Controlled Area*

The aforementioned map shows the area which the ISIS has been controlling and governing. The ISIS has been reported to collect taxes in Mosul on a variety of commercial activities.[445] In Raqqa, the ISIS has imposed the same tax the Prophet impose on non-Muslims for protection. Further, the ISIS has

[443] See supra note 17 Kenya.
[444] See supra note 17 Kenya.
[445]Forbes, *How ISIS is Using Taxes to Build a Terrorist State,* http://www.forbes.com/sites/taxanalysts/2014/08/18/how-isis-is-using-taxes-to-build-a-terrorist-state/#460c135b7580 (last viewed on: Oct. 10, 2016).

also been reported to be using Raqqa's Central Bank as the city's tax authority.[446] Along with the state function of collecting taxes, the ISIS is also running its own Sharia courts, which, are imposing inhumane punishments.[447] In addition, the ISIS has diversified and created divisions amongst itself to govern the aspects of both the civil and military functions of the state. The ISIS is divided into:

(i) The Military Council.

(ii) The Shura (Consultant) Council

(iii) The Judicial Authority

(iv) The Defence, Security and Intelligence Council

(v) The Islamic State Institution for Public Information.[448]

Bearing in mind the functions administrative functions exercised by the ISIS, which indicate towards a Governmental structure being established, that is exercising sovereign functions of a state, the ISIS does qualify as entity governing a specified territory. As demonstrated earlier (refer 2.3 and 2.4), the ISIS is indeed capable of committing widespread and systematic attacks against a civilian population and has in fact been doing so for a period of two years.

Further, the ISIS has expressly declared that their goal is to form an Islamic Caliphate in the Middle East with Abu Bakr al-Baghdadi as the Caliph.[449] This satisfies the requirement that the attack must be committed in pursuance to a particular policy.

[446] Id.
[447] Daily Star, *ISIS Running shariah court in Arsal in bid to win hearts and minds,* http://www.dailystar.com.lb/News/Lebanon-News/2015/Feb-07/286716-isis-running-shariah-court-in-arsal-in-bid-to-win-hearts-and-minds.ashx (last viewed on: Oct. 10, 2016).
[448] See supra note 38.
[449] Mail Online, *The ISIS map of the militant world,* http://www.dailymail.co.uk/news/article-2674736/ISIS-militants-declare-formation-caliphate-Syria-Iraq-demand-Muslims-world-swear-allegiance.html (last viewed: Oct 10, 2016).


*Caliphate as planned by ISIS*

2.5.2 Test laid down by the majority judgment in the Kenya Authorisation Investigation.

The majority judgment in the Kenya Investigation Authorisation laid down that the determination of a group as an organisation under Article 7 of the Statute must be done on a case-by-case basis. The benchmark for qualifying as an organisation under Article 7 is to be a group that has the capability to infringe basic human values. For this determination, the majority laid down the following tests which are non-exhaustive and merely indicative:

(i) Whether the group is under a responsible command, or has an established hierarchy.

(ii) Whether the group possesses the means to carry out a widespread or systematic attack against a civilian population.

(iii) Whether the group exercises control over part of the territory of a State.

(iv) Whether the group has criminal activities against the civilian population as a primary purpose.

(v) Whether, the group articulates expressly or implicitly, an intention to attack a civilian population.[450]

As has been established in the paper earlier, ISIS indeed has an established hierarchy (refer figure 1). Further, it has been duly established that ISIS can and has committed widespread and systematic attacks against a civilian population (refer 2.3 and 2.4). Further, (refer 2.5.1), it is evident that ISIS controls and governs certain parts of the territories of Iraq and Syria (refer figure 2). Lastly, the authors submit (as established in 2.4) that ISIS has indeed carried out attacks with a civilian population as its primary target and has expressly articulated such a policy. The authors therefore submit that the test laid down by the majority in the Kenya Investigation Authorisation to determine the status of a group as an organisation under Article 7 is also satisfied.

2.5.3 Test laid down by Judge Kaul in his dissenting opinion in the Kenya Authorisation Investigation.

Judge Kaul, dissenting from the majority in the Kenya Authorisation Investigation laid down that for a group to qualify as an organisation under Article 7 of the Statute, although the constitutive elements of statehood need be established, the group in question must partake some characteristics of a state. [451] Judge Kaul further lays down certain tests that determine the state or quasi-state abilities of a group which are as follows:

(i) A collectivity of persons;

(ii) Which was established for a common purpose;

[450] See supra note 17.
[451] See supra note 17.

(iii) Over a prolonged period of time;

(iv) Which is under responsible command or adopted a certain degree of hierarchical structure, including some kind of policy level;

(v) With the capacity to impose the policy on its members and to sanction them; and

(vi) Which has the capacity and means available to attack any civilian population on a large scale.

The authors submit that the requirements for a common purpose a hierarchical structure, a policy and the means available to commit attacks on civilian populations have been conclusively established in this paper. The ISIS is reported to be a body that is 80,000 – 100,000 member strong. The sheer volume of persons qualify the group to be a 'collectivity of persons'. The ISIS rose to power in 2013 with the fall of Raqqa and has continued its operations to date, which spans over a period of 3 years. Such a lengthy period of time certainly falls under the ambit of a prolonged period in time, bearing in mind that the atrocities committed have been termed as Crimes against Humanity by the Prosecutor and the United Nations. Further, the ISIS is known to be harsh on its member and sanction them for transgressions of the established norms. For instance, five ISIS militants who tried to flee Fallujah in the midst of a military operation had their tongues cut out.[452] In another instance, the ISIS was reported to boil its fleeing fighters.[453] Thus, it is observed that the ISIS holds the

[452] Mail Online, *Five ISIS fighters who tried to flee Fallujah have their TONGUES cut off in public,* http://www.dailymail.co.uk/news/article-3609039/Five-ISIS-fighters-tried-flee-Fallujah-TONGUES-cut-public.html (last viewed: Oct. 10, 2016).
[453] Fox News, *ISIS reportedly boils its fleeing fighters alive in Fallujah,* http://www.foxnews.com/world/2016/07/06/isis-reportedly-boils-its-fleeing-fighters-alive-in-fallujah.html (last viewed on: Oct. 10, 2016).

power to sanction its members for breaches of policy and thereby imposes the ideology on its members.

In light of the aforementioned submissions, it is evident that the ISIS fulfils the third test of determining whether or not a group falls within the ambit of organisation under Article 7 of the Statute.

### 2.6 Synopsis on Crimes against Humanity

In light of the aforementioned submissions, the authors conclude that, with respect to Crimes against Humanity:

a. The acts of ISIS constitute an attack that is of both a widespread and a systematic nature. Although the requirement is only disjunctive, the operations of ISIS are such that they fulfil both the criteria.

b. The attack is directed against the civilian population, which has been demonstrated by taking the example of Yazidi community.

c. ISIS falls within the ambit of organisation under Article 7 of the Statute as it satisfies 3 different tests to establish the same.

d. Since all the contextual elements which are to be fulfilled at the proposed stage by the authors (authorisation to investigate) there is a reasonable basis to proceed with investigating the territories of Iraq and Syria for Crimes against Humanity being committed by the ISIL.

## 3. CONCLUSION

In conclusion, the authors submit that the only hindrance to the ICC prosecuting the ISIS is the exercise of jurisdiction. Since the possibility of obtaining declarations accepting the jurisdiction of the court under Article 12(3) do not see to be probable in the near future, the onus falls on the world community, especially the Security Council to act under Chapter VII of the Charter of the United Nations and bring an end to the ongoing threat to world peace by referring the situation to the Court under Article 13(b).

As it has been established in the paper that once the jurisdictional issue is resolved, it is certain that the ISIS can be prosecuted for the international crime of Crimes against Humanity under Article 7 of the Rome Statute owing to the magnitude and the gravity of the heinous crimes committed by the organisation.

Prosecution of the ISIS in the ICC is a viable solution in light of the fact that the ISIS continues to terrorise the globe and expand its operations from a terrorist organisation to a functioning Government and therefore, this reign of terror must be put to an end.

## 14. SURROGACY (REGULATION) BILL, 2016: AN ANALYSIS*

Author(s): Ayush Srivastava[454] and Adithyan Sreekumar[455]

**ABSTRACT**

*In this paper, the authors have mainly analyzed The Surrogacy (Regulation) Bill, 2016 and the current scenario of the surrogacy industry in India. Surrogacy industry in India is a small but a fast growing industry with a lot of peoples' livelihood being dependent upon it. With the enactment of The Surrogacy (Regulation) Bill, 2016, the government has tried to sweep away the surrogacy industry in India entirely. Such an act by the government can lead to a lot of problems such as a creation of an underground industry which is explained in detail in the paper. Through this paper the authors have also tried to criticize The Surrogacy (Regulation) Bill, 2016 for a lot of its flaws. The bill seems to be incomplete and allows only infertile couples who have been married for 5 years to opt for surrogacy. As explained in the paper, such a move by the legislators seem to take away The Constitutional Rights of other categories of people, who wish to opt for surrogacy. The paper, in this regard, discusses in detail, the judgments of various High Courts of the country. The Surrogacy (Regulation) Bill, 2016 has also reflected the Indian "culture" and "ethos", by opting out certain categories of people, like homosexual couples and couples engaged in live-in relationships, out of the scope of surrogacy. The authors have tried to analyze the reasoning of the government behind such a move and have given suitable recommendations for it in detail in the paper. The Surrogacy (Regulation) Bill, 2016 also fails to take into account, the basic human right of "consent" of the surrogate mother and other groups opting for surrogacy and the paper looks into the legal aspects of the same. The authors have also tried to decode the logic behind the "altruistic surrogacy" which was given by the government. Such a move by the government restricts the option of getting a surrogate mother just to the close relatives of the couples. This was also one of the heavily criticized aspects of the bill which is also looked into, in the paper. Through*

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*this paper, the authors have closely analyzed and understood the above-mentioned problems along with other problems of the bill and have provided solutions for the same.*

## INTRODUCTION

Recently, the Union Cabinet gave its approval, for the introduction of The Surrogacy (Regulation) Bill, 2016. The bill will regulate surrogacy in India, by establishing National Surrogacy Board at the central level and State Surrogacy Boards and Appropriate Authorities in the State and Union Territories.[456] The legislation aims to ensure effective regulation of surrogacy, prohibit commercial surrogacy and allow ethical surrogacy to the needy infertile couples.[457]

The passing of The Surrogacy (Regulation) Bill, 2016 has been a subject matter of a variety of debates in the nation, as the bill has turned out to be a rollercoaster ride in itself. The bill on one hand with its objectives of doing away with commercial surrogacy has stated its clear intention of doing so by banning commercial surrogacy in the country, but on the other hand has not failed to look at the rights and aspirations of the countless number of people which will be affected by such a ban. The bill has failed to look into the innumerable aspects pertaining to surrogacy in general, specifically to that of commercial surrogacy. The bill will have a very significant impact on the socio-economic status of millions of people. This socio-economic aspect is also discussed in this paper by looking at the various aspects of The Surrogacy (Regulation) Bill, 2016.

The bill allows only specific category of people to opt for surrogacy, i.e., couples who have been married for 5 years and who do not have a child, have raised many eyebrows. Such a move by the government has led to the exclusion of homosexuals, couples engaged in live-in relationships, fertile

[456] *Cabinet approves introduction of the "Surrogacy (Regulation) Bill, 2016"*, (August 24, 2016), http://www.pmindia.gov.in/en/news_updates/cabinet-approves-introduction-of-the-surrogacy-regulation-bill-2016/
[457] Id

couples etc to opt for surrogacy. The government's stance, of not allowing such class of people to opt for surrogacy, reeks of outdated values in the modern times and will only push the efforts to regulate surrogacy in India, backwards. Moreover, such a blanket ban on commercial surrogacy can lead to various other problems as well. These issues will be also addressed in this paper.

**SURROGACY (REGULATION) BILL, 2016**

The most important, visible and stark feature of this bill, is that the bill only allows surrogacy for "altruistic" purposes. It means that the surrogate mother should be a close relative of the couple, one who is sympathetic to the situation. Altruism in simple words, means selflessness. The usage of the term "Altruism" in the Surrogacy (Regulation) Bill, 2016, has led to a massive controversy in the country. The bill permits altruistic surrogacy for infertile couples. The bill however limits the scope of altruistic surrogacy only to close relatives of the couples who can be surrogates.[458] Such a move by the legislators heavily restricts the scope of couples who are looking to proceed through Surrogacy. In countries with well developed laws pertaining to surrogacy, altruism is not related just to close relatives. For instance, in Australia anyone can opt to be a surrogate mother without asking for financial support.[459] This permits the couples to look for women, who are willing to be surrogates outside their family. The legislators through the bill have also heavily restricted the scope of surrogate mothers, by permitting such surrogate mothers to be surrogates only once. What exactly amounts to a surrogate mother may later be defined in a better way in the rules.

The authors in this paper have tried to look into such a radical idea behind this move of permitting only altruistic surrogacy. The question which this bill has avoided is with regard to the consent of the

[458] *Cabinet clears the surrogacy bill*, THE HINDU, (August 26, 2016), http://www.thehindu.com/news/national/cabinet-clears-surrogacy-bill/article9025848.ece
[459] *Regulating surrogacy in Australia*, HUMAN RIGHTS LAW CENTRE, (17 April 2015), http://hrlc.org.au/regulating-surrogacy-in-australia/

women opting to be surrogate mothers. The idea of consent has been forgotten by the legislators, thus forgetting/ignoring the basic human rights.. The explanation by the government for this is that it is clear trying to prevent the abuse of women who are surrogate mothers[460]. The logic for this seems to be derived by the same logic behind the prostitution and sex-work industry. What one needs to know is that prostitution, is a type of work, where a woman is completely giving her body to fulfill another man's needs, which is not the case here. Again the question of consent comes into being at the same juncture. Although, it may be interesting to note that in some countries like the UK, only 'blood relatives' can become surrogate mothers for altruistic purposes. However, the proposed bill expands this definition to include 'close relatives' also.

The surrogacy industry in India is not a small one, rather one which is rapidly growing, and such a radical step by the government raises a big question of livelihood for many.[461] A complete crushing of the surrogacy industry does not help anyone but increases the possibility of there arising an underground surrogate industry which will possess an even more danger to the society. This is added to the fact that egg donations have been banned by the Surrogacy (Regulation) Bill, 2016 which can further the development of such an underground industry.[462]

## OUR TRADITION, OUR LIMITATION

The bill has also miserably failed in trying to address other issues that mainly being, restricting the scope of who can opt for surrogacy. The category of people who are not permitted to opt for surrogacy

[460] Prabha Raghavan & Divya Rajagopal, *Double whammy: What the surrogacy bill brings in India*, THE ECONOMIC TIMES, http://economictimes.indiatimes.com/news/economy/policy/double-whammy-what-the-surrogacy-bill-brings-for-india/articleshow/53987298.cms
[461] Nita Bhalla & Mansi Thapliyal, *Foreigners are flocking to India to rent wombs and grow surrogate babies*, BUSSINESS INSIDER, http://www.businessinsider.com/india-surrogate-mother-industry-2013-9?IR=T
[462] Malavika Ravi, *A critical analysis of the Surrogacy Regulation Bill 2016*, FEMINISM IN INDIA.COM, http://feminisminindia.com/2016/08/31/critical-analysis-surrogacy-regulation-bill-2016/ [hereinafter "**Malvika**"]

include single parents, foreigners, homosexuals, Non-resident Indians, couples who already have a child, fertile couples and couples in live-in relationships.

Such a ban on these many categories of people in the world's most populous democracy just shows how unfair it can be. The question as to why homosexuals cannot opt for surrogacy was swatted by the current foreign minister who repliedstating that, homosexuality is against "Indian ethos".[463] Such a comment by one of the policy makers at the highest level in the country shows the mindset of the legislators drafting such a bill. Such a mindset is not new in The Indian Society. Section 377 of The Indian Penal Code prohibits "unnatural" sexual intercourse between two people of the same gender.[464] Therefore the exclusion of homosexuals from the scope of surrogacy is not surprising for a nation which criminalizes homosexuality in the 21st century.

Another category of people, which have been unfairly excluded is couples who already have a children. The bill has again violated the basic right of people to decide how many children one can have, by only allowing couples who have been married for 5 years and not having a child to opt for surrogacy. The same reasoning applies to fertile couples. The loopholes in the bill have led to the right family planning of fertile couples being rejected. As stated earlier, such a blanket ban can only led to problems of development of an underground system which will provide for all the excluded categories of people to opt for surrogacy.

Another reasoning given in the bill, that the authors have failed to understand is why there has been a ban on Non Resident Indians (NRI) opting for surrogacy. NRIs often have been permitted to adopt

[463] *Cabinet approves bill to prohibit commercial surrogacy, Sushma Swaraj slams celebrities for misusing practice*, THE INDIAN EXPRESS, http://indianexpress.com/article/india/india-news-india/surrogacy-bill-2016-sushma-swaraj-slams-celebrities-for-misusing-practice/
[464] The Indian Penal Code, Section 377, (1860)

and are on the same likes as a regular citizen as per a 2015 guideline.[465] Therefore the bill gives no rationale behind such a ban on NRIs opting for surrogacy. The similar exclusion of people in 'live-in' relationships, also brings about the same issue of Indian culture and ethos, by failing to recognize such couples as being legally competent to opt for surrogacy.[466]

However, the authors do appreciate how the bill has disallowed foreigners to opting for surrogacy within India. This was a much needed move, not only considering the surrogacy industry's current situation, but also the rights of the child who will be born after such a process is done. The rights of the child might not be recognized in other countries where there is either a ban on surrogacy in general or if there is a lack of clear legislation which identifies the rights of a child born to a surrogate mother outside that respective country. As seen in the famous case of *Baby Manji* where a Japanese couple, which split before the child was born, shows the dilemma in permitting foreigners to opt for surrogacy. In that case, the child was left stateless and was not taken in, by either of the parents and currently resides with its grandmother. In another famous case of *Jan Balaz*, a German court refused to grant citizenship to the newborn child conceived through surrogacy, shows the vulnerable state of the child which will be given to the foreign parents. This move also protects the countless "baby farms" which have grown in the country, especially in Gujarat, which is the hub of surrogacy in India. In such farms, illiterate women who desperately require money are gathered to be surrogates for possible parents who are unable to conceive. Majority of India's surrogacy industry thrives on foreign couples for its continued existence.

Moreover, such a blanket ban on most of the aspects of commercial surrogacy raises a major question as to the manifold increase in corruption. This question of corruption will undoubtedly arise, especially

[465] *Guidelines Governing Adoption of Children, 2015*, http://cara.nic.in/InnerContent.aspx?Id=163#Guidelines - 2015
[466] Malvika, Supra note 7

in a country like India where there is a possibility of people circumventing the system to achieve their objectives and will open further loopholes which should be corrected at a later point of time. Therefore, putting such a system in place will only cause more troubles for the administration and can lead to a parallel system running simultaneously.

## BILL ON THE TOUCHSTONE OF CONSTITUTIONALITY

A very interesting feature of the proposed Surrogacy Bill, is the fact that it describes surrogacy on a commercial basis. The Bill allows only "altruistic surrogacy" by a close relative and the woman should have already given birth to a child before. Although, the intention of the Government seems to prevent the exploitation of women (especially from the lower income groups) by prohibiting surrogacy on a commercial basis. Also, the fact that the woman should have already given birth to a child before seems to have been included to try and make the woman not emotionally attached to the child born.

But, such restriction of only a close relative being a surrogate mother may not be able to pass the test of constitutionality. Being a surrogate mother is a source of income to many women across our country and putting a complete restriction on commercial surrogacy may amount to violating their right to livelihood under Article 21 of The Constitution.

Surrogacy has been defined by the Supreme Court of India in the case of *Baby Manji*[467] as "*a method of reproduction, whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracting party.*"

The point worth remembering is, that every woman who wants to give birth to a child, is not capable of doing so due to certain medical conditions or there is a huge risk involved to her life, if she decides to give birth to a child. Also, many such women who are incapable of giving birth to a child may not

[467] Baby Manji Yamada v. Union of India, AIR 2009 SC 84

necessarily have a close relative who would agree to become a surrogate. In such a case, that woman may not be able to have a child of her own as per the provisions of this Bill. But, not being allowed to have a child of her own may amount to violation of The Constitution as right to life enshrined under Article 21 is not mere 'animal existence'[468] and includes all aspects which make it worth living.[469] Article 21 includes "the right to carry on such functions and activities as constitute the bare minimum expression of the human self."[470] Surely then, having a child of own can be read into Article 21 of The Constitution.

Further, some women, although capable of giving birth are at a risk of losing their lives or being subject to life-long medical complications. In such cases also, they have a right to have a child of their own and they also may not necessarily be able to find a close relative who would agree to be a surrogate. In fact, the Madhya Pradesh High Court has held that, "*It be remembered that the inability of women to survive pregnancy and child birth violates her fundamental rights as guaranteed under Article 21 of The Constitution of India. And it is the primary duty of the state to ensure that every woman survives pregnancy and child birth, for that, the State of Madhya Pradesh is under obligation to secure their life*." So, the government by not allowing commercial surrogacy may also be restricting the fundamental rights of such women who are not able to conceive or may develop some kind of medical complications, if they indeed decide to go ahead with the pregnancy.[471]

Further, the Bill allows only infertile couples, who have been married for at least five years, to avail the option of surrogacy. It is an antediluvian provision and reeks of the feudal mind-set of our policy makers. In fact, even if a woman is perfectly healthy and capable of giving birth to a child, why should

[468] P. Rathinam v. Union of India, (1994) 3 SCC 394
[469] Id
[470] Mohini Jain v. State of Karnataka AIR 1992 SC 1858
[471] Sandesh Bansal v. Union of India, W.P. 9061/2008

she be prohibited from availing the option of surrogacy? It is putting an unnecessary burden on her to conceive when she can opt for surrogacy. When such a woman can adopt a child, there is no reason why she should not be allowed to go for surrogacy. It is contradictory to the 'right of reproductive autonomy' as held by the Andhra Pradesh High Court.[472] Further, this gap of waiting for five years before being allowed to avail the option of surrogacy and the permissible age limits for

Also, as per the Bill, only a close relative can be a surrogate. There may be constant interactions, especially in close knit families, between the surrogate mother and the newly born child. This may lead to several tricky situations like the surrogate mother may develop emotional feelings for the new born child. But more importantly, there may be cases where the surrogate mother would want her identity not to be revealed. This may not always be possible considering the familial set-up in India. This would result in violation of her 'right to privacy' as envisaged by the Supreme Court in various cases like *Kharak Singh*.[473]

## CONCLUSION

As discussed earlier in this paper, it is clear that the blanket ban on commercial surrogacy will not lead to any benefit to anyone, considering the fact that various groups of people will be affected in different manners by such a blanket ban.

As discussed in the previous parts of this paper, one can understand how the usage of the term altruistic surrogacy can cause much chaos and problems in this country. The restriction of the scope of altruism also makes it next to impossible to have a surrogate child, if there are a lack of willing relatives for both the couples. The exclusion of multiple categories of people including homosexuals

[472] B.K. Parthsarathi v. Government of Andhra Pradesh, AIR 2000 AP 156
[473] Kharak Singh v. State of U.P., AIR 1963 SC 1295; PUCL v. Union of India, AIR 1997 SC 568

and fertile couples, as stated earlier have raised the question as to the progress of the mindset of the Indian law and policy makers especially with regard to homosexuality.

Moreover, as discussed above, various clauses of the proposed bill may not be able to survive the touchstone of The Constitution, as they may violate one's right to livelihood, right to reproductive autonomy, right to privacy etc.

Therefore, it can be conclusive to state that the bill lacks completion and requires dire update immediately. The inclusion of the, as of now excluded categories of people, with the exclusion of foreigners still being prevalent along with the widening of the meaning of the term "altruism" to include non-relatives will help the bill to take a better shape. Moreover, the most important question to be revisited by the law makers again is a question of rights and the question of livelihood of millions of people who depend upon surrogacy. The Surrogacy (Regulation) Bill, 2016, will leave millions without a livelihood. There should be a serious shift in stance of the lawmakers with this regard. Otherwise, as we have seen in many other areas there will be a development of an underground industry in the country with regard to surrogacy.

## 15. A DISCOURSE ON THE CASE OF AHMAD AL- FAQI AL- MAHDI BY INTERNATIONAL CRIMINAL COURT

Author(s): Shubhangi Bhargava[474]

**ABSTRACT**

*The destruction of heritage and cultural sites has become a common phenomenon in recent times. The blowing up of Buddha statues in Afghanistan and destruction of treasures by the jihadists in Iraq and Syria has shaken the world completely. In the wake of such global terrorism and concerns about the future of targeted monuments in the Middle East and North Africa, the International Criminal Court ("**ICC**") at The Hague has delivered a landmark judgment on 27th September 2016. It was the first judgment which upheld the destruction of heritage sites as a war crime provided under Section 8(2)(e)(iv)[475] of the Rome Statute ("**Statute**"). The judgment was delivered by three judges namely Judge Raul C. Pangalangan, Judge Antoine Kesia-Mbe Mindua, and Judge Bertram Schmitt who held Ahmad Al- Faqi Al- Mahdi guilty for demolishing heritage sites in Timbuktu, Mali and ordered him into 9 years of imprisonment.*

*This paper is written on Theme 9 which is "Contemporary issues in International Law- War Crimes, Genocide, and International Criminal Court." It aims to review the aforementioned judgment in the case of "THE PROSECUTOR vs. AHMAD AL- FAQI AL- MAHDI". The paper covers the background in which the crime took place and throws light on the proceedings of the first ever trial conducted against a person accused of destruction of heritage sites. It also discusses several sections of the Statute namely Articles 8(2)(e)(iv) , 23[476], 25(3)(a)[477] , 65[478] and 76[479] to 78[480]*

[474] Fourth Year of Five Year Law Course, Government Law College, Mumbai.
[475] Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.
[476] Nulla poena sine lege - A person convicted by the Court may be punished only in accordance with this Statute.
[477] Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.
[478] Proceedings on an admission of guilt
[479] Sentencing
[480] Determination of the sentence

*and Rules 139[481] and 145[482] of the Rules of Procedure and Evidence (hereinafter referred to as, "**Rules**") pursuant to which the judgment was delivered and sentence determined. In conclusion, the significance of the judgment in today's world is highlighted.*

**BACKDROP**

On January 17th, 2012, the Tuareg rebels broke the 2009 peace agreement with the Government of Mali which had officially ended Tuareg rebellion, and waged a war against the Malian government with the goal of attaining independence for the Northern region of Mali and to have their own separate ethnic state known as Azawad.

The Tuareg rebels were led by the National Movement for the Liberation of Azawad ("**MNLA**") and they attacked areas in Northern Mali because of which many civilians were forced to flee to Mauritania, Niger and Burkina Faso, creating a huge refugee crisis and dire humanitarian consequences to which United Nations High Commissioner for Refugees ("**UNHCR**") sent staff to assist some 20,000 people who had to flee their homes.

By April 2012, the Tuareg rebels seized control of Northern Mali and called for Independence. The MNLA were initially backed by the Islamist groups Ansar Dine and Al- Qaeda in the Islamic Magrehb ("**AQIM**") but after MNLA seized control of the Northern Mali, the Islamists began imposing Sharia Law in the new state. The MNLA and other Islamist groups failed in reconciling their conflicting opinions with Tuareg rebels over the imposition of Sharia Law in the creation of the new seceding state of Azawad. This conflict led to the fight between the MNLA, Ansar Dine and AQIM.

[481] Decision on admission of guilt
[482] Determination of sentence

By 28 June, 2012, Gao, Timbuktu and Kidal, the three biggest cities in the disputed secessionist region of Azawad within what was recognized as Malian territory, were under the control of Ansar Dine and its Islamist allies. They imposed their religious and political edicts on the territory of Timbuktu and its people through an Islamic Tribunal. Mr. Al Mahdi (the convict) was in direct contact with the leaders of Ansar Dine and AQIM, and was an active participant as an administrator.

It was 2 days after United Nations Educational, Scientific and Cultural Organization ("**UNESCO**") declared Timbuktu and the Tomb of Askia on the list of "World Heritage in Danger" that these sites were demolished and destructed by the Islamist groups. This reaction was in counter of, the violation of Sharia and labeling of these sites in the list of "World Heritage in danger."

## TRIAL AT THE INTERNATIONAL CRIMINAL COURT

The Government of Mali which is a State party to the Statute apprehended that the situation in Mali was going out of control and required the ICC to investigate and intervene in such circumstances of severe crisis. Therefore, the Official Prosecutor received a referral from the Government of Mali (in accordance to Article 14[483] of the Statute) on 18th July, 2012 to investigate the situation in Mali for the purpose of determining whether one or more specific persons should be charged with the commission of crimes that fell under the jurisdiction of ICC mentioned in Article 5[484] of the Statute. Thereafter, the Prosecutor forwarded the referral to the Presidency as per the provisions of Statute and the Presidency after receiving a request from the Prosecutor decided on 19th July, 2012 that situation in the Republic of Mali should be assigned to Pre Trial Chamber II immediately. The decision by the Presidency was given pursuant to Article 38[485] of the Statute which lays down the composition and duties of the Presidency.

[483] Referral of a situation by a State Party
[484] Crimes within the jurisdiction of the Court
[485] The Presidency

The Pre Trial Chamber after receiving the forward from the Presidencies' decision issued a warrant for Mr. Ahmad Al- Faqi Al- Mahdi's arrest and convened a hearing for the first appearance of Mr. Mahdi on 30th September, 2015 which was to be held in open session. This order was issued by the Pre Trial Chambers to conform to the Articles 60(1)[486] and 67[487] of the Statute which set out the functions of the Pre Trial Chambers and rights of the accused respectively. Along with this a notification was released by the registrar to appoint. Mohamed Aouini as duty counsel for Mr. Ahmed Al- Faqi Al- Mahdi to comply with the major right of the accused mentioned in Article 67(1)(d) of the Statue.

## CHARGE CONFIRMED BY THE PRE TRIAL CHAMBERS

At the stage of Pre Trial Chambers, on 17 December, 2015, the Office of the Prosecutor filed its document alleging that Mr. Al Mahdi is responsible for the war crime of attacking 10 buildings of a religious and historical character in Timbuktu, Mali, between around 30 June, 2012 and 11 July, 2012. He was alleged to be responsible under Article 8(2)(e)(iv) of the Statute:

*"Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."*

On 24 March, 2016, the Pre Trial Chamber confirmed the charge alleged by the Prosecution.

## REVIEW OF THE JUDGEMENT

[486] Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

[487] Rights of the accused

After the confirmation of charge by the Pre Trial Chamber, the case was forwarded to the Trial Chamber for judgment. The judgment was delivered by the Trial Chamber VII which was constituted on 2 May, 2016. The Trial was held from 22nd to 24th August, 2016. During the trial, Mr. Al-Mahdi made an admission of guilt as per the provisions of Article 65 of the statute. This was the first time the ICC dealt with Article 65. It was cited by the Chambers in the subject judgment that while International Law Commission was drafting this provision of 'allowing the accused to enter a plea of guilty and not guilty', in 1994, the provision faced a lot of controversy for two main reasons which were marked by the delegates of different committees. The reasons were:

1. It would be inappropriate to allow plea bargaining.

2. There is a great need to bridge a gap between common law system and civil law system.

However, it is pertinent to note that Article 65 today is an intermediate solution of the systems of common law and civil law. It also ensures that the admission of guilt by the accused does not open the gates of plea bargaining by explicitly mentioning that *inter parte* discussions are not binding on the Trial Chambers.

Regarding/With regard to this particular case, the Trial Chambers has well assessed the evidence by relying on the admissions of the accused, the material evidence presented by the prosecution and accepted by the accused, and the testimony of witnesses to make sure that the admission of guilt is well supported with the facts of the case.

After the analysis, it has been concluded by the chambers that Mr. Mhadi is guilty of the war crime beyond reasonable doubt as both, a direct perpetrator and co-perpetrator, under Articles 8(2)(e)(iv) and 25(3)(a).

### a) ARTICLE 8(2)(e)(iv) – DIRECT PERPETRATOR OF THE CRIME

While dealing with Article 8(2)(e)(iv) with which the accused was principally charged, the court drew two important interpretations:

Firstly, the element of 'directing an attack' encompasses all acts of violence against protected objects and it would be of no importance to distinguish whether the attacks were carried out during the battle or after the battle. Secondly, "It applies to armed conflict not of an International character" which means that the hostilities that took place were in the territory of the State where there exists an armed conflict between Government Authorities and Organized Armed Groups.

The parties have submitted to this and there has also been evidence to that effect. The guilt of Mr. Mahdi under Article 8(2)(e) (iv) was proved because of the following facts:

1. He was engaged in the direct perpetration of the destruction of the five buildings as he personally participated in the destruction of those buildings in addition to deciding to use a bulldozer to destroy the building and passing order(s) to the same effect.
2. He was in direct contact with the leaders of Ansar Dine and AQIM and as an expert on the matters of religion and Islamic knowledge; he was often consulted by the Islamic Tribunals for the plotting and planning of the crime.
3. He led Hesbah. (There was a local government through which the group of Ansar Dine imposed their religious and political laws on Timbuktu people. This local government comprised of a police, media and morality brigade. Morality Brigade was called Hesbah.)

### b) ARTICLE 25(3)(a) – CO-PERPETRATOR OF THE CRIME

Article 25(3)(a), read as:

*"In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*
*(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;"*

The Chamber was satisfied that along with being a direct perpetrator, he was also a co-perpetrator and that the following points proved his guilt:

1. He was the member of Ansar Dine group, which imposed Sharia Law on the people of Mali and committed crimes in furtherance of their discriminatory religious motives.
2. Despite his initial reservations he agreed to conduct an attack on the mausoleums and mosques upon the receipt of instruction by Mr. Ag Ghaly. It shows his consciousness of the common plan which was made to attack these sites.
3. He wrote a sermon which was dedicated to the destruction of the mausoleums, and which was read during the Friday prayer, the day of the attack. Delivery of sermon by him immediately before the attack shows that the plan was premeditated and that he was an executor.
4. He was the one who decided the sequence in which the buildings were to be destroyed.
5. The coordinated and deliberate manner in which the attack was carried out.

**DETERMINATION OF SENTENCE**

For the purposes of determining the appropriate sentence, the Chamber had taken into account, *inter alia*, Articles 23, 76, 77[488], and 78 of the Statute and Rule 145 of the Rules. The maximum punishment laid down in the statute for the crime committed is 30 years but due to the factors listed below Mr. Al Mahdi was sentenced to 9 years of imprisonment.

1. **The Gravity of Crime** – It was found to be significant because the religious monuments of emotional and heritage value for the inhabitants of Timbuktu were destroyed for discriminatory religious motives, though the gravity is lesser in cases where the crime is against property and not against person.
2. There were no relevant **Aggravating Circumstances** according to the facts of the case as determined by the Chambers.
3. The **Mitigating Factors** taken into account were:
   (a) Admission of guilt;
   (b) Co-operation with the prosecution in establishing the facts of the case;
   (c) Remorse and empathy for the victims expressed by him;
   (d) The initial reluctance to commit the crime; and
   (e) Good behavior during detention despite crises in family.

**CONCLUSION**

The judgment in the case of *The Prosecutor vs. Ahmad Al- Faql Al- Mahdi* is indeed a landmark judgment in the history of international law and justice. It is relevant in today's scenario where most of the

[488] Applicable penalties

countries of the world are facing this challenge of destruction of cultural heritage, which is mainly carried out for the ethnic cleansing of some religious groups in totality.

This is the first ever prosecution which is delivered to an accused guilty of the war crime of demolishing and destructing heritage property, by the ICC.
This is significant because it has marked and highlighted the importance of the heritage sites for humanity and its role in peace building. It has very much ended the impunity which is often there in cases of destruction of cultural heritage, by devoting this judgment wholly to the war crime of destruction of heritage sites. It has also brought up the challenge to the security of these heritage sites, the culture of the people associated to it and the human rights which the world seemed to have forgotten.

# 16. THE IMPACT OF BREXIT ON GLOBAL TRADE AND INVESTMENT WITH SPECIAL REFERENCE TO UK, USA AND INDIA

Author(s): Harshita Bachhawat[489] and Vibhu Jain[490]

## ABSTRACT

*Brexit i.e. withdrawl of Great Britain from the European Union is something which the global economy feared. In this paper we would like to discuss the impact of Brexit on global trade and investment with special reference to UK, USA and India. The paper has been divided into four chapters, the first giving a basic introduction of the whole situation, the second chapter which is subsequently divided into five parts dealing about the impact of Brexit on global trade, the third being impact of Brexit on foreign investment which is divided into three parts and the last chapter being the conclusion where we talk about the current scenario after Brexit occurred. To substantiate the assertions made by us, we have used latest statistics and data accessible, wherever necessary. Through this paper we are trying to make an assertion that prima facia the decision to leave European Union will dearly cost the United Kingdom. This assertion is based on the existing trade links between Britain with the whole world and the chances of any subsequent trade agreement with the rest of the world post- Brexit being very slim. We have also explored alternative ways the United Kingdom has to remain in the single market offered by the European Union and a brief analysis of the same shows that United Kingdom is on the slippery side of the slope here. On the foreign investment front to strongly assert anything at this point of time will be a mistake but a brief analysis of what has transpired so far and the most immediate outcomes has been discussed briefly. Our paper deals with the situation that can be observed in three nations where the impact of Brexit with respect to foreign investment is very much concerning. The assertion that we are making based upon the latest available data is that Brexit will impact these three nations in both a positive and a negative manner. On a deeper analysis the situation could swing*

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*in any direction since United Kingdom has been one of the most powerful economies, it has the potential to take on the consequences of the decision it has made and only time will show the true and clear picture.*

## 1. INTRODUCTION

The Great Recession of 2008-09 and the austerity policies of the EU policy makers has made the United Kingdom leave the European Union, which came to be commonly known as the "Brexit". It had been warned by a number of economists over and over again that Brexit could lead to an adverse domino effect on Britain as well as on the entire world. After Brexit, Britain is bound to lose its favourable access to the European market which could lead to drying up of business investment and making the country tumble into recession.

On 23rd June 2016, the British voters decided to vote "Leave" anyway and will now have to combat with the adverse consequences including any economic turmoil that are bound to happen. On 24th June, 2016 markets slumped sharply around the world, pointing towards serious economic risks. Brexit will not only effect UK and the European Union but will have its impact on the global economy which will be felt in the upcoming years affecting various cross border trade agreements and foreign direct investment policies and strategies.

Not only this but Britain will also lose its influence over European affairs and trade relations. The results of Brexit led to chaos and even the people who voted in favour of Brexit seemed to be taken aback. There are divergent views of economists with regard to Brexit. Danielle Pletka of the American Enterprise Institute thinks that "the Brexit vote is the sign of a setting sun on Europe and that Brexit could be a wakeup call or it could be 1933 all over again". On the other hand, Dean Baker, co-director of the Centre for the Economic and Policy Research, more optimistically says that Brexit could set

Europe "back on a path of high employment and healthy growth". Therefore it can be said that Brexit has rattled not only Britain and the European Union but the entire world.

## 2. IMPACT OF BREXIT ON GLOBAL TRADE

To analyse the ramifications of Brexit on the United Kingdom's international trade, the authors have to take into consideration the following four conditions:-

1. Britain's current trade links with the European Union.

2. Trade relationships which might follow between UK and rest of the world.

3. The opportunity cost of leaving the single market.

4. Repercussions on trading sector in a situation where no post-Brexit trading agreement can be made.

### 2.1 BEFORE BREXIT TRADE LINKS

The trade links of Britain with the European Union were well established. "The official trade statistics show that European Union was supposedly the destination of about half of all British goods exports."[491] United Kingdom as of now has facilitated commerce concurrences with a number of countries including Switzerland, South Africa, Canada and Mexico. (See Figure 1).[492]

[491] The Office for National Statistics estimates that closer to 46% of goods exports go to the European Union. Office for National Statistics, *How important is the European Union to UK trade and investment?* (Office for National Statistics, Newport), 2015, [accessed 06/08/2016], http://www.ons.gov.uk/ons/rel/international-transactions/outward-foreign-affiliates-statistics/how-important-is-the-europian-union-to-uk-trade-and-investment-/sty-eu.html, URL.
[492] International Monetary Fund Direction of Trade Statistics.


**2.2 Post Brexit Chances of a Trade Agreement**

Even after Brexit, high odds of a favourable trade agreement could be reached between UK and the remaining EU-members since a continued closed commercial arrangement is profitable for both sides. Factually, the British markets are as vital to the rest of European Union as the rest of the European Union is vital for the smooth functioning of the British Trading sector.

To substantiate the above mentioned claim, if the European Union is considered in its totality, the exports of EU going to the United Kingdom, which amounts to 18% of its exports, is little when compared with the exports of Britain that go to the remaining members of the European Union, which mounts to not less than 50% of its exports.

The picture is different in the event that we analyse the position of the biggest economies inside the European Union. Not considering the German economy, Britain gives a greater business sector to the

greatest European Union economies than they accommodate the United Kingdom with. (See Figure 2).[493]


Any hostile trade relations UK and EU-individuals will turn out to be unfavourable quod the size of trade association, and the upsides of keeping up a close commercial arrangement. Additionally, it is irrational to believe that Britain is not capable enough to enter into new trade deals with the countries it currently has free trade agreements with via the European Union.

### 2.3 The Opportunity Cost Of Losing The Single Market

The European single market is not only a free trade agreement without tariffs where goods can move uninhibitedly in light of the fact that all individuals stick to basic administrative prerequisites and

[493] Trade Map, International Trade Centre, [accessed 28/08/2016], http://www.intrac.en.org/marketanalysis, URL.

specialized measures but is something of far more economic importance than that by providing free movement of services, capital and people.

There are two alternative ways for Britain to remain a part of the single market in any case.

1. By following the lead of Norway, Iceland and Liechtenstein by becoming a member of the European Economic Area.

2. By becoming a member of the European Free Trade Association like Switzerland and still have trade relations with the European Union and the advantage of single market through a progression of respective understandings.

"Despite the fact that their exchange with the alliance is liable to Brussels' 'rules of origin' regulations, both Norway[494] and Switzerland[495] have the opportunity to decide their own particular trade policy and courses of action with outsider nations."

In the direst outcome imaginable if the United Kingdom does not remain in the single market, "the British trading industry would confront additional costs in selling into the European Union. The same would include additional costs of clearing customs and the administrative costs of complying with the European Union's rules of origin".[496] They may also face in a likewise manner other barriers, such as quotas which are non-tariff in nature. In order to export freely to the European Union, they would in any case still need to comply with the European product standards.

[494] EEA Review Committee, Outside and Inside: Norway's agreements with the European Union (unofficial translation) (General Secretariat of the Council of the European Union, Brussels), 2012, Capital Economics.
[495] Integration Office FDFA/FDEA, Bilateral agreements Switzerland-EU (Integration Office FDFA/FDEA, Bern), 2009, Capital Economics.
[496] These set a limit on the proportion of the inputs into a good that can come from outside the European Union in order for it to get tariff-free access. This is not an obstacle when selling into the European Union. Outside it, however, firms would need to keep track of the components going into a good.

More than a hindrance, the factors mentioned above would merely cause inconvenience in trade like they cause to nations such as the United States, but the United Kingdom will find an alternative to export successfully and efficaciously to the European Union despite such hurdles. Moreover, the single market does not give much advantage to Britain over other counties of the Union in comparison to countries outside the single market in exporting. "Between 1993 and 2011, Britain was just the 28th fastest growing exporter to the next 11 founding members of the single market. (See Table 1) Furthermore, Britain's trade with countries outside the EU is growing."[497]

**2.4 Worst-Case Scenario**

Indeed, even in the direst outcome imaginable where the United Kingdom fails to reach to an agreement with the European Union that allows free trade, the losses incurred by Britain on trade or manufacturing industry would not be cataclysmic. On the off chance that it followed, the 'World Trade Organization option' will come into play where the United Kingdom's trade with the union will be undertaken and governed by the 'most-favoured nation' rules.[498]

In any case, there have been 3 key advancements in the course of recent years which imply that the concern is far smaller than what it might have been earlier.

[497] John Springford, Simon Tilford, The Great British trade-off: The impact of leaving the EU on the UK's trade andinvestment.[accessed28/08/2016],https://www.cer.org.uk/sites/default/files/.../pdf/.../pb_britishtrade_16jan14-8285.pdf, URL.
[498] World Trade Organization, Understanding the WTO: Principles of the trading system (World Trade Organization, Geneva), 2015 [accessed 24/08/2016]

To begin with, there has been a substantial fall in the tariffs globally thereby reducing trade barriers. "As part of this, the average European Union most-favoured nation tariff on manufactured goods has tumbled to just 4% compared to over 8% at the start of the 1990s. (See Figure 3)."[499]

Table 1: Top 35 fastest-growing exporters of goods to 11 founding members of the EU Single Market 1993-2011[500]

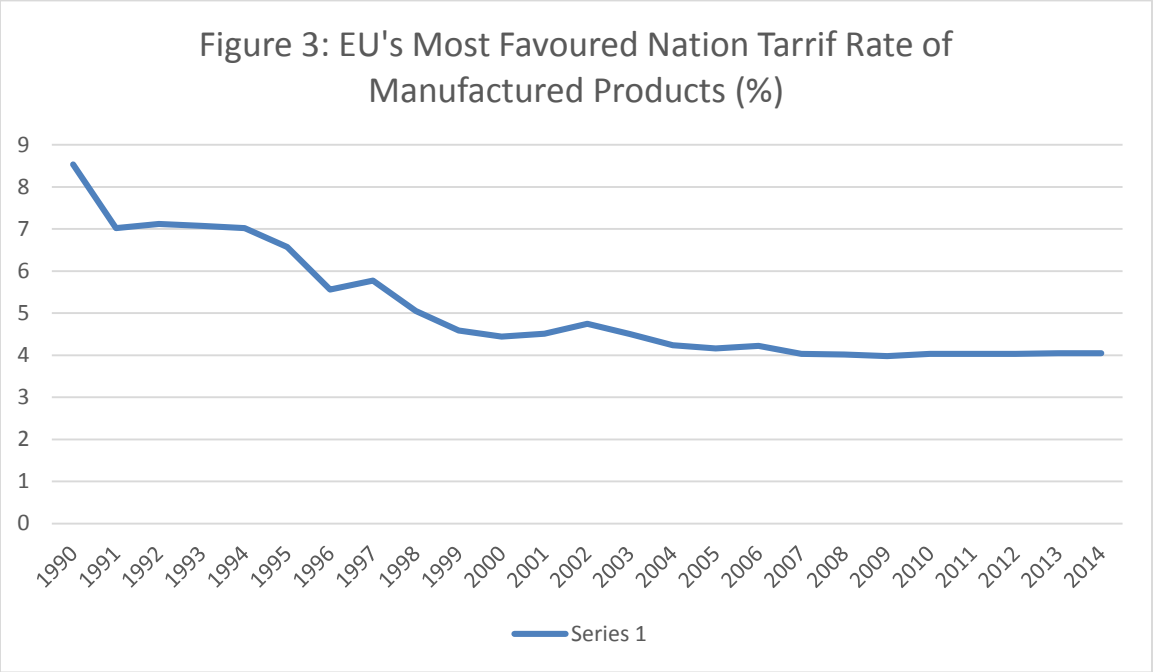
| Rank | | % growth over 19 years measured in US$ (1993) | Exports per month in 2011 in US$bn (2011) |
|---|---|---|---|
| 1 | Vietnam | 544 | 0.4 |
| 2 | Qatar | 496 | 0.3 |
| 3 | Ukraine | 446 | 1.1 |
| 4 | China & Hong Kong | 429 | 15.3 |
| 5 | UAE | 402 | 2.8 |
| 6 | Russia | 377 | 7.8 |
| 7 | India | 367 | 3.4 |
| 8 | Brazil | 357 | 3.4 |
| 9 | Turkey | 295 | 6.2 |
| 10 | Nigeria | 250 | 1.1 |
| 11 | Australia | 243 | 2.6 |

[499] World Bank staff estimates using the World Integrated Trade Solution system, based on data from United Nations Conference on Trade and Development's Trade Analysis and Information System (TRAINS) database and the World Trade Organisation's (WTO) Integrated Data Base (IDB) and Consolidated Tariff Schedules (CTS) database.

[500] OECD Database of International Trade, [accessed 28/08/2016], www.oecd-ilibrary.org.OECD database Monthly Statistics of International Trade doi:10.1787/data-02279, URL.

| | | | |
|---|---|---|---|
| 12 | South Africa | 224 | 2.1 |
| 13 | Chile | 198 | 0.6 |
| 14 | Korea | 197 | 3.0 |
| 15 | Mexico | 176 | 2.1 |
| 16 | Morocco | 170 | 1.5 |
| 17 | Singapore | 163 | 2.3 |
| 18 | New Zealand | 147 | 0.3 |
| 19 | Canada | 142 | 2.3 |
| 20 | Bangladesh | 129 | 0.1 |
| 21 | Bahrain | 129 | 0.1 |
| 22 | US | 126 | 22.2 |
| 23 | Switzerland | 114 | 11.8 |
| 24 | Saudi Arabia | 114 | 2.3 |
| 25 | Norway | 114 | 2.7 |
| 26 | Kenya | 99 | 0.1 |
| 27 | Egypt | 96 | 1.1 |
| 28 | UK | 81 | 23.9 |
| 29 | Israel | 51 | 1.5 |
| 30 | Japan | 51 | 4.7 |
| 31 | Taiwan | 50 | 1.5 |
| 32 | Iceland | 48 | 0.1 |
| 33 | Thailand | 48 | 0.9 |
| 34 | Kuwait | 21 | 0.3 |

| | | | |
|---|---|---|---|
| 35 | Indonesia | 12 | 0.6 |



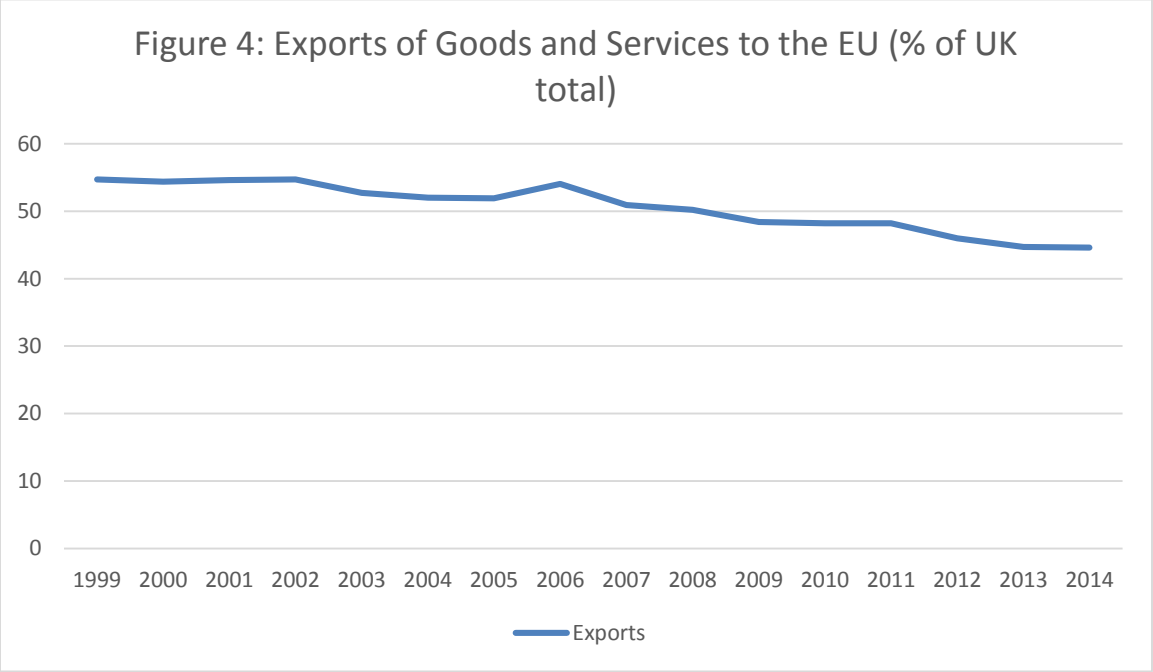

"These costs would be well within the typical scope of exchange rate movements; sterling (in trade-weighted terms) has expanded in worth by 12% in the course of past 2 years and by around 5% since the beginning of the 2015."[501]

Secondly a substantial fall in the manufacturing sector can be seen in the British economy. Manufacturing has tumbled from over 20% of GDP in the mid-1990s to under 10% now. "While the services exports as a share of output have been rising, goods exports as a share of output have been exhaustively consistent (fluctuating around an average of 16% since 1999)."[502]

The third development is that Europe has turned out to be of little significance, as an export market, for the United Kingdom. From 55% in 1999 to 45% currently, Britain's exports of goods and services

[501] Bank of England's sterling effective exchange rate index
[502] Office for National Statistics, UK

to the European Union has been declining, in spite growing enrolment of the European Union over the same time frame. (See Figure 4).[503]




For all sectors or regions the situation will definitely be different. Currently the assumption is that average tariff at the rate of 4% could be imposed on the United Kingdom under the 'most-favoured nation rule'. As mentioned earlier, the situations would be different for different sectors, for example, food and drinks product sector will suffer heavily in lieu of high tariff rates. In addition to that the automobile industry will suffer in lieu of 10% and 5% tariff on cars and imported components respectively.[504]

To combat the issue of high tariff rates, the government has an option of choosing to use the £10bn savings to compensate the hardest hit sectors and regions from its contributions to the European

[503] Office for National Statistics, UK
[504] https;//www.wto.or/English/res_e/trade_profiles 13_e.pdf 12-08-2016

Union budget. The additional costs which British exporters would incur is presumed to be less than the savings the United Kingdom would make, thereby, making it convenient for the government to compensate from those losing due to Brexit, in the short term.[505]

Keeping in mind the strength of the British economy and its apparent ability to reallocate its resources from disadvantageous sectors to more advantageous ones, it can be said that in the long term, the British economy might just survive the impact of Brexit.

**2.5 WHY LEAVING MIGHT BE BENEFICIAL**

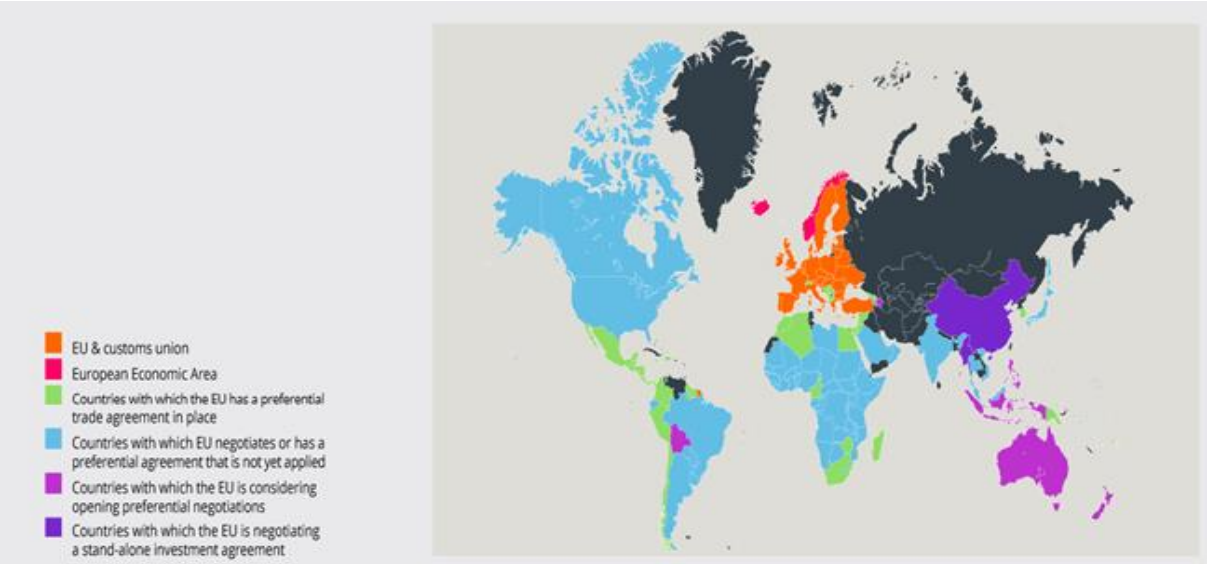
Regardless of the possibility that Britain's overall trade with Europe did suffer, there is a chance that these losses could be offset in the long run through the profits made from anticipated trade boost with other countries. In recent past, the countries outside the European Union have principally contributed in the growth of exports for the United Kingdom. It is very likely that economic growth in European Union will be a little low when compared to the rest of the world. By leaving the European Union, Britain gets a crucial opportunity to arrange with the non-European Union countries, new and more favourable trade deals. Since, all trade negotiations could only be carried out for the Union (as a whole), such arrangements were not previously permissible under European Union membership. There remain large areas of the world with which the European Union has not reached a free trade agreement. (See Figure 5).[506]

In doing so, the United Kingdom would have the capacity to keep low the tariffs on imported goods from the countries with which it might strike unilateral trade policies. This would in actuality boost

[505] Business for Britain, Change, or go (Business for Britain, London), 2015 [accessed 24/08/2016], https://forbritain.org/cogwholebook.pdf, URL.
[506] European Commission, EU Trade Relations Worldwide- a map (Europe Commission, Brussels), 2012 [accessed on 13-08-2016], http://ec.europa.eu/trade/policy/countries-and-regions/agreements/, URL.

consumers' real incomes. Also, since domestic producers will have to compete against cheaper imports, the competition will also rise. Such rise in competition will in turn boost the manufacturing industry. Britain would, in return for bringing down its import duties, have the capacity to arrange simpler access to overseas markets.

Figure 5: EU trade agreements with third party countries.




People who opposed Brexit and condemned it contend that given the small size (just 2.5% of global output) of the United Kingdom, no country would want to have any desire in getting involved with any trade agreements with Britain on its own. Be that as it may, negotiating with Britain would in all likelihood be less demanding and much faster when compared to dealing with the European Union's

bureaucratic machine. "Switzerland, which is not a member and is smaller than the United Kingdom, has had more success establishing free trade agreements than the European Union."[507]

As a matter of fact, the worldwide fall in tariffs as of late means prospective gains from free trade will eventually reduce and fall down.

## 3. IMPACT OF BREXIT ON FOREIGN INVESTMENT

### 3.1 EUROPEAN UNION'S INVESTMENT IN BRITAIN

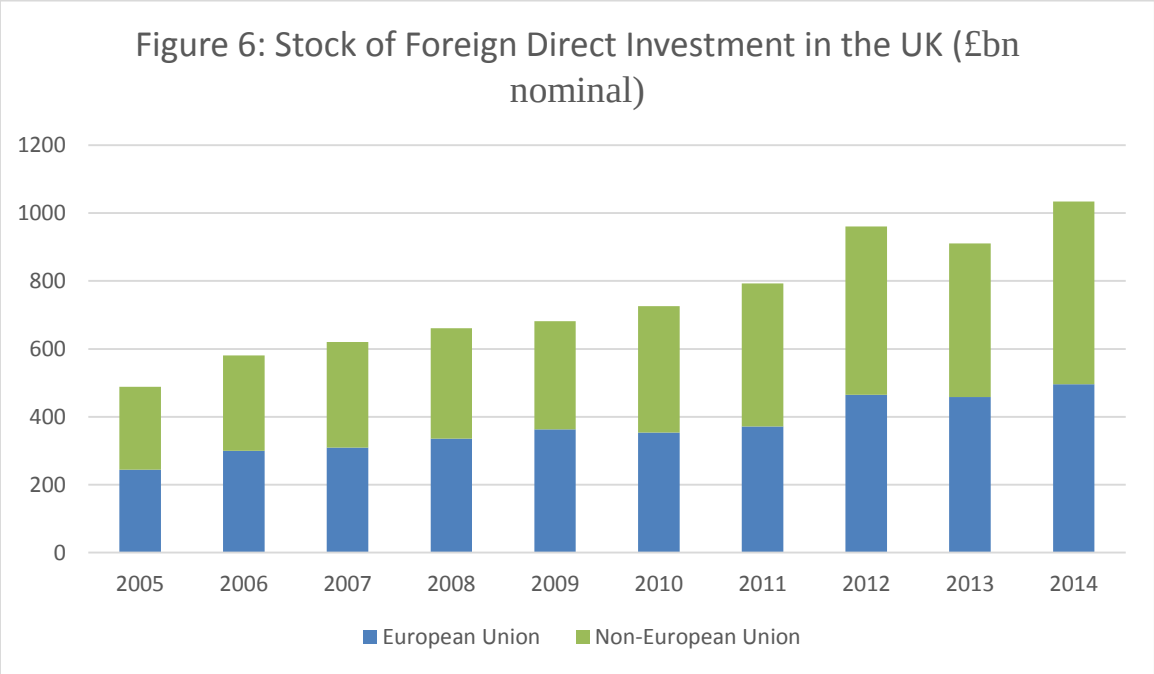
Foreign direct investment (FDI) is an investment made by a company or an individual of a country in business interests in another country by either setting up business operations or acquiring business assets like ownership of the other country. It can also control interest in a foreign company.

"According to UK Trade and Investment (UKTI, 2015), UK is a major beneficiary of FDI with an estimated stock value of over £1 trillion, about half of which is from other members of the European Union (EU)."

There are various components that decide the firm's preference to locate and invest. Firms are pulled in by bigger and richer markets. UK is an alluring FDI location since it has flexible labour markets, highly educated labour force and a strong rule of law. Whether UK remains in EU or not, these focal points will be enjoyed by it nevertheless. Nevertheless membership in the EU minimizes trade and investment costs and consequently is prone to have an effect even subsequent to controlling these aforesaid factors.

[507] Switzerland's free trade agreement with China entered into force on 1 July 2014. State Secretariat for Economic Affairs SECO, *Factsheet: Free Trade Agreement between Switzerland and China* (State Secretariat for Economic AffairsSECO,Bern),2014[accessed24/11/2015],http://www.seco.admin.ch/themen/00513/02655/02731/04118/index.html?, URL.

The European Union has always been an integral source of foreign direct investment for the British economy. In 2014 (the latest year for which data are accessible), United Kingdom's stock of inward foreign direct investment by the European Union accounted for 48% and its share of the overall stock of foreign direct investment has been fairly steady over the past decade. However, inflows of foreign direct investment from European Union countries have been moderating over recent years and more investment can be seen from non-member countries. (See Figure 6).[508]




There are certain reasons why FDI might fall if the UK left the EU:

• Firstly, UK makes an alluring export platform for multinationals as their costs from tariff and non-tariff barriers are very less when they are exporting to the rest of the EU for the only reason that they belong in the Single Market.

[508] Office for National Statistics, UK

• Secondly, now since the UK has left the EU, multinationals have to face complex supply chains and various co-ordination costs between their headquarters and local branches which would turn out to be troublesome for such multinationals.

• Third, the vulnerable shape of the future trade arrangements between the UK and the EU could likely have a tendency to dampen FDI.

Considering the two alternatives, (i.e. become a member of EFTA or become a member of EEA), that the UK can adventure to remain in the single market even in the wake of leaving the EU, UK still loses a significant portion of its FDI.

In the event that UK becomes a member of the European Free Trade Association (EFTA) like Switzerland, it will not restore the FDI advantages of being in the EU. Truth be told, membership in EFTA doesn't accommodate for any advantages in the FDI front. "Brexit is likely to diminish FDI inflows to the UK by about 22%."[509]

On the off chance that UK, then again, becomes a member of the European Economic Area (EEA) outside the EU like Norway, it will need to contribute considerably to the EU budget like all the other members of the EEA have to contribute. On top of it, the UK will need to accept all regulations made by the EU without a vote on the rules and will have to allow free labour mobility with the EU to gain certain privileges.[510]

[509] Swati Dhingra, Gianmarco Ottaviano, Thomas Sampson and John Van Reenen, The impact of Brexit on foreign investment in the UK, CEP Brexit Analysis No. 3, LSE.

[510] The United Kingdom already had the benefits of voting on the rules set by EU when it was a member nation. Further, it was the issue of labour movement across the continent which was an additional reason as to the vote of "leave". Going back to such state that too without voting rights would be a huge mistake on the part of UK's Government.

In numerous non-European Union countries, investors and firms have been utilizing Britain as a channel to Europe by which they profit from the zero-tariff environment and also from free movement of labour and capital. Since the United Kingdom voted to leave, foreign direct investment inflows would drastically reduce thereby resulting in the closure of shops of the parent companies and moving their production or offices elsewhere. Furthermore, as we know that foreign multinationals aspire to enhance their productivity and bring with them new technologies and management practices, a drying up of this investment into Britain could lead to damage for the country's potential in the long haul.

Contrastingly, the World Bank's "*Doing Business* survey (which assesses countries according to the ease of doing business in them), Britain ranks highly in areas such as attaining credit, dealing with construction permits and protecting minority investors."[511] There are reasons why Britain has been more successful than other European countries in attracting FDI amounting to 28% of investment into (European Union and non- European Union) Europe in 2014. [512] The reasons for the success attained by the United Kingdom are benefits from good transport connections, a welcoming political environment, a strong rule of law and the English language.

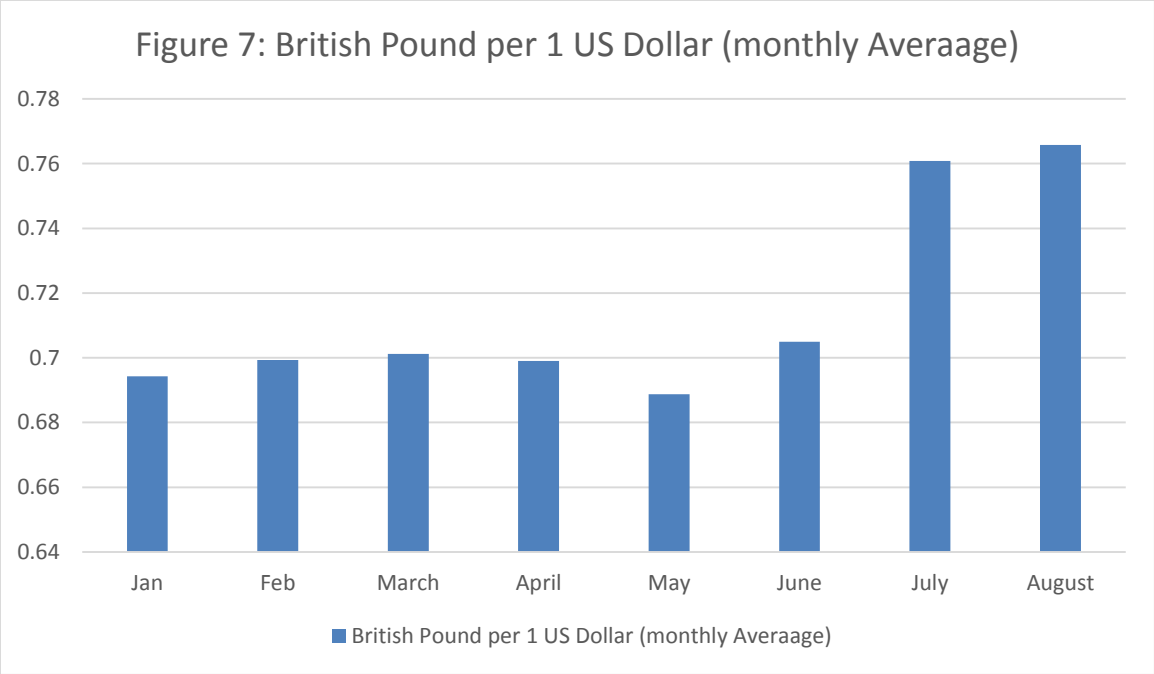
### 3.2 IMPACT ON AMERICA

The economy of both the United States and the United Kingdom is very well knit through trade and global finance. "The U.S. exported $56.1 billion worth of goods to the U.K. in 2015, and imported $57.9 billion worth from the U.K."[513]

[511]The World Bank Group, Doing Business 2016 (The World Bank Group, Washington), 2015 [accessed 24/108/2016], http:// www.doingbusiness.org/~/media/.../Doing%20Business/.../DB16-Full-Report.pdf, URL.
[512]fDi Intelligence, The fDi report 2015 (The Financial Times Ltd, London), 2015 [accessed 24/11/2015]
[513] https://www.census.gov/foreign-trade/balance/c4120.html

Though the trade between U.S. and Britain is very meagre in the POV of the United States, the connections between the two nations are not only limited to the same. The impending effect on American economy is anticipated to come through a number of chain reactions which might be called as "the Brexit domino effect" on the global economy.

The most devastating effect which can be seen on the U.S. economy is the surge in the rate of dollar. The price of dollar has been substantially increasing since the aftermath of Brexit. (See Figure 7).[514]




High dollar to pound rates might sound good and favourable to the American consumers but the same will spell disaster for the business sector of the USA that exports its products.

Considering a situation where dollar is stronger than other currencies, any company's products that are exported from the United States automatically becomes more expensive and in turn less feasible

[514] Exchange Rates (US Dollars to Great British Pound), [accessed 24/08/2016], http://www.x-rates.com/average/?from=USD&to=GBP&amount=1&year=2016, URL.

to buyers residing in the importing countries. That "hurts sales for tech giants like Apple, equipment makers like Deere (DE) and Caterpillar and global brands like Coca-Cola and Nike."[515] American corporates are now suffering from what is called as an "earning recession", whereby the corporates are earning profits but at a declining rate.

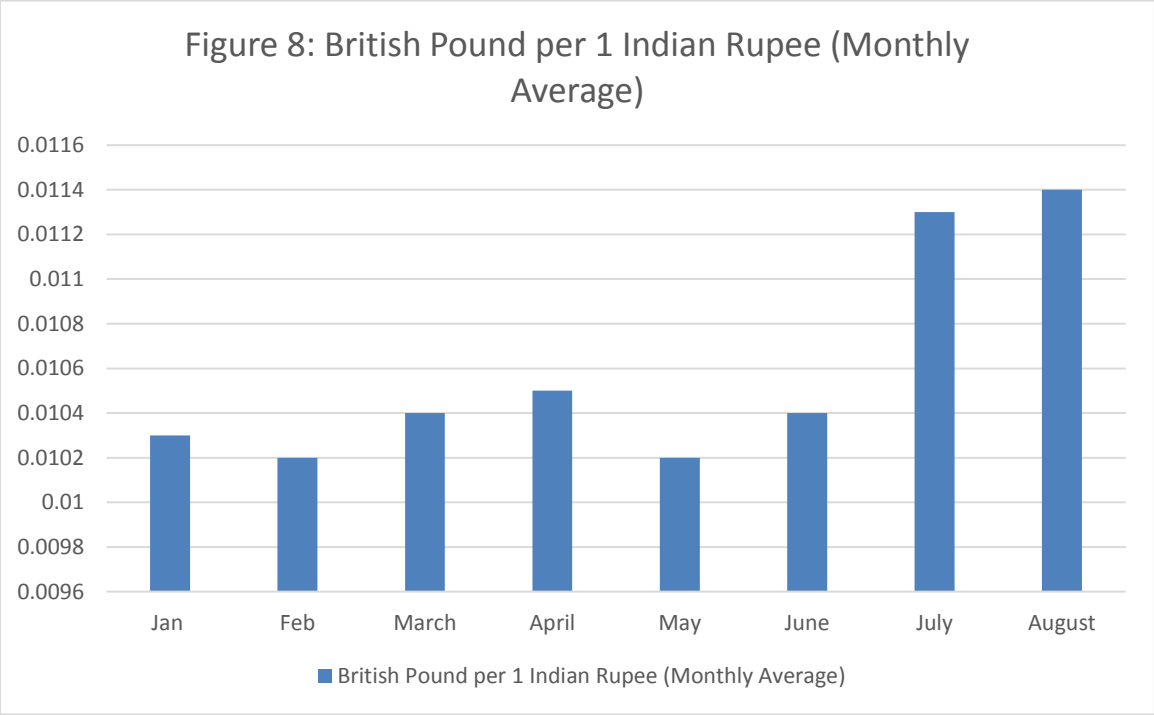
A stronger dollar would in turn lower U.S. exports. As reported by Goldman Sachs "earlier this year, the U.S. manufacturing sector, which relies heavily on trade, fell into a 5-month recession triggered by the strong dollar."[516] Manufacturing lost a net 39,000 jobs in the past 12 months. The reasons cited by the multinational banking firm were high oil prices and a surge in the rate of dollar. If such a situation continues, which is heavily implied by the increasing rate of dollar post Brexit, the U.S. economy will be affected negatively.

### 3.3 Impact On India

It has always been more convenient for Indian companies to access the financial markets in London and doing business with Europe via UK. In terms of bilateral trade with Britain, India currently boasts positive trade surplus of $3.64 billion. The aggregate trade in FY16 remained at $14.02, out of which $8.83 billion was in exports and $5.19 was in imports. "In the month of April 2016 the exports to Britain stood at 17.66 % (USA 17.80%) of the total exports. In terms of imports, India imports only 1.45% of its net imports from UK."[517]

[515] Patrick Gillespie, How Brexit impacts the U.S. economy, [accessed 28/08/2016], http://money.cnn.com/2016/06/24/investing/brexit-impact-on-american-global-economy/ , URL.
[516] Patrick Gillespie,U.S. in longest manufacturing recession since 2009 [accessed 28/08/2016], http://money.cnn.com/2016/03/01/news/economy/us-manufacturing-recession-ism/?iid=EL, URL.
[517] www.tradingeconomics.com/india/exports

As indicated before[518], after Brexit, the pound rate will fall against the dollar and thus will fall against the rupee also.[519] (See Figure 8)




India's exports to the UK have been around 3% of its aggregate exports and exports to the European Union are around 17% of aggregate exports but off late Indian exports to both UK and Europe have declined because of the stifled demand led by a frail and scattered recovery in the region. Post Brexit there is a highly probable chance of this trend being amplified in the near future" given the likelihood of disturbances in currencies and UK facing a further log jam in development.[520]

With the anticipated fall of pound up to 20 percent after Brexit, Indian companies with sizeable presence in the UK will need to endure the brunt at any rate for short term. "Jaguar Land Rover,

[518] See Note 21.
[519] Exchange Rates ( Indian National Rupee to Great British Pound), [accessed 24/08/2016], http://www.x-rates.com/average/?from=INR&to=GBP&amount=1&year=2016, URL.
[520] FICCI, BREXIT-Views and suggestions from India Inc., July 2016

Britain's biggest carmaker and Tata Motors subsidiary, assesses its annual profit could be cut by 1 billion pounds or $1.47 billion by the end of the decade if Britain leaves the European Union, said a *Reuters* report."

Nasscom recently said Brexit will have a negative impact on the $108 billion Indian IT sector in the short term.[521]

Thus again, the imports from UK get less expensive on the event of Brexit, mainly rough uncut diamonds, spirits etc. which is beneficial for the country.

The overall impact in real terms is liable to be comprehensively muted — as the flows of trade and investment would likely proceed in the normal course. Two potential casualties, after Brexit, could be manufacturing companies that have set up base in the UK while having a significant exposure to mainland Europe, and firms in the services sector, particularly information technology firms.

## 4. CONCLUSION

To conclude we can say that the EU referendum campaign was marked by a lot of claims and predictions as to what would or wouldn't happen after the vote but what has been clear that the decision to leave the European Union will have far fetching consequences on Britain as well as the world economy for the upcoming years. The actual result of what has happened will be known to us in a few months but what has already happened can be seen by looking at the value of pound decrease. It can be further noticed that UK economy is shrinking as no new trade deals can be seen. What we don't know as of now in such a short span of time is how will inflation and unemployment be affected. According to economists' inflation would rise because falling pounds will make imports more

[521] Fintech in India a Global Growth Story June 2016, [accessed 06/8/2016], http://www.nasscom.in/fintech-india-global-growth-story-june-2016, URL.

expensive but this can only be estimated after some months pass by. The same analogy applies with unemployment which can only be predicted after some time passes by. Therefore, in order to analyse the impact of Brexit we have to wait and watch. It can have a negative as well as a positive impact on the global economy and thus coming to conclusions, in just a span of three months after Brexit occurred, would be unfair.

## 17. WHITE COLLAR CRIMES- AN ANALYSIS

By Ananya Saroha[522]

**ABSTRACT**

*Greed is neither created by birth nor extinguished by education.*

*There is no debate on the impact that white collar crimes have on the world economy. Billions of dollars worldwide are lost due to actions of people who are in the positions of power and influence or just possess the knowledge and skill to satisfy their greed without spilling a drop of blood and never get detected.*

*This paper ventures to explain the complex and multifaceted concept of White Collar Crimes, which are not only illegal acts, or series of illegal acts, generally committed by non-physical means through concealment or guile, to obtain money or property, and/or to avoid the payment or loss of money or property, or to obtain business or personal advantage. These are also the acts which due to their intricate nature and ignorance/inefficiency of the jurisprudence system are not recognised as acts violating any law. These acts not only violate the letter, but the spirit of the law. The aim is to present the concept as simply as possible for a deeper understanding.*

*An investigation into the origin, recognition and development of a singular force that now has the world in its invisible clutches. The paper sees when the first white collar crimes were committed in India, how they developed over the two World Wars and became a force that the government was forced to recognise, and rake measures to prevent. We also briefly look into the resulting acts and amendments. Also, various White Collar Crimes like corporate espionage, tax evasion, hacking are classified according to the area in which they are committed. The classification, though not full proof, helps in understanding the vast avenue of white collar crimes.*

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*The paper, in the end, looks into the reasons due to which it is hard, if not impossible, to detect and prosecute white collar crimes. The reasons vary from political influence to social status of the offender.*

## INTRODUCTION

The human brain provides the species with the singular ability to commit a crime. But not all humans are capable of committing all kind of crimes. The kind and range of crimes that a person is able to commit are dependent on the abilities and knowledge of the individual in question along with the surrounding circumstances, and the psychological health or lack thereof. Crudely speaking a man commits a crime he is capable of committing. The capability can be mental or physical. For example any person with working arms and/or legs can commit a murder involving a gun, but for a hacking job on a government website, the individual requires the skills and knowledge to either do the job himself or commission other people to do it. In the second case the requirements are more specific meaning there will be less people who are capable of committing the crime.

Given that more people are capable of committing a traditional crime or the blue collar crime for which physical viability is more important than mental viability. For a white collar crime, mental viability along with some level of knowledge and skill is required. The laws made until the end of 20th century focused primarily on the prevention and punishment of Blue Collar Crime.

This piece of literature is an analysis of the concept of White Collar Crime going from the very origin of the subject to the latest developments in the same. It looks into the characteristics of the crime which distinguish it from the traditional crimes, and also the reasons for non-detection and prosecution of White Collar Crimes. The aim is to simplify the concept so that all can understand the underlying idea of the crime, and how it affects the world in general.

White Collar Crime as a concept was introduced by Professor Sutherland in American Sociology Society presentation in 1949. He defines a white collar criminal as, "a person of the upper social economic class, who violates the criminal law in the course of his occupation or professional activities". He pointed out that "white collar crimes are more dangerous to society than ordinary crimes, firstly, because the financial losses are higher and secondly, because of the damage inflicted on public morale".

He observed that while the financial loss due to white collar crimes like embezzlement range in several million dollars every year, the loss due to crimes like burglary, robbery, larceny remain around a million. According to him, the financial loss, though substantial, is unimportant compared to the damage to public relations. The distrust that is created due to these crimes leads to lower morale and disorganisation in the society. On the other hand, ordinary crimes have little effect on the institutions and social organisations.[523]

The white collar crime theorised by Sutherland was confined to the business world, he talked about corporate espionage, infringement of patent and copyrights, misrepresentation in advertisements etc. and was severely criticised. But the concept has evolved since then and now includes not only the original:

- Adulteration of food and drugs
- Fraud in business
- Mal- practices in medical profession
- Crimes by Lawyers

[523] Sutherland (1941) 217 Crimes and Business, The Annuals of the American Academy of Political and Social Science, 112

- Trusts, consortiums, cartels, associations, syndicates etc. formed to ward-off competition, or to raise profits or in some way interfere with the freedom of trade to the disadvantage of honest competition or the consumers.
- Bribery and/or graft by public servant(s)[524]

But also:

- Hacking and other computer related crimes
- Black Marketing and Hoarding
- Bond Forgery
- Tax Evasion

The list is ever expanding, and existing categories broadening. Various new definitions were provided by sociologists and criminalists to accommodate these new additions. Later, more fitting definitions of a white-collar crime were formulated as the one by Edelhertz in 1970. According to Edelhertz, white collar crime is defined as "an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage".[525]

Brightman in 2009 proposed a slightly modified version of Sutherland's definition for white collar crime. He defined White Collar Crimes as "an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage without any relation to the social strata the person belongs to". According to him, the social strata part is not important anymore

[524] The Law Commission Report No. 29, 1966 pg. 10-11
[525] Edelhertz, 1970, pg. 3

as the activities that were once the sole domain of the financial elite, are now accessible to all with the help of technology like personal computer. He argues that the scope of the term white collar crimes should be broadened to include virtually any non-violent act which is committed for financial gain, regardless of one's social strata.

## CHARACTERISTICS OF WHITE COLLAR CRIMES

According to Pickett and Pickett[526] there are several typical characteristics of a white collar crime namely:

a. It is **deceitful**. White collar criminals cheat, lie and/or manipulate the truth and conceal the facts or truth.
b. It is **intentional**. Such crimes do not result from simple errors of omissions or commissions but involve deliberate attempts/acts to illegally gain an advantage.
c. It breaches **trust**. Whenever one someone tries to defraud the other, the trust between the two parties is breached.
d. There are **victims**. Financial crime is based on activities to secure illegal gains, it implies the existence of an actual but not necessarily ascertainable victim.
e. It involves **loss**. There is a degree of loss or disadvantage. Such losses may be covered by insurance or written off, but the fact remains, that it causes a financial loss.
f. It may be **concealed**. The distinguishing feature of a white collar crime is that it may remain undetected and concealed indefinitely. The crimes may not be detected until a determined effort is made to uncover the same.

[526] Pickett and Pickett, 2002

## CLASSIFICATION OF WHITE COLLAR CRIMES

White Collar crimes can be classified on the basis of the areas they happen in:

### White Collar crimes in Legal Profession

The white collar crimes became quite widespread after the industrial revolution. The new crimeswhich evolved with time, became complex in nature with time. There developed a growing commercial nexus among insurance, banking, stocks and related corporate entities. This further, gave rise to typical legal complexities related to property rights and other legal matters which created opportunities for new kind of activities for the professionals. Because of the greed and lust for personal gratification, some of the advocates devoted their expertise to identify the legal loopholes mainly to help the rich entrepreneurs to accumulate more wealth. They studied hard to find out new ways for maximum tax evasion for their rich clients, and for themselves. These legal practitioners committed white collar crimes which were related to identifying the illegal/semi-legal methods of tax-evasion. There are lot of instances where unscrupulous and unethical practices like that of "*fabricating false evidence, engaging professional witnesses, thereby violating ethical standards of legal profession and dilatory tactics in collusion with the ministerial staff of the courts*".

### White Collar Crimes in Medicine

The white collar crimes are nearly omni-present. The medical practitioners are often found involved *in false medico-legal evidence – either increase or decrease in severity of injuries, issuance of false certificates, carrying out illegal abortions/operations, giving/prescribing in-effective or adulterated drugs and medicines to the patients, prescribing costlier and/or ineffective medicines, secret services to blue collar/white color criminals by giving expert opinion which leads to their acquittal, performing unnecessary surgeries, diluting medication to prolong the treatment to increase profit, and inappropriate prescribing practices. Dilatory tactics are often adopted by them in providing treatment to their patients*

*just to gain extra financial benefit.* The person having a good practice also indulges in such illegal activities. *Misleading and fake advertisements which claim absolute cure* for an incurable disease are also one of the frequent malpractices being carried out in the medical profession. More dangerous activities include unlawful organ transplant - including illegal human organ trade and clinical drug trials without consent or proper protection to the patient. A new addition to the above list is the insurance fraud. The following are a part of the insurance frauds: *"Billing for services not rendered, billing for a non-covered service as a covered service, misrepresenting dates of service, misrepresenting locations of service, misrepresenting provider of service, waiving of deductibles and/or co-payments, incorrect reporting of diagnoses or procedures (includes unbundling), overutilization of services, corruption (kickbacks and bribery), false or unnecessary issuance of prescription drugs."*[527]

The nexus of doctors/hospitals, insurance companies and pharma companies are looting common people to the extent that the medical services are getting out of the reach of the public in some countries. Its ill effects are visible in India also.

In majority of the cases the wrong doers often escape punishment, as they cannot be said to have violated the letter of law, mainly due to weak legal framework. But, by violating the spirit of law, they commit crimes against society and create huge damage to the public health and safety of the people.

**White Collar Crimes in Engineering**

Speaking of the engineers' role in white collar crimes, we often find instances of *underhand dealing with contractors, suppliers, passing of sub-standard works and maintenance of bogus reports of the labour works. Passing faulty building plans, illegal gratification for certification of substandard work*. Over or under specification of requirements, or tweaking of terms and conditions of the work contract for illegal gratification.

Marilyn Price, MD, and Donna M. Norris, MD, *Health Care Fraud: Physicians as White Collar Criminals?,* Editorial, J Am Acad Psychiatry Law 37:286–9, 2009

Such people earn more for their inferior works from the contractors, than the actual worth of their work.

**White Collar Crimes in Education**

The white collar crimes in educational institutions do come in the league, with a license to operate with impunity. There are rackets operating in these institutions for procuring students to appear in the examinations on the basis of *manipulated eligibility certificates, falsification of degrees, leaking of exam papers and allowing proxies to write exams in the place of the rightful candidate*, thereby damaging the standard of education in India. Fake universities/colleges/boards and fake courses dupe students. Sale and purchase of seats in various course, manipulation of admissions merit list and examination results, fake certificates are just the tip of the iceberg of white collar crimes in education.

In governmental institutions, the teachers and staffs are often found to be involved in unscrupulous practices. Teachers often force the students for taking private tuitions, and they sometimes even blackmail them by threatening to ruin their future, if they deny doing so. "Educational institutes *falsify records of existence of both teachers and students* for state grants. Medical colleges have been known to *recruit patients from nearby villages and falsify non-existent facilities at the time of inspection*."[528]

**White Collar Crimes in Corporate Sector**

The lion's share of white collar crimes is taken up by the business tycoons and politicians whoho have the capacity and capability of taking such criminal activities to new levels which common person cannot even dream of. In India, all major financial scandals are a result of an unlawful involvement of

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**Andrew MacAskill, Steve Stecklow and Sanjeev Miglani, *Rampant fraud at medical schools leaves Indian healthcare in crisis*, Filed June 16, 2015, 1 p.m. GMT**

politicians. Most of the business houses/tycoons are involved in one or the other type of white collar crimes – at least in creation of black money and tax evasion. They are corporate criminals who more often than not, are involved in *illegal/illegally obtained contracts, combinations and conspiracies of trade restraints/practices, unfair labour practices, manufacturing/selling of adulterated commodities, bribing of public officials for various unlawful gains including manipulation of public policies,* so on and so forth. They take shelter behind the corporate veil to indulge in many crimes. The Satyam scam, Coal-gate scam, 2G spectrum scam, Commonwealth games scam, Harshad Mehta and Ketan Parekh cases and Sahara Scam Case are worth-mentioning illustrations, nexus of politicians, where the bureaucrats and the corporate entities indulged in defrauding millions of people and made huge money for themselves.

**General White Collar Crimes**

Technocrats are often master minds of white collar crimes, carried out in a planned manner, in the form of *scams, frauds*, *black marketing, hoarding* etc. using their technical expertise and position. Some offences *like peddling drugs and narcotic substances, counterfeiting of currency, financial scams, high level smuggling* evoke serious concern, and impact the national security and governance. *Foreign exchange regulations, and import and export laws* are frequently violated for huge unlawful profits.

**Other White Collar Crimes**

A white collar crime that is quite common among the individuals, whether they belong to the middle or upper strata of the society is that of evading taxes. The complexity of the Indian taxation laws provides a number of loopholes, using which, most of the individuals try to escaping. *Tax-evasion* is not bound by any profession or class in our country. Engineers, doctors, advocates, business tycoons or even a simple small industry traders-all have mastered the trick of evading taxes. The Income Tax Department is finding it difficult to acquire true information of the exact income of these persons. It

is a general perception that only a small amount of their total income is declared as income before the Income Tax Department and the rest goes into the circulation as black money. Even the frequent changes in the tax-laws of the country have not been able to add any significant check on this continuing menace which in fact reduces the Government revenue to a large extent, which in turn adversely affects the growth of the country.

**GROWTH OF WHITE COLLAR CRIME AND ITS RESULTS**

The number of white collar crimes in a most countries coincide with the economic growth of the country. The two go hand in hand, and this is not surprising because most white collar crimes are, directly or indirectly, connected to production and/or distribution of wealth.

The Industrial Revolution and the corresponding changes in the society led to the first white collar crimes in England and the Western world. Unfair labour practices, agreements in restraint of trade, black-marketing and hoarding became rampage as the businessmen discovered that a lot of profit can be extracted by these activities and there is not regulation prohibiting it. At this time India was a British colony and consequently a big market along with the biggest exporter of raw materials, the British businessmen started to engage in the same activities they did in England for maximum returns. This did not go unnoticed by Indian businessmen who not only adopted there techniques but also perfected them. Lack of legislation to curb these practices resulted in revenue loss to the country. The committing of white collar crimes increased further during and after the two World Wars. Black Marketing of essential commodities increased manifold due to war and other natural disasters. By the time India gained independence it was already neck deep in corporate white collar crimes.

Taking this into consideration the Santhanam Committee was constituted. This committee submitted a 200 pages long report "the 29th Law Commission Report on White Collar Crimes" in 1966. The

report took Sutherland's observations into consideration. The report focused on the Corporate Crimes and gave a detailed account of the misdeeds of businessmen and industrialists. It defined the Indian Market Scenario as, "business communities in India, of large and small merchants, are basically a dishonest bunch of crooks…… while it is true that the object of businessmen is to make profit, there are degrees of making profit, and nowhere in the world do businessmen get rich so quickly as they do in India…."

As the major concern at the time were corporate crimes, legislations were passed related to the same. The Companies Act with its numerous amendments, the SARFASI Act, the DRT Act and other related acts are a testament to the same. Other white collar crimes which have gained the attention of the law makers are corruption, hacking and tax evasion and for all these, appropriate legislations were made. Prevention of Corruption Act, 1947 provides for equal punishment to bribe giver and bribe receiver. It is to note that bribery is only a white collar crime if a person occupying an official position indulges in an illegal activity in the course of his legitimate work for financial gain. The I.T. Act, 2000 provides for punishment for cybercrimes including white collar crimes. For tax evasion and related crimes, the Income Tax Act, 1961 provides the penalty. Also the crimes like forgery, cheating, violation of trademarks are covered (though not adequately) by the Indian Penal Code, 1860. Other such legislations are Essential Commodities Act, 1955, Prevention of Food Adulteration Act, 1954, Customs Act, 1962 and Trade and Mercantile Marks Act, 1958.

The White Collar Crimes that are not effectively, or not at all covered are the professional crimes. Professional Crimes include illegal activities done by professionals like doctors and lawyers in the course of their profession.

**Reasons for Non Detection and Investigation of White Collar Crimes**

White Collar Crimes by their very nature are complex and include a variety of elements making it very hard to detect and thus, harder to punish. Sutherland suggests that the preferential treatment to white collar crimes can be explained in terms of higher socioeconomic status of the offender, the remedial philosophy of the laws in question, and the relatively unorganised resentment of the public against white collar crimes. According to him the lack of the said resentment exists because of the following factors—

a) The violation being complex can be appropriately appreciated only by professionals.

b) The lack of media coverage on the matters as their complexity poses presentation problems.

c) The regulatory laws being comparatively young and nonspecific.

Sutherland sums up his observation in the area by saying that "the white collar criminals are more powerful than blue collar criminals and thus, hold higher influence in the society. The victims who generally happen to be the consumers are unorganised, lack the technical knowledge and are incapable of protecting themselves. White Collar Crimes remain undetected because it transcends the visibility of ordinary cheating practices of small merchants".

**COMPLEXITY**

Generally, all White Collar Crimes contain an element of complexity which makes it difficult to be detected by the common man. For example, in case of a forgery of a valuable painting, only an expert with prior knowledge and skill in that particular style or era of painting can determine if the given piece is a fake or not. For a normal human, a common man, a good fake Raphael and a real Raphael[529] are the same, and only an expert, on the analysis of the brush stroke patterns, the age and shade of

[529] Raphaels is the name given to the paintings by Raphael Senzio an Italian Painter and Architect of High Renaissance

colour and canvas used, and the techniques used by the painter in that particular part of his life etc. can determine if the given piece is worth millions of dollars or few thousands.

The same goes with other white collar crimes like corporate espionage. Non experts are incapable of detecting inconsistencies in the balance sheets of the company. Only experts like forensic accountants can understand the mass of numbers present in the balance sheets and audit reports of the company, and come to a conclusion about the existence and extent of the problem. Similarly, only a hacker can understand a code produced by another hacker and understand its functions and ramifications and only a better hacker can prevent the damage, cause repairs and lead to prosecution of the hacker.

Due to lack of the ability of a common man to understand and appreciate the impact of white collar crimes, they remain undetected.

**Lack of Qualified Experts**

As discussed above, experts with a specific skill set are required to understand and detect white collar crimes. But there is a chronic shortage of experts who are actually qualified to detect such crimes. While dealing with white collar crimes the experts need to be apprised with the latest trends in the world, not only on their law enforcement side but also on the darker side. Not only they need to be ready to detect the kind of crimes and problems that they are used to facing, but also new and innovative ways to commit a crime. It is not an easy task to do. For example an expert detecting a bond forgery needs to be apprised with the possible methods of forgery, also he needs to know about the latest technology in the market which may be used to create such a forgery. If he does not have any of the above knowledge, he may not be able to identify a forgery.

Also in case of tax evasion, the expert who is analysing a company or an individual needs not only the knowledge of the traditional and existing ways of tax evasion, but also the possible ways of doing the

same. He also needs to know about the latest developments in the market, or he might miss out on the clues of tax evasion and let a criminal walk free.

Given that experts in any field are scarce and then adding the above mentioned factors there are not a lot of experts in the world capable of detecting white collar crimes effectively.

**Impersonality of the Offence**

White Collar Crimes are generally impersonal in nature. The effect is financial and may affect a lot of people but the fact remains that they are impersonal. The effect of the crime remains indirect and no one cares about the indirect effects. For example, in a case of adulteration of a batch of a drugs, there is no detection until the adulteration results in death or serious damage to a lot of patients, and even then until there is an individual compliant there can be no prosecution. But this does not generally happen. Generally, the effect of the adulteration, if done after proper planning, goes unnoticed, then the symptoms, if any, develop in a very small number of people and thus the same is not detected.

In any corporate crime it is either the customers, the shareholders or the investors who lose the money. If the loss is small or compensable or dispensable, it is not bothered with, and if possible remains hidden. Though it does not seem to affect the company financially, but it does weaken the trust and morale.

**Concealment**

White Collar Crimes are committed by people possessing higher knowledge and skill level. Because of this and the complexity factor mentioned above, these crimes are well hidden. They are not as easy to find or prove, as the blue collar crimes. The knowledge and skill level along with the money is used in concealment of these white collar crimes. Generally, it is done quietly and efficiently and no violence is involved, but sometimes it is and this is when a white collar crime is converted into a red collar

crime. There is an actual case where an auditor was killed because he discovered substantial fraud while helping in restructuring of the company and refused to keep it under wraps.[530] This is not an isolated case or the only one. The offenders can resort to any number of measure including death threats, torture, murder or abduction if the easier method of bribery does not prove useful enough. Even political influence can be used to this end. The extreme measures taken by the offenders to ensure that their crimes remain concealed make it difficult for them to be detected. But the problem doesn't end with the detection of a white collar crime. After a white collar crime is detected, and evidence is collected in spite of the given hurdles, the problem of lack of prosecution and trophy punishment remain.

According to Sutherland, the problems in prosecution and punishment exist because the judges ordinarily belong to the upper strata of the society and this affects their attitude, consciously or otherwise towards the white collar offender who come from the same strata. This of course cannot be proved but is said to be a major factor.

Another reason for lack of prosecution and punishment can be the influence of the offender. Given that they are highly skilled individuals who happen to be very resourceful, there is bound to be some level of connections and influence. Sometimes this influence is enough to prevent the matter from being prosecuted.

The third reason for the lack of prosecution and punishment is the lack of appropriate laws. The laws related to most of the white collar crimes are old and are in need of amendment to ensure the prosecution of a white collar criminal. The same was realised by Santhanam Committee which

[530] *The Michael Wansley case, the case was in Thailand Court for 16 years at the end of which the death sentence of the two offenders was reversed.*

recommended amendments to various relevant laws to make them more prosecution friendly. Amendments were recommended to Anti-Corruption Act, Foreign Exchange Act, Food Adulteration Act and Wealth Tax Act among others.[531] But the fact still remains that there is a further need of amendment in white collar crimes addressed in Indian Penal Code, 1860 and other relevant legislations.

Lastly, the failure of trial courts to understand the gravity of the white collar crimes. In the case of M. H. Hoskot v. State of Maharashtra[532], Hoskot an employee of the Saurashtra University was found guilty of an attempt to forge degrees of Karnataka University. He was awarded a single day imprisonment by the Sessions Court on the basis of the background of the offender, the lack of criminal tendencies and lack of possibility of him participating in such activities again. The Supreme Court however disagreed and held the Sessions Court as "incredibly indiscreet". Though the Supreme Court has been working hard to rectify the situation, ruling that the laws related to white collar crimes should be broadly interpreted and seriously taken, there are still slips by the lower judiciary.

After the above discussion, it a clear that detection, investigation, prosecution and punishment of white collar crimes is not easy. Due to this, there is no way to truly understand the extent of white collar crime in the society. The above factors coupled with the fact that some of these white collar crimes are relatively new and that many white collar crimes are dealt with by tribunals, administrative boards or commission of inquiries make it nearly impossible to gain data.

In India, the criminal statistics are given in "Crime in India", compiled by the Bureau of Police Research and Development, Ministry of Home Affairs. It does not provide the data regarding the extent of white collar criminality in the country. The White Collar Crimes for which information is

[531] *Supra 2*
[532] (1978) 3SCC 544; 1978 SCC (Cri) 468

provided in the Crimes of India 2015 are economic crimes including crimes under prevention of Corruption Act, frauds and forgeries, cybercrimes and crimes which lead to seizure of property.

The types of offences for which there is no data available at all are professional crimes including the crimes committed by lawyers and doctors. This is due to the above mentioned factors coupled with the lack of limelight on the subject, lack of political will and lack of organised resentment towards the same.

## CONCLUSION

White Collar Crime as a concept was introduced after the industrial revolution when the social dynamics began to change and resulted in many businessmen cheating consumers and investors for personal monetary gain. Initially only corporate crimes which resulted in monetary gain without use of violence were included in the definition. Social Strata also played an important role. But over time, the concept has evolved to become more multifaceted and includes professional and occupational crimes like insurance frauds, tax evasion and even cybercrimes. The lack of violence and the ability of going undetected, are the reasons white collar crimes are more complicated than traditional crimes. The overall damage caused by white collar crimes makes them more dangerous than traditional Blue Collar Crimes.

The detection and collection of evidence related to white collar crimes is more complicated and skill oriented than traditional crimes. Also the skill or influence level of the offender makes not only detection hard but also prosecution (if it was somehow detected), and finally the punishment, harder. Supreme Court has been trying its best to ensure that white collar criminals are adequately punished but it is far from enough.

As far as the question of prevention of white collar crimes is concerned, updated and amended legislation with strict implementation and better detection might help, but it is only possible when the public is aware of the overall impact such white collar crimes have on the society and shows some sentiment against it.

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## 18. ASPECTS OF CRIMINAL LAW AND SOCIAL CONTROL IN INDIA

Author(s): Bhot Natasha Kersasp[533]

**ABSTRACT**

*Crime in India exists in various forms. This paper deals with four characteristics of criminal law that have been predominantly existent in India. The juvenile justice system, execution of death penalty, legality of suicides and cybercrime. In India, the procedure and punishment for crimes are provided under the Indian Penal Code, 1860, The Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. This paper has been written with the objective of studying the different criminal acts in our country, the various laws that govern them, and the steps that can be taken to prevent these acts in the future. We need more stringent laws and more so, laws passed in the interest of justice.*

*The Juvenile Justice (Care and Protection) Act was passed after much uproar by the public, and the media in the aftershock of the December, 16 Delhi gang rape case in which one of the accused, a 17 year old juvenile was first sent to a correctional home for three months. The Juvenile Justice system has progressed over the years from The Apprentices Act, 1850 to the Juvenile Justice Act, 2015 today. According to it, a juvenile from 16 – 18 years of age, involved in Heinous Offences, shall be treated as an adult. But despite the amendments there are still some lacunae in the Act which have been mentioned in this paper.*

*The constitutionality of the death penalty has been a long debated issue in India. The Supreme Court has held in Bachan Singh v. State of Punjab [(1980) 2 SCC 684] that "death penalty would be awarded only in the rarest of rare cases", however it did not define the term 'rarest of rare' leaving it to the facts and circumstances of every individual case. Despite this doctrine, the number of capital punishments awarded by the courts has been very high. Awarding death penalty to offenders has not reduced the number of crimes in India. Awarding life imprisonment instead of death penalty is the true punishment for criminals as they will realize what the family of victims goes through once they lose their loved ones. Hence, death penalty should be abolished, or they should be awarded only for violent acts against the state.*

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*In today's technologically advanced world, it is difficult to protect your computer from cybercrimes. Even the government and military websites are not completely secure and are under threat from cybercrimes at all times.*

*Attempt to suicide was recently decriminalised in India. But, no provision has been made to provide counselling or psychiatric help to the person who attempted to commit suicide. Societal pressure, family pressure or career pressure can push a man to take his own life. Suicide affects the family of the victim in an adverse way as it forces them to think if there was anything they could have done to prevent the suicide. Suicide is not justifiable and is seen as an act of cowardice by society. No problem is too large that it cannot be solved with the help of near and dear ones.*

## INTRODUCTION

Criminal law is that part of law which deals with crime. It monitors social conduct and prohibits whatever is injurious, menacing, or otherwise intimidating to the lives, property, and well-being of the citizens of the country. It also lists down punishments for the perpetrators of crime. In criminal law, the emphasis is more on punishment. Whereas, civil law varies on the point that, more emphasis is given to dispute resolution and victim compensation.

Criminal law is distinctive for the exceptionally grave possible consequences in case of failure to abide by its provisions. Every crime has a number of criminal elements. Death penalty may be awarded in some countries for severe criminalities. Although prohibited, caning, whipping and other corporal or physical punishments are still imposed in some countries of the world especially the Gulf countries. Individuals may be locked up in a variety of conditions depending on the laws of the country. Depending on the nature of the crime, an individual will be jailed for a minimum term of a day to a maximum of life imprisonment.

Social control means having a certain amount of control over the citizens of a state in order to maintain law and order in the state. The aim of social control is "nipping irregular trends by the bud".

According to E.A. Ross, "the individual has deep-rooted sentiments that help him to cooperate with other fellow members to work for social welfare. These sentiments are sympathy, sociability and a sense of justice. But these sentiments by themselves are not enough to suppress the self-seeking impulses of the individual. Society has to make use of its mechanism to accomplish the necessary order and discipline. This mechanism is called social control". As Ross defines, "Social control refers to the system of devices whereby society brings its members into conformity with the accepted standard of behaviour. "[534]

The five main agencies for exercising social control in India are:

1. Custom: Denotes a habit backed by social sanctions
2. Folkways and Folkmores: The tendencies that man obtains from his ancestors which help him to solve his issues.
3. Law: The most formal means of social control. May be in the form of written or unwritten commands.
4. Religion: Lays down certain mannerisms according to which man is to behave in society
5. Education: An informal method of acquiring knowledge which never stops till the death of the person.

## JUVENILE JUSTICE SYSTEM

"**Children need love, especially when they do not deserve it.**"

- Harold S Hulbert

Section 2(35) of The Juvenile Justice (Care and Protection) Act, 2015 defines juvenile as "a child below the age of eighteen years" Juvenile is someone who, being below the age of eighteen years, allegedly commits acts which are in violation of any law and are declared to be illegal. A juvenile shall

[534] http://www.yourarticlelibrary.com/sociology

be treated as a juvenile even if he is involved in any criminal acts and has to appear before a court of law for trial and punishment. In India, this Act is the primary legislation for dealing with children who encounter the wrong side of the law or simply said, children committing crimes. The first legislation dealing with children was the Apprentices Act, 1850. The Apprentices Act, 1850 was then repealed by The Juvenile Justice Act, 1986.

**Historical Outlook**:

- Pre-Independence

"Differential treatment for children can be traced as far back as the Code of Hammurabi in 1790 BC, the responsibility for their supervision and maintenance being vested on the family. During the colonial regime the first centre for destitute children called "Ragged School" was established in 1843 by Lord Cornwallis. The period between 1850 and 1919, marked by social and industrial upheavals, called for the enactment of the Apprentice Act (1850), the IPC (1860), the Cr.P.C (1861), and the Reformatory Act (1876 and 1897), announcing the paradigm shift in the penal philosophy in India from punitive to reformative."[535] Thereafter, the Reformatory Schools Act, 1897 provided that children less than 15 years of age should be sent to reformatory cell if they had been sentenced to imprisonment.

- Post-Independence

Subsequently, it was comprehended by the Indian Parliament that persons below the age of 18 years especially those who were neglected required care and protection and hence, the Juvenile Justice Act, 1986 was passed. This Act brought about a uniform juvenile justice system all over the country.

[535] www.manupatrafast.com/articles

The Constitution of India lays down various articles for the care and protection of juveniles. Article 15(3)[536] enables the State to make special provisions for children. Whereas, Article 21[537] provides for free and compulsory education up to the age of 14 years. Articles 23[538] and 24[539] prohibit trafficking and forced labour of children. Article 39(e)[540] and (f)[541] enables the state to direct policies towards the welfare of children. In addition to these provisions, other legislations that ensure the protection of children in independent India are: The Probation of Offenders Act, 1959, The Factories Act, 1948, The Child Marriage Restraint Act, 1986 and The Child Labour Act, 1986.

## PRESENT LEGISLATION

The Juvenile Justice (Care and Protection of Children) Act, 2015 was passed on 7th July, 2015 by the Lok Sabha, and on 22nd December 2015 by the Rajya Sabha. This Act repealed the previous Juvenile Justice (Care and Protection of Children) Act, 2000 with an aim to try juveniles in the age group of 16-18 years involved in heinous offenses as adults. Heinous offences are those offences which are punishable with a sentence of minimum seven years under the Indian Penal Code, 1860. The Act mandates the State Government to set up Juvenile Justice Boards under section 4 and Child Welfare Committees under section 27 in every district. Both, the Board as well as the Committee must have at least one woman member. The Act empowers the Juvenile Justice Board to decide whether to try a juvenile of 16 years or older as an adult. The Board also appoints a Judicial Magistrate and two

536 "Nothing in this article shall prevent the State from making any special provision for women and children."
537 "No person shall be deprived of his life or personal liberty except according to procedure established by law."
538 "Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."
539 "No child below the age of fourteen years shall be employed to work in any factory or mine or employed in any hazardous employment."
540 "that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength"
541 "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment"

social workers as members. If the Board approves that the juvenile does not deserve to be tried as an adult, then the juvenile will be sent to a juvenile home for rehabilitation. The Child Welfare Committees shall look at institutional care of children in their respective districts. Each committee will have a chairperson and four other members, all of whom will be specialists in matters associated to children. This new Act also aims at adopting a child-friendly approach for children whose acts are in conflict with the existing laws, and are in need of care and protection for their development. India is a signatory to the *UN Convention on the Rights of the Child* which mandates all children under the age of 18 years to be treated as equals whereas, the Juvenile Justice Act, 2015 sets the age of juveniles at 16. Thus, this Act is in violation of the Convention as it prescribes different punishments for the same crime committed by a sixteen-year-old, or say a seventeen-year-old. The Act also deals with adoption of children in Section 38 and lays down the eligibility criteria for adoptive parents in Section 57. "A central adoptive resource agency will frame the rules for adoption, which will be implemented by state and district level agencies."[542]

**CONCLUSION:**

In conclusion, it can be said that the Act should be in the interest of justice. A law must not be made or amended due to single act of barbarism; because a law is for all and for all times to come.[543] Children in the age group of sixteen to eighteen years are being found in commission of heinous crimes more than ever before. It is not only the responsibility of the child and his family but also of the society, as an increase in crime rate means that the society has failed inproviding a proper and healthy childhood to the children and has let them drift towards criminal activities. As per National Crime Records Bureau, in the year 2013, juveniles were charged with almost 3.4 per cent of total number of rapes

[542] www.ndtv.com
[543] www.indiacelebrating.com

registered in India.[544] Also, it has been proven time and again that harsher laws do not lead to fewer crimes.

Therefore, it must be discussed whether we as a society want to have a system based on retributive punishment, or a system which is reformative and assimilative for the juvenile offenders. It is the responsibility of the State as well as the society to ensure that the children do not become rebellious, and remain in the social mainstream; hence, not punishment but 'care and protection' must be the main motto of the Juvenile Justice (Care and Protection) Act.

- ***Execution of Death Penalty***

There has been a constant debate in India, and the world over regarding the constitutionality and validity of the death penalty. The death sentence has been abolished in a total of 98 countries, including France, Belgium, Austria and Ireland amongst others for all crimes. Whereas, seven countries, including Brazil, Chile and Kazakhstan award death penalty for exceptional crimes, and have abolished it for ordinary crimes.

**Death penalty in India**

In India, death penalty is awarded for murder (Section 302, Indian Penal Code, 1860), abetting the suicide of a child or insane person (Section 305, Indian Penal Code, 1860), waging war against the government (Section 121, Indian Penal Code, 1860) and abetting mutiny by a member of the armed forces (Section 131, Indian Penal Code, 1860). The death sentence is also awarded to terrorists under anti-terror laws. Generally, courts award life imprisonment to convicts in a murder case. Only in "rarest of rare" cases, convicts are given death penalty.

[544] ncrb.nic.in

Death sentence is imposed on the convict only when the court comes to a conclusion that life imprisonment is not an appropriate punishment, after taking the facts and circumstances of the case into consideration.

Section 354(3) of the Criminal Procedure Code[545], requires a judge to give "special reasons" for awarding death sentences. Capital punishment can be inflicted only in the gravest cases, and the condition of the convict is also to be taken into account in awarding the sentence.

In 1980, in **Bachan Singh vs. State of Punjab**[546], the Supreme Court propounded the "rarest of rare" doctrine, and ever since then, while passing a judgment, life sentence is the rule and the death sentence is the exception. There is no statutory definition of "rarest of rare". It depends upon the facts and circumstances of each individual case, as well as on factors such as the conduct of the offender, previous history of his involvement in crime, brutality of the crime, chances of reformation etc.

The generally applied test of 'rarest of rare' cases while awarding life imprisonment to a convict is, whether the life of the offender has to be taken away in order to have an organized society, and whether failure to put him to death would nullify the death sentence provided under Section 302 of the Indian Penal Code, 1860. The sordid nature of a crime, wherein the victim has been murdered in cold blood, is generally taken into account to decide whether a particular case falls within the parameters of 'rarest of rare'.

In **Bachan Singh vs. State of Punjab**[547]**,** Hon'ble Mr Justice R.S. Sarkaria who authored the judgment on behalf of Chandrachud, C. J., A.C. Gupta and N. L. Untwalia, JJ held that,

[545] When the conviction is for an offense 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 judgment awarded and, in the case of sentence of death, the special reasons for such sentence.
[546] AIR 1980 SC 898
[547] Ibid

"*Death penalty should be imposed when collective conscience of the society is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty"*

Over 1,440 death sentences were handed out between 2004 and 2015. But executions are rare because of the lengthy appeals process, and the debate over which crime falls in the "rarest of rare" category to warrant the maximum punishment.[548]

**Recent Death Sentences Passed:**

- Oct 30, 2015; A special women's court sentenced 28 year old Chandrabhan Sanap to death for 2013 rape and murder of 23 year old Andhra techie Esther Anuhya
- Sept 30, 2015; Five sentenced to death over the 7/11 Mumbai local train blasts.
- April 4, 2014; A Sessions court handed out death penalty to three men for the 2013 gang rape of a photojournalist at Shakti mills.

The number of death sentences pronounced has been very high in India despite the "rarest of rare" doctrine that limits the scope of awarding capital punishment.

"According to an Asian Centre for Human Rights (ACHR) report — The State of Death Penalty in India 2013 — Uttar Pradesh topped the list with 370 death sentences, followed by Bihar (132). But sentences for 4,321 convicts were commuted from death penalty to life imprisonment during this period. This, of course, included many convicts who were given death penalty before 2001. The

[548] 'The Death Debate' Mumbai Mirror Sept. 9, 2016 p. 6

highest number of commutation — 2,462 — happened in Delhi, followed by Uttar Pradesh (458). But thousands of convicts still remain on the death row."[549]

On 31 August 2015, the Law Commission of India excepting the crime of waging war against the nation or for terrorism-related offences recommended the abolition of capital punishment for all crimes in India,

"There are those of the Indian judiciary who have articulated their clear views on the usefulness served by the death penalty as a deterrent. One such is Justice V.R. Krishna Iyer of the SC of India. His experience of years on the bench leading him to the conclusion that, "Our penal code provides for capital punishment for a wide range of offences. But sadly, the death penalty has never reduced these crimes in the country." This is of specific relevance to individual death penalty cases, as well as to cases generally. Empowered by their own case-law, despite any ruling, including that by the Head of State, Article 21 of the Constitution allows the court to intervene at any stage where the threat of deprivation of life is imminent as it always is, in death penalty cases."[550]

Death penalty in India should be completely abolished as; no authority can be given the right to take away a person's life. Time and again it has been proved, as also has been observed by judicial stalwarts that the death penalty fails to serve as a deterrent for heinous crimes. Many a times it is also seen, that an innocent person is sent to the gallows while the accused runs scot free. The Supreme Court held that death penalty is to be awarded only in the 'rarest of rare' case but it did not define the term leaving it upon the facts and circumstances of every individual case, and hence making it unclear.

[549] 'Death penalty: 'Rarest of rare' cases are not so rare in India now' Hindustan Times Feb 05, 2016
[550] Vinay Naidu, Can society escape the noose--?: the death penalty in India : cases, materials, and opinion, p.47, 2005

**Cyber Crime**

A Cyber Crime is a criminal activity carried on with the use of computers and the internet. The computer is either made the tool, or the target, or both. Theft, fraud, forgery, defamation, mischief and other criminal activities can be committed using the computer and the internet. The computer can be made a target by using it to attack other computers, for example; hacking, worm attack, DOS attack, etc. Whereas, the computer may be made a weapon to commit crimes such as, Credit Card Frauds, Cyber Terrorism, IPR Violations, Pornography etc.
In today's technologically advanced world, cyber-crime has been on a rise. Retrieving sensitive data and information and using it for unlawful means has become easier, and catching such criminals has become difficult. Hence, this has led to a rise in cyber-crimes across the world.

**CYBER CRIME TYPES**

Cyber-crime can be classified into three types namely,

- Crime against individual: This type of cyber-crime can be in the form of cyber stalking, bullying, trafficking and distributing pornography etc. This is the most dangerous form of cyber-crime as it may also lead to the victim committing suicide, if the bullying does not stop and hence, it has become an important agenda for law enforcement agencies, and international help is taken to reach out to the victims and to arrest the perpetrators.
- Crime against property: Cyber-crimes are similar to real world crimes in the sense that in both these domains, criminals resort to stealing and robbing, and both crimes cause damage to property. In the case of cyber-crimes, the criminals illegally obtain a person's bank details and drain off money, make ill use of the credit card, scam innocent people of their hard earned money, use malignant software to gain access to an organization's website.

- Crime against government: Crimes against a government, although not as popular, are referred to as cyber terrorism. If successful, it can cause destruction and panic amongst the people. The culprits can be terrorist outfits or governments of rival nations.

The offence of cybercrime falls under the sections of the IT Act, 2000, the Indian Penal Code and other special laws such as Obscenity Law, Communication Decency law, self regulation, etc.

Cyber space plays a positive role in the political, economic, as well as the social world today. Cyber terrorists use the technology to their otherwise illegal advantage. To restrain the activities of these perpetrators, the Information Technology Act 2000 was passed which is based on UNCITRAL[551] model of Law on e-commerce. It gave legal recognition to electronic transactions, records, authentication of digital signatures, prevention of computer crimes etc. But at the same time, this Act has also faced criticism as it does not cater to the protection of Intellectual Property Rights or the domain name.

## LEGALITY OF SUICIDES

Suicide is often resorted to a result of despair, the cause of which is frequently attributed to a mental disorders such as depression, schizophrenia, borderline personality disorder, alcoholism, or drug abuse. Stress factors such as financial difficulties, or troubles with interpersonal relationships often play a role.

"Approximately 0.5% to 1.4% of people die by suicide, a mortality rate of 11.6 per 100,000 persons per year."[552] "Suicide resulted in 842,000 deaths in 2013, up from 712,000 deaths in 1990."[553]

[551] The United Nations Commission on International Trade Law
[552] Värnik, P (March 2012). "Suicide in the world". International Journal of Environmental Research and Public Health.
[553] GBD 2013 Mortality and Causes of Death, Collaborators (17 December 2014)."Global, regional, and national age-sex specific all-cause and cause-specific mortality for 240 causes of death, 1990-2013: a systematic analysis for the Global Burden of Disease Study 2013."

Attempted suicide or suicidal behaviour is self-injury with the need to end one's life that does not result in death. In India attempted suicide was an offense punishable under section 309 of the Indian Penal Code, 1860 up till December, 2014. On December 10, 2014, the government decriminalized "attempt to suicide" by deleting Section 309 of the Indian Penal Code from the statute book. Under the said Section, a suicide bid was punishable with imprisonment up to one year, or with fine, or both. "Law Commission of India, in its 210th Report, had recommended that Section 309 (attempt to commit suicide) of IPC needs to be effaced from the statute book. As law and order is a state subject, views of States and Union Territories were requested on the recommendations of the Law Commission. 18 states and 4 Union territory administrations have supported that Section 309 of the IPC may be deleted. Keeping in view the responses from the states/UTs, it has been decided to delete Section 309 of IPC from the statute book," the MoS stated in the reply.[554]

**ABETMENT OF SUICIDE**

Section 306 of The Indian Penal Code, 1860 states "If any person commits suicide, whoever commissions the abetment of such suicide, shall be punished with imprisonment of either description which may extend to ten years, and shall also be liable to fine." Also, a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his objective of killing himself.

In the case of **G M Reddy versus Andhra Pradesh**[555], the trial court had convicted a farmer, the accused, of harassing his farm-hand by accusing him of theft and thus, abetting his suicide. The High Court upheld the conviction. The Supreme Court set aside the conviction and held that it had no merit. In the above case, the Supreme Court observed, "Abetment involves a mental process of

[554] 'Government decriminalizes attempt to commit suicide, removes section 309', Times of India, December 10, 2014.
[555] 2010 Cr.L.J. 2110, Para. 20

instigating a person, or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the Legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306, IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide."

The 'right to life' and 'suicide' are two sides of the same coin. Article 21 includes a 'right to live' as well as a 'right to die. 'Every individual should be allowed to choose between life and suicide. Suicide should not always be held to be unreasonable. Sometimes, it is the only solution the victim is left with; a line of last resort that can legitimately be taken when the alternative is considered worse. No being should have to suffer unnecessarily. Suicide provides an escape from sufferings.

Herodotus, a Greek historian rightly wrote: "When life is so burdensome, death has become for man a sought-after refuge".

Also, a terminally ill person or a person suffering from an incurable disease wherein 'suicide' is the last resort to avoid and to bring an end to the sufferings of the person concerned, as also of the day in and day out sufferings of the near and dear ones. In such a case, he may be permitted to terminate his life prematurely. Such cases would only come within the ambit and circumference of 'right to die with dignity'. In such cases, extinguishing lives will not amount to taking one's life, but will amount to accelerating the natural death process which has already commenced over a period of time. A Division Bench of the Supreme Court of India held that the right to life which Article 21 of the Constitution of India provides for can be said to include the right not to live an enforced life.[556]

[556] P. Rathinam v. Union of India AIR 1994 SC 1844

There have also been many philosophical arguments made that show suicide to be immoral and unethical. One popular argument is that some of the reasons for committing suicide – such as depression, emotional pain, or economic hardship – are temporary and can be improved with treatment and by making changes to some phases of one's life.

A common adage in the discourse surrounding suicide prevention sums up this view: "Suicide is a permanent solution to a temporary problem."[557]

## CONCLUSION

Suicide in India is a complex problem and hence, suicide preventive measures should also be multifaceted. Cost-effective, relevant and appropriate methods such as cooperation, collaboration, and commitment are needed to be developed as it is the need of the community. "In India, suicide prevention should be undertaken as more of a social and public health objective. Mental health professionals should adopt proactive and leadership roles in suicide prevention and save the lives of thousands of young Indians."[558]

Even health professionals have held that 'Suicide cannot be completely prevented'.

Ending your life or committing suicide to end the normal or as some people may call it, minimal problems of life is seen as an act of cowardice and is not justified.

Suicide is morally wrong as it inflicts pain on others. Suicide effects family and near ones immensely. It also affects friends and colleagues and forces them to wonder if they could have done anything to prevent the death of that friend.

Suicide can impact us even if we did not know the person. For example, they could have been a part of our community, a distant relative or even an associate. Whatever be the situation, it is important to

[557] Phil Donahue, NBC TV, May 23, 1984
[558] http://www.ncbi.nlm.nih.gov/pmc/articles

realize that even the suicide of a stranger could affect us severely; it may not cause us to grieve the same as we would for a family member or a friend, but it definitely does make you sit up & think; hence stimulating strong reactions and questions.

## 19. MUSHROOMING "BABY FACTORY": ANOTHER BAN-WAGON

### Legal Lacunae under the Proposed Legislation

Author(s): Aneet Kaur[559] and Anam Usmani[560]

"Little souls find their way to you, whether they're from your womb or someone else's" – Sheryl Crow

## INTRODUCTION

Instinct of motherhood is the most powerful and significant desire, that exists in all the living creatures, that include all humans and animals. According to The Ancient Indian philosophy, the biological purpose of life, is to propagate one's own genes, and all the living creatures are here on a transition phase, to pass their own genes or traits, to the next generation.

Infertility is generally considered as a social stigma in India. But the agony and trauma of infertility, is best felt and described by the infertile couples themselves. Although, infertility does not claim the life of a person, but it inflicts devastating impact on the life of an individual for not fulfilling the biological role of parenthood for no fault of his/her. Indian society has got a very stable family structure, with a strong desire for children, particularly a son to carry forth the lineage. With the astronomical advances in the field of medicine, infertility can now be treated using the latest medical technologies collectively called - ART[561], which includes ICSI[562] or IVF[563] and surrogacy etc. After Louise Brown[564]

[559] BA. LLB (Hons.) student at Army Institute of Law, Mohali, Punjab
[560] BA. LLB (Hons.) student at Army Institute of Law, Mohali, Punjab
[561] Assisted Reproductive Technology
[562] Intracytoplasmic Sperm Injection
[563] In Vitro Fertilization
[564] Louise Brown, The birth of the world's first child through In Vitro Fertilization, on July 25, 1978, was a path-breaking step in control of infertility.

and Kanupriya/Durga's[565] birth, surrogacy comes as a ray of hope to fulfil the desire of infertile couple to have a child. For the purpose of outsourcing commercial surrogacy, Anand[566], a small town in Gujarat is famous as "a cradle of surrogacy in India".

**SURROGACY: "Parenthood requires love, not DNA"**

"Surrogacy" "means an arrangement, in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate."[567]

**MODERN TIMES**

After business process, legal process and knowledge process outsourcing, genetic pool banks of India are the latest outsourcing industry. Equally, renting wombs is another easy and cheap option in India. Relatively low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and lack of any law to regulate these practices, is attracting both foreigners and Non-resident Indians (NRIs) to sperm banks and surrogate mothers in India.[568] In 2002, India became the first country to legalise commercial surrogacy. By 2012, India had become the "surrogacy capital" of the world[569]. India has become a mushrooming centre, with its "reproductive tourism" with an industry worth $2.billion[570]. As rightly said by Anil and Ranjit Malhotra, "It is presumably considered legitimate because no Indian law prohibits surrogacy, but then, as a retort, no

[565] Dr Subhash Mukherjee, Kolkata announced the birth of India's first test tube baby in Octopber 1978.
[566] Hiral Dave, *Anand,India's "baby factory",* HINDUSTAN TIMES, Aug,27,2016,at 8
[567] The Surrogacy (Regulation) Bill, 2014, Section 2(f)
[568]Anil and Ranjit Malhotra, *Commercial Surrogacy In India – Bane Or Boon,* (March 17,2016, 11:25 PM)http://www.reunite.org/edit/files/articles/COMMERCIAL%20SURROGACY%20IN%20INDIABANE%20OR%20BOON.pdf
[569] Roli Srivastava, *Centre clears Bill regulating surrogacy,*THE HINDU, Aug.25, 2016, at 12
[570] Soumya Swaminathan, *Why The Surrogacy Bill is Necessary,* THE HINDU,Aug.28,2016,at 9

law permits surrogacy either"[571]. In the absence of any law to govern surrogacy, the Indian Council of Medical Research (ICMR) issued Guidelines in 2005 to check the malpractices of Assisted Reproductive Technology (ART). These national guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 are non statutory, have no legal sanctity and are not binding, silent on major issues they lack teeth and are often violated. Exploitation, extortion, and ethical abuses in surrogacy trafficking are rampant, go undeterred and surrogate mothers are misused with impunity.[572]

Even the 228th Law Commission Report suggested the need for a legislation to regulate the mushrooming industry. The commission stated-

"Non-intervention of law, in this knotty issue will not be proper at a time, when law is to act as ardent defender of human liberty, and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds, without a proper assessment of social ends and purposes, which surrogacy can serve, would be irrational. Active legislative intervention is required, to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour, is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibiting commercial ones."[573] The Union Cabinet chaired by the Prime Minister, Shri Narendra Modi, has given its approval for introduction of the "Surrogacy

[571] Ibid.
[572] Ibid.
[573] The Law commission Report(228*), Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy*,(March 23,2016, 10:37 PM) http://lawcommissionofindia.nic.in/reports/report228.pdf

(Regulation) Bill, 2016"[574]. The object of the proposed law, is ostensibly to curb the exploitation of poor women, who often act as surrogate mothers[575].

Since there is no law regulating surrogacy, there is a great amount of ambiguity, as to whether surrogacy is either permitted or prohibited in India. Difference in intention of the people opting for surrogacy, can very easily get converted from bonafide to malafide, thereby defeating the entire concept and objective of surrogacy. For example- a couple's need of having a child through surrogacy to complete their family, and shift to a desire for child with specific genes or a "designer baby". In turn leading to a drastic shift from "social good" to complete violation of human rights, thereby proving the necessity to govern this rapidly emerging industry, for the protection of all the stakeholders connected to it.

**WHY SURROGACY?**

Child adoption is a complicated issue in India. It is over burdened with knotty legal processes and complicated lengthy procedures, for those who want to give a new home and life to the millions of Indian orphans. The Guardian and Wards Act, 1890 does not permit adoption, it rather permits Guardianship. The Hindu Adoption and Maintenance Act, 1956 does not permit non-Hindus to adopt a Hindu child. Even though The Indian Constitution, 1950 ordains it to be a sovereign, socialist, secular, democratic republic, but still, even after 68 years of Independence, we don't have a comprehensive adoption law, applicable to all the citizens, irrespective of their race, religion, sex or the country they live in, for example- Persons of "Indian Origin (PIOs), Overseas Citizens of India (OCIs) and Non-Resident Indians (NRIs)". Requirements of immigration have further hurdles after

[574] Anonymous, *Cabinet approves introduction of the "Surrogacy (Regulation) Bill,2016"*, NARENDRA MODI,(Sept,13,2016,20:13PM), http://www.narendramodi.in/cabinet-approves-introduction-of-the-surrogacy-regulation-bill-2016--513367

[575] Suhrith Parthasarathy, *Republic of Unreason*, THE HINDU,Sept.1,2016,at 10

adoption. The outcome, those who cannot by law adopt, and can be appointed only as guardians under personal Indian laws, turn to options of IVF or surrogacy.

## JUDGEMENTS

### Jaycee B. v. Superior Court[576]

The child had five people who could lay claim to parenthood – a genetic mother, a surrogate mother, a commissioning mother, a genetic father and a commissioning father.

### Baby Manji Yamada V. Union of India [577]

It was a matter of matrimonial discord after entering into the surrogate agreement which led to custody issues between the commissioning parents with regards to the child born.

### Israeli Gay couple's case[578]

In order to prove the paternity before the baby's passport and other documents were prepared. Israeli government required the gay couple to go for a DNA test.

[576] Jaycee B. v. Superior Court ,42 Cal.App.4Th 718 (1996), Facts –"Using the sperm and eggs from anonymous donors a child was born to a surrogate mother as the infertile couple was unable to create their own embryo using the IVF technique. The couple chose to use anonymous donors rather than asking the surrogate to use her own eggs because of the controversy in Baby M (109 N.J. 396 (1988) case in New Jersey in which the surrogate had eventually refused to hand over the baby claiming that she was its biological mother and her right to raise the child pre-empted the commissioning parents."

[577] Baby Manji Yamada V. Union of India ,JT 2008 (11) SC 150, Facts- "The custody of a child Manji Yamada who was given birth by a surrogate mother under a surrogacy agreement with her entered into by Dr Yuki Yamada and Dr Ikufumi Yamada of Japan. There were matrimonial discords between the commissioning parents. Finally grandmother of the baby Manji, Ms Emiko Yamada flew from Japan to take care of the child and filed a petition in the Supreme Court under article 32 of the Constitution. Ultimately, baby Manji left for Japan in the care of her genetic father and grandmother."

[578]Israeli gay couple's case, Times of India 18-11-2008, Facts- "The gay couple Yonathan and Omer could not adopt or have a surrogate mother in Israel. They came to Mumbai and Yonathan donated his sperm. They selected a surrogate. Baby Evyatar was born. The gay couple took son Evyatar to Israel."

**LOOPHOLES IN THE BILLS**

**A. Applicability of the Bill**

- **The Surrogacy (Regulation) Bill, 2016 – Bans Commercial Surrogacy and allows only Ethical Altruistic Surrogacy.**

Who can opt for Surrogacy?

Couples who have been married for 5 years or more, and are childless, are eligible to opt for surrogacy. In addition to this, couples having a mentally or physically challenged first biological child will also qualify. The bill, expressly provides an age limit for the husband (26-55 years) and for the wife (23-50 years), within which they can opt for surrogacy.

Who all are Barred?

Foreigners, overseas Indians, single parents, unmarried couple, live-in partners and gay couples are barred from commissioning the services of a surrogate mother. Couples who have a biological or an adopted child, will not be allowed to have another baby through surrogacy. Hence, it is implied that a person who had a child from his or her first marriage, but is now divorced, cannot opt for surrogacy in the second marriage.

- **ART Bills**

According to The ART Bill 2014,"commissioning couple"[579], "couple"[580] and "patients"[581] have been defined under Sections 2(h), 2(i) and 2(zg) respectively.

The term "married couple", which has been used under the above stated Sections, and under Section-61(1) and (3)[582] , has not been defined anywhere in the entire bill. The term "married couple", is too vague and uncertain, and can include couple legally married in India, legally married outside India (but their marriages are not recognised in India), creating chances of applicability of surrogacy in India for foreign married homosexual couples.

Ironically the terms "unmarried couple" and "married" were defined under Section 2(v) and 2(dd)[583] respectively of the Draft ART Bill 2010, but have not been retained in the Draft ART Bill 2014. This has led to great ambiguity with respect to the applicability of the bill.

Thus, people opting for surrogacy, could be infertile married couple or married homosexual couples, since such marriages have been legally recognised in a number of countries, like Columbia, France,

[579] The Assisted Reproductive Technology (Regulation) Bill,2014, section 2(h)- )"commissioning couple" "means an infertile married couple, who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining service's that the assisted reproductive technology clinic or the assisted reproductive technology bank is authorised to provide."

[580] Ibid. Section 2(i)- "couple" "means a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage which is legal in India."

[581] Ibid. Section 2(zg)- "patients" "means an infertile married couple who comes to any registered assisted reproductive technology clinic and is under treatment for infertility."

[582]Section 61(1)-"A child or children born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child or children born through sexual intercourse."
Section 61(3)-"In case of married couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child or children are born, the child or children shall be the legitimate child or children of the couple."

[583] Section 2(v)- "married couple", "means two persons whose marriage is legal in the country / countries of which they are citizens."
Section 2(dd)-"unmarried couple", "means two persons, both of marriageable age, living together with mutual consent but without getting married, in a relationship that is legal in the country / countries of which they are citizens."

UK, US, Brazil, South Africa, Canada, Ireland etc[584]. Therefore, there is a likelihood that Section 2(h) and Section 2(i) can be interpreted to allow such couples to apply for surrogacy, but in the backdrop of Section 377 of IPC[585] criminalizing homosexuality in India, makes it ineligible for the homosexuals to opt for surrogacy.

After a close analysis of the above criteria that is laid down, an entire section of individuals get excluded. Thus, equality before law that is proposed under Article 14, of The Indian Constitution, is infringed. Disqualifying others on the basis of sexual orientation, nationality, age or marital status, does not seem to qualify the test of equality under Article 14, and has no connection with the intended objectives of the proposed bill. People who are more likely to opt for surrogacy, have been excluded explicitly[586]. By limiting the eligibility criteria, the Central Government is seeking to deny a host of perfectly suitable individuals, who are well within their spirits to demand access to surrogacy services.[587]

The Right to Life, includes the Right to Reproductive Autonomy i.e the Right to Procreation and Parenthood. It is not for the state to decide the modes of parenthood. The state can't interfere in the prerogative of a person(s) to have children naturally or through surrogacy. Infertility can't be a condition to undertake surrogacy[588]. The government is infringing the Right to Privacy (Article 21) of the people by laying down the age limit, within which they can opt for surrogacy. It is also possible that a person gets married at the age of 35 and wants to opt for surrogacy, but will have to wait for 5

[584] David Masci, Elizabeth Sciupac and Michael Lipka, *Gay Marriage Around the World*, PEW RESEARCH CENTRE(Jul.31,2016,10:44pm), http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/
[585] Section 377 of IPC "Unnatural offences"—"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."
[586] Anil Malhotra, *One more for the Ban-Wagon*, INDIAN EXPRESS,Aug.27,2016,at 11
[587] Kapil Sibal, *Unequal by law*, INDIA EXPRESS, Sept.12,2016,at 8
[588] Supra 26

years as per the recent guidelines. Instead of using the term "married couple", legislature should use the term "individual", thus widening the scope for people, who can opt for surrogacy, and will thus include heterosexuals and homosexuals as well.

So The Surrogacy Bill 2016 and the previous ART Bills (2010 & 2014) cannot be read together harmoniously, since there are so many shortcomings and are self-contradictory.

**R. Rajagopal alias RR. Gopal v. State of Tamil Nadu**[589]

The Supreme Court emphasised, that The Right to Privacy has achieved a constitutional status in today's recent times. Even though it is not expressly provided, but, it is an implied right under Article 21 which guarantees Right to Life and Personal Liberty. Article 21 has been interpreted to incorporate 'the right to be let alone'. It is a citizen's right to protect his privacy, family, marriage, procreation and other personal matters.

**B. Who can be a surrogate?**

- **The Surrogacy (Regulation) Bill, 2016**

According to the new Bill, the surrogate mother shall act as a surrogate, only once in her lifetime, between the age of 25-35 years, and has at least one child of her own. A woman can act as a surrogate, only if she is a close relative of the intending couple. A childless woman, an unmarried women, NRI and a foreigner are not allowed to be a surrogate mother. The Bill which borrows heavily from UK's altruistic surrogacy Bill, has changed the British provision of allowing only blood relatives to "close

[589] R.Rajagopal alias RR. Gopal v. State of Tamil Nadu, SCC 6 632 (SC 1994)

relatives", a term that will be further elaborated in the rules[590]. So the Indian legislature has narrowed down the scope of women who can opt for surrogacy.

Since a close relative is involved, the child would know who the biological mother is. As expressed by Abantika Ghosh, "In many families when a child is born out of surrogacy not even immediate blood relatives of the couple get to know, for fear of both social ostracization and concerns about the future integration of the child in the family. In its insistence on altruistic surrogacy , the proposed bill makes the identity of the surrogate mother open for the consumption of the family and beyond and when information on a couples' reproductive health is open to be sliced , diced and discussed , issues graver than just privacy are put at stake"[591]. So the implication of such a bill is that, the surrogate will always be around in the family circle and the child while he is growing up , allowing the emotional bond to develop , unlike in commercial surrogacy, where the child is immediately handed over to the commissioning parents after the delivery and the payment leaving no room for bonding.

- **ART Bills**

Section 2(zq)[592] of the ART Bill 2014 defines "surrogacy" as an arrangement, where pregnancy is achieved through assisted reproductive technology, and the gametes used are neither of the surrogate nor her husband's, with a clear intention of carrying the baby to the term and handing over the child to the commissioning couple, after the delivery.

[590] Anonymous, *New Surrogacy law bars single parents, homosexual, live-in couples,* INDIAN EXPRESS, Aug. 25,2016,at 2

[591]Abantika Ghosh, *How focus on altruism "close relatives" overlooks reality,* INDIAN EXPRESS,Aug.26,2016,at 16

[592]The Assisted Reproductive Technology (Regulation) Bill,2014, section 2(zq) "surrogacy" "means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the commissioning couple for whom she is acting as a surrogate."

Section 2(zr) of the ART Bill 2014 defines "surrogate mother"[593]. Thus, this section aims to regulate, specifically commercial gestational surrogacy along with the clause 17(a) of Section 60 of the concerned bill, which states that surrogates shall not act as a donor for the commissioning couple. Since it is an "only-surrogate and not-donor" clause it seeks to prevent situations, where the surrogate mother might develop attachment to the child, because of being either genetically or partially related to the child. But the term "another woman" has not been defined in The ART Bill, 2014.

Moreover, there is no provision of providing maternity leave to both, the surrogate and the commissioning mother. The Delhi and Madras High Courts, have said that a commissioning mother is entitled to maternity leave after the child's birth[594].

**Dr. Hema Vijay Menon v. State of Maharashtra[595]**

*"Para 7 ... a woman cannot be discriminated as far as maternity benefits are concerned, only on the grounds that she has obtained the baby through surrogacy. Though the petitioner did nt give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary.... A mother, as already stated herein above would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother who has begotten the child."*

[593] The Assisted Reproductive Technology (Regulation) Bill,2014, section 2(zr)-"surrogate mother" "means a woman who is a citizen of India and is resident of India, who agrees to have an embryo generated from the sperm of a man who is not her husband and the oocyte of another woman, implanted in her to carry the pregnancy to viability and deliver the child to the commissioning couple that had asked for surrogacy."
[594] Chitra Narayan, *Ignoring best practices*, THE HINDU, Aug.31,2016,at 12
[595] Dr. Hema Vijay Menon v. State of Maharashtra, 2015 SCC OnLine Bom 6127

The same was held in **P. Geetha v. The Kerala Livestock Development Board Ltd**[596]., (decided on 06-01-2015) and **Kalaiselvi v. Chennai Port of Trust** [597].

### C. Surrogate child

- **The Surrogacy (Regulation) Bill, 2016**

Under the Bill 2016, legal parents will be the couple commissioning in the surrogacy, and not the surrogate mother. A child born through surrogacy, will have the same rights as a biological child[598]. "The Juvenile Justice (Care and Protection of Children) Act, 2015 allows the court to give a child for adoption to foreign parents, irrespective of the marital status of such a person. The JJ Act also authorises state government, to recognise one or more of its institution or voluntary organisations, as agencies for the placement of orphans for adoption, by the Central Adoption Resource Agency (CARA). The latest guidelines notified on July17, 2015 permits single parent adoption, but bars single males from adopting a girl child, it seems there are different barometers in matters of adoption and surrogacy".[599] This clearly shows the disparity in the views of the government, where on one side JJ Act recognises the adoption of Indian orphans by foreign parents through inter – country adoption, but on the other hand, the Surrogacy Bill 2016 bars foreigners from opting surrogacy in India.

Similarly, the JJ Act has now allowed adoption of Indian orphans by a single parent, but in stark contrast to it, the Bill 2016, states that no single parent is allowed to opt surrogacy in India. One of the reasons behind such a step in the Surrogacy Bill 2016 is that, our ministers feel that foreign parents are subject to greater divorce rates and the concept of single parent is against our Indian ethos. So the government is exercising different behaviour towards the child of same nationality i.e. an 'Indian'.

[596] P. Geetha v. The Kerala Livestock Development Board Ltd, 2015 SCC OnLine Ker 71
[597] Kalaiselvi v. Chennai Port of Trust, 2013 SCC OnLine Mad 811.
[598] Anonymous, *Surrogacy Bill: necessary controls, some concerns*, INDIAN EXPRESS,Aug.25,2016,at 16
[599] Supra 26

- **ART Bills**

Sadly, The Bill of 2016 contains no provisions or rules on how to regulate Foetal Reduction/Sex Selective Abortion or making of "designer babies" in comparison to Draft Bill 2010 and 2014 under Section 2(o)[600]. In 2012 an Australian couple who had twins by surrogacy, arbitrarily rejected one and took home the other[601]. It is recommended that provisions should be made making it mandatory for the intending parents, to accept the child/children born through surrogacy as they are.

## CONCLUSION

CARA guidelines have helped to deal with the problems pertaining to adoption of Indian children by foreigners. A similar approach could be made to regulate surrogacy as well. It is clearly evident, that Indian government has not been able to keep up with the ban administered, on organ donation and sex selective determination test, so it is highly likely that they won't be able to exercise an effective ban on commercial surrogacy. The 2016 bill also requires setting up of "national and state surrogacy boards", which will act as regulating authorities. Instead of spending money on setting up such boards, "surrogacy courts" can be set up at both, national and state level.

Provisions for domestic, altruistic surrogacy offer an opportunity for exploitation and corruption and promotes an illegal black trade, which will further push commercial surrogacy to go underground. This way, the government will in fact help, in mushrooming the black trade. So, the prime objective of the government of introducing this Act, to stop the over exploitation of the surrogates, would further increase, because ultimately it is the exploitation government should stop not the freedom to choose surrogacy. Fake relatives will be created and surrogates will be impregnated in India and taken

[600] The Assisted Reproductive Technology (Regulation) Bill,2010 and 2014, section 2(o) "foetal reduction", "means reduction in the number of foetuses in the case of multiple pregnancies"
[601] Supra 10

to permissible territories. So instead of banning commercial surrogacy altogether, the government should allow it and then regulate it.

Surrogacy leads to a "win-win" situation for both, the infertile couple and the surrogate mother. The infertile couple is able to fulfil their most important desire and the surrogate mother receives the suitable reward

For the new legislation to completely act as 'a defender of human liberty and an instrument and tool of the distribution of positive entitlements' the main objective of the laws that are made and enacted must be to ensure that the ultimate beneficiaries of this entire procedure must be the child, surrogate and intended parents and not the middlemen within a recognized framework of ethics and good medical practices. The laws must take into consideration the kinship, diversity and moralities, which frame issues of reproductive choice and consent on the ground.

Surrogacy is

**S** pectacular journey

**U** nreal to most

**R** esulting in and

**O** f the

**G** reatest gift

**A** person

**C** an ever give or receive

**Y** ielding in amazing beauty.

# 20. IS RIGHT TO PRIVACY A FUNDAMENTAL RIGHT UNDER THE INDIAN CONSTITUTIONAL SCHEME AND IS UIDAI VIOLATIVE OF INDIVIDUAL'S RIGHT TO PRIVACY?

Author(s): Siddharth Srivastava

## ABSTRACT

*The rise in the magnitude of personal information and its usage has led to an alarming rise of the threat to privacy. The privacy of individuals is gravely under threat and has been compromised with on multitudinous occasions. Consequently, many nations and international institutions have recognised a Right to Privacy either statutorily or through judicial decisions. This essay seeks to trace down the existence of Right to Privacy throughout the world, analyse its ambit in India and to establish it as a Fundamental Right by the virtue of various judicial decisions over the years. Withal, the essay also peruses the various facets and the contours of the UIDAI scheme in India which is allegedly violating the Right to Privacy of the residents of the country. The scheme is comprehensively scrutinised in contrast with the Right to Privacy. The scheme has not been properly implemented, having a horde of apertures and no safeguards to protect the data. Following an in-depth multi-dimensional analysis, the author concludes that the UIDAI scheme is unconstitutional and is violating the Right to Privacy. The government shall halt or suspend the scheme till the Supreme Court delivers the final verdict.*

I. INTRODUCTION

A. RIGHT TO PRIVACY

B. *HISTORY AND EVOLUTION*

C. *POSITION IN INDIA*

II. UIDAI SCHEME

A. UIDAI SCHEME VIOLATING THE RIGHT TO PRIVACY

B. *THREAT OF LEAKAGE OF INFORMATION*

C. *DEVOID OF STATUTORY BACKING*

D. *WAIVER OF FUNDAMENTAL RIGHT*

E. *FURTHERANCE OF A WRONG*

III. CONCLUSION

## I. INTRODUCTION

"Does Privacy in fact and substantially exist and has it been and is in fact enjoyed? If it were found that no privacy is substantially existing or is enjoyed, there would be no further question in an ordinary case to decide. If, on the other hand, it were found that the privacy did substantially exist and enjoyed, the next question would be that is privacy substantially and materially interfered with by the acts of the defendant?" [602]

In a world where intrusion to privacy is gradually becoming the order of the day, there is a dire need to safeguard the interests of the people. The human urge is to keep things, which are private, away from the public gaze. To safeguard this privacy, various International Institutions and Nations have

[602] Kaye vs. Robertson (1991) FSR 62

recognised a Right to Privacy. "The Right to Privacy is the right to be left alone."[603] It is the recognition of man's inviolate personality, the inner man, rights inherent and inseparable and private space in which may remain himself without any intervention.[604]

However, in India, the Right to Privacy of the individuals has been allegedly compromised by the Unique Identification Authority of India. Hence, the theme of the essay. The UIDAI scheme collects the personal information of the residents of the country to avail them various social security schemes launched by the government and to give them an identification as a resident of India. Under the UIDAI scheme, the government has issued a 12 digit identification number to each resident and collected their biometric data.[605] This collection of personal data on a prodigious scale without an appropriate legislation providing safeguards has allegedly led to violation of the Right to Privacy of the Residents.

In the context of the above two paragraphs, the theme of this essay should be considered. The essay advances two immediate questions. First, it asks whether the Right to Privacy is a Fundamental Right under the Indian Constitutional scheme. Second, it questions whether the UIDAI is violative of the individual's Right to Privacy.

Section II of the essay comprehensively analyses the Right to Privacy. In Part A, the author has traced the History and Evolution of the Right to Privacy over the years. In Part B, the author has analysed the Right to Privacy in India and established that it is a Fundamental Right. Section III examines the UIDAI scheme. It starts with an overview of the scheme and anatomy of the Aadhaar Card. It further sifts the advantages and disadvantages of the scheme. Section IV peruses the Right to Privacy in

603 Samuel Warren and Louis Brandeis, "The right to privacy", Harvard Law Review 4, p. 193 – 220 (1890)
604 Govind v. State of Madhya Pradesh, cited at: AIR 1975 SC 1378.
605 Chin, Roger "India's Aadhaar Project: The Unprecedented and Unique Partnership for Inclusion". Journal of Administrative Science. (June 2015).

contrast to the UIDAI scheme to examine if the scheme is violating the individual's Right to Privacy and lays down how it is doing so. Finally, Section V closes with an overview of the main points covered herein, and leaves the reader with a sound takeaway message derived from the Supreme Court's findings and orders and the actions of the government with regard to the implementation of UIDAI scheme.

### A. Right to Privacy

Right to Privacy is a "right to be let alone"[606]. In words of David Calicut, "the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."[607] A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".[608] This right is granted to the individuals for protection of their liberty.

The need for Privacy increases with the social conditioning of a human being. As a human gains knowledge, traits, wealth, information etc. there is a necessity to protect these from the wrongdoings of the society. The increasing use and utility of information technology and collection and usage of data related to the individuals and their respective identities has accelerated the demand for a Right to Privacy to safeguard such data.

Furthermore, new developments in various field such as banking, telecommunications, medical research and care, military operations, frauds, cyber space and advanced transportation systems have

[606] Supra note 2
[607] Chairman David Calcutt, "Report of the Committee on Privacy and Related Matters" QC, 1990, Cmnd. 1102, London: HMSO, page 7.
[608] R. Rajagopal v. State of Tamil Nadu 1994 SCC (6) 632

increased the quantum or magnitude of personal information. This information could be obtained through illegal means.

The concern over privacy of individuals is higher than at any time in history. Various countries and the people have expressed concerns over privacy matters and reported cases related to encroachment on privacy. Human rights groups are concerned that much of this technology is being exported to developing countries which lack adequate protections due to financial constraints. The use and transfer of such information is accelerating rapidly and the danger or invasion of privacy is increasing correspondingly. Thus, the Right to Privacy is a necessity in the modern age for safeguarding an individual's right to liberty.

Before comprehensively analysing the ambit of Right to Privacy, the author seeks to first establish the definition of Right to Privacy, with reference to the words "Right" and "Privacy" separately.

So what are Rights? According to Stanford Encyclopaedia of Philosophy, "Rights are entitlements to or not to perform certain actions, or to be in certain states; or entitlements that others perform certain actions or be in certain states. They dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived."[609] The characteristic mark of a legal right is its recognition by a legal system. An essential of a legal right is its enforceability by legal process.[610]

Of all the human rights in the international catalogue, privacy is probably the most difficult one to circumscribe and define.[611] Definitions of privacy vary according to the environment, context and region. In many countries, the concept has been fused with Data Protection, which interprets privacy

[609] Stanford Encyclopaedia of Philosophy http://plato.stanford.edu/entries/rights/
[610] W. Panton in his Text-book of Jurisprudence, 3rd Edn. at p. 250
[611] James Michael, Privacy and Human Rights, UNESCO 1994 p.1.

in terms of management of personal information and in others it is interpreted as invading an individual's private space. Outside this rather strict context, privacy protection is the demarcation of society's interference in a person's life and his personal space.

However, in a general sense, Privacy is defined as right to be let alone or as per the dictionary definition, "the right of a person to be free from any unwarranted publicity or the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned."[612] Privacy Is basically the control we have over information about ourselves and not our information in the minds of others. Privacy is the "control over knowledge of oneself."[613]

Therefore, Right to Privacy can be defined as the right of the people to protect the inviolate personality, the individual's independence, dignity, integrity and the desire to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviour to others.

Right to Privacy forms an integral part of the modern life, violation of which could have detrimental effect on an individual's liberty and dignity. As a result, this right has been given a widespread recognition as a fundamental right, though not an absolute right, by various Nations and International Institutions.

### B. History and Evolution

Historians are often asked: Why should we study history? Why does it matter what happened long ago? The answer is that History is inescapable. It studies the past and the legacies of the past in the

[612] Black's Law Dictionary
[613] Gregory, Fried & Charles Fried. Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror (W.W. Norton & Co. 2010).

present. It helps people to build, change and evolve themselves on the basis of past experiences of our ancestors i.e. History.

The concept of Privacy dates back to the time of our two epics, the Mahabharata and the Ramayana. Words like 'Ekant' (solitude) and 'Gupt' (secret) were not alien to the nomenclature of the Indian society. In Indian Mythology, disturbing a sage was considered the biggest wrong, therefore the people had a sense to respect the privacy of the sage. Chanakya in his Arthashastra[614] had laid down a detailed procedure for consulting ministers so as to ward off the possibility of leakage of state policies. He did not consider the Individual privacy but recognised the privacy of state affairs.

The law of privacy under Common Law can be traced as far back as the year 1361, wherein the Justice of the Peace Act provided for the offences committed by peeping toms and eavesdroppers. In 1765, British Lord Camden, struck down a search warrant and wrote, "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have."[615] This was the first case wherein the Right to Privacy was recognised under the Common Law system.

In 1776, John Adams wrote that it had been the British right to search houses without justification that sparked the fight for independence. In other words, in John Adams' opinion, it had been the unwarranted violation of privacy that sparked one of the most remarkable revolutions in history.[616]

In 1792, the Declaration of the Rights of Man and the Citizen declared that private property is inviolable and sacred. In 1858, France prohibited the publication of private facts and set stiff fines.[617]

[614] Kautilya's Arthshastra
[615] Entick v. Carrington, 1558-1774 All E.R. Rep. 45.
[616] John Adams - Letters of John Adams addressed to His Wife. Boston, C.C. Little and J. Brown, 1848 p. 338.
[617] The Rachel affaire. Judgment of June 16, 1858, Trib. pr. inst. de la Seine, 1858 D.P. III 62

In 1890, American Lawyer Samuel Warren and a future Supreme Court Judge Louis Brandeis wrote a landmark article on the Right to Privacy, describing it as a "Right to be left alone".[618] They wrote that the object of privacy is to protect 'inviolate personality' and not merely to protect the private property.

The Universal Declaration of Human Rights, 1948, is the landmark legislation for modern day privacy laws which protected territorial and communications privacy. Article 12 states, "No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honor or reputation. Everyone has the right to the protection of the law against such interferences or attacks."[619]

Article 8 of European Convention on Human Rights, 1950[620] and Article 17 of International Covenant on Civil and Political Rights are on the same lines with the Declaration on Human Rights, 1948[621] with regards to Privacy.

With the emergence of Information Technology, the interest in Right to Privacy increased in 1960's and 1970's. The origin of privacy law legislations can be traced to the enactment of first data protection law in the Land of Hesse in Germany in 1970. This was followed by enactments in Sweden (1973), the United States (1974), Germany (1977) and France (1978).[622]

[618] Supra note 2
[619] Universal Declaration of Human Rights, 1948
[620] European Convention on Human Rights, 1950
[621] International Covenant on Civil and Political Rights, 1976
[622] David Flaherty, "Protecting Privacy in surveillance societies", University of North Carolina Press, 1989.

In 1980, the Organization for Economic Cooperation and Development (OECD) developed its privacy guidelines.[623] In 1995, the European Union passed a Europe-wide directive which will safeguard the privacy of citizens and provide them with adequate measures to protect such data.[624]

While over 100 countries now have laws relating to Privacy, many countries still require adequate legal safeguards or legislations to give citizens and consumers' confidence in handling their personal information by the government and other agencies. More are in the process of being enacted.

### C. Position in India

The Fundamental Rights are defined as basic human freedoms that every Indian citizen has the right to enjoy for a proper and harmonious development of personality. These are certain rights guaranteed to the people by the Indian Constitution which can be enforced against the Government for it could become arbitrary at times. Guaranteed under Part III of the Constitution, the Fundamental Rights safeguard certain civil rights and ensures the freedom of the people.

The Constitution of India recognises six Fundamental Rights. However, these rights are not exhaustive. There are several rights that have been held to be Fundamental Rights by the Supreme Court though they were not initially explicitly or expressly mentioned in the constitution but have been held as incidental or part of one or the other fundamental rights. For e.g., in People's Union for Civil Liberties vs. Union of India[625], the Supreme Court held that non-payment of minimum wages to the workers was a denial to them of their right to live with basic human dignity and violative of Article 21 of the Constitution.

[623] OECD Guidelines on the Protection of Privacy and Trans border Flows of Personal Data
[624] Directive 95/ /EC of the European Parliament and of the Council of on the Protection of Individuals with regard to the processing of personal data and on the free movement of such data.
[625] People's Union for Civil Liberties vs. Union of India (1982) AIR 1473, 1983 SCR (1) 456

The Supreme Court has, over the years, actively interpreted and increased the ambit of the Fundamental Rights so as to suit the democratic environment without harming the basic structure of the Constitution. The framers of the Indian Constitution anticipated large number of difficulties in enunciating the Fundamental Rights in general terms and gave the courts the power to interpret them.[626] "The attempt of the court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by process of Judicial Construction."[627] The Courts would not restrict the ambit or circumscribe the Fundamental Rights except in case provided by the Constitution itself.[628]

"If I were a dictator, religion and state would be separate. I swear by my religion. I will die for it. But it is my personal affair. The state has nothing to do with it. The state would look after your secular welfare, health, communications, foreign relations, currency and so on, but not your or my religion. That is everybody's personal concern!"[629] In the words of our Father of the Nation, Mahatma Gandhi, the Right to Privacy was first acknowledged.

The legal validity of the Right to Privacy as a Fundamental Right was raised in the case of Kharak Singh v. State of UP [630] for the first time in India. In this case, the Court while holding that Right to Privacy was not a guaranteed constitutional right, held that Article 21 was the repository of residuary personal rights and recognised the common law right to privacy. However, the minority judgement was that the right to privacy is a part of right to protection of life and personal liberty. In this case, the Court had equated privacy to personal liberty.

[626] M.P. Jain - A Survey of Law preventing concentration of Economic Power, Some Problems of Monopoly and Company Law, p. 43-62 (1972)
[627] Maneka Gandhi vs Union of India AIR 1978 SC 597: (1978) 1 SCC 248
[628] Daryao vs State of Uttar Pradesh AIR 1961 SC 1457: (1962) 1 SCR 574
[629] Mahatma Gandhi to a Christian Missionary, September 1946. Gandhi on Secular Law and State – The Hindu, October 22, 2003
[630] Kharak Singh v. State of UP AIR 1963 SC 1295

Subsequently in 1975, in Govind v. State of Madhya Pradesh[631], Mathew, J. observed "Right to Privacy as an emanation from Art. 19(a), (d) and 21, but it is not absolute right. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, the fundamental right must be subject to restriction on the basis of compelling public interest."

Finally, in 1994, the Supreme Court in the case of R. Rajagopal v. State of Tamil Nadu[632], for the first time directly linked the right to privacy to Article 21 of the Constitution and laid down that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". The Supreme Court observed "A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages."

Further, in People's Union for Civil Liberty v. Union of India[633], the Supreme Court observed that telephone-tapping would be a serious invasion of an individual's privacy. Thus, telephone-tapping would infringe the Right to Privacy under Article 21 of the Constitution thereby recognising the Right to Privacy.

Therefore, the concept of privacy of an individual has evolved over the years and has been held to be a fundamental right by the Supreme Court. The Supreme Court has observed over the past few years

631 Govind v. State of Madhya Pradesh 1975 AIR 1378, 1975 SCR (3) 946
632 Supra note 6
633 Supra note 24

that right to privacy is implicit in and derived from the language of Article 21 of the Constitution. It is an essential ingredient of an individual's Right to Liberty.

India does not have a separate and specific legislation that recognises the Right to Privacy and defines its ambit. However, the government has introduced a Draft Bill on Privacy Laws[634] in the Parliament in 2011, though it is yet to be passed.

## II. UIDAI SCHEME

One of the key challenges faced by people in India is difficulty in establishing identity. The citizens have a variety of identity documents, each serving a different purpose. Hence, there was a need to have an identity that would be valid across all platforms in the country and which every organisation or institution would recognise. The government sought to satisfy this need through the Unique Identity Scheme (UID). Consequently, the UIDAI was established.

The Unique Identification Authority of India (UIDAI) is a central government agency of India. The role that the authority envisions is to issue a unique identification number that can be verified and authenticated in an online, cost-effective manner, which is robust enough to eliminate duplicate and fake identities.[635] Its objective is to collect the biometric and demographic data of residents, store them in a centralised database, and issue a unique identity card called Aadhaar to each resident. It neither aims to replace any existing identity cards nor is it a cognizance of citizenship. Aadhaar neither confers citizenship nor does it guarantee rights, benefits or entitlements.

Aadhaar is a 12-digit unique number which will be issued by the Unique Identification Authority of India (UIDAI) to all residents of the country. It's a step towards putting India in the club of more

[634] The Draft Bill on Right to Privacy, 2011
[635] Mandates and Objectives of UIDAI https://uidai.gov.in/all-about-uidai/mandates-objective.html

than 50 countries around the world that have some form of national identity cards. The number will be stored in a centralized database and linked to the basic demographics and biometric information like photograph, ten fingerprints and iris of each individual.[636]

With the help of an Aadhaar number one can access useful services such as mobile phone connections, cooking gas connections and banking. While in the initial stages this number is only applicable for government-run services, it is expected that in future other similar services, including the ones run by non-governmental entities will come into its fold as well. This card can be used as an identity across India. Further, it helps in keeping a track on the activities of the immigrants and separate them from the residents. The government has provided an online database called Aadhaar Verification Service (AVS) which could be accessed from anywhere to verify the Aadhaar Card number.[637]

Even though it confers so many benefits on the people, it is not mandatory to hold an Aadhaar Card to avail these benefits. It makes it less cumbersome for people having an Aadhaar Card to avail them, than the ones without it. Further, it helps the government keep a track on how many people have availed these benefits.

However, the UIDAI scheme has some drawbacks too. Firstly, the Aadhaar Card is issued to the residents and not to the citizens. A lawful permanent resident is someone who has been granted the right to live in the country indefinitely. Permanent residence includes the right to live and work here. Permanent residents continue to remain the citizen of another country. They do not have a right to vote.[638] On the other hand, the Citizens possess all rights guaranteed by the Constitution of India.

[636] Learning with the Times: What is Aadhaar?", The Times of India. 4 December 2010.
[637] "India launches Aadhaar verification services, enrolment centers". ZDNet. 27 May 2013.
[638] Ilona Bray - Permanent Resident vs. Citizen: What's the Difference? http://www.alllaw.com/articles/nolo/us-immigration/permanent-resident-vs-citizen-difference.html

Secondly, there is no legal basis for UID. There is no legislation backing this scheme. When such crucial data is being collected on a prodigious scale, there shall be a legislation safeguarding the interests of people and prescribing precautionary and punitive measures. The draft bill was rejected by a standing committee in 2010 and has not been tabled in the parliament ever since.

Thirdly, Aadhaar cards are being issued to the illegal immigrants by the corrupt politicians to gather more votes. Since Aadhaar Card can give a national identity to person, it is facilitating increase in illegal migration leading to exploitation of government facilities and thereby burdening the state.

Fourthly, the system integration contractor is a foreign company, Accenture PLC[639]. The entire national demographic database would be stored in systems owned and operated by companies run by foreign countries and there will be continued dependence on them for such data. This could lead to leakage of information of the biometrics of the entire populace to another country who is parent to this company.

Fifthly, the Aadhaar Card is being forced on citizens who wish to avail of their rights as citizens. The government is attempting to tie the UID with every other scheme. The government has made it necessary to have an Aadhaar Card to avail benefits of employment, education and LPG schemes.[640]

Finally, the Aadhaar Card is violating an individual's Right to Privacy which is a Fundamental Right guaranteed by the Constitution of India. This has been discussed comprehensively in subsequent section by the author.

[639] Accenture to provide biometric solution to UIDAI's Aadhaar – Economic Times, July 8, 2010.
[640] UIDAI, Petroleum Ministry sign MoU on AADHAR"-The Hindu. 30 June 2011

## III. THE UIDAI SCHEME VIOLATING THE RIGHT TO PRIVACY

In India, Right to Privacy is an essential ingredient of the Right to Liberty under Article 21 of the Constitution of India. Though it is not expressly a Fundamental right but an elaborate interpretation of Article 21 has brought it under its ambit.[641] The UIDAI scheme is violating the Right to Privacy of the individuals, as has been explained in the subsequent parts of this section.

### A. Threat of Leakage of Information

The Biometric identification denoted for UID i.e. Iris Scan, fingerprint identification and the personal detail could easily be misused for fraudulent purposes. Access to this information could expose the entire population of the country to numerous risks in an international stage thereby violating the Right to Privacy of the people. Leakage of the biometric data, could result in people being singled out, tracked, harassed and have their rights violated.

There have been several cases of infiltration of crucial information throughout the world. The biggest example is when Edward Snowden exposed the United States of America's operations and leaked a large number of highly classified documents causing a massive spur all over the world and embarrassment to the country.[642] America has one of the most secured systems in the world and it was still easily compromised by the actions of one man alone. Consequently, the US government has scrapped Aadhaar-like project for its residents.[643] The decision of the US to not allow biometric profiling of residents was followed by China, Australia and UK and similar proposals were shot down by the respective governments.

[641] Bhavesh Jayanti Lakhani vs. State of Maharashtra, (2009) 9 SCC 551
[642] Edward Snowden, Whistle-Blower – New York Times, January 2, 2014
[643] Real ID Act, 2005 of United States of America

The United States of America mounted covert ops to infiltrate biometric database in other countries. According to the disclosures by Edward Snowden, US intelligence was collecting biometric data of people from many countries including India.[644] The fact that the data storage has been given to Accenture PLC and L1 Identity Solutions, which are companies based in America, it is even easier for the American intelligence agencies to access the data. It is absolutely absurd that the private players have been brought into play when such information which is paramount for national security is in question. Furthermore, these private companies being run by people of other countries is even more detrimental to the interests of the nation.

Even the Intelligence Bureau (IB) had warned the government about the threats to national security by leakage of such data, but the government paid no heed to it.[645] Such information shall never be outsourced and shall stay within the strict control of the government.

### B. Devoid of Statutory Backing

The UIDAI is devoid of statutory backing for protection of Right to Privacy. There are no legal safeguards for protection against the misuse of information or punitive measures against the defaulters. There is an absence of a statute to guide on the crucial questions such as who can collect biometric information, how it is to be collected and stored, and protection of collected data, who can use the data and when it must be used.

[644] NSA Files Decoded - The Guardian, November 1, 2013
http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded

[645] Left MP urges Narendra Modi to 'scrap' Aadhaar project – Economic Times, 9 June 2014

The National Identification Authority of India[646] Bill contains safeguards and the punitive measures in Chapter VI[647] and Chapter VII[648] respectively of the Bill. However, since the Bill has not been passed by the legislature, it is ineffective. These measures cannot be enforced by the Judiciary, leaving the data insecure and exposed to misuse of data. The UIDAI's ratification of memorandum of understanding with foreign states has no legal sanctity and is ultra vires. When an authority is functioning on such a huge scale and concerns information crucial to national importance, it must be backed by a statutory legislation. Thus, there is no penal or preventive measures which are enforceable for violation of Right to Privacy.

### C. Waiver of Fundamental Right

It was argued by the government in the Supreme Court that when the people accepted the terms and conditions for getting an Aadhaar Card, they waived off their fundamental right. K.K. Venugopal, arguing for a pro-UID party to the case, submitted "even if privacy was a fundamental right, the Aadhaar beneficiaries would not mind waiving it for the sake of accessing welfare benefits. The court could not insist that the beneficiary retain the right to privacy if he wanted to waive it."[649]

The "doctrine of waiver" explains that any individual entitled to a right or privilege has the authority to waive off such right or privilege. It is voluntary relinquishment or abandonment of conferred right or privilege.[650] However, the Supreme Court of India has held that a citizen does not have the power to waive a fundamental right conferred by Part III of the Constitution. These rights are not only meant for the benefit of individuals but also for the society at large.[651]

[646] National Identification Authority of India Bill, 2010
[647] Id in Chapter VI – Protection of Information
[648] Id in Chapter VII – Offences and Penalties
[649] Aadhaar and the right to privacy - The Hindu, October 20, 2015
[650] Singh M.P., V.N. Shukla's Constitution of India, Eastern Book Company (Lucknow, 11th Ed., 2008)
[651] Muthiah vs. Commissioner of Income Tax, AIR 1956 SC 269

In Indian and U.S. law, there is a "doctrine of unconstitutional conditions". Supreme Courts of both the countries have held that the government cannot condition receipt of public benefits on waiver of fundamental rights. The doctrine of unconstitutional conditions posits that if the government is prohibited from directly limiting the exercise of constitutional rights in a given situation, the government may not achieve the same result indirectly by offering benefits subject to the condition that the recipients waive their constitutional rights.[652]

Therefore, it is not open for the people to waive off a Fundamental Right and the government should not be allowed to enforce the Aadhaar Card on the basis of this argument.

**D. Furtherance of a Wrong**

The Attorney General on behalf of the government that 91% of the adult population in India and 23% of those aged below 18 have already been issued Aadhaar numbers and Rs. 6000 crores have been spent on it. Such a scheme shall not be impeded right before reaching the goal post.[653] However, this shall not be considered while deciding on the validity of the scheme. The protection of the Fundamental Right is of utmost importance and nothing should compromise with it. Violation of a Fundamental Right and its continuance would lead to destruction of the sanctity of the Constitution.

Moreover, according to the common law maxim, Nullus commodum capere potest de injuria sua propria[654] - No one can take advantage of his own wrong. It is a maxim of law which says that no man shall take advantage of his own wrong and this maxim and is fully recognised in courts of law and of

[652] Edward J. Fuhr – The Doctrine of Unconstitutional Conditions and the First Amendment, Case Western Reserve Law Review pp. 97 available at http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2618&context=caselrev
[653] Government defends ID cards, says right to privacy not a fundamental right - India Today, July 23, 2015
[654] Broom's Legal Maxims, 10th Edition. Co. Litt. 148.

equity. If the government has made a wrong decision, it shall not be allowed to continue its wrongful actions on the mere claim that a lot of expenditure has been made on it.

Therefore, the UIDAI scheme has violated the Right to Privacy of an individual and the collected data has numerous threats due to the loopholes in the management of such data.

## IV. CONCLUSION

"To him who overcomes, I will give some of the hidden manna. I will also give him a white stone with a new name written on it, known only to him who receives it"[655]. That is to say, the godly will respect others property right and privacy rights and the ungodly will violate other property and privacy rights. Even Christ and the Church acknowledged an individual's Right to Privacy.

The previous sections demonstrate that over the years, privacy has gained a lot of importance and it has found its way into the statutory laws of the nations and the legislations by International Institutions. In India, by the virtue of judicial decisions, Right to Privacy has been held to fall under the ambit of Article 21 of the Constitution of India, thereby making it a Fundamental Right. The UID scheme has violated an individual's Right to Privacy by exposing the information to various threats and storing it without any legal safeguards. The government shall be held accountable for any misuse of information or any illegal mishap to the data. Till such time the statutory law is passed by the legislature, the UIDAI scheme should be suspended. The issuing of Aadhaar Cards shall be put on hold till the Supreme Court decides on the matter.

Ours is a 'living constitution' which protects and defends the sanctity of the values ingrained in the bedrock of the Republic and which form the heart and soul of the Constitution. Rather than deny us our constitutional right, the Union Government ought to enact a privacy legislation to clearly define

[655] Revelation 2:17, The Holy Bible

the rights of citizens consistent with the promise of the Constitution before furthering the UIDAI Scheme. This is indeed one of the most important constitutional cases of India's post-Independence legal history.

## 21. DEATH SENTENCE: "REPEAL OR RETENTION RIDDLE"

Author(s): Krutika Khare and Debajyoti Saha

**ABSTRACT**

*The paper aims at understanding the validity of Capital Punishment in the light of the Article 21 of the Indian Constitution. The most fundamental of all rights is undoubtedly this right. Every other right adds quality to a person's life and hence, depends upon pre-existing life itself for its operation. There would be no other Fundamental Right if Article 21 had been interpreted in its original text. Capital Punishment means the convict is sentenced to death in "the rarest of rare cases" and prima facie seems to be very harsh. There is huge uproar among the public, whether to abolish capital punishment or not. The justification of the criminalization process of death penalty has been taken into consideration in this article. There is a drastic change in the view of the courts regarding capital punishment. The authors in this paper have described the inadequacies in the administrative set up, and have taken the views both for and against capital punishment in order to come to a conclusion.*

*"It is better to risk saving a guilty man than to condemn an innocent one" – Voltaire*

### INTRODUCTION

The Latin term 'caput', meaning head is original source of Capital Punishment, and refers to death caused due to decapitation.[656] Death Penalty laws were established way back in the 18th century BC in the Code of Hammaurabi of Babylon, which awarded death penalty for 25 different crimes[657]. In 1764, the term again gained its popularity, when the Italian jurist, Beccaria, in his treatise, "An Essay on Crimes and Punishment" argued that abolishing capital punishment is essential to a society's progress from barbarity to civilised refinement. He questioned the legal system by saying that it is

[656] *Death Penalty in India* (June 20, 2016, 07:00 AM), www.amicus.iupindia.org.
[657] CAPITAL PUNISHMENT: CONCEPT & CONTEXT I (The Icfai University Press, 2006).

absurd that the law which prevents homicides is committing homicides of the convicts in the public. His arguments were that capital punishment would neither deter the crimes nor reform the criminals. Secondly, the state's right to take away the life of the individual is illusory and opposed to social contract as it derives its sovereignty from them[658]. Today almost 93 countries continue to impose the capital punishment. Section 53 of the IPC includes death as one of the many forms of punishment that may be imposed for a crime.[659]

Over time, capital punishment, also commonly referred as death penalty, has been a debatable issue in the criminal justice system. Capital punishment is a type of punishment where the convict is sentenced to death and hence, given only in the rarest of the rare cases[660]. It *prima facie* seems to be very harsh. There is huge uproar among the public regarding the debate on abolishing death penalty. Death penalty takes away the Right to Life of the convicts. There are numerous perspectives for, and against death penalty that fight each other in the guise of providing justice to the victims. The cost of execution remains debatable again, considered one among the many reasons whether to execute or not. The proponents and opponents argue on the grounds of cruelty and unusuality of the punishment, violating the Constitution. The opponents argue on moratorium on executions, and instead provide the alternatives to death penalty. Lawyer's skills also set the ground for execution of an accused. The ultimate thing that matters is how the death penalty affects the persons on whom it is imposed, the society, and the authorities by whom it is imposed. The social and legal repercussions have to be studied in a wider sphere.

[658]Suhrith Parthasarthy, *India's muddled thinking on punishment*, THE HINDU (June 22, 2016, 04:30 PM), http://www.thehindu.com/opinion/lead/indias-muddled-thinking-on-punishment/article5131843.ece.
[659] *Supra* note 1.
[660]*Bachan Singh v. State of Punjab*, A.I.R. 1980 S.C. 898.

**DEATH PENALTY IN INDIAN STATUTES**

Four principal characteristics of capital punishment may be pointed out in India[661]:

- Only select seven crimes are punishable with death penalty.
- Public hanging is prohibited under law.
- Death sentence would not be executed by painful methods.
- Only a governing authority can award capital punishment.

Eight different sections of the Indian Penal Code, 1860[662] recognize capital punishment. Courts also agree with the proposition that death penalty deprives a person of his right to life, and many additional fundamental rights, and thus, the soundness of such a punishment can be tested. In the case of *Jagmohan v. State of UP*, it was held that "the judge was to make the choice between death penalty and imprisonment for life on the basis of circumstances, facts and nature of crime brought on record during trail. Therefore, the choice of awarding death sentence was done in accordance with the procedure established by law as required under article 21." [663] Thus the punishment of awarding death penalty is to be given only in cases of exception, rather being a rule. The Court in the leading case of *Bachan Singh* explained that "Article 21 recognizes the right of the State to deprive a person of his life in accordance with just, fair, and reasonable procedure established by the law." [664] This was also reiterated in the case of *Maneka Gandhi v. Union of India*[665] by Bhagwati J. The death penalty is awarded

[661]Babu, Boban et al., *Capital Punishment-An Eye for an Eye-Right or Wrong?*, European Journal of Forensic Sciences (2015).
[662]Act 45 of 1860.
[663]Jagmohan v. Satte of U.P., 1973 A.I.R. 947.
[664]*Supra* note 3.
[665]Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597.

to protect the interests of greater number of people. The validity of any such law can be challenged on the grounds of violation of fundamental rights.

Article 21 of the Constitution[666] reads as

*"No person shall be deprived of his life or personal liberty except according to a procedure established by law."*

The Article prohibits the deprivation of the above rights except according to a procedure established by law. The position in regards to onus of proof in a case where the challenge is under Article 21 is much clearer and much more free from doubt and debate than in a case where the complaint is of the violation of Article 19(1). Whenever there is a deprivation of life the burden must be on the state to prove that the procedure of deprivation is reasonable, fair and just.[667] The right to life is considered more important than even personal liberty; personal liberty too postulates a sentient human being who can enjoy it. The decisions in the cases of *Ram Krishnan Dalmia*[668] and *Mohd. Hanif Qureshi*[669] and several other subsequent decisions of the Supreme Court have stated that there is a presumption in favour of constitutionality of a statute, and the burden of proving the arbitrariness lies upon the petitioner, because it must be presumed "that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds." There are cases where the importance of the right was affected and the court refused to proceed on the basis of presumption of

[666]CONSTITUTION OF INDIA, 1950.
[667] Bachan Singh, Sher Singh And Anr.vs State Of Punjab And Ors., AIR 1982 SC 1325.
[668]Ram Krishna Dalmia v. Justice S.R.Tendolkar, A.I.R. 1958 S.C. 538.
[669]Mohd.Hanif Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731.

constitutionality, and demand from the State seeking justification of legislature for the legislation establishing that it is not arbitrary or discriminatory[670].

**INTERNATIONAL STATUTES**

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations (UN) in 1948, protects the two aspects of death penalty namely, the right to life and the right to live free from torture. Article 6 of the ICCPR[671] permits the use of the death penalty in limited circumstances. However, the same cannot be used to delay or to prevent the abolition of capital punishment by any State party to the Covenant.

33 years later, in 1989 the UN General Assembly adopted the Second Optional Protocol to the ICCPR which emphasised on abolition. The States which became parties to the Protocol agreed to not execute anyone within their jurisdictions. In the resolutions of 2007, 2008, 2010, 2012 and 2013, the United Nations has requested the member nations to accept the international standards of death penalty and to try to reduce the death penalty cases.[672]The methods of execution of death penalty are hanging and shooting. Hanging is one of the methods of execution recognized under Indian Criminal Procedure Code.[673] Under the Army Act[674], both shooting and hanging are used as methods under the court martial proceedings in the military courts. The Criminal Law (Amendment) Act, 2013 has also expanded the ambit of death penalty in the country. This Act imposed death penalty on the accused who has committed rape, and subsequently resulted in the death of the victim, or left her in

[670]PAWAN JAIN, SUPREME COURT ON DEATH PENALTY 50-55 (1st ed., Universal Law Publications 2016).
[671]International Covenant on Civil & Political Rights, 1966.
[672]Death Penalty, United Nations Human Rights, Office of High Commissioner, http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx, Accessed on August 30, 2016).
[673]India Criminal Procedure Code, Ch. XXVII, Sec. 354 (5), 1973.
[674]The Army Act, 1950.

permanently vegetative state (Section 376A). This amendment also imposed death penalty for certain repeat offenders.

**NATIONAL RECORDS**

According to the National Crime Records Bureau (NCRB), more than 2000 individuals were awarded death sentence from 1998-2013. The highest sentences took place in the year 2007.[675] However, the Asian Centre for Human Rights (ACHR) report based on the NCRB data claimed that there have been several death sentences between 2001 and 2011, but only a few of them have actually been carried out[676]. But an overwhelming number of death sentences were also commuted to life imprisonment during 2001-11. Dhanonjoy Chatterjee (murder and rape of a 14 year girl), Auto Shankar (serial killer), Afzal Guru (Parliament attacks, 2001), Yakub Memon and Ajmal Kasab (Mumbai blasts, 2006 and 2008 respectively) are the ones who were put to death. The shocking revelation was that of the non-awarding of death penalty to the convicts in the murder cases of Jessica Lall, Priyadarshini Mattoo and Graham Staines because it did not fall under the rarest of rare cases.

**RAREST OF RARE CASE AND THEORIES OF PUNISHMENT**

The Constitutional Bench judgement of *Bachan Singh*[677] laid down that death penalty should be awarded in the rarest of rare cases only. This included instances of "honour killings", as well as "encounter killings." Committing Sati**,** caste based violence; drug trafficking and rape offenders were

[675]Venkatesh Nayak, *More than 2000 individuals were awarded death sentence in India between 1998-2013,* FACTLY (June 18, 2016, 05:00 AM), https://factly.in/more-than-2000-individuals-were-awarded-death-sentence-in-india-between-1998-2013/.
[676]*Rarest of rare cases are not so rare in India now*, THE HINDUSTAN TIMES (June 12, 2016, 01:00 PM), http://www.hindustantimes.com/india/rarest-of-rare-cases-are-not-so-rare-in-india-now/story-JxTLyJ4tPIDBnHhatCcIL.html.
[677]*Supra* note 3.

also included in the same. The UN General Assembly Resolution calling for a moratorium on the death penalty, was voted against by India in December 2007 and subsequently in November 2012.[678]

The three ends of punishment are also the justifications advanced in support of capital punishment. These are reformation, retribution and deterrence. If any punishment prescribed by law cannot be justified under any of these three penal purposes, it would have to be condemned as arbitrary and irrational. It is a condition of legality of punishment that it should serve a rational legislative purpose or in other words, it should have a measurable social effect[679].

Death Sentence under Section 302 of the Indian Penal Code read with Section 354(3) of the Criminal Procedure Code, 1973 does not lead to any legitimate end as ultimately the convict is killed without getting a chance for reformation. This is not the characteristic of the life sentence. It is against the deterrence theory of punishment. Though there are some countries where retributive theory is practised, but in the Indian enlightened philosophical background, it is absurd. It is arbitrary and irrational, therefore violating the Art.14 and 21 of the Constitution of India.[680]

## CRIMINAL STATUTES AND INTERPRETATIONS

The unlimited power given to the courts of India to decide upon the fact whether to liquidate the person out of existence or to give him life sentence seems to be arbitrary. There is no doubt that Indian statutes have given the power to the executive to entertain the mercy petitions. But it is the court that is the first forum to decide on the above. The Section 302 does not prescribe any standards for the court's exercise of its discretion. It can be regarded as an additional point which supports that

[678]Srishti Guru Krishnakumar, *The Capital Question: Individual Rights & Capital Punishment*, UNIVERSITY EXPRESS (June 23, 2016, 09:00 AM), http://www.universityexpress.co.in/delhiuniversity/2015/09/the-capital-question-individual-rights-and-capital-punishment/.
[679]*Supra* note 11.
[680]PAWAN JAIN, SUPREME COURT ON DEATH PENALTY 58-63 (1st ed., Universal Law Publications 2016).

death penalty is violating the Article 14 and 21. Section 354(3) of the Criminal Procedure Code, prescribes life sentence for murder and only in special circumstances Courts can go for death penalty. But the courts have not evolved any kind of concrete situations where death penalty would be awarded. Even the 'rarest of rare' precedent does not hold apt in all situations. Special reasons for one judge, may be different from the other judges. It depends on the skills and talents of the judges i.e. on their social philosophy and the value system. It cannot be expected from normal lawyers but persons of wide and diverse experiences. Even if there are standards prescribed for the judges to be complied with before awarding any death penalty, it will still remain difficult for the judges to award death sentences. Indians tend to believe that all the decisions taken by the judges are in view of legal principles but there is involvement of the subjective element in the decision making of the judges. But looking at the series of decisions that the apex court has given on death penalty, it is quite clear that there is very less objectivity remaining in the judicial decisions. There is no uniformity in the judicial behaviour, and there are no coherent guidelines prescribed by the same court. Murder is considered as "brutal", "cold-blooded", "deliberate", "unprovoked", "gruesome" etc. by the court of law, but these are only the judicial expressions describing commission of crime, and it is quite possible that one judge may not adhere to the above factors while deciding upon the death sentence.[681]

There are multiple cases where death sentences have been awarded on the basis of joint liability under Sections 34[682] and 149[683] of the Indian Penal Code, and also many where the criminals have not been awarded the same because criminal liability of the accused was only found under these Sections

[681] *Supra* note 20.
[682] Babu v. State of Uttar Pradesh, 1965(2) Cr. L.J. 539.
[683] Mukhtiar Singh v. State of Punjab, 1971 Cr. L.J. 1298.

Therefore there is no established rule that the person who had participated in the actual commission of the crime but was not involved in giving the fatal blow.[684]

The young age of the convicts has been taken by some of the courts as one of the mitigating factors for commuting death sentence into life imprisonment such as in cases like *State of Uttar Pradesh v. Samman Dass*[685]and *Raghubir Singh v. State of Punjab*[686]. But there are cases which contradict the above stance like that of *Bhagwan Swarup v. State of Uttar Pradesh*[687]. Therefore, the judiciary is merely playing with the age factor of the accused, and it tends to lead to a situation where a habitual offender goes scot-free and a serious offender does not.[688]

**PECULIARITY OF CRIMINAL CASES**

It is true that every criminal case has its own distinguishing features, and peculiar configuration events. Therefore, someone has to be there to give the individualistic justice to the individuals, and the Constitution of India has given this duty to the judges of the court of law based on their judicial discretion. But the same discretion cannot be unfettered. That is why the legislature has time and again prescribed maximum period of punishment in almost all cases and, in some cases, it has prescribed the minimum as well. The judges have been given the discretion to decide between the maximum and the minimum punishments based upon the peculiar facts of the cases. But where the choice has to be made between life imprisonment and death without any guidelines or standards given by the legislature, the decision becomes arbitrary. A sentence of imprisonment, whether it is for one

[684] *Supra* note 20.
[685] State of Uttar Pradesh v. Samman Dass, 1972 Cr. L.J. 487 (489).
[686] Raghubir Singh v. State of Punjab, A.I.R. 1974 S.C. 677.
[687] Bhagwan Swarup v. State of Uttar Pradesh,1971 Cr LJ 413
[688] *Supra* note 20.

year, two years, or for life, will remain the same - imprisonment. But it is qualitatively different from the death penalty. Death penalty is irreparable, taking away the life of the accused.[689]

There should be government of laws and not of men even if the administration of justice is in the hands of the judges. Judges are after all humans only. It is an essential requirement of the Article 14 of the Constitution of India that any exercise of discretion should be guided by reasons so that no arbitrary action can prevail. It is antithesis of our constitutional scheme.[690]

There are cases where the courts have exercised their discretion to evolve some standards but those are deducible from the statutes itself. These are not principles evolved or created by the court but they are merely discovered by the court. It is not legitimate to evolve any new standard as this is a legislative function, not a judicial one.[691]

The only way in which the arbitrariness can be removed is the review by the Supreme Court of every decision of High Court confirming death sentence on the accused. The bench should agree unanimously on imposing the death sentence on the accused, and it has to cite reasons for the same. The reasons have to be strong in a way that the accused cannot be reformed in any other way, and it is in the interest of the society to award him death penalty. If it can be proved that the accused even after suffering life imprisonment, and undergoing rehabilitative therapy cannot be reformed at all, then the court can award death penalty.[692]

The very basic principle of human existence is "reverence for life". When any member of the society violates the above principle, the society may agree to get rid of that individual. Every member owes to the society for the protection provided by it. When any member of the society expresses ingratitude

[689]PAWAN JAIN, SUPREME COURT ON DEATH PENALTY 66-68 (1st ed., Universal Law Publications 2016).
[690] *Id.*
[691] *Id.*
[692] *Id.*

in place of gratitude by killing other members, the community for its self-preservation may decide to kill the individual without providing any protection to him, but the community will not do it in all cases unless it is collective conscience. [693]

**INABILITY OF JUSTICE SYSTEM**

The inability of the Criminal Justice system to deal with all the cases uniformly leads to imbalance in the end. There are people convicted of murder who are awarded death sentence but there are other people who, though being in the similar situation, due to the non-uniformity of the exercise of the discretion of the court, are not sent to the gallows. In *Sangeet v. State of Haryana*, the Apex Court took into consideration that in the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing." [694] "It is not possible to standardize and categorize crimes. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantial checks in the statute. It is provided under Section 432 of the Criminal Procedure Code, 1973". [695]

In Shankar *Kisanrao Khande v. State of Maharashtra*[696], Court approved the view expressed in the above case. The court held that the tests that the courts have to apply, while awarding the death sentence, are "crime test", "criminal test", and the "R-R test" and not the "balancing test". The crime test has to be 100% and the criminal test is 0% that is there should be no mitigating circumstances which are

[693]PAWAN JAIN, SUPREME COURT ON DEATH PENALTY 69-78 (1st ed., Universal Law Publications 2016).
[694] Sangeet v. State of Haryana, (2013) 2 S.C.C. 452.
[695] *Supra* note 31.
[696]Shankar Kisanrao Khande v. State of Maharashtra, (2013) 5 S.C.C. 546.

in favour of the accused. Even after both the tests are satisfied, the R-R test has to be applied (Rarest of Rare). The R-R test depends on the society-centric approach, not the judge centric approach[697].

**SOCIETAL PERSPECTIVE**

It is not surprising that various criticisms can be levied against arguments for death penalty. It is against the UDHR. The people who are giving the death penalty have always stated that it is to deter other criminals from committing crime. But there is no such data available that capital punishment will deter criminals more than the imprisonment in the jails. According to the Hart- Devlin debate, the concept of individual versus community interests was evolved. In such a situation, though the process of punishment may be against the morals of the society as a whole but the interests of the individuals also have to be protected at any cost by the legislators.

Following the principle of individual autonomy, the rights of the culprits also need to be protected. Humanitarian treatment of all individuals, be it even criminals, is a pioneer to the inculcation of rational empathy in any society.

There can never be a justification for the torture and cruelty associated with death penalty which is very evident. Execution involves an extreme physical and mental assault upon the convict. The pain caused to the person can never be quantified in nature, nor can the psychological damage. Thus death penalty denies the value of a person's life and rights. Once a particular State uses death penalty as a mode of punishment, it legitimates other States to follow the same procedure for whatever reasons as suited. There is no data in existence that the moral of the criminals cannot be reformed by any method. Therefore we cannot take death penalty as the only resort.

[697] *Supra* note 31.

The retentionists claim death penalty to be more effective than any other offence and therefore it is economical as well. The society has to be saved from such serious criminals. On the other hand, the philosophers who condemn the same, advocate that it is not at all more effective than imprisonment and, it diminish the dignity of life of the criminals.[698]

**35th AND 187th LAW COMMISSION REPORT**

Based on the analysis of the existing socio-economic and cultural structures (including education levels and crime rates) and the absence of any Indian empirical research to the contrary, the *35th Law Commission Report*[699] concluded that the death penalty should be retained and that the executive should retain the power of mercy. The Commission again reviewed the matter in the *187th Report on the Mode of Execution of Death Sentence and Incidental Matters*[700].

The key question therefore is not whether death penalty has a deterrent effect or not but whether death penalty has a greater deterrent effect than life sentence. Whatever may be the position prior to the enactment of the Code of Criminal Procedure, 1973, it is now clear that under section 354(3), life sentence is the rule and it is only in the exceptional cases for special reasons that death sentences may be awarded. The entire drift of the legislation is against infliction of death penalty and the courts are most reluctant to impose it save in the rarest of rare cases[701].

[698]Dr. Chandrika Prasad Sharma, Death Sentence: Repeal or Retention Riddle, (2004) PL WebJour 22, http://www.ebc-india.com/lawyer/articles/842.htm, Accessed on August 30, 2016.
[699]*Report on Capital Punishment*, Law Commission of India, 1967, available at http://lawcommissionofindia.nic.in/1-50/Report35Vol1and3.pdf.
[700]Law Commission of India, 187th Report, 2003, available at http://lawcommissionofindia.nic.in/reports/187th report.pdf.
[701]*Supra* note 11.

The Courts have felt on numerous instances that the there should be a jurisprudential basis for awarding death penalty so that the uncertainty that prevails currently can be avoided[702]. The Law Commission has been requested to resolve the issue by examining whether death penalty is a deterrent punishment, or is retributive justice or serves an incapacitating goal[703]. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*[704], the Court has lamented upon the lack of empirical research on this issue. In *Shatrughan Chauhan v. Union of India*[705], the Supreme Court has expressed concern over the delay in the execution of the clemency applications. The powers of pardon given to the Executive of the Union and the State respectively under Articles 161 and 72 of the Constitution of India have to be exercised in 'just, fair and reasonable' manner. The Court admitted unexplained delay in the execution of the application of death penalty as one of the grounds of the commutation of the punishment to life imprisonment. Once the order for death penalty is given as exceptional depravity, the convict should not remain in the prison anymore i.e. his clemency application should be executed. The Supreme Court for the first time emphasized on the accountability right from the level of the Ministry of Home Affairs to the Office of the President of India.[706]. While deciding the case on the rights of prisoners the court has to be take into consideration quality legal aid and humane treatment. The court does not question the pardoning power that has been conferred on the President. But the interpretation of Fundamental Rights should be best left to the court of law.

## ADMINISTRATION OF DEATH PENALTY

[702]*Supra* note 34.
[703]*Id* at para 148.
[704]Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 S.C.C. 498.
[705]Shatrughan Chauhan v. Union of India, (2014) 3 S.C.C. 1.
[706]Anup Surendranath, *Supreme Court's decision on death penalty a humane approach*, LIVEMINT (June 22, 2016, 05:20 AM) http://www.livemint.com/Opinion/rSZ5NXi3SKNCZQM7jtsWeL/Supreme-Courts-judgement-on-death-penalty-a-humane-approach.html.

An important thing that should not be forgotten is that all these concerns happen only in the high profile cases. This is only one of the aspects of the administration of death penalty. But there are many prisoners in different jails of the country who are being subjected to custodial torture; they do not know as to whether they will be represented by someone in the court of law or not. A moratorium should take place before the passing of any death penalty order.

Capital Punishment should be given to that person who really deserves it. It seems as a temporary solution to the heinous crimes. Even if we take the Delhi Rape case example, the Apex Court has given death penalty to the convicts. But whether that has really deterred the convicts from committing rapes? The answer is no. The rape cases are on a rise in almost whole of India. Awarding death penalty to those people who do not have the feeling of guilt is like talking to a deaf person who cannot listen. There is no proof in the whole world that capital punishments will decrease the rate of crimes. Crime is a vicious circle which will perpetuate if we use violence to deal with the violence.

Capital Punishment involves a lot of expenditure in the form of legal proceedings and lawyer's fees. The victim's family does not get any benefit from it, except what they think to be justice. But they are still the ones who have to suffer the aftermath of the crime. This ultimately negates the whole purpose of awarding it[707]. Life imprisonment without parole can be one of the solutions in place of death penalty. India believes in non-violence philosophy.

Death Penalty is not only offering more protection but also it is promoting brutalization. But still countries want to go forward with the punishment of death penalty. The decisions on sentencing a person for life are carried out on behalf of the whole country's population. So every person of the country must know about what is death penalty. The court gives the reason of urgency while giving

[707]Rajindar Sachar, *Abolishing the Death Penalty*, THE HINDU (June 13, 2016, 06:40 PM), http;//www.thehindu.com/2003/09/04/stories/2003090403281000.htm.

this decision. Now the question is arises whether the state has a right to do so. No matter what is the type of prosecution that the state takes into consideration, the death penalty is something of a peculiar nature. The movement for its abolition is not different from the movement of human rights. The state uses the defence of "self-defence" to punish a person with death penalty mostly in cases of warfare or in cases where there is such an emergency. But above all these, the capital punishments are guarded by the internationally accepted conventions. The international standards approve of death penalty in cases where the criminal has been subjected to fair trial. If that is not the case, then it is violates the right of the prisoners to access justice and, also equality before law.

The most tragic aspect of the death sentences is that we have a dire image of the convict in our minds. There is no place in our mental or legal imagination about the effects of long time incarcerations. Sometimes, this leads the prisoners to depression and psychosis[708]. The differences in judicial opinions on the death penalty will remain as long as the provision for capital punishment remains in the statute. Judges interpret the provisions in their own manner i.e. according to retributive or reformative theories.

## RECENT POLITICAL DEVELOPMENTS

### *NATIONAL DEVELOPMENTS*

Recent political developments in the country show favorable opinions of abolition of death penalty. In August 2015, the Tripura Assembly voted in favor of a resolution seeking abolition of death penalty[709]. Demands for the abolition of the death penalty have also been made by various political parties such as the Communist Party of India (CPI), the Communist Party of India (Marxist)

[708]Anup Surendranath, *On the verge of Unconscionable Hanging*, THE HINDU (June 25, 2016, 04:00AM), http://thehindu.com/opinion/op-ed/on-the-verge-of-unconscionable-hanging/article5244610.ece.
[709]Syed Sajjad Ali, Tripura passes Resolution against Death Penalty, The Hindu, 7 August 2015.

[CPI (M)], the Communist Party of India (Marxist – Leninist Liberation) [CPI (M-L)][710], the Marumalarchi Dravida Munnetra Kazhagam (MDMK), and the Dravida Munnetra Kazhagam (DMK)[711]. The year 2015 has also seen many Private Members' Bills being introduced in the Parliament seeking abolition of capital punishment[712].

Till date, there is no clear empirical study on the administration of the death penalty in India. The National Law University, Delhi has conducted the Death Penalty Research Project[713] which is not only limited to the Supreme Court decisions but also the state-wise execution. All the states have been asked to cooperate in this project but some of the states are reluctant to give their records. The reports have not been yet published. But according to the interim findings of the Project volunteers, it has been found that the convicts are mostly Dalits, poor, first time offenders etc[714]. Their conviction is based on mostly tortured confessions. In India the criminal justice system discriminates on the basis of caste, colour and religion. The case of acquittal of the convicts in the Akshardham shootout, among whom Adambhai was one , is a good example which proves this. While explaining his ordeal, he described the torture that was instituted on him by the police officials during the investigation. It took around 11 years to acquit him from all the charges. Now the difficulty that he is facing in coping up with the current society is really miserable[715].

[710]PTI, Left joint movement asks Centre to not hang Yakub Memon, Economic Times, 27 July, 2015; IANS, Death penalty: CPI leader D Raja moves private member's resolution, Economic Times, 31 July, 2015. ET Bureau, Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill, Economic Times, 7 August, 2015; See also: Repeal Death Penalty, CPI M-L, 30 June, 2015, available at http://cpiml.in/cms/editorials/item/150-repeal-death-penalty.

[711]ET Bureau, Seeking end to death penalty, DMK's Kanimozhi set to move private member's bill, Economic Times, 7 August, 2015; See also: Repeal Death Penalty, CPI M-L, 30 June, 2015, available at http://cpiml.in/cms/editorials/item/150-repeal-death-penalty.

[712]*Supra* note 14.

[713]Centre on the Death Penalty, NLU Delhi available at http://www.deathpenaltyindia.com/.

[714]*Most death convicts are poor*, OUTLOOK INDIA (June 20, 2016, 05:00 AM), http://www.outlookindia.com/magazine/story/most-death-row-convicts-are-poor/292789.

[715]Chinmay Kanojia, *Acquitted, but irreparably broken*, OUTLOOK INDIA (June 21, 2016, 04:30 PM), http://www.outlookindia.com/magazine/story/acquitted-but-irreparably-broken/292797.

**INTERNATIONAL DEVELOPMENTS**

Amnesty International's information shows that:[716]

- Death penalty for all crimes has been abolished by 90 countries and territories;
- Death penalty for exceptional crimes has been abolished by 11 countries;
- There are 30 countries which are considered abolitionist in practice;
- A total of 131 countries have abolished the death penalty in law or practice,
- 66 other countries and territories have retained death penalty

India is among those 39 countries that voted against a UN general assembly draft resolution calling for a moratorium before execution.[717] Mahatma Gandhi openly proclaimed his opposition to capital punishment, saying: "I cannot in all conscience agree to anyone being sent to the gallows. God alone can take the life."[718] In 1967, when then 35th Report had been published, only 12 countries had abolished capital punishment[719]. However, presently 140 countries have abolished it either in law or practice. A number of countries have also abolished death penalty for crimes such as murder and retained it for exceptional crimes such as crimes under military law, or under exceptional circumstances[720].

The Apex Court has suggested amending the Indian Penal Code and providing for life imprisonment without remission in heinous crimes. It is against the reformation principle prescribed

[716]17 September 2007.
[717]*India voted against UN Resolution*, (June 12, 2016, 04:00 PM), http://indiatoday.intoday.in/story/india-voted-against-the-un-resolution-for-abolition-of-death-penalty/1/230232.html.
[718]Seema Sengupta, *India must do away with Death Penalty*, THE GUARDIAN (June 18, 2016, 09:00 PM), http://theguardian.com/commentisfree/2010/nov/23/india-do-away-death-penalty.
[719]*Death Penalty*, AMNESTY INTERNATIONAL (June 12, 2016, 05:40 PM), https://www.amnesty.org/en/what-we-do/death-penalty/.
[720]ROGER HOOD AND CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 5 (5th ed. 2015).

in the Indian Penal Code, 1860[721]. The appropriate government, through the prison officials, are the best persons to evaluate the reformation process of the prisoners. There are chances of abuse of power but there should not be undue interference in the powers of the appropriate government in the commutation, remission of punishment etc. The mentality of people regarding death penalty is limited to the hanging of the prisoner. But how will it affect the prisoner's family is never taken into consideration[722].

## CONCLUSION

While the ultimate question still remains unanswered as to whether death penalty should be curbed, there is ample room for reform and restrictions on the death penalty. It can thus be stated after observations that in fact there is no uniform pattern of judicial behavior in the imposition of death penalty and no coherent guidelines for the award of capital punishment have been given. The Judges are using their discretion for awarding capital punishment. The Supreme Court also has divergent attitudes and opinions in regards to capital punishment[723].

The Indian society is very dynamic and progressive. Even if some standards are set for the application of death penalty, it might seem that capital punishment has to be there and hence, the judiciary is finding it difficult to define the standards. Above that, the clemency power, which have been given by the Constitution of India to the President[724] and the Governor[725], are proving as some kind of impediment in deciding the death penalty cases. According to abolitionists, criminal justice system disproportionately singles out least advantaged members of society for execution. Those who

[721]*Supra* note 4.
[722]*Mercy & the machinery of Death*, THE FRONTLINE (June 25, 2016, 06:00 PM), http://www.frontline.in/the-nation/mercy-and-the-machinery-of-death/article5795913.ece.
[723]*Supra* note 11.
[724]Article 72, CONSTITUTION OF INDIA, 1950.
[725]Article 161, CONSTITUTION OF INDIA, 1950.

stand high in society rarely receive death penalty. Factors like appeal, revision, mercy petition and delay in execution of death have also diminished the deterrence of death[726]. It is hence upon the legislature to consider all the conditions and decide better means of punishment than death penalty.

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[726]Triveniben v. State of Gujarat, A.I.R. 1989 S.C. 142.