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ARTICLES

MEDIA AND CRIMES IN SOCIETY

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1. Introduction

Transparency and accountability are very essential for proper functioning of a democratic system. Media is considered as the watchdog of society for its impacts on human behavior. Today, despite the mass media's propensity for sleaze, sensationalism and superficiality, the notion of the media as watchdog, as guardian of the public interest and as a conduit between governors and the governed remains deeply ingrained.[1] Investigative reporting has made the media an effective and credible watchdog in the society. It has also been responsible for the growth of culture of openness and disclosure which has been responsible for accountability of democratic governments. Free and fair media is regarded as *sine quo non* in every form of government. India is a vast and diverse democracy. Unless, the media acts without any bias and prejudice it cannot contribute to healthy democracy. Despite possessing great merits like evoking transparency, investigative journalism has been in controversy time and again. Media eye spies raise several questions regarding media ethics, interference with right to privacy etc. Now-a-days, investigative journalism is mostly related with sting operations to highlight the crimes in society. This role of media has enabled citizens to form opinions about the malpractices of governments and the criminal activities in the society. Media watch of public life can prevent crimes because of its deterrent effect. Media can also take up the issue of investigation into unreported cases. It can also fasten and make effective in the investigative process. Even the crime redressal process is influenced by the media. These influences can be both positive and negative.

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[1] *"The Role Of The Media In Deepening Democracy,"* by SHEILA S. CORONEL, available @http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010194.pdf

2. Structure of media

Freedom of media is considered to be the freedom of people as they should be informed of matters in governance. Free and healthy press is indispensable to the functioning of democracy. In democracy, people are expected to participate in all affairs of the community life. They must be informed about the current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to form opinion. The right to freedom of speech and expression as contained in Article 19 of the Constitution does include the freedom of press. However, the freedom is not absolute as it is bound by sub clause (2) of the same article.

Modern media consists of different formats like print, television, movies, video games, music, cell phones, various kinds of software and the internet. Advancements in technology, new types of information disseminated and the new ways of communication have been continuously influencing crimes in the society. During the exclusive print media era, people were just passive consumers and their attitudes were not so much influenced by the print media. But today people are active participants in media and they are not aware as to how their attitude gets changed due to media dissemination. Apart from media formats like print, sound and visual media, today digital interactive media is making much impact. Social media is the result of this technology.

Irrespective of the format, media is disseminating contents in the form of entertainment, advertisement, news and information, then we consider media information on crimes, it serves three purposes such as information, news and entertainment.

3. Role of media in transitional society

The power of media to influence public opinion and even to provoke great movements is witnessed already. Presently, India is passing through a transitional period. It can be described as a transition from agri-based economy to modern industrial society. As Justice Markhandeya Katju says, this is a very painful and

agonising period in history.[2] The traditional society and many of the ethoses have been uprooted and thrown apart. At the same time, the new or modern society is not yet entirely established. Older values are decaying. What was regarded as bad earlier is now regarded as good and vice versa. Love marriages, caste system, etc are the examples which have received 'U' turn treatment in the transition.

It is the duty of right thinking people and the media to assist this society to get over this transition period quickly and with less discomfort. Since media deals with ideas and ultimately public opinion, it has great role to perform. Media can perform this role to the optimum when it protects society from the social crimes.

At times it is observed that media is responsible for diverting the attention of people from real issues to non-real issues. Instead of focussing on issues like honour-killing and religious fundamentalism, media is focussing more on film stars, fashion shows, reality shows, etc. It is true that entertainment cannot be overlooked but it should be to the reasonable extent. Another problem with the present media is that it is dividing the people. Another flaw is its inability or reluctance to develop scientific and practical attitude in people. Intellectual level of an average Indian might be low as it is surrounded by casteism, superstition, etc. Should the media try to change this attitude or no? It is its primary duty to develop scientific rational ideas in people. But considerable portion of media always indulges in propagating superstitious ideas.

We have glaring examples of Indian print media responding to social issues even during pre-independence period. Rajaram Mohan Roy wrote against sati and child marriage in his newspaper 'Miratul Akhbar'. Feudal practices and women's oppression was agitated through print media by Munshi Prem Chand and Sharath Chandra Chattopadhyaya.

However, today's TV Channels rampantly show astrology. This is nothing but spreading of superstition. Despite these observations, there are good numbers of media attempts which can be considered as idealistic. For example, a good number of journalists are efficiently reporting farmers' suicides and honour-killings in India. The most important democratic functions that we can expect the media to serve are

[2] The Hindu, Justice Markhandeya Katju on "*The Role of Media in India,*" appeared on 8th November 2011 and updated on 21st April 2017.

surveillance of socio-political developments, identifying the most relevant issues, providing a platform for debate across a diverse range of views, holding officials to account for the way they exercise power, provide incentives for citizens to learn, choose, and become involved in the political process, and resist efforts of forces outside the media to subvert their independence.[3] Expecting this from media is not interference with its freedom under Article 19(1)(a). This freedom is subject to restrictions under Article 19(2) and basically media is expected to know that all freedoms are coupled with responsibilities.

4. Media influence on prevention of crimes

Can the media help in preventing the occurrence of crime? It is a very difficult question to answer. Media watch as a surveillance can have different impacts but its deterrence effect on crimes is highly suspected. It is evident all over the world that surveillance through CCTV has made criminals to plan their activities than to deter them from committing those acts. Deterrence theory of surveillance has no nexus with motivations to commit crime. The idea of committing street offences in an unplanned way and is almost equal to bankrupt when there is surveillance. Hence perpetrators make choice of plan depending upon the type of acts they intend to execute.

Yet, the deterrent effect of media information cannot be side lined in the total analysis. Media can contribute towards crimes prevention strategies in the following ways:

1. Media exposure of crimes can sensitize and educate people on underestimated or overlooked social problems.
2. Media coverage and campaign about violence against women and children has led to great social awareness. Law and policy are coming out with new strategies to prevent these crimes.
3. Media coverage of crimes like child sexual abuse can affect cultural standards and thereby overcome the stigmatisation of the victim.
4. Media can help to develop newer self- protection and safety strategies.

[3] *"The supposed and the real role of mass media in modern democracy,"* by Agner Fog, available @http://www.agner.org/cultsel/mediacrisis.pdf

5. Democratic role of media in crime prevention is very crucial in a country like India. Media dissemination of information can make people to develop critical thinking about the issues of crime and its prevention. The media can help to guarantee transparency of institutions specialising in crime prevention and safety.[4]

6. The modern media which is very much participative can ensure civic journalism. Such a state of affairs will foster responsibility on the part of the media to provide trust worthy information and to take up positive crime prevention initiatives.

5. Media influence on investigation of crimes

Media as eye spy on society is well known in the present day society. Investigative journalism is much into practice, these days. However, this has been a controversial issue ever since it was practiced. Although this type of journalism raises several questions regarding ethics, privacy, etc., this has radically helped to shape public opinion. Investigative journalism revolves mainly around scandals, crimes, politics, corruption, etc. But this is not restricted to the above mentioned fields in India. In India, Bofors scandal and the type of reporting done by the media made the country take notice of a new form of journalism that was previously limited to magazines and journals. Nowadays, media is very busy with sting operations. They are widely carried out to report corruption and misdeeds of politicians and bureaucrats. Due to the interference of the media, many cases have attracted the attention of the masses to form a particular public opinion. Tactics like live shows, debates, discussions, talk shows, etc help bring these critical issues into the public sphere. This can enable people to know, enjoy and enforce their rights. This has often led to aggrieved parties getting much needed justice.

Jussica Lal and Priyadarshini Mattoo cases are the clear examples of effects of investigative journalism in India. The role of media in both the cases is indicative of voice of people. None of the cases would have got so much of importance, had the media not intervened. The investigations on part of media helped to accelerate the trials of the cases. These cases exposed the loopholes and showed how influential

[4] Vivien Charts, *"The Media, Crime Prevention and Urban Safety - A Brief Discussion on Media Influence and Areas for Further Exploration."*

and powerful people can manage to get away even after committing serious crimes. Power of media is shown in these cases which ultimately influenced the public and ensured justice to the citizens. Thus, media interference helped the hidden facts to be unearthed. Judiciary took notice of the loopholes and extensive malpractices of the administrative system in India. Indian media is witness to various incidents ever since its inception. Media intervention is also very important when police are bit reluctant to register and act upon the information received. Media at times makes higher police officers to act upon the inactiveness of the subordinate police officers.

6. Media influence on redressal of crimes

Media plays crucial role in shaping the public opinion and it is capable of changing the perceptions of people about various events that take place. Crimes are evils and they need to be condemned and the media is justified in calling for the perpetrators to be punished in accordance with the law. However, the media cannot usurp the functions of the judiciary. It must stick on to its basic function of objective and unbiased reporting. While a media over-regulated by government is unhealthy for democracy, the implications of continued media unaccountability are even more damaging. Steps need to be taken in order to prevent media trials from eroding the civil rights of citizens, whereby the media have a clearer definition of their rights and duties, and the courts are given the power to punish those who flagrantly disregard them.

Democracy is the rule of the people with a system having three strong pillars viz., legislature, executive and the judiciary. But the guarantee of Article 19(1)(a) in multi-dimensional way has given rise to a fourth pillar known as media or press. It acts as a conscious keeper, a watchdog and points to the wrongs in our system, by bringing them to the knowledge of all, with the hope of correction. There is no dispute that the unprecedented media revolution has resulted in great gains for the general public. Even the judiciary has been assisted by the ethical and fearless media. *Suo moto* cognizance of the matters in various cases, reliance on newspaper reports about violation of rights has been the hallmark of dynamic judiciary.

Media has now started acting like a 'public court' or *Jantaa Adalat*. It completely overlooks basic principles of criminal justice. The principles of

'presumption of innocence until proven guilty' and 'guilt beyond reasonable doubt' are sidelined here. In media trial, the media itself does a separate investigation, builds a public opinion against the accused even before the court takes cognizance of the case. In this way the public and even judges are prejudiced as against the accused. If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime.. Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent the encroachment of civil rights.

Restrictions on media report about pending cases is well summarised by the chief justice Gopal Rao Ekkbote of Andhra Pradesh High Court in the case of *Y.V. Hanumantha Rao* v. *K.R. Pattabhiram and Anr.*,[5] where in it was observed by the learned judge that:

" ...When litigation is pending before a Court, no one shall comment on it in such a way there is a real and substantial danger of prejudice to the trial of the action, as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making the comment honestly believes it to be true, still it is a contempt of Court if he prejudices the truth before it is ascertained in the proceedings. To this general rule of fair trial one may add a further rule and that is that none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint or defense. It is always regarded as of the first importance that the law which we have just stated should be maintained in its full integrity. But in so stating the law we must bear in mind that there must appear to be 'a real and substantial danger of prejudice.' "[6]

A larger issue is the complex nature of juror bias and how that bias predisposes a juror toward one side in a case. It is no secret that we all have biases. The difficulty comes from understanding how those biases may ultimately affect the viewing of evidence and the deliberations in a case. Judges are also human beings they too care about the reputation and promotion. Now-a-days Judges are social and being a human they care about their promotions and remunerations. In high profile cases

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[5] AIR 1975 AP 30

[6] Available@ https://indiankanoon.org/doc/299670/

they tend to be bias and give verdict as per as media reports just to be in lime light. This will surely help them to get a promotion before other competitive judges. Media is so much into our daily life's that judges too can't stay away from it and they usually tend to give verdict as per media reports.

The media can create unconscious pressures on judges in high-profile cases. This is especially possible when the cases come to the courts and applications for interim orders are placed. Judges know that they are being watched by the public. This may elevate their verdict at least in terms of IA orders to a level beyond the existing norms applicable to them. But in India, by and large, we have rarely seen media reports affecting the judgements, at least in lower judiciary. Its effects on the judicial mentality at higher courts are a highly debatable issue.

7. Conclusion

Crime and criminality have always been a social problem for a country like India. But the worrying factor is that the number and brutality of these crimes is increasing. As India pushes to emerge as a developed nation, crime too seems to be growing as a natural consequence. There has to be a framework which works with the collaboration of government, stakeholders and the media to curb crimes and criminality in the society. Within this framework, the government could focus on media literacy education as a necessary crime prevention tool. The increasing impact of different media programmes on youth has been witnessed in some live shows and reality shows conducted by celebrities. As the media continues to be a socializing agent, discussing the complex links and relations between the media and crime prevention and safety of the people is very important for the community at large. Media literacy education deserves more attention, as it can help encourage and inform the ways future generations interact and make use of the media in crime prevention. Unfortunately today's media is being influenced by liberalisation like any other field. Accordingly, they are after those reporting which are profitable than relevant. Because of liberalization of the media market stories are selected for profitability rather than relevance. Most media in modern India are privately owned and organized as firms and companies. There are many other possible forms of ownership. Newspapers, radio stations, cable channels, televisions can be owned by public bodies like universities, non-profit corporations, community-

based associations, employee-owned cooperatives. Each of these has advantages and disadvantages. Healthy media environment means a good distribution of all these forms of ownerships. Professional journalists want to be more autonomous. They feel less comfortable when they work for newspapers controlled by capitalist firms. In this way there can be new initiatives by the right thinking people.

CONSTITUTIONAL GOVERNANCE IN A GLOBALIZED WORLD

*Dr. Ana Claudia Santano**

1. Introduction

In the last years, all of us followed (and lived) a deep transformative process of our societies, not only in the economic field, but also in our way to interact with other countries, other people, in our concepts about the world and life. This is the result of phenomenon called globalization. The development of different civilizations across the world clearly demonstrates that any state cannot develop independently; rather they need to cooperate with other states for their healthy development.

It is impossible to deny the influence of the globalization in our daily life today, and also it is hard to believe that we can simply disregard its effects to plan our future – short or long term. The globalization came to stay, and its withdrawal can be very worse than its adjustment for what we aim as a society. Hence, it is necessary for the states in the world to cooperate and communicate in order to deal with the common problems, including environment pollution, preventing and fighting against the international crimes and terrorism and the effective cooperation in the field of protection of human rights.[1]

According to Marxism, social development depends on economic growth. This social ideology emphasizes the importance of a legal system in the development of a state. In particular, with growing importance of the WTO (World Trade Organization), economic globalization based on the world market gives rise to the states in the sphere of ideology and legal system. It is worth noting that the United Nations after the World War II have played a very important role in promoting the

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This paper is a result of my participation as a Guest of Honor in the International Workshop on Constitutional Governance in Globalized World, held on December 3rd and 4th, 2018, at School of Indian Legal Thoughts, Mahatma Gandhi University, Kottayam, Kerala, India.

[1] Cf. AA.VV. Preface. *Globalization and Constitutionalism.* Available in : <https://www.kas.de/c/document_library/get_file?uuid=997c94e0-2b85-b6bb-c27e-4187f03201d0&groupId=252038> Accessed on 28th Dec. 2018.

development of globalization and cooperation among the different civilizations, especially in the domain of protection of human rights and the rule of law.[2]

In this sense, globalization is not only a theoretical concept, but also a practical one in many countries, as Brazil and other Latin American states, China, India, and so forth. Its importance in the public life has grown, particularly in the field of constitutional construction. The ideas about democracy, liberty, human rights and the rule of law based on the background of globalization have deeply changed the political reforms and legal constructions in many places of the world.[3]

The concept of globalization is not very clear. As it is stated before, this concept is still a challenge to be explained by the literature of the academy. However, there are some standards which can be identified as its historical evolution and main meaning.

The early origin of globalization stems from the capitalistic colonialism in the form of input and output of the international capital. The actual birth of globalization can be seen in the forming process of the United Nations which has enhanced the cooperation and communication among the national states and has promoted the development of protection of human rights through a series of International Conventions on Human Rights since 1948. The World Trade Organization has become a global economic organization which has established the basic economic order.[4]

However, the category and extent of globalization is not definitively complete. Particularly the concept of globalization did not comprise legal, social and political factors. In this sense, it is undeniable for the effects of globalization in some countries when their societies are, now, very plural, concerning the nationality of people who work and produce goods for the growth of economy of their country of residence. The globalization of democracy and the political parties in the national states, when many of political causes are common in many countries and some political parties are created in purpose of globalization, such as the movement of green earth and the common ideology. At present, the best example of it is the

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[2] *Supra* note 1.

[3] *Ibid.*

[4] Bauman, Zygmunt. Globalização: as consequências humanas. Rio de Janeiro: Zahar, 1999

Green Party, which played a bigger role in the process of general election in many states, including the European Union, where there is an European Green Party, composed by many other green parties of the state members.

Social problems are globalized too, as a direct effect of economic globalization. Poverty, lack of opportunities, inequalities, so forth, are pretty common, not only because national governments are inefficient in achieving their goals, but also because economic globalization facilitated the growth of poverty, the exploitation of workers, having, parallel to it, the evasion of tax payment, decreasing economic resources of the states to fight against these social problems and to make good public policies. About these panoramas, we can see many current examples which demonstrate how a national social problem can be considered and turned into a globalized problem, such as the "Caravana Migrante", or, in English, Migrant Caravan, happening now in the border of Mexico and United States, to mention as an example here. This tragic event shows us how the urban violence, the poverty, the unlimited exploitation of human resources and the systemic state corruption can involve many more countries than the national one. Around 3000 Central American migrants, who have arrived in the Mexican border city of Tijuana after crossing Mexico and parts of Central America because their lives became impossible or heavily difficult in Honduras, Guatemala, El Salvador, due to the strong criminal gangs and urban violence and the lack of alternatives in their home countries.[5]

This is a globalized problem, not only because it involves a group of countries, but also because depending on the solution applied, it can "inspire" or be done in other places of the world where there is the same refugee or migrant issues, as Myanmar and Bangladesh with the Rohingyas' case,[6] or even Europe and the African and Syrian people who are running from wars and lack of environmental resources, like water.[7]

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[5] BBC News. Migrant caravan: What is it and why does it matter? Available at: <https://www.bbc.com/news/world-latin-america-45951782> Accessed on 28th Dec., 2018

[6] UN News. Causes of Rohingya refugee crisis originate in Myanmar; solutions must be found there, Security Council told. Available at: <https://news.un.org/en/story/2018/02/1002612> Accessed on 28th Dec., 2018.

[7] Black, Richard. Environmental refugees: myth or reality? Available at: <https://www.unhcr.org/research/working/3ae6a0d00/environmental-refugees-myth-reality-richard-black.html> Accessed on 28th, Dec., 2018.

Therefore, globalization, cannot be considered as an economic issue only. It is much more complex and deeper, involving political, social and cultural issues. Taking into account, the process of globalization must be thought also from a legal point of view, towards common solutions, the share of common values, considering equal human beings.

2. Globalization and Constitutionalism

The traditional view of constitutionalism stems from the academic school of the people's sovereignty in the form of the theoretical basis of the right to make a constitution. The identity of the subject of constitution-making determines the concrete process of accepting the people's will and forming the content of constitutional law.

In the early times of constitutional-making, a lot of countries copied the mode of the Constitution of the United States, France and England. In the process of constitution-making, more and more countries have learned from each other, what makes this reciprocity of constitution-making in these traditional countries is obvious. However, in the modern societies, based on the system of international protection of human rights, series of international conventions of human rights create a strong impact on constitution-making in the member states. The universal value about protection of human rights has been accepted in the different constitutional laws, in particular, just to mention one example, the Constitution of the European Union, well known as 'Lisbon Treaty', creates a great impact on the member states of the EU through the political process of constitution-making. [8]

In this sense, it is really difficult to find some constitution with few or no rules about human rights. The tendency is the contrary: progressively all the constitutions in the world are adding to their contents – at higher or lower level – rules about human rights, making it a global process. The integration of countries in the international sphere strengths the protection – and the responsiveness – towards human rights. All member states of NGOs have the obligation to respect international treaties that they voluntarily opted to ratify. This relation based on *pacta sunt servanda* principle obligates countries, after signing and ratifying the

[8] Bauman, Zygmunt. Globalização: as consequências humanas. Rio de Janeiro: Zahar, 1999.

international instruments, to strictly comply with their goals, in the same time resulting in the need to adapt – if necessary – to make reasonable endeavors to reach all the agreed targets related to human rights.

Considering this, it is visible that the tendency of the international protection of human rights has put substantial impact on constitution-making in many countries, like Brazil, 1988 Constitution, widely based on human rights and the dignity of the human person after a very hard and long military dictatorship. This process will not stop, and we, scholars, jurists, have to deal with this new constitutional global law of thinking.

3. The influence of international protection of human rights on the constitutional national systems

The Human Rights emerged in the process of anti-inhuman treatment in times of wars. In the early twentieth century, International Labor Organizations and the other international bodies played a very important role in protecting the human rights, mainly in the field of minorities and labours.

After World War II, in regard to the lesson caused by the fascist authorities in violating human rights and disregarding the human dignity, Universal Declaration of Human Rights was adopted and proclaimed by General Assembly Resolution 217A (III) of December 10th, 1948.[9] It settled the foundation of the protection of human rights which were equally suitable to everyone without distinction of any kind, such as race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.

On the basis of all provisions in Universal Declaration of Human Rights, in 1966, both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights were adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A(XXI) of December 16th.[10] In the subsequent period, one optional protocol to Covenant on Civil and Political Rights was passed and came into effect for the ratified member states, one related to establishing an individual complaints

[9] Full document text available at: < http://www.un-documents.net/a3r217a.htm> Accessed on 28th Dec., 2018.

[10] Full document text available at: <http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200A(XXI)_civil.pdf> Accessed on 28th Dec., 2018.

mechanism for the International Covenant on Civil and Political Rights. In this sense, through this protocol, state parties agree to recognize the competence of the United Nations Human Rights Committee to consider complaints from individuals who claim their violated rights under the Covenant. Complainants must have exhausted all domestic remedies and anonymous complaints are not permitted. Until now, the above international documents constitute the legal framework of international protection of human rights.[11]

The other Optional Protocol is related to the International Covenant on Economic, Social and Cultural Rights, passed only in 2008 due to its controversial content economic, social and cultural rights, well known as second generation of rights, with all the critics that this denomination rise. As the other optional protocol on civil and political rights, this also establishes an individual complaints mechanism for the Covenant. State parties agree to recognize the competence of the Committee on Economic, Social and Cultural Rights to consider complaints from individuals or groups who claim their violated rights under the Covenant. In both instruments, the rules also include an inquiry mechanism: parties may permit the Committee to investigate, report and make recommendations on "serious or systematic violations" of the Covenant. However, parties may skip this obligation on signature or ratification, which can impact the protection of these rights and the main goals of the protocols.[12]

The same can be said about inter-American system of human rights. The Inter-American System for the protection of human rights is a regional human rights system, and is responsible for monitoring, promoting and protecting human rights in the 35 independent countries of the America that are members of the Organization of American States (OAS).

The Inter-American System is composed by two main entities: the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACHR). Both bodies can decide individual complaints concerning alleged human rights violations and may issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of

[11] For more information, cf. <https://www.ushrnetwork.org/our-work/issues/iccpr> Accessed on 28th Dec., 2018.

[12] Full document text available at: <https://www.ohchr.org/en/professionalinterest/pages/opcescr.aspx> Accessed on 28th Dec., 2018.

irreparable harm. The Commission engages in a range of human rights monitoring and promotion activities, while the Court may issue advisory opinions on issues pertaining to the interpretation of the Inter-American instruments at the request of an OAS organ or Member State.[13]

Additional bodies within the Inter-American System focuses on specific rights of groups. These include, the Inter-American Commission of Women (CIM, by its Spanish initials), the Working Group on the Protocol of San Salvador (treaty about social rights), and the various rapporteurships of the IACHR.

On the one hand, the IACHR established by an Organization of American States (OAS) resolution in 1959, began operating in 1960, observed human rights conditions via on-site visits, and in 1965 IACHR was authorized to begin processing specific complaints of human rights violations. OAS Member States recognized the IACHR as the region's principal human rights body through a protocol to the OAS Charter which was adopted in 1967 and came into force in 1970.[14]

In addition to carrying out country visits and receiving complaints, the Commission also holds thematic hearings on specific topical areas of concern, publishes studies and reports, requests the adoption of precautionary measures to protect individuals at risk, and has established several thematic rapporteurships to more closely monitor certain human rights themes or the rights of specific communities in the hemisphere. [15]

Individuals, groups of individuals and non-governmental organizations recognized in any OAS Member State may submit complaints ("petitions") concerning alleged violations of the American Declaration of Rights and Duties of Man, American Convention on Human Rights (treaty about civil and political rights) and other regional human rights treaties. Year after year, the Commission receives more petitions, as we can see as follows[16]:

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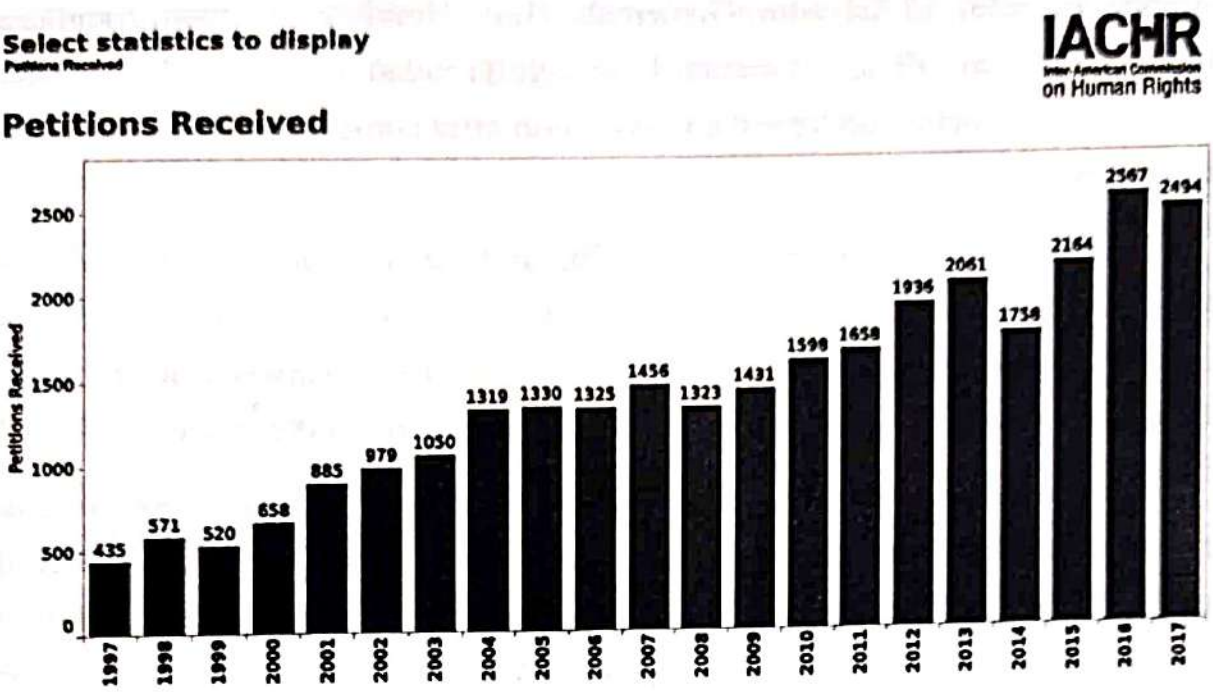
[13] Full information is available at: <https://ijrcenter.org/regional/inter-american-system/#Inter-American_Commission_on_Human_Rights>

[14] Available at: <https://ijrcenter.org/regional/inter-american-system/#Inter-American_Commission_on_Human_Rights>

[15] Available at: <https://ijrcenter.org/regional/inter-american-system/#Inter-American_Commission_on_Human_Rights>

[16] Data Available at: <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> Accessed on 28th Dec., 2018.



On the other hand, the Inter-American Court of Human Rights is the judicial organ of the Inter-American Human Rights system. The Court's mandate is more limited than that of the Commission because the Court may only decide cases brought against the OAS Member States that have specifically accepted the Court's contentious jurisdiction and those cases must first be processed by the Commission. Additionally, only States parties and the Commission may refer contentious cases to the Court.[17]

The seven judges of the Court are independent, although they are chosen by States through the OAS General Assembly, the Judges are elected for a six-year term, once renewable.[18]

Currently, 24 OAS Member States have ratified the American Convention on Human Rights, 22 of whom have opted to accept the Court's contentious jurisdiction in accordance with Article 62 of the American Convention. The 20 of them over which the Court may exercise its contentious jurisdiction are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican

[17] Full information available at: <https://ijrcenter.org/regional/inter-american-system/#Inter-American_Court_of_Human_Rights> Accessed on 28th Dec., 2018.

[18] Full information available at: <https://ijrcenter.org/regional/inter-american-system/#Inter-American_Court_of_Human_Rights> Accessed on 28th Dec., 2018.

Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Trinidad Tobago and Venezuela. However, Venezuela withdrew the Convention after some sentences condemning the country.[19]

The Court began operating in 1979, and soon issued several advisory opinions, but did not begin exercising its contentious jurisdiction until 1986, when the Commission submitted the first contentious case: Velasquez Rodriguez v. Honduras, regarding which the Court issued a judgment on the merits in 1988.[20]

Over the Court's first several decades in operation, its annual case load had become more than double; many more States have found themselves before the Court; and the Court has adjudicated a significant range of rights protected by the American Convention and ancillary agreements, from extrajudicial execution and forced disappearance cases, to labor, land, and freedom of expression of rights.

It is worth noting that International Conventions on Human Rights have played a substantial influence on constitution-making and policy-making in the field of protection of human rights in the member states. Lots of member states have wholly accepted the views of universal human rights affirmed in International Conventions on Human Rights. The common standard of protection of human rights for all people and all nations as showed in Universal Declaration of Human Rights has been established both among the people of member states themselves and among the people of territories under their jurisdiction.

In the process of accepting the views of universal human rights, there are many value contradictions which need to be resolved both in the theoretical and practical sense. The most important issue is the relation between international conventions on human rights and the laws of protection of human rights in the member states, particularly in form of connections between universal human rights and the rights protected by the inner laws in member states.[21]

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[19] Full information about signatures and ratifications can be found at: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> Accessed on 28th Dec., 2018.

[20] Full information available at: <https://ijrcenter.org/regional/inter-american-system/#Inter-American_Court_of_Human_Rights> Accessed on 28th Dec., 2018.

[21] Cf. AA.VV. Preface. *Globalization and constitutionalism*. Available at: <https://www.kas.de/c/document_library/get_file?uuid=997c94e0-2b85-b6bb-c27e-4187f03201d0&groupId=252038> Accessed on 28th Dec., 2018.

Considering this, we have to discuss the relationship between International Conventions on Human Rights and international laws in the member States. In essence, we need to probe into the relationship between the rule of law and the protection of human rights. Without the conformity or a kind of consensus of the international and internal principles of the rule of law, the value of human rights is able to become softened because a great number of value contradictions among member states and other states could not be resolved peacefully.[22]

It is very important on the level of national states that the dialogue and mutual understanding shall be established so that all states can be respected and encouraged in the field of protection of human rights.

4. Multi-level system of law, considering international law and domestic law, toward an *ius constitutionale commune*

Monism and dualism were originally conceived as two opposing theorizations of the relationship between international and domestic law. Subject of considerable debate in the first half of the 20th century, monism and dualism are regarded by many modern scholars as having limited explanatory power as theories because of their failure to capture the working of international law within states in practice.[23]

Notwithstanding their decline as theories, monism and dualism retain power as analytical tools. They act as consistent starting points for examinations of the relationship between international and domestic law. For example, scholarship on the role of international law in domestic or European Union (EU) law, and on the ways that domestic courts incorporate international human rights law, continues to use monism and dualism as touchstones for analysis. A number of recent decisions in domestic courts have seen some scholars reviving monism and dualism as potential ways to understand domestic judicial reasoning on international law.[24]

Monism and dualism also provide a shorthand way of signaling attitudes of individuals and institutions within domestic legal systems towards international law. In its most straightforward form, monism holds that international and domestic law

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[22] *Supra* note 21.

[23] CHIAM, Madeleine. *Monism and dualism in International Law*. Available at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml> Access on 28th Dec., 2018.

[24] *Ibid.*

forms part of a single universal legal system. Monism's most famous proponent, Hans Kelsen, considered that there was a hierarchical relationship within the monist legal system, under which international law was superior to domestic law and thus prevailed in any conflict between the two laws. A dualist system treats the international and domestic systems of law as separate and independent. The validity of international law in a dualist domestic system is determined by a rule of domestic law authorizing the application of that international norm. Because of the variety of ways in which domestic systems incorporate international law, some scholars have preferred the term "pluralism" to "dualism." There are multiple forms of both monism and dualism.[25]

Indeed, one of the main critiques of both theories is that, no state's system is strictly monist or dualist. Instead, international law may treat in a variety of ways by the different institutions of a state. For example, courts may use international law in ways that a parliament does not. Or a state may allow for the direct incorporation of customary international law, but require international treaties to be transformed into domestic legislation before they can have direct effect within a state. The scholarship on monism and dualism can broadly be divided into two kinds- theoretical expositions on the concepts themselves and analysis that takes monism and dualism as the departure point for critique, often combined with an exposition on the practice of international law within states.[26]

Considering this, to reach all the goals related to the protection of human rights, I suggest to overcome the theoretical problem and to deal with monism and dualism as an "old fashion" thing, reducing its importance in a practical and globalized world. We have to dialogue – and to foster this dialogue – between countries, between national legal systems and mainly between the constitutions of these countries. For this, I consider the concept of *ius constitutionale commune* as a great beginning.

The notion of an *Ius Constitutionale Commune* bore in Latin America, from many inter-american system studies, mainly about its impact and results in the constitutional systems of Latin American states. Although this concept was

[25] *Supra* note 24.

[26] Cf. Crawford, James. *Brownlie's Principles of Public International Law*. 8th ed. Oxford: Oxford University Press, 2012. pp. 48.

idealized for Latin America, maybe it is time to think about it in some other regions of the world.

According to Armin von Bogdandy *et al*, from Max Planck Institute, in the first place, *Ius Constitutionale Commune* for Latin America has an analytical, even ontological function. We use it to posit a new legal phenomenon. It is composed of elements from various legal orders which are united by a common thrust, namely transformative constitutionalism. *Ius Constitutionale Commune* for Latin America links the American Convention on Human Rights, other Inter-American legal instruments, the concordant guarantees of national constitutions, the constitutional clauses opening up the domestic legal order to international law as well as pertinent national and international case law. For example, The legal understanding of the Inter-American Court of Human Rights (IACHR) mutates from a lonely international institution tucked away in the fairyland Republic of Costa Rica into just one of the many servers which nurture the Latin American web of transformative constitutionalism. That web links the IACHR to likeminded domestic courts and tribunals.[27]

Secondly, according to and following von Bogdandy *et al* say, *Ius Constitutionale Commune* for Latin America has a normative function. It supports the specific thrust of transformational constitutionalism in Latin America, as adopted or renewed in the constitutional projects that followed a period of authoritarian regimes. It aims at expanding the regionally secured realization of the central promises of national constitutions and portrays the embedding of various countries in a mutually supportive structure as a key to success. This should help diffusing human rights standards, compensating national deficits, and fomenting a new empowering dynamic among social actors.[28]

Third, *Ius Constitutionale Commune* for Latin America designates a scholarly approach. It is characterized by a disciplinary combination of national and

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[27] Von Bogdandy, Armin; *et al. Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*. Research Paper n°. 2016-21. Max Planck Institute for Comparative Public Law & International Law (MPIL). Available at: < https://poseidon01.ssrn.com/delivery.php? ID=613115082115015 015100018112030073004105010020053060007069095014069005113002098112030098123043125040056029116103015126118090086048 0 1601302208802211 210011712411807610903605807112508307001502506512009612011802004065124102009 12408107311700310 3097098086096&EXT=pdf> Accessed on 28th Dec., 2018.

[28] *Supra* note 27.

international legal scholarship, a comparative mindset, and a methodological orientation towards principles, in particular the triad of human rights, democracy, and the rule of law. Its logic is incremental, and rights are its main focus and instrument.[29]

Considering this, the three dimensions of *Ius Constitutionale Commune* for Latin America shows, coining, developing, and propagating this concept is consequential, and it is meant to be this way. It aims at impacting reality. Law is a social construct. The terminology of lawmakers, courts, and legal scholars is not external to the law, but constitutive. It is essential to create and shape the law. This is true for specific legal institutions, such as freedom of speech or property, as for entire legal regimes, such as domestic law or international law. *Ius Constitutionale Commune* for Latin America affirms the very existence of a new legal phenomenon, one emerged out of the interaction between and the confluence of domestic and international law, distinguished by its specific thrust.[30]

The concept of *Ius Constitutionale Commune* for Latin America gives this legal phenomenon an identity, provides orientation and aims at generating and structuring academic, political and judicial communication. By naming this phenomenon and describing it under a single label, we propose a shared reading of legal, doctrinal and scholarly phenomena that have, until now, been mainly explored as separate occurrences. By naming *Ius Constitutionale Commune* for Latin America, we strive to bring together people and projects of very diverse backgrounds, who nonetheless share a common belief in the transformative potential of human rights, democracy, and the rule of law for Latin America. And I do believe, this sharing of common beliefs is spreading for other parts of the world, beyond the continental borders that we can have.[31]

Law and legal scholarship can make a difference in a social agenda. Latin America provides an important regarding human rights. Human rights have developed over the last thirty years into a common and consequential language, legal–but also political and social–that did not exist previously. It is not only a

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[29] *Supra* note 28.

[30] *Ibid.*

[31] Cf. Von Bogdandy, Armin; *et al.* (eds). *Construcción y Papel de los Derechos Sociales Fundamentales. Hacia un Ius Constitutionale Commune en América Latina*. Mexico City: Instituto de Investigaciones Jurídicas, 2011.

language amongst legal professionals, but also a platform of mobilization for the broader public.[32]

Ius Constitutionale Commune for Latin America is an inclusive concept. But, like any legal concept, it is not neutral or agnostic. Indeed, by its link to transformative constitutionalism, it professes its normativity and becomes part of broad social processes. Indeed, many actors, not only jurists, aim at changing political and social realities of Latin America in order to create the general framework for the full realization of democracy, the rule of law, and human rights, making Latin American countries more differentiated and more cohesive at the same time. As abstract and vague as this appears at first, such a project is in fact quite concrete and precise.[33]

Considering all these brief lines about *Ius Constitutionale Commune* for Latin America, it is only an initial suggestion, we could think about this concept outside Latin America, taking into account this globalized world. The challenges are huge and the complexity can be an enormous obstacle. However, we, as scholars, jurists, lawmakers, if we want to adapt this globalization process to other directions, avoiding to take globalization through economic issues, pursuing other goals as can be the real and wide protection of human rights, we will have to find new ways to analyze this panorama, and fast, because one big nationalist wave is coming and that we are watching to rise in the world, getting stronger day by day. That is our biggest challenge.

5. Concluding remarks: Are we in a new era of globalization or are we going back to the nationalist systems?

Unfortunately, the news is not so good relating to globalization, human rights and new democratic phenomenon. In many places of the world, people are choosing for some strong nationalist agenda, with many discriminatory slogans,

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[32] Von Bogdandy, Armin; *et al. Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*. Research Paper n°. 2016-21. Max Planck Institute for Comparative Public Law & International Law (MPIL). Available at: < https://poseidon01.ssrn.com/delivery.php? ID=613115082115015015100018112030073004105010020053060007069095014069005113002098112030098123043125040056029116103015117611809008604801601302208802211210011712411807610903605807112508307001502506512009612011802000406512410200912408107311700310309709808609 6&EXT=pdf> Accessed on 28th Dec., 2018.

[33] *Ibid.*

as "you foreign, out" or "your place is not here" or "rights only for nationals" and so forth. This is good neither for human rights – considering we are all equals and human beings – nor to the globalization process outside economic issues.

It is believed in a better world, a globalized, democratic and inclusive world, scholars, jurists, have the duty to find new paths to reach all these tasks. In the twentieth century, we made a lot. We built the legal structure to make huge changes in social agenda. Now it is time to put all of it in practice, through strong, wide and global constitutional governance.

LEGAL LIABILITY OF INTERNET INTERMEDIARIES IN INDIA - PANORAMIC VISION

*Dr. Nagarathna. A**

1. Introduction:

Internet Intermediaries play a significant role in the use of information technology. They facilitate the transfer of information, communication or data form one website to another. The liability of online service provides including Internet Service Providers (ISPs) is one of the controversial issues in cyber law. The acts of third parties on the net sometimes make them liable and many countries in fact hold the ISPs liable. However, there is an inclination amongst the legal systems of the day to provide safety valves to them. A wrong committed by a third party on the net cannot bind an intermediary, if he has no knowledge of such commission. In addition, exercising due diligence also can exempt an internet intermediary from legal liability.

2. Conceptual Understanding- Internet Service Providers

Generally a company which provides access to internet is regarded as "ISP". It is they who provide connection to the internet to the customers or users of internet by using "telephone lines, existing cable TV lines, new fiber optic cable may be strung or the user has to use a modem and dial a phone number. Examples of ISPs are AOL, Earthlink, MSN, Time Warner Cable, Verizon, etc."[1] and also wireless modes. Today ISPs apart from providing connection to internet, also offer Internet services like email, web hosting and access to software tools. A network service provider in India is included under the term "intermediary". Section 79 of the IT Act, 2000 declares ISP as an intermediary. Section 2(w) defines an "Intermediary" with respect to any particular electronic records.[2]

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[1] James Bucki, Internet Service Provider (ISP) – A Definition of Internet Service Provider (ISP), http://operationstech.about.com/od/glossary/g/ISP.htm

[2] Any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafés.

The expression 'Network service providers' used in Section 79 includes within it all kinds of Internet service providers irrespective of what function they perform in the long chain of intermediaries that transport Internet content to the desired destinations.[3]

3. Liability of internet intermediary:

An internet intermediary can be held liable for wrongs committed on internet such as copyright infringement, pornography, etc. However, it is on the other hand, argued by the intermediaries that as they are mere carriers or passive actors they must not be held liable for the act of a third party. In order to balance the interest of both public in general and the intermediaries in specific, it is essential to have laws imposing liability upon intermediaries for contributing to cyber wrongs and the individual interest of Intermediaries by safeguarding them from liability for cyber wrongs of another.

4. Scenario before amendment of Information Technology Act, 2000

The original Information Technology Act of 2000 [prior to 2008 Amendment] though safeguarded from liability for acts of another under section 79, yet failed to provide the same as it lacked clarity and certainty. Under Section 79[4] of IT Act, 2000 the statutory explanation defined 'third party information' as "any information dealt with by a Network Service Provider (NSP) in his capacity as an intermediary" which lacked clarity thereby making it difficult to apply the section in the interest of Internet intermediary. In addition the scope of the provision was also not clear as to if it applied in case of content providers or search engines, etc., as the statutory explanation to the section defined a "network service provider" as "an intermediary." The section exempted liability of NSPs for third party information or data made available by him. This further required 'absence of knowledge' and 'due diligence' which to an extent is similar to the current provision.

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[3] Raman Mittal, Copyright infringement, http://cyberlawsconsultingcentre.com/copyright-infringement.html

[4] For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulation made there under for any kind party information or data made committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

5. Under the amended Information Technology [Amendment] Act, 2008:

Section 79[5] of the Act exempts the liability of an Intermediary in certain cases. The protection given to the intermediary under sub-section (1) is wider than the protection that was provided to NSP under original Act of 2000. By the proposed amendment the extent of liability of the intermediary is on the same lines as the EU Directive on E-commerce 2000/31/ issued on June 8th 2000.[6] Sub-section (1) of Section 79 does not impose the burden of proof upon the intermediaries.[7]

Section 79 - Conditional Exemptions: The immunity granted to Internet intermediaries under Section 79 of the IT Act, 2000 is subject to certain conditions. The conditions are as follows:

1st Condition – No active Participation: The exemption granted to intermediaries including ISPs under Section 79 is conditional, subject to fulfilment of certain conditions. According to sub-section (1) this immunity will be granted only if conditions laid down in sub-section (2) and (3) are adhered with. According to sub-section (2) the immunity will be granted only if the intermediary limits his function to provide access to a communication system over which information made available by third parties is only transmitted or temporarily stored or if the

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[5] (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or

(b) The intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission

(c) The intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act (ITAA 2008)

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner

[6] Justice Yatindra Singh, Cyber Laws, Universal Law Publishing Co., Third Edition, 2007, at pp. 28.

[7] *Ibid.*

intermediary does not initiate transmission, select the receiver of the transmission and select or modify the information contained in the transmission.

The statutory explanation to Section 79 defines third party information as "*any information dealt with by an intermediary in his capacity as an intermediary.*" Thus an Intermediary actively involving in providing content *or* uploading contents, designing contents, etc. on the website cannot claim this immunity under law. It is necessary that the intermediary does not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission. As long as he is only providing the access to a communication system over which information made available by third parties or the users is transmitted or temporarily stored he cannot be held liable for the acts of such third party.

The Information Technology (Intermediaries guidelines) Rules 2001[8] defines 'user' as 'any person who access of avail any computer resource of intermediary for the purpose of hosting, publishing, sharing, transacting, displaying or uploading information or views and includes other person jointly participating in using the computer resource of an intermediary."

Thus the protection provided to an intermediary is only for the acts of third party, which happens without his knowledge and participating and which happens in spite of his exercise of 'due diligence'. An intermediary under this section is not liable for any third party information, data, or communication link made available or hosted by him, which in other words, identifies intermediaries as primarily "storage and transmission medium".[9]

2nd Condition – Due Diligence: In the *Bazee.com case,*[10] an internet website carried a listing which offered for sale a video clip, shot on a mobile phone, of two children of a school in Delhi indulging in an explicitly sexual act. The Petitioner, Avnish Bajaj was the MD of Baazee.com India Private Limited [BIPL], a wholly owned subsidiary of Ebay Inc. USA, and the owner of the website http://www.baazee.com filed this case asked the Court to annul his criminal prosecution for

[8] Available on : http://www.dsci.in/sites/default/files/Rules%20for%20sections%2043A%20and%2079%20of%20the%20IT%20(Amendment)%20Act,%202008.pdf

[9] *Supra* Note 3, at p 286.

[10] *Avnish Bajaj* v. *State of Delhi* 150 (2008) DLT 279

the offences of making available for sale and causing to be published an obscene product within the meaning of Section 292 Indian Penal Code (IPC) and Section 67 of the Information Technology Act 2000 (IT Act). In this case, the Delhi High Court had held that the ISP had failed to exercise due diligence as it failed to provide efficient filters to screen pornographic contents and also failed to introduce operative or policy changes to prevent the listing / display/sale of the same on the portal.

However, the above decision came under huge criticism as the extent of duty [of preventing cyber wrongs] form the ISP was very high. It is in this light that the amendments made to IT Act in 2008 are noteworthy, as they only expect exercise of 'due diligence' from the ISPs and not complete involvement in the prevention of cyber wrongs. It is important to note that this case ultimately reached the Supreme court the apex court quashed the proceedings against Avnish Bajaj by holding: "the director could not have been held liable for the offence under Section 85 of the 2000 Act [IT Act]. Resultantly, the Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the director. As a logical sequester, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the company in the present form are quashed."[11]

The condition of 'due diligence' requires an intermediary to take immediate action in case of receipt of information about misuse of the web. Such action can involve immediate removal of illegal content. It can also require him to block access to the concerned site or provide assistance for blocking of sites when required by Government. The new Act provides for power to make rules for the functioning of the 'Intermediaries' including Cyber Cafes' under Section 87. By exercising this power, the Central Government recently issued Information Technology (Intermediaries guidelines) Rules 2001[12] This rule clarifies the nature

[11] *Aneeta Hada* v. *M/S. Godfather Travels & Tours*, Criminal Appellate Jurisdiction, decided on 27th April 2012, Supreme Court.

[12] Available on : http://www.dsci.in/sites/default/files/Rules%20for%20sections%2043A%20and%2079%20of%20the%20IT%20(Amendment)%20Act,%202008.pdf

of duties required to be discharged by an intermediary under the condition of 'due diligence' so as to get exemption for the acts of third party.

3rd Condition – Absence of Knowledge: The Indian IT Act, 2000 also confers exemption similar to that of the UK law. Section 79 provides two exceptions of Lack of Knowledge and due diligence. It is essential to have 'knowledge of the illegal contents' on part of the Internet intermediary in order to be held liable under the law. The knowledge that illegal contents were stored and passed through their servers is essential to hold them responsible.

As soon as an Intermediary gets to know about an illegal content been stored or passed through his service, it becomes essential for him to take immediate steps by removing or deleting such content form their servers. In addition, it is also necessary for the Internet intermediary to notify on their web that any person uploading or transmitting illegal contents through their servers will be subjected to legal action. If both these requisites are met, the internet intermediary can be exempted from liability for the acts of third party. In fact Section 79 (3) (b) requires an intermediary to remove or disable access to materials which are used to commit the unlawful act. According to this clause: *"if the intermediary upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by him is being used to commit the unlawful act, fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner."*

Limitation of the Exemption: According to Sub-section (3) of Section 79, Sub-section (1) will not apply if:

(a) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act

(b) if the intermediary upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by him is being used to commit the unlawful act, fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner[13]

[13] Section 79(3), IT Act, 2000

Thus, if an internet intermediary abets or conspires another to commit an unlawful act, he will not be eligible to claim immunity under Section 79. Similarly, if he fails to remove access to illegal materials immediately after getting the knowledge of the same, he fails to get the protection accorded under Section 79.

Scope of the exemption granted: Even though provisions of other laws such as IPC, Copyright Act, etc. can be extended to impose liability upon Internet intermediary, yet due to Section 81 of the IT Act, which has an overriding effect, it is not possible. Section 81 of the Act, "the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force." Thus the provisions of the act will preview notwithstanding anything inconsistent therewith contained in any other law for the time being in force.[14] This indicates that in case of an allegation against internet intermediaries, it is the provisions of IT Act, 2000 which will apply and not any other law. In the view of the aforesaid section, any offences related to 'obscenity in electronic form' must only be tried under the provisions of sections of the IT Act only and any attempt to impart provisions of Section 292 of the Indian Penal Code, 1860 would tantamount to disregard the legislative intent behind the Act.[15] However, if the other laws' provisions do not go against the provisions of IT Act, both can apply simultaneously. As long as both of them are in conformity with each other, both the laws can be applied in a case, even in case of determining liability of Internet intermediary.

Thus, the current Section 79 of the IT Act, 2000 exempts an intermediary from liability for offences made out not just under IT Act but also under other laws. The use of words "Notwithstanding anything contained in any law for the time being in force" gives this wider application to the exemption.

6. Search Engines and Copies on the Internet - Legal issues involved:

Search engines[16] on internet are creating a bundle of problems to the

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[14] *Supra* note 3, at pp.293.

[15] *Ibid* at pp. 294.

[16] Search engine refers to an on-line intermediary's service of providing an information location tool to users of the internet to locate and display a list of links to web sites where the requested information is located. See: Rajendra Kumar and Latha R, Copyright Protection in the Internet: An Indian Perspective, World E-Commerce and IP Report, November 2001, volume 1, Issue 14, available at http://www.knspartners.com, last visited on 2nd October 2011.

creations[17] thus raising issues of copyright protection. By providing linking techniques such as simple linking, deep linking, faming, etc.,[18] it is many times used to infringe copyright.

In *Perfect 10* v. *Google Inc*,[19] the US District Court for the first time brought Google under the ambit of copyright law and held it liable for copyright infringement for saving the thumbnail displays of images. The decision however was later overruled in the case of Ninth Circuit in *Perfect 10* v. *Amazon.com*[20]. In *Universal International Music B.* v. *EMI (Taiwan) Ltd.* v. *Beijing Alibaba IT Co. Ltd.*, a Chinese case, the Yahoo! China Case, the Beijing High Court held the search engine liable for copyright infringement. In *Le Meridien Hotels* v. *Google France*[21], a French case, the Google search engine was held liable for infringement of trade mark for encouraging advertisers to infringe certain registered trademarks.

Thus, it is not just a person who illegally copies information from net who will be liable, along with him even the one who facilitates such infringement such as search engines, content providers, etc., are vicarious and jointly liable for the infringement of copyright. Hence, if the search engine is used to infringe copyright under Section 51 of Copyright Act 1956, apart from the person who infringes the facilitators [including search engine] can be subjected to liability. According to clause (ii) of Section 51 of the Act *'permitting for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of copyright in the work, unless he was not reasonable ground*

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[17] Some of such problems include: The engines are displaying thumbnails of the images. They have copied the image or information and created the thumbnail and stored at least the thumbnail, and maybe the full image or information in their database and they did it without the creator's permission.

Some of the engines point to the file directly instead of to the page that "contains" the file. This seems to permit the searcher to look at or listen to the file, and to copy it, without really "visiting" (in any meaningful way) the website that hosts the image. The site owner gets a visitor, but not a meaningful visitor.

Finally, why are searchers even looking for the subject matter? Is it so they can copy the same to use on your own website? Are the search engines just making this easier?

Some of the search engines haven't made clear to their visitors that the images and information they find are not public domain property. The notice may assume that because the images or information are shown that they are available for use.

For details, see: Search Engine Disputes, http://www.jamesshuggins.com, last visited on 1st October, 2011

[18] Supra Note, Rajendra Kumar and Latha R

[19] Case No. CV 04-9484, United States District Court, Central District of California, February 21, 2006

[20] 487 F. 3d 701 (9th Cir, 2007)

[21] www.juriscom.net, last visited on 30th October 2011

for believing that such communication to the public' amounts to infringement of copyright. According to Section 2(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available. According to the statutory explanation of Section 2(ff) "for the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public".[22]

The above provisions can be interpreted to indicate existence of 'communication of the work to pubic' and thereby impose liability upon search engines. However, if search engine only provide addresses of the information sought by the user and does not actively participates in or assist the acts of infringement, it cannot be held liable. If such user [seeker of information] later uses the address and gets access to information which is infringing in itself it is the source from which infringing materials were made available to the user which will be liable and not the search engine. Further according to Section 51 (a) (ii), as long as a person is able to prove absence of awareness and lack of reasonable ground to believe that the communication was an infringement of copyright, he will not be held liable for infringement of copyright.

Section 43(b), IT Act, 2000 imposes civil liability for the acts of copying of data, computer database or information over a computer, computer system or computer network. Section 66 imposes criminal liability for the same act if it is done with fraudulent or dishonest intention. Section 79 imposes liability upon 'Network Service Provider' for certain wrongs including infringement of copyright. These provisions of IT Act can be interpreted to extend liability upon search engines for acts of infringement of copyright.

Another issue which affects search engines is its liability for ad words advertising programme. According to Section 29(7) of the Trademarks Act, 1999 "a registered trademark is infringed by a person who applies such registered trade

[22] Section 2 (ff), IT Act, 2000

mark to a material intended to be used for labelling or packaging goods, as a business paper or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorized by the proprietor or a licensee." In many countries, search engines such as Google or Bling have recently been defending various claims filed by trademark owners for displaying advertisements in response to user queries that include trademarks.[23] The Supreme Court of Austria has held that the use of a trademark as a keyword infringes the rights of the owner and had reasoned that the users could get the wrong impression that the advertiser is closely connected to the owner of the trademark.[24]

7. Intermediaries responsible to protect privacy and confidentiality:

While section 43A read with the rules prescribed by Department of Electronics and Information Technology (Deity) imposes civil liability upon corporates including ISP handling personal data, Section 72A imposes criminal liability for failing to protect personal data. According to Section 72A[25] the internet intermediary can be criminally held responsible for making disclosure of personal information of a person without such person's consent, if such disclosure is done with an intention to cause wrongful loss or wrongful gain or in breach of a lawful contract.

8. Obligation to retain data:

Currently according to Section 67C of Information Technology Act[26] an

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[23] Thomas George and Himanshu Bagai, World Intellectual Property Review Annual 2009, available at: http:// www.luthra.com

[24] *Ibid.*

[25] Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both

[26] Preservation and Retention of information by intermediaries:

(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub section (1) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine.

intermediary including is duty bound to preserve and retain certain specified information.

However, currently the period of retention as per Rule No. 4 of the Information Technology [Intermediary] Guidelines Rules, 2011 is only ninety days. The object of this rule is to facilitate flow of required information to the investigating officers in cases of need. However this period of 90 days is too short, considering the time taken in getting the cases registered and completing investigation. Further any intermediaries are placed outside the country, and seeking any such information form them involves additional procedural formalities which may cross the given 90 days. Hence it is suggested to extend the period of retention of information for a minimum of 180 days that is 6 months.

9. Proposed amendment to Intermediaries Guidelines:

The Ministry of Electronics and Information Technology on 24th December 2018 has notified proposed amendments to the Intermediaries Guidelines the special features of which are as follows[27]:

i. The intermediary through the rules and regulations to be published by them must also inform to its users that they shall not[28]:

   - threatens public health or safety; promotion of cigarettes or any other tobacco products or consumption of intoxicant including alcohol and Electronic Nicotine Delivery System (ENDS) & like products that enable nicotine delivery except for the purpose & in the manner and to the extent, as may be approved under the Drugs and Cosmetics Act, 1940 and Rules made thereunder;
   - threatens critical information infrastructure.

ii. The intermediary shall inform its users at least once every month, that in case of noncompliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the intermediary has the right to immediately terminate the access or usage

[27] See Annexure 2

[28] Rule 2 (3), IT (Intermediary) Guidelines Rules, 2011

rights of the users to the computer resource of Intermediary and remove noncompliant information[29]

iii. When required by lawful order, the intermediary shall, within 72 hours of communication, provide such information or assistance as asked for by any government agency or assistance concerning security of the State or cyber security; or investigation or detection or prosecution or prevention of offence(s); protective or cyber security and matters connected with or incidental thereto. Any such request can be made in writing or through electronic means stating clearly the purpose of seeking such information or any such assistance. The intermediary shall enable tracing out of such originator of information on its platform as may be required by government agencies who are legally authorised.[30]

iv. The intermediary who has more than fifty lakh users in India or is in the list of intermediaries specifically notified by the government of India shall: (i) be a company incorporated under the Companies Act, 1956 or the Companies Act, 2013; (ii) have a permanent registered office in India with physical address; and (iii) Appoint in India, a nodal person of contact and alternate senior designated functionary, for 24x7 coordination with law enforcement agencies and officers to ensure compliance to their orders/ requisitions made in accordance with provisions of law or rules.[31]

v. The intermediary upon receiving actual knowledge in the form of a court order or on being notified by the appropriate Government or its agency under Section 79(3)(b) of Act shall remove or disable access to that unlawful acts relatable to Article 19(2) of the Constitution of India such as in 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, on its computer resource without vitiating the evidence in any manner, as far as possible immediately, but in no case later than twenty-four hours in accordance with sub-rule (6) of Rule 3. Further the

[29] Rule 4, IT (Intermediary) Guidelines Rules, 2011

[30] Rule 5, IT (Intermediary) Guidelines Rules, 2011

[31] Newly inserted rule 7 to the guidelines, IT (Intermediary) Guidelines Rules, 2011

intermediary shall preserve such information and associated records for at least ninety days one hundred and eighty days for investigation purposes, or for such longer period as may be required by the court or by government agencies who are lawfully authorised. [32]

vi. The Intermediary shall deploy technology based automated tools or appropriate mechanisms, with appropriate controls, for proactively identifying and removing or disabling public access to unlawful information or content[33]

10. Conclusion:

Intermediaries is a very wide concept which includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafés. An 'online service provider' is a wider term including under its ambit any person who provides service relating to internet and its working. It refers to a company, organization or group which provides an online service, which includes web sites, discussion forums, chat rooms or web mail; it also refers to a company that provides dial-up access to the internet. It is they who provide connection to the internet to the customers or users of internet by using "telephone lines, existing cable TV lines, new fibre optic cable may be strung or the user has to use a modem and dial a phone number.

Section 79 of the original IT Act of 2000 lacked clarity with regard to the cases in which intermediaries could be exempted from liability for the acts of third parties or users of internet. Though it mentioned 'due diligence' and 'lack of knowledge' of illegal acts as the two exceptions, yet it did not specify the duties which were required to be discharged by them in order to amount to 'due diligence' and hence was ambiguous and unclear. The amendments made to the Act in 2008 apart from widening the ambit of the term 'intermediary' thereby covering ISPs, NSPs, etc., also clarified the extent of exemption granted to Intermediaries. The rules issued by Central Government has further made the concept of 'due diligence' and extent of liability of intermediaries more clear.

[32] Rule 8, IT (Intermediary) Guidelines Rules, 2011

[33] Rule 9, IT (Intermediary) Guidelines Rules, 2011

It is true that intermediaries play an important role in the use of information technology. It is they who facilitate the transfer of information, communication or data form one website to another and the actual utilization and realization of the use of technology. With this power comes their responsibility to prevent misuse of technology and hence they are made obliged to exercise due diligence and assist State in tacking cyber wrongs. Failure to do so can result in liability under law. However, holding an Intermediary liable for all the acts of third parties is unfair and unjust for which it became one of the controversial issues in India, especially after Bazee.com case. However, the current IT Act with amended provisions along with rules issued under the Act have clarified these issues and to an extent balances the interest of both intermediaries on one hand as well as public and State on the other hand.

It is essential to balance the interests of ISPs as well as the public at large. This can be done by making laws imposing obligations on ISPs as long as they are inevitable, fair and justified and also by providing immunity for their actions taken in good faith. It is essential also to have collective efforts of all legal enforcement machineries inter-alia. It is essential to involve both public as well as private entities including ISPs in all required initiates based on cooperative models.

FREE MEDIA AND INFORMED CITIZENRY

*Dr. Avishek Chakraborty**

*Mr. Kiprono Emmanuel Ngeno***

1. Introduction

In India, media has always played a significant role in dissemination of information regarding the governmental affairs, including judicial proceedings. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.[1] When the media reports on the judicial process, freedoms collide. The conflicts which arise between the media and the courts are a consequence of collision of two fundamental values. These are right to a fair trial and public trial and the right to a free press.[2] It is not doubted that an accused as well as public in general have a right to know about what is happening in the nation's courtroom. The main concern here is that the pre-trial publication of information about the accused or the offence might bias the potential jurors. Victim rights groups also express their concern that reporting of certain trial information by the press is an unnecessary invasion of privacy.[3]

2. Court-media friction

When the media extensively covers *sub judice* matters by publishing information and opinions that are clearly prejudicial to the interests of the parties involved in litigation pending before the Courts. The problem is more sensitive in respect of criminal trials and matters, where media reporting has the potential to sway popular sentiments either way. Justice K.G. Balakrishnan, Former Chief Justice of India, in his speech in a regional workshop on 'Reporting of Court

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[1] J. Venkataramiah, *Indian Express Newspapers (Bombay) Pvt. Ltd.* v. *Union of India*, AIR 1986 SC 525 at p. 527.

[2] Justice F.B. William Kelly, *Free Press* v. *Fair Trial: Judicial-Media Interaction* (Paper presented in Ninth International Conference on The Media and the Criminal Justice System: *Free Trial* v. *Free Press*: An International Perspective in Santa Monica, California on December 1995). See *icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/.../FairVSFree.pdf* accessed on 15.7.2014 at 11 a.m.

[3] *Ibid.* at pp 6.

proceedings by media and administration' organized in Mumbai, outlined few concerns arising out of reporting of judicial proceeding.[4]

He highlighted the professional and moral obligation on the media agencies to ensure fair and accurate reporting of court proceedings. He considered it as a cause for concern because he observed that it is a very common occurrence to come across news-reports wherein statements made by judges and lawyers in the courtroom are distorted and cited without an explanation of their context. Furthermore, he gave emphasis on the need to check prejudice against parties which can arise as a consequence of reporting on *sub judice* matters. Especially in criminal cases, photographs are shown on television, hypotheses are made and inferences are drawn, which seem to point towards a particular person, who may have been assumed to be guilty. Therefore, the issues of gagging order by the court or an order for postponement for publication of sensitive news and its proper use have gained considerable importance.

3. Sahara India case - Media coverage judgement

This raises concern about the protection of the constitutional right of the parties to receive a fair trial. There is a requirement for balancing the constitutional guarantees of freedom of press on one hand and right to fair trial on the other. In *Sahara India Real Estate Corp. Ltd and others* v. *Securities & Exchange Board of India and another*[5] Justice S.H. Kapadia observed that finding an acceptable constitutional balance between free press and administration of justice is a difficult task in every legal system. In this case the appellants, "Sahara Ltd." were directed to refund amounts invested with the appellants in certain Optionally Fully Convertible Bonds (OFCD) with interest. With the same regard, there was an official communication enclosing one proposal by the Advocate-on-Record for Sahara to the Advocate-on-record for SEBI. A day prior to the hearing of IA No. 3 on 10.02.2012, one of the news channels flashed on TV the details of the said proposal which had been communicated only inter parties and which was obviously not meant for public circulation. The concerned television channel also named the

[4] Address by Justice K.G. Balakrishnan, Chief Justice of India, Regional Workshop on 'Reporting of Court Proceedings by Media and Administration of Justice,' at the High Court of Maharashtra and Goa, Mumbai. *See* www.supremecourtofindia.nic.in/speeches/speech2008.htm, accessed on 15.8.2017 at 3 p.m.

[5] I.A. Nos. 4 and 5 in C.A. No. 9813 of 2011 and 9833 of 2011

valuer who had done the valuation of the assets proposed to be offered as security. These facts were brought to the notice of the Supreme Court and Shri F.S. Nariman, learned counsel for Sahara orally submitted that disclosure to the Media by SEBI was in breach of confidentiality. The Court observed, "We are distressed to note that even 'without prejudice' proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV Channels. Such reporting not only affects the business sentiments but also interferes in the administration of justice." It also held that constitutional courts like the High Courts or the Supreme Court can 'postpone' media reporting, a sub-judice matter, to protect the right of an accused to have a fair trial. Although the Supreme Court deemed it necessary to frame guidelines on reporting of sub-judice cases, however, when the judgement was pronounced, it did not lay down any such guidelines.

Mr. Nariman said that the court laying down guidelines would result in punitive action against erring reporters in the absence of law. However, the Chief Justice of India made it very clear that the Court is not interested in controlling media. The Court is interested in prevention rather initiating contempt of court proceedings against the erring media. Justice Khehar expressing his concern over trial by media in several pending criminal cases said "The media creates a mindset about what is right or wrong. When the judgement is not on those lines, the judge's image is tarnished and all sorts of motive are attributed to him and his judgement becomes suspect."

4. Om Prakash Chautala case

In another recent case the issue of 'gagging orders' and its reasonable exercise became very important. In this case Vidya Dhar, Sher Singh Badshami and Om Prakash Chautala, the last being a former Chief Minister of the State of Haryana, filed a suit seeking to injunct the appellant from telecasting the television programme, "Crime Patrol Dastak: Haryana Teacher Recruitment Scam" pleading that three have been convicted for offences punishable under various sections of the penal code as also the Prevention of Corruption Act, 1988. The trial related to recruitment of Junior Basic Trained Teachers. It was pleaded that telecast of the programme would have an immediate and prejudicial impact on the rights of the above mentioned persons. The injunction order was justified by reasoning that

Mr. Om Prakash Chautala was recently convicted and was filing an appeal as well as seeking bail. Therefore, the telecast in issue would interfere with his right to fair trial and prejudice the legal proceedings. However, the Division Bench of Delhi High Court by its judgement in *Multi Screen Media v. Vidhya Dheer and others*[6] lifted the injunction in appeal on the telecast of a television programme reporting on the conviction of Mr. Om Prakash Chautala. In this connection the Division Bench observed that there should be an exercise of restraint in granting 'gagging orders'. The court highlighted the conflict between 'the right to tell' and 'the right to fair trial'.

5. Justice Swatenter Kumar case

On 10th January 2014, a news item written by Mr. Maneesh Chibber, Reporter, The Indian Express Ltd., was published in The Indian Express. The said news pertained to an alleged complaint made by an individual against a retired Judge of the Hon'ble Supreme Court, with the headline "Another intern alleges sexual harassment by another SC Judge." In the same day, on the show "the News Hour", the channel, Times Now was conducting a debate as to whether the name of the judge with regard to the complaint that has been filed by an intern ought to be disclosed or not. The said channel also sought to publicise its programme by publishing and asking the following question: "If a sitting Supreme Court Judge has sexually harassed his intern, should his name be made public?" and "If Justice AK Ganguly's name was made public, should the Judge's name be made public in this case as well?" Consequently, Justice Swatanter Kumar, former Judge of Supreme Court of India and the then Chairperson of National Green Tribunal, prayed for permanent injunction against The Indian Express Ltd., Times Now and 'CNN-IBN' from publishing, republishing, carrying out any further reports or articles or any other matter, telecasts or repeat telecasts or programs or debates or any discussion or reporting of any kind, directly or indirectly pertaining to the sexual harassment allegations against Swatanter Kumar.[7] Justice Manmohan Singh ordered the defendants, i.e., The Indian Express, Times Now and CNN-IBN to remove certain articles and items from their archives and restrained them

[6] FAO (OS) No. 119/2013 (decided on February 28, 2013)

[7] *Swatanter Kumar* v. *The Indian Express Ltd. and others*, I.A. No. 723/2014 in CS (OS) No. 102/2014 (Order pronounced on January 16, 2014).

form publishing Justice Swatenter Kumar's photograph in connection to the story. However, Justice Singh added that, "observations made in this order are prima facie in nature and will not preclude the defendants to report the Court cases and happenings as facts which are covered ambit of fair reporting on the basis of true, correct and verified information."

6. Gagging order prohibiting reporting of judicial proceedings

As far as gagging orders in respect of reporting of judicial proceedings are concerned, there is no mandate or guidelines as such. Regarding postponement of a publication that could impact the trial, the approach taken by Supreme Court in *Sahara case*[8] can be made subject to critical analysis. Firstly, the judgement given in Sahara case indicates that writ of postponement of publication is available to 'anyone' including an aggrieved person. Without any qualification this writ can be interpreted either narrowly or broadly. If it is interpreted broadly, complete strangers without a legitimate connection to the case may approach a High Court to issue the writ.[9]

It is evident that the writ of postponement of publication creates broad powers and these powers are required to be balanced with clear safeguards.[10] Paragraph number 34 of the Sahara judgement talks about the issuance of this writ after balancing proportionality of the interference with free speech and the test of necessity. The specific ingredients of this, 'balancing test' and 'neutralising device' was described in the judgement. However, it is incomplete and will naturally require legal determination. In the absence of clear safeguards, one can expect contrasting court rulings and potentials for abuse by the petitioners.

The recourse against the grant of such writ is not clearly defined. The remedy which has been indicated in the judgement is that of an appeal against the order which prohibits the publication. The efficiency of this remedy can be doubted.[11] At the same time the Supreme Court in the Sahara case observed that postponement

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[8] In Sahara *India Real Estate Corp. Ltd and others* v. *Securities & Exchange Board of India and another*, I.A. Nos. 4 and 5 in C.A. No. 9813 of 2011 and 9833 of 2011.

[9] Apar Gupta, "*The Advent of Gag Writ*", *see* http://www.thehoot.org/web/The-advent-of-the-gag-writ/6309-1-1-7-true.html, accessed on 15.8.2017 at 4 p.m.

[10] *Ibid.*

[11] *Ibid.*

orders can be passed by the court after seeing the publication and no general orders restraining future publications can be made. "Courts should look at the content of the offending publication (as alleged) and its effect."

A private organisation representing 22 leading news and current affairs broadcasters, called as The News Broadcasters Association (NBA) framed reporting Specific Guidelines for reporting court proceedings. Among other things, the guidelines stipulate that the news channel shall not telecast a running commentary or continuing debate including oral commentary by court, counsel(s), litigants or witnesses during court proceedings which do not form part of the record of pending court proceedings. Moreover, the news channels or journalist's own opinion over the *sub judice* matter shall not be aired and nothing else should be done which tend to interfere with the course of justice in connection with any pending judicial proceeding. However, in case of any deviation, whether intentional or inadvertently, NBA has a mechanism for the same but it lacks statutory sanctity.

7. Conclusion

It is required to comprehend that the role of media is to 'supplement' and not 'supplant' a pending trial before a court of justice.[12] If the media is reporting the proceedings of the court, there is no harm, but if they incorporate commentary and quote experts, it will not be justified. Therefore, adequate legal qualification and knowledge for media persons reporting court matter is the need of the hour. In the existing legal framework the use of civil remedies, such as injunctions, 'gags orders' and orders for 'postponement of publication is not common.'[13] The issue, whether the safeguards against trial by media are to be mandated by judiciary or by Parliament is a subject of deliberation. Imposing restraint on media reporting of judicial proceedings should be regulated by clear directive to prevent the danger of abuse. Ultimately independence and dignity of the court is to be preserved. Media reporting of judicial proceedings has to be balanced.

[12] Hemant Kumar, *"Judiciary* v. *Media: Avoidable Confrontation"*, *see* http://lawyersupdate.co.in/LU/8/832.asp, accessed on 15.8.2017 at 5 p.m.

[13] Supra note 4.

ANALYSING THE ROLE OF LAW AND MEDIA IN EMPOWERING THE TRIBAL COMMUNITIES IN INDIA

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1. Introduction

There are one hundred and four million indigenous people and seven hundred and five ethnic groups in India as per the census conducted by the office of the Registrar General and Census, Commissioner of India in 2011. These tribal communities have faced various barriers in the modern era of development but communicative barriers are one of the most important among them. Communicative barriers are also considered as one of the main reasons for marginalization and has let to their weak bargaining power. Since independence, the *Adivasis* in India has been called the *'ashura'* (demons), 'born criminals' and 'untouchables' which has placed them in the lower strata of the society (*shudra*).[1] In the 1700's during the British regime, the *Adivasis* in India was perceived keeping in mind the Eurocentric and Western Centric approach, which later led to erosion of their traditional knowledge even before the importance of the same was understood.[2] In the post independent era, the state claiming its control over the natural resources and the agendas adopted to build a developed country, has posed a huge challenge for the lives and livelihood of the *Adivasi* people. As a result, India being a democratic country has not served much purpose in the lives or upliftment of *Adivasi* People in India.[3] Maybe for the rich, influential and people who know how to use democracy, it is a right to justice, liberty and equality but for the poor, landless tribal people, trying to prove their identity; democracy is just an empty thought.

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[1] Danda, A. K., 1981, *"Statutory Provisions Safeguarding Interests of Scheduled Tribes and Scheduled Castes"*, in *"Tribal Development and its Administration"*, (ed.) L.P. Vidyarthi, Concept Publishing Company, New Delhi, pp. 19-28.

[2] Das, A. K., B. K. Ray Chaudhary and M. K. Raha, 1996, *"Handbook of Scheduled Castes and Scheduled Tribes of West Bengal"*, Calcutta, pp. 133-34.

[3] Dutta, P., 1989.*"Nehru and the Tribes of Arunachal Pradesh"*, Jawaharlal Nehru, *"Tribes and Tribal Policy"*, (ed.) K. S. Singh, Anthropological Survey of India, Calcutta, pp. 67-72.

2. Invisible synthesis in the welfare of *adivasis* and the role of media

Due to Western Centric approaches indigenous media like their traditional folk dances, folk songs, stories and other traditional knowledge have been fading away.[4] In the background of marginalization, undermining and de-legitimization of tribal voices is becoming a norm. Hegemonic stereotypical approaches has to be encountered with the help of media in creating awareness by portraying the real voices, cultural and traditions of tribals, through which dominant misrepresentation and hegemonic stereotypical way of understanding their life and lifestyle can be countered.[5] Considering the factual evidence, some researchers also say that the survival capacities of the poor and indigenous communities are degrading day by day and inspite of which the media has always ignored and neglected in the glare of National and International news with better TRP's. At the same point, it is also important to notice that the rights of *Adivasis* have been deprived and have been denied of their rights to access their land, forest and natural resources on which their livelihood is dependent on. Thus, very systematically the voices and cries of *Adivasis* have been silenced, erased and wiped off. This is not only the case in India but also in many other parts of the world. Like, in the USA, where Native Americans were hunted and shooed off from their native land to build civilized America.[6] But recently the situation is given a new turn and colour, in which we can see, a very few left out natives have been portrayed as the last in the race and has been given threatened species status, especially economically developed countries like USA and Australia has tried to give some mediated space.

In the USA and other countries, the media has every now and then reported about the missing representation of minorities in media and other social networking sites, but in India, even this issue is missing. It is a known fact that putting media in the hands of socially vulnerable communities and local communities in a democratized way would make media, the vehicle of cultural and ideological expressions.[7] It can be further noted that the media is also capable of addressing social injustices and

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[4] Dutt, K., 1984,"*Development of Primitive Tribes - Planning Strategy and Implementation of Programmes*", in "Development Strategy Primitive Tribal Groups, (ed.) Tribal Cultural Research and Training Institute", pp. 78-86

[5] Chaudhuri, B., (ed.) 1986. *"Tribal Health : Social Cultural Dimensions"*, Inter- India Publications, New Delhi.

[6] L.P. Vidyarthi, *"Leadership in India"*, Asia Publishing House, Bombay, 1967. pp. 35-40.

[7] Dalton, 1972. *"The Brihors : Descriptive Ethnology of Bengal"*, Govt. of Bengal, Council of the Asiatic Society of Bengal, Calcutta, pp. 218-21.

other concerns of the *Adivasi* community in India, by reinforcing their identities locally and nationally. Maybe lack of literacy has held an *'Adivasi'* back in claiming his right, and with which their language are still unknown to the outside world and suffer in discursive spaces when compared to the mainstream agendas of the existing media. Even though the *Adivasi's* languages have been recognized under the Constitution of India, we can still see a large number of *Adivasi* people speaking in their native languages which have not been employed.[8] As a result of prolonged and systematic negligence of such communities, they have helped them become semi-urbanized or extinct, where in the meanwhile; they are losing their roots and identities.

3. Ideologies in conflict: media and the law

Media being partners with many of the leading companies and other profit-oriented organizations and their unfair nexus has further suppressed their voices. For example, we can consider Kamal Nath case where the environment minister, Mr. Kamal Nath gave clearance to alter the course of river Beas to build a resort on the banks of the river, which later was condemned by the Supreme Court of India and fine was imposed for the activities in one of the most eco sensitive area and upheld the 'Doctrine of Public Trust.' This may also be referred to many of the legal and illegal mining cases occurring in the tribal belt and eco sensitive areas, conducted by multinational companies.[9] Lafarge is a Bangladeshi company having mining activities in the State of Meghalaya for lime stone quarry with an intention to fulfil the needs of its well established cement factories. In the process, a huge chunk of forest was cleared and destroyed for which the court said sustainable development must be adopted, and inter-generational equity must be maintained.[10] Referring to *Narmada Bachao Andolan* case will not serve any purpose because it is an exceptional case. Because of media being involved and having favourable interests in industry's profits, they normally turn a blind eye towards the sufferings of the local community and make them fight for their rights which goes unrecognized many a times.[11]

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[8] D.N. Majumdar, *"A Glimpse of Garo Politics"*, North Eastern Affairs, Vol. II, No. 1, 1973, pp. 9-13.

[9] *M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388.

[10] *Lafarge Umiam Mining Pvt. Ltd., T.N. Godavarman Thirumalpad* v. *Union of India*, (2011) 7 SCC 338.

[11] Supra note 6.

As a result of this suppression and imposition of hegemonic approach, the *Adivasi* communities evolved as a most dynamic, organic and unique combination of nature, creativity and traditional innovation. As the indigenous people's expression completely depends on the way of life that they follow and the way in which they like to govern themselves and manage their internal and external affairs. Therefore we can see Panchayat Raj Extension to Scheduled Areas (PESA) coming into action under the Constitution of India. This Act was designed and enacted to help *Adivasis* in retaining their distinct social, political, economic and cultural institutions.[12]

4. 'Right to speak' and *adivasi* rights

In the meantime, it is important for the *Adivasi* community in India to communicate among themselves and it is useful to establish media in their own language, so that it is not only easily understood but also creates a bias to share their knowledge and distinct voices. Because very often the mainstream media like the television, radio and newspaper has failed to reach out and represent the issues and concerns of *Adivasis* and therefore, the *Adivasi* communities have been very sceptical about sharing their thoughts with the external media,[13] and therefore, a local media representation will serve as a credible source to these indigenous communities. As we all know, *Adivasi* in Sanskrit is 'adi = from the beginning, vasi = inhabitants or residents' and Scheduled Tribes is the word that is used to define *Adivasi* people in India. According to the census conducted by the Office of the Registrar General & Census Commissioner in India in 2011, there were around one hundred and four million in number and still lack the capacity to bargain for their rights, as they do not have a local media to bind themselves in an organized way.[14]

In the meantime, we can also see some sort of a cultural drift as we can see a small number of Scheduled Tribes living in urban spaces; where they can access the technology and other infrastructures and are better equipped to help their

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[12] Maharatna, Arup, *"Demographic Perspectives on India's Tribes,"* Oxford University Press, 2005, (SCJL). pp. 40

[13] Rath, Govinda Chandra, *"Tribal Development in India: Contemporary Debate,"* SAGE, 2006. pp. 21-23.

[14] Ratnagar, Shereen, *"The other Indians: Essays on pastoralists and prehistoric tribal people,"* (Three Essays Collective), Gurgaon, 2004. pp. 30-32.

fraternity living in non-urban and forest areas but even then organization among themselves is the problem (The Planning Commission of India, 2008). Keeping in mind the population of scheduled tribes, we can find them in large chunks in two main parts of India. The first one would be the central indigenous belt, where we can find more than 79% of the ST's and the second in the north- eastern region of India. Some attention is given to the ST's living in north- eastern part of India by enacting PESA under the Constitution but the ST's living in Central indigenous belt are the most neglected and were unfortunate to have been witnessed the direct conflict between the state and the locals in the division of natural resources and bloodshed, have been a common phenomenon to safeguard their lives, lands and resources from the ever expanding need for the resources to develop the country. The World's Indigenous Peoples, a United Nations Publication has also observed that the indigenous communities as a group is ranked in the bottom of the strata and they score very low in terms of education, health, and many other social and economic aspects of the country as measured by the Human Development Index of the country.

Erosion of indigenous culture and artefacts and their distinct language is one more issue that demands attention. Every now and then we can see that the last speaker of one or the other indigenous language is getting extinct, for instance, the last speaker of 'Bo' language, Boa Sr. died in 2010 and amongst seven hundred and eighty living indigenous languages, four hundred and eighty of them is spoken by indigenous people in India.[15] Therefore, it is crucial to protect and safeguard the cultural identity of indigenous communities in India. As a reference to this context, we can also consider that large number of endangered languages of them which around forty two is critically endangered languages as listed under UNESCO documents are on the brink of extension and majority of them are indigenous languages. Unfortunately no indigenous language is accepted as an official language for Judicial or Administrative work in any of the states that ail from central indigenous region. But only Santali, which has around six million speakers was included in the eighth schedule of the Indian Constitution along with

[15] Roy, Chandra, "*The International Labour Organization : A Handbook for minorities and indigenous people,*" Minority Rights Group International, London, 2002. pp. 26-29.

other twenty one scheduled languages. But, as it is evident in this article, it's very important to understand the role played by the state in protecting the rights, culture and the identity of an *Adivasi* community in India. But before we get into the analysis of the role played by India in protecting the rights of *Adivasis* in India, it is crucial to understand that the relationship between *Adivasi* land and *Adivasi* communities. Land is what defines the identity of an *Adivasi* community in any part of the world. Having control over land not only defines ones identity but also describes ones culture, tradition and lifestyle that is associated with that land.[17] The concept of private ownership of lands in *Adivasi's* is an alien concept, as they only believed in community management of resources. But *Adivasi* land alienation for different purposes has left them running for identity and to make livelihoods.

5. Role of state and laws in protecting *adivasi* rights in Indian context

For a long time, the Constitution of India has protected the rights of *Adivasis* even when the law and the administrative practices have reduced their existence to sufferance of the state. They were not only tagged as illegal encroachers but also deprived them from determining their own fate. But when Forest Rights Act, 2006 and Panchayat (Extension of Protection to Scheduled Areas) Act 1996 came into existence there were hopes that situation would drastically change. In 1950, when the Constitution promulgated and incorporated the idea of Scheduled Tribes and Scheduled areas, it recognized the value of the native land for *Adivasis* in India.[18] The connection was very delicate and intricate at the same time, therefore restrictions on alienation of land to non-*Adivasis* was not recognized or encouraged. In rare cases this could have been evaded only with the permission of collector.

Very soon this protection that was ensured to *Adivasis* started to erode when state itself was involved in many developmental projects and conservation projects like building dams, power grids, mining, wildlife conservation came into practice. As a result 40 of the *Adivasis* living in forest was displaced and moved to make way for these revenue generating projects which not brought money but name,

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[16] Samuel, John, *"Struggles for survival, Resource book on the status and rights of the Adivasi community in India,"* National Centre for Advocacy Studies, Pune, 2002, NHRC. pp. 34-37.

[17] Vyas, N. N, *"Indian Tribes in Transition,"* Jaipur, 1980, SCJL. pp. 26-27

[18] Talesra Hemlata, *"Development of Citizenship Habits among indigenous people."* Indian Publishers, Delhi.

fame and popularity to the concerned states.[19] Apart from which *Adivasi's* presence in the forest areas chosen for the project would have made this task harder for the project to sustain and flourish. Another interesting fact to be considered was that all the projects were under 'Public Sector' undertaking and therefore it was not seen as a non-*Adivasi* activity, instead of which it was considered as an essential part of country's development. But in 1997, the Supreme Court in the famous *Samatha* case[20] said that any land transfers made to a non- tribal person or company is unconstitutional, void and inoperative. But in 2001, in Bharat Aluminium Company Ltd. the government was trying to change the existing reservations and when the Supreme Court accepted for it, the transfer of *Adivasi* land to corporate could be facilitated but fortunately their efforts did not go too far.

The next episode to this, found its place when Vedanta Company wanted to mine in the Niyamgiri hills of Orissa, which is a Scheduled area where Dongria Kondhs have their habitat. Initially, the Orissa Mining Corporation stepped in to help and sort out the issue and took this land on lease and later gave it to Vedanta Company, the strategy behind this was that to show that the tribal land was taken by the government entity itself and not any private company. The Orissa Mining Corporation failed in its attempt to put Niyamgiri under mining when Supreme Court of India intervened and said the company should not mine in this area. As an irony we can further see, Orissa Mining Corporation took up the case in Supreme Court on behalf of Vedanta Company and not on behalf of the *Adivasis* living in this area. This episode speaks a lot about the state's approach in protecting *Adivasis* in India.[21]

6. Conclusion

It is very much evident from the above examples that the state's approach to protect *Adivasis* and their culture has been considered as an obstacle to the state's access to natural resources and inspite of Forest Rights Act, 2006 being in force the states still find exceptional reasons like Tiger Conservation, Elephant Corridors as the best way to evict the *Adivasis* in India. The voices of *Adivasis* are unheard

[19] Upreti. H C, *"Indian Tribes: Then and Now,"* Pointer Publishers, Jaipur, 2007. DELNET. pp. 45-50.

[20] *Samatha* v. *State of Rajasthan,* 1997 Supp(2) SCR 305.

[21] *Orissa Mining Corporation Ltd.* v. *MoEFCC,* (2008) 2 SCC 222.

because there is no means to make their voices audible apart from media. Media is the only instrument which can connect people from different parts of this country and media is the only means to seek state's support against the atrocities faced by the *Adivasis* in India. There are too many developmental projects that demand the *Adivasis* to pay the price and the forest land to be diverted for non- forest purposes. In 2006, there are instances in Kalinganagar where twelve *Adivasis* were shot down for protesting against their lands being taken away for Tata Project. Even today inspite of Forest Rights Act, 2006 we can see Chattisgarh jails overflowing with *Adivasis* who are facing 'naxal offences', and locals see this as an attempt made by state to suppress the resistance done against the corporatization of their land. In cases, where *Adivasi* consent is required to initiate a project there are instances here the consent is manufactured by fraud.[22] Therefore, this paper strongly recommends that media is an important instrument to combat all illegal activities in forest an antihuman approach towards *Adivasis* in India. It is the duty of every citizen of India to make sure that the voices of poor, vulnerable and minorities is heard because we are committed ourselves as a 'Welfare State' and therefore we all share the same responsibility to stand by each other in terms of crisis.

[22] Usha Ramanathan, *"Where do Adivasi's stand in Indian Law,"* International Environment, Law Research Centre, Grist Media, 2015. pp. 96-98.

FACTUAL AND LEGAL DYNAMICS CONCERNING INVESTIGATIVE JOURNALISM IN INDIA: A CRITICAL ANALYSIS

*Dr. Jyothi Vishwanath**

1. Introduction

> *"Reality is an aspect of property. It must be seized. And investigative journalism is the noble art of seizing reality back from the powerful."* -Julian Assange

Investigative Journalism [hereinafter referred to as IJ] has assumed great relevance in the present times due to its inherent capacity of rendering the powerful and the ruling government accountable to the society. The sole objective of IJ is to make individuals and institutions accountable and answerable to the society by uncovering the hidden issues which are desired to be kept under wraps for personal gains. IJ is rendered inevitable in a democratic setup and is the lifeblood of democracy. It is expected that IJ plays a guardianship role by scrutinising the laws, regulations and the operation of significant public and private bodies for effectiveness and for achievement of highest public good in a democratic setup.

Motivated by ill-gains and bad motives, unfortunately IJ is taking an ugly shape in the present times. At times, instead of alerting the public against the power, hungry social elements, political parties and the government, it tends to sensationalise the information for profit and incentives. Instead of acting as a watch dog of democracy, public interest and exposing abuse of power, it tends to over focus on the personal lives of the prominent people in the society, thereby raising serious questions regarding the sincerities of the IJ. Amidst this scenario, this research paper endeavours into the academic exercise of examining the concept and nature of IJ; its evolution and relevance and the role played by the Centre for Investigative Journalism. Further, it examines the prominent Investigative Journals and their *modus operandi* in India with a view to highlight the true ways of IJ. It also focuses on the ways of prominent investigative journalists in their pursuit of truth.

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2. Nature

The dictionary definition of "investigation" is "systematic inquiry" which typically cannot be done in a day or two; a thorough inquiry requires time.[1] Investigative[2] Journalism refers to the journalism which tries to discover information of public interest that someone is trying to hide.[3] It aims at revealing the truth and re-establishing fairness. IJ aims at uncovering what others don't want to. One of the main goals of investigative journalism is to spur change. IJ is the discipline of digging deep and bringing to light verified facts about wrongdoing or about a matter of significance which are sought to be covered up or are otherwise inaccessible to the public. But getting the facts right only lays the foundation for investigative work which will not be worth very much if the reporter does not get the 'meaning of events right'.[4]

IJ involves exposing matter concealed from the public either deliberately by someone in a position of power or accidentally behind a chaotic mass of facts and circumstances that obscure understanding. It requires using both secret and open sources and documents.[5] The Dutch-Flemish IJ group VVOJ defines investigative reporting simply as "critical and in-depth journalism."[6] It involves a set of methodologies which can be referred as a craft and it can take years to master. It consists of in-depth inquiries which painstakingly track looted public funds, abuse of power, environmental degradation and health scandals. IJ employs a careful methodology, with heavy reliance on primary sources, forming and testing a hypothesis and rigorous fact-checking.[7] IJ refers to the following:[8]

- An original, proactive process that digs deeply into an issue or topic of public interest.

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[1] https://gijn.org/resources/investigative-journalism-defining-the-craft/ accessed on 8th October 2017 at 5.55 a.m.

[2] The term investigative means to search out & examine the particulars in an attempt to learn the facts about something hidden, unique, or complex, especially in an attempt to find a motive, cause, or culprit. –http://www.dictionary.com/browse/investigative accessed on 8th October 2017 at 5.39 a.m.

[3] Cambridge Dictionary definition. http://dictionary.cambridge.org/dictionary/english/investigative-journalism accessed 7th October 2017 at 5.22 p.m.

[4] N.Ram., Journalism as investigation. http://www.thehindu.com/opinion/lead/n-ram-on-investigative-journalism/article8561770.ece accessed on 8th October 2017 at 10.01 a.m.

[5] As defined in Story-Based Inquiry, an investigative journalism handbook published by UNESCO - https://gijn.org/resources/investigative-journalism-defining-the-craft/ accessed on 8th October 2017 at 5.55 a.m.

[6] *Ibid.*

[7] *Ibid.*

[8] http://www.investigative-journalism-africa.info/?page_id=31 accessed on 8th October 2017 at 6.02 a.m.

- Producing new information or putting known information together to produce new insights.
- Multi-sourced, using more resources and demanding team-work and timing.
- Revealing secrets or uncovering issues surrounded by silence.
- Looking beyond individuals at fault to the systems and processes that allow abuses to happen.
- Bearing witness and investigating ideas as well as facts and events.
- Providing nuanced context and explaining and reasoning.
- Not always about bad news and not necessarily requiring undercover techniques, though it being the usual agenda.

Being original and proactive, IJ should produce new information or put together previously available information in a new way to reveal its significance. It should be multi-sourced and due to its in-depth nature, calls for greater resources, team working and time.[9] IJ refers to a process of digging deep into an issue or topic which has to be of public interest.

A journalist becomes an investigative journalist when his story grows in scope and depth beyond a routine report.[10] An investigative journalist digs deep into one story, whether it is corporate financial corruption, violent crime or other topics that might not get covered in the everyday news.[11] While investigating, exploring, and experimenting, journalists of the first rank are not satisfied with bringing to light a mass of material facts that they manage to unearth through diligent work or that falls into their lap by a stroke of luck. Their real pursuit is to invest these hitherto concealed or inaccessible facts with social, moral or historical meaning and weave them into a coherent and compelling story, so that the journalism contributes significantly to raising social awareness of the issues involved and also stands the test of time.[12]

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[9] http://sand-kas-ten.org/ijm/Chapter_1.pdf accessed on 8th October 2017 at 6.19 a.m.

[10] *Ibid.*

[11] http://study.com/academy/lesson/investigative-journalism-definition-examples.html accessed on 8th October 2017 at 5.41 a.m.

[12] *Supra* note 4.

An investigative reporter needs to have curiosity, passion, initiative, logical thinking, organization and self-discipline, flexibility, good team working and communication skills, well-developed reporting skills, broad general knowledge and good research skills, determination and patience, fairness and strong ethics, discretion, citizenship and courage.[13]

3. Evolution and Relevance of IJ

Though IJ mainly revolves around the areas of scandals, crime, politics, corruption, it is not restricted to them. In India, IJ became popular in the 1980's. The Bofor's scandal in which the then Indian Prime Minister, Rajiv Gandhi was accused was the first instance when IJ came into focus. This scandal later on led to Rajiv Gandhi's defeat in the next elections. This scandal and the type of reporting done by the media made the country take notice of a new form of journalism known as IJ.[14]

The credit of starting IJ safely belongs to the magazines. The 70's decade between 1973-1980 was marked by momentous events as the emergency, the Janata government coming to power and Mrs. Indira Gandhi's return to power. The entire nation was engulfed in highly politicized political dramas. The journalists were drawn to these events with many youngsters joining the profession and offering to take risks. This period also witnessed a magazine boom. The magazine took to investigative reporting to quench the thirst of people who were curious to know as to what was happening behind-the scene.

In the initial stages, the conservative dailies merely reacted and published follow-up stories. As a result of a formidable challenge from the magazines, the circulation of the dailies fell and they were left with no alternative but to catch up with them. The Indian Express, The Hindu and The Statesman gradually began to shed off their conservatism. The investigative reports published by the Indian Express and the Hindu on the Bofors gun scandals are landmarks in Indian journalism. The reports contributed a great deal to the 'Waterloo' of the Congress Party in the 1989 general elections.[15] This was the beginning of IJ in India.

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[13] *Supra* note 8.

[14] Kathakali Nandi., Investigative Role of Media: Responsibility to the Society, Global Media Journal – Indian Edition/ Summer Issue / June 2011.

[15] http://www.mittalbooks.com/products/Investigative-Journalism-In-India.html accessed on 8th October 2017 at 8.56 a.m.

4. Centre for Investigative Journalism

Hundred Reporters, Global Journalism Investigative Network, Forum for African Investigative Reporters, Investigative Reporters and Editors, Investigative News Network, SCOOP and the International Consortium of Investigative Journalists are some of the International non-profit organisations dedicated to IJ.[16]

The Centre for Investigative Journalism [hereinafter referred to as CIJ] is India's first independent and non-profit organization dedicated to support and strengthen in-depth and IJ in India. It is registered as a trust with the Government of India and is headquartered in New Delhi.[17] The primary mission of the CIJ is to provide a centre of excellence for the training of journalists, to promote best practices of journalism, to raise the standard of critical reporting to a high professional level and to build a network of watchdog journalists in India. The CIJ will provide resources and new media techniques to journalists across India.[18]

CIJ conducts investigative journalism training classes, workshops, conferences and data boot camps to train a new generation of Indian watchdog journalists. The CIJ does not intend to replace the work of individual newspapers or TV news channels. It aims to bring investigative journalists from different states together in teams, eliminating rivalry and promoting special reporting projects with larger public interest, focusing on underreported and unreported issues. It helps reporters to use Right to Information Act, 2005 to produce investigative stories by filing RTI requests on behalf of the investigative journalists for protecting their identity. This is critically important because many who sought information through RTI have been threatened, attacked and even killed.[19] The Indian media undoubtedly is free and vibrant, deadline pressures, market pulls, competition, budgetary constraints, and sometimes legal and safety issues make it difficult for many journalists to

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[16] https://www.outlookindia.com/website/story/the-fall-and-rise-of-investigative-journalism/291837 accessed on 8th October 2017 at 9.37 a.m.

[17] Syed Nazakat is an award-winning journalist, media entrepreneur, founder and editor-in-chief of DataLEADS. DataLEADS is a Delhi-based media firm which conducts data analysis, visualization, Pan-Asia boot camps and India's first, award-wining, data-driven website dedicated to healthcare reporting. He also leads Centre for Investigative Journalism, a non-profit organization he founded to promote the cause of watchdog journalism in India. - https://www.icij.org/journalists/syed-nazakat accessed on 8th October 2017 at 3.04 p.m.

[18] http://cij.co.in/AboutCij.php accessed on 8th October 2017 at 9.40 a.m.

[19] https://gijn.org/2014/11/01/indian-centre-for-investigative-journalism-launches-in-delhi/ accessed on 8th October 2017 at 6.36 a.m.

delve into the causes and broader meanings of news events due to the threatening circumstances surrounding such events. CIJ comes forward in such circumstances to the rescue of the journalists.

More importantly there is no platform for investigative journalists in the country where they can share ideas, skills and knowledge and support each other in order to enhance critical inquiry and professionalism. Membership in the CIJ is open to individual Indian journalists, media organizations and educational institutions that actively work in support of independent and watchdog journalism.[20]

5. Investigative Journals and Their modus operandi

As rightly remarked by Stephen Grey, *"However much we try to refine our methods, there's a hell of a lot of luck in this."* Investigative journalists use a variety of resources to learn more about the topic they are investigating. They use information from interviews, public records, legal and tax reports. They also use standard undercover sources when there isn't enough information in databases and sources aren't willing to come forward. Usually a combination of these different methods is resorted for building a strong case.[21] There are different ways of finding interesting stories. One's own experience, experience of friends and family, the fast-traveling gossip and anecdotes of street traders, taxi drivers and passengers, and people in bars and cafés, local newspapers, following unpublished stories, reading and surfing the web, checking public information are some of the prominent ways resorted to by investigative journalists.[22] The main role players in building up of a story can be plenty. Witnesses, *i.e.,* the people who have experienced or are otherwise directly involved in a story; people currently associated with the subject like (e.g. other company officers or shareholders, family members, business associates, employees or clients); people who were previously associated with the subject: ex-partners in business, former spouses, employees, doctors, teachers; chains of enquiry; experts; technical experts, historians, research scientists, lawyers and engineers and many more. Government departments and experts are regarded as reliable sources of information. There

[20] http://cij.co.in/Membership.php accessed on 8th October 2017 at 10.10 a.m.

[21] *Supra* note 11.

[22] http://www.investigative-journalism-africa.info/?page_id=182 accessed on 19th October 2017 at 1.31 a.m.

is a long history of apparent impartiality in scientific reports, accurate minutes of meetings, court proceedings and registrations. Further International agencies and international agency representatives can also act as crucial in providing the required information.[23]

Many a times, IJ can be very risky and chances of arrest by police or assassination are very high and this forces the journalist to work discreetly or underground. But sometimes informing the public that one is working on a topic or that already possess certain information tends to help. It can be done by informally by using ones networks of contacts; sometimes by publishing a preliminary, sketchy story on the investigative project. At that point, new people may volunteer additional information or previously reluctant sources may come forward to 'correct' your story. Sometimes this way may prove fatal since this may alert people to the scrutiny and force them to hide evidence, silence sources or take pre-emptive action against the journalist.[24] Talking to discontented employees in companies, organizations and government departments also helps many a times. Networking in the relevant social circles of the people prominent in the story concerned also helps in digging more information about the issue. Going to the places where the people under investigation socialize often helps. Talking to people can help in gradually narrowing in on people associated with areas of or individuals involved in the issue. Further networking with the journalist colleagues also helps many a times. The most useful contacts are those within an organization like secretaries, receptionists and door security officers. They are usually referred to as gate-keepers. With a promise of maintaining anonymity, they usually are ready to reveal lots of sensitive information.[25] Cell phones and smart phones can be of great help in recording audio and video conversations relating to the issue under scanner. Though using electronic equipments like smart phones should be minimal in the investigation process and only in rare circumstances. They ought to be used only as a last resort, after having tried all legal and public channels for filling the defined gaps in the research and only after careful consideration and discussion of the ethical implications.[26] While investigating in organizational scams, one can

[23] http://www.investigative-journalism-africa.info/?page_id=161 accessed on 19th October 2017 at 1.49 a.m.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

uncover if authorities or organizations have made important mistakes. The most important information in such an investigation is to know who did what, where and at what time.[27]

Further IJ has changed dramatically with the internet becoming more and more prominent as a search tool. This has led to more and more reporters using it to get hints and help with fact checking. They inform their community about their investigation; asking what is known to them, or whom it might be good to talk to. Using social media like twitter, Face book, blogs though kept to minimum during the investigation, can be of great help. Internet can be crucial in revealing scandals.

The journalists face issues pertaining to *modus* and ethics while investigating sensitive subjects. They are usually forced to resort to deception while dealing with anonymous and confidential sources. The generally agreed rules relating to the use of deception in investigation are clear enough; the problem is with their implementation and enforcement in newsrooms. The first rule prohibits resort to deception unless it becomes clear that the information sought by the journalist, on a matter of significance, cannot be obtained in a straight forward way. The second rule requires that the 'public interest' test be applied if the deception contemplated is serious and would not be countenanced in the normal professional course. The third rule lays down that any investigation that relies on deception must be closely monitored by an editorial supervisor with sufficient experience to make calls on what is and is not legitimate from the standpoint of professional ethics.

The use and misuse of anonymous and confidential sources is a global phenomenon and has many a times shaken the public's trust in journalism. The real problem for Indian journalism today is not so much the protection of anonymous and confidential sources. It is the license given to official, corporate and other privileged sources to use and abuse its columns and broadcast time and space, hiding behind the veil of anonymity. If they are free from scruple, these sources are able to wield power and influence without responsibility like promoting official agendas and special interests, attacking and at times, scandalizing opponents and opposing views, planting self-serving stories and, from time to time, plain disinformation. Since the justification for the demand of anonymity and confidentiality is rarely

[27] https://gijn.org/2011/10/03/new-methods-for-covering-events-and-investigative-journalism-melts-together/ accessed on 19th October 2017 at 2.14 a.m.

questioned by reporters and since the deals struck routinely between reporter and privileged source to grant confidential status are rarely monitored and supervised properly, the misuse of sources by journalists has assumed epidemic proportions. This is where clear, precisely formulated, and well-publicized editorial guidelines are badly needed in Indian newsrooms.[28]

The Story of a Shipwrecked Sailor, young newspaper reporter Márquez's story of Luis Alejandro Velasco, originally published in the Colombian newspaper *El Espectador* in 1955 and Kenzaburo Oe's *Hiroshima Notes*, which began in 1963 as an on-the-spot report for a monthly magazine and was completed in 1965. They are unlikely to find a place as case studies in the textbooks but as investigative reporting, hard worked, meticulously researched, imaginatively conceived and beautifully written, they will stand the test of time.[29] The disclosure of the Panama Papers[30] was the outcome of the cross-border collaborative IJ.[31]

In the recent times, IJ has been receiving increasing judicial and governmental support. Many prominent news magazines and TV channels have sprouted as a result. Outlook magazine, Tehelka magazine, Times TV channel, Headlines today TV channel are few of the Investigative Journals in India.

Outlook: The weekly magazine Outlook has been awarded the International Press Institute (IPI)-India Award for Excellence in Journalism, 2007, for its

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[28] *Supra* note 4.

[29] *Supra* note 4.

[30] Panama Papers are an unprecedented leak of 11.5m files from the database of the world's fourth biggest offshore law firm, Mossack Fonseca. The records were obtained from an anonymous source by the German newspaper Süddeutsche Zeitung which shared them with the International Consortium of Investigative Journalists (ICIJ). ICIJ then shared them with a large network of international partners including the Guardian and the BBC. The documents show the myriad ways in which the rich can exploit secretive offshore tax regimes. Twelve national leaders are among 143 politicians, their families and close associates from around the world known to have been using offshore tax havens. -https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers accessed on 19th October 2017 at 3.16 p.m.

[31] Investigative journalist Daphne Caruana Galizia was the personality behind the revelation of Panama Papers. Caruana Galizia, who claimed to have no political affiliations, set her sights on a wide range of targets, from banks facilitating money laundering to links between Malta's online gaming industry and the Mafia. Over the last two years, her reporting had largely focused on revelations from the Panama Papers, a cache of 11.5m documents leaked from the internal database of the world's fourth largest offshore law firm, Mossack Fonseca. The data was obtained by the German newspaper Süddeutsche Zeitung and shared with media partners around the world including the Guardian, by the International Consortium of Investigative Journalists (ICIJ) in Washington. Unfortunately Daphne Caruana Galizia died in the afternoon of 16th October 2017 when her car, a Peugeot 108, was destroyed by a powerful explosive device which blew the vehicle into several pieces and threw the debris into a nearby field. -https://www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist accessed on 19th October 2017 at 3.17 p.m.

investigative journalism during 2006. According to a release issued by the IPI-India Chapter, the work done by Outlook to expose the leak of sensitive information from the Navy's War Room, and the bungling in the purchase of submarines for the Navy was chosen as the *"best example of furtherance of public interest by a media organization."* The jury also took note of the fact that the magazine had continuously investigated these two subjects of high public importance; resulting in a criminal investigation. *"The magazine's reporters had diligently investigated and followed the two developments to their logical conclusion,"* the jury observed. Headed by the former Chairman of the National Human Rights Commission, Justice A. S. Anand, the jury comprised the IPI-India Chairman and Editor of The Hindu, N. Ravi, Managing Editor of Malayala Manorama Philip Mathew, Editor-in-Chief of the Press Trust of India, M. K. Razdan, and Editor-in-Chief of Business Standard T. N. Ninan.[32]

Operation #BetiUthao was one of the results of IJ by Outlook. In a three-month-long investigation, *Outlook* accessed government documents to expose how different Sangh outfits trafficked 31 tribal girls as young as three years from tribal areas of Assam to Punjab and Gujarat. Orders to return the children to Assam, including those from the Assam State Commission for the Protection of Child Rights, the Child Welfare Committee, Kokrajhar, the State Child Protection Society, and Childline, Delhi and Patiala, were violated by Sangh-run institutions with the help of the Gujarat and Punjab governments. The full, 11,350-word text of Neha Dixit's five-part investigation "Operation #BabyLift" depicted how the Sangh Parivar flouted every Indian and international law on child right to traffic 31 young tribal girls from Assam to Punjab and Gujarat to 'Hinduise' them.[33]

Tehelka magazine- With the launch of Tehelka magazine in 2004, IJ got stimulation. *Tehelka has invested heavily in hard hitting investigative reporting and has pushed the boundaries of editorial content further than most..."* -BBC.[34] Tehelka is an Indian English-language weekly news magazine whose motto is "*free, fair, fearless.*" It focuses on investigative journalism in the public interest:

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[32] http://www.thehindu.com/todays-paper/tp-national/IPI-India-award-for-Outlook-magazine/article14887008.ece accessed on 19th October 2017 at 7.46 a.m.

[33] https://www.outlookindia.com/magazine/story/operation-betiuthao/297626 accessed on 19th October 2017 at 8.08 a.m.

[34] http://www.tehelka.com/about/ accessed on 8th October 2017 at 7.58 p.m.

stories that can make a difference. Tehelka began in an online-only form in 2000 with $750,000 of investment[35] and 15 dedicated journalists.[36] It's founder Tarun Tejpal's desire to *"bring back the hard journalism of the 1980s"* which he said had been far more combative and adversarial than the softer journalism of the 1990s. Tejpal also hoped that the publication would be a *"place for refined and complex writing"* but that its journalists would retain *"the ability to dirty our hands."* Tejpal started Tehelka as an online-only news magazine because the dot. com boom seemed to offer great potential. However, after the website was forced to close due to a barrage of legal action after breaking what Tejpal described as *"the biggest story in Indian journalism,"* Operation West End, Tejpal decided that the web was not the best medium for his publication.[37]

Tehelka's first success was to catch cricketers and officials taking bribes. Its second success was even more sensational even though it was entirely based on a kind of hoax. For eight months, two Tehelka reporters worked on an elaborate sting involving hidden cameras, whisky parties and prostitutes. They approached the then president of the ruling Bharatiya Janata Party (BJP), Bangaru Laxman, as representatives of a fictitious arms company called West End. Laxman was offered a *"new year party gift"* in exchange for putting an arms deal their way. It was not a large sum: about £1,500-worth in dollars or rupees. Laxman, a practical man, chose US dollars.

To further smooth their pretended enterprise, the men from West End entertained Indian army officers and defense ministry officials who took to the Royal Stag whisky and the girls provided with gusto. These sponsored parties, as well as Laxman counting out his cash, were recorded on camera. The material, hotter than any Hindi gangster picture, was distributed last March to television stations all over India. Laxman had to resign, and so did George Fernandes, the defense minister.[38]

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[35] http://www.editorsweblog.org/2009/12/16/investigative-journalism-in-india-tehelka accessed on 19th October 2017 at 7.50 a.m.

[36] https://www.theguardian.com/theguardian/2002/jan/16/features11.g2 accessed on 19th October 2017 at 7.55 a.m.

[37] *Supra* note 35.

[38] *Supra* note 36.

Operation West End was a sting investigation into corruption in defense procurement, targeting several political figures who were then members of the ruling coalition. Tehelka reporters masqueraded as arms dealers and taped senior politicians and army officers accepting bribes to approve arms deals. Another One was exposing alleged state collusion in the Gujarat riots of 2002. *"The immediate aftermath of that story was disappointing,"* Chaudhury said: *"it was such a political hot potato that nobody wanted to touch it."* But Tehelka's recordings made during their investigation have become part of the official investigation into the issue and the story *"has had a huge impact,"* she added. Tehelka now has about 35 journalists *"a small but motivated team"* Tejpal said. The journalists only produce original journalism.[39]

The revelation of the defense scandal involving Mr. Bangaru Laxman, Ms. Jaya Jaitly and others by Tehelka.com bore the unmistakable stamp of those who helped to fix the fixers of cricket. The nightmarish fact is that a fictitious arms company could buy outright 34 individuals in high places, including the president of the pre- eminent national party, for a paltry sum of 11 lakhs.

Tehelka.com made the significant revelations from the tapes *viz.*, (1) Corruption is a systematic game. There are fixed percentages that each player is entitled to. According to Ms. Jaya Jaitly, her party expects 3 per cent of the deals that Mr. George Fernandes finalizes. (2) Mr. R. K. Jain, the Samata Party treasurer, admits to his own involvement for a commission in several high-cost deals, netting Rs. 50 crores for his party. He is known to the arms mafia as George's briefcase man. (3) Mr. Jain thinks that the PM received money out of the Sukhoi deal. (4) According to Mr. R. K. Gupta, the super trustee of the RSS, the Russians pay only half the commission they agree to (12-15 per cent of the total value of every deal); they keep the other half. If this is true, our defense establishment has been a party to letting the Russians robs the country. The significant fact that emerges from the Tehelka tapes is the systematic institutionalization of corruption in high places. The truth that emerges from all these is that defense deals are not necessarily driven by considerations of national security, but by the greed of the political and bureaucratic sharks who have no qualms in poisoning the vitals of our nation for filthy lucre. Its tragic outcome is that the defense establishment comes under a

[39] *Supra* note 35.

compulsion to keep conflicts smoldering, without which inflating defense outlays cannot be justified. This has several lamentable consequences. First, innocent lives are routinely sacrificed in the process. Second, the scarce resources of the nation are diverted into unproductive channels, crippling the nation's development and people's welfare. The Sukhoi deal, for example, envisages an expenditure of over Rs. 22,000 crores over a period of time. That kind of money can take us a long way towards wiping out illiteracy from India or providing safe water to rural India, avoiding the untimely death of thousands of children each day. Third, the economic costs of futile wars are passed on to the people, both directly and indirectly. In every way the politicians gain and the people lose. The Tehelka tapes authenticate the preference of politicians to be paid in dollars. It is a widely known secret that the sleaze money is stashed away overseas. The wealth that has thus been taken out of this country could well exceed our country's total external debt which now stands perilously close to the hundred billion dollar mark.[40]

6. Investigative Journalists:

As per the Records of Committee to Protect Journalists, since 1992, 27 journalists have been murdered in India with complete impunity. Unfortunately there have been no convictions. More than half of those killed reported regularly on corruption. The cases of Jagendra Singh, Umesh Rajput, and Akshay Singh, who died between 2011 and 2015 highlights the vulnerable condition of investigative journalists.[41] The top-notch investigative journalists in India are Rana Ayyub, Amitabha Chowdhury, Anuranjan Jha, Arun Shourie, Tarun Tejpal, Madhu Trehan, Hussain Zaidi.[42]

Case 1- Rana Ayyub: Rana Ayyub is an Indian journalist and writer. She worked for Tehelka, but now works independently. Rana Ayyub resigned from Tehelka in November 2013, to protest against the organization's handling of a sexual assault charge against its editor-in-chief Tarun Tejpal. She has been critical of the Narendra Modi-led Bharatiya Janata Party (BJP) government. Ayyub's investigation of the

[40] http://www.thehindu.com/2001/03/20/stories/13200341.htm accessed on 19th October 2017 at 10.23 a.m.

[41] https://cpj.org/reports/2016/08/dangerous-pursuit-india-corruption-journalists-killed-impunity.php accessed on 8th October 2017 at 3.16 p.m.

[42] https://en.wikipedia.org/wiki/Category:Indian_investigative_journalists accessed on 19th October 2017 at 10.15 a.m.

alleged Gujarat fake encounters has been listed by Outlook magazine as one of the twenty greatest magazine stories of all time across the world. She is the author of *Gujarat Files: Anatomy of a Cover Up*. In her book Gujarat Files: Anatomy of a Cover Up, Ayyub documented the verbatim transcripts of recordings, made using a concealed recording device, of many bureaucrats and police officers of Gujarat. The recordings were made in the course of an undercover investigation to reveal the views of bureaucrats and police officers on the post-2002 Gujarat riots and Police encounter killings. Ayyub had been posing as Maithili Tyagi, a student of the American Film Institute, having an ideological affinity for the Rashtriya Swayamsevak Sangh's beliefs, to enable her to make the recordings.

Case 2- Chitra Subramaniam Duellais an Indian journalist famous for her investigation of the Bofors-India Howitzer deal (Bofors Scandal) which is widely believed to have contributed to the electoral defeat of former prime Minister Rajiv Gandhi in 1989. She is the co-founder and Managing Editor of The News Minute – an online news website. She is working with Republic TV of Arnab Goswami Republic – a news channel. Chitra joined India Today, an Indian news magazine as a reporter in 1979 and continued to write for it and other Indian publications when she moved to Switzerland in 1983. She was based in Geneva as a United Nations (UN) correspondent when the Swedish State Radio reported in April 1987 that bribes had been paid to Indians and others for the sale of field howitzers to India by the Swedish arms manufacturer, Bofors. Working out of Switzerland and Sweden and reporting for The Hindu, she secured over 300 documents which established the fact of the illegal payments that led to a political turmoil in India. While there was no evidence linking the illegal payments directly to Prime Minister Rajiv Gandhi, the money-trail to people close to the Gandhi family was conclusive. The documents also detailed the massive cover-up in India to bury the documents and the Prime Minister lost his mandate as corruption became a major election plank in 1989. When The Hindu abruptly stopped publication of the investigation due to political pressure and internal management disputes, Chitra Subramaniam ceased to work with N. Ram, and moved on to work with Indian newspapers such as The Statesman and The Indian Express, then considered to be India's top newspapers for investigative journalism.

Subramaniam continued to report on the investigations and court proceedings in Switzerland till the Swiss government handed over secret Swiss bank documents with additional details of the payments to the government of India in 1997. In 2017 she joined Republic news channel launched by Arnab Goswami. As a UN correspondent, she has reported on various issues including disarmament, the Bosnian war and peace negotiations, the Uruguay Round of multilateral trade negotiations that led to the creation of the World Trade Organisation (WTO) and human rights.

For her work she has received several journalism awards including the prestigious B.D. Goenka Award and the Chameli Devi Award. She is the author of several books, including; India is for Sale, a New York Times – India, best seller the cover for which was designed by one of India's best known cartoonists Mr. R. K. Laxman. In April 2012, Columbia University's School of Journalism cited a joint article by N. Ram, who headed The Hindu's investigation, and Subramanian among 50 Great Stories since 1915.

Case 3 - Amitabha Chowdhury (1927 November 11 - 1 May 2015) was an Indian investigative journalist. He was awarded the Padmashree in 1983. Other than being associated with three leading Bengali dailies - Anandabazar Patrika, Jugantar and Aajkal - for more than three decades, he authored around 40 books, which mostly explored various facets of Rabindranath Tagore. In 1956, he joined Anandabazar Patrika as a reporter, embarking on a profession that brought him much fame, acclaim and accolades apart from numerous awards throughout an illustrious career. He was awarded the Bangavibhushan by the state government in 2013. He was known for his scholarly and journalistic pursuits. He received the Ramon Magsaysay Award for his reporting on individual rights and community interests in India.[43]

Case 4 - Anuranjan Jha is an Indian Journalist covering issues relating to Indian politics, society, art and culture. He was the one who conducted several news programmes, shows for leading channels and most importantly some significant sting-operations including a sting against Aam Aadmi Party in Nov 2013. Jha, who also launched India's first matrimonial television channel, Shagun TV, is a sting

[43] https://timesofindia.indiatimes.com/city/kolkata/Journalist-writer-Amitabha-Chowdhury-dies-at-88/articleshow/47135945.cms at 10.27 a.m.

specialist of sorts. His career in journalism spans 20 years. He has primarily been a reporter specializing in investigations. Before launching Shagun TV, Jha has worked with India TV Cobra Post, Zee News, Aaj Tak, BAG Films, India News and Jansatta, and was most recently chief operating officer (COO) of the news channel CNEB. He started his Journalism career with Print Media and worked with Indian Express and Jansatta as correspondent. At the age of 30 only Anuranjan Jha became an Editor and News Director of News channel India News. He is a cerebral man and has worked with companies like Zee news, Aaj Tak, BAG Films, India TV, India News, Cobra Post, Jansatta. He has worked with CNEB News Channel as COO. Then, he became Managing Director of well known Media company Vertent Media Soft Pvt. Ltd. The company has a full-fledged 24-hour lifestyle/ entertainment TV channel called Shagun TV, India's first matrimonial channel. Anuranjan Jha founded Park Media Pvt Ltd. in the 2009 and started a News and Investigative Web Portal Media Sarkar.com in 2010. He is currently founder and CEO of Media Sarkar, which came into light after conducting a sting operation in which several Aam Aadmi Party (AAP) leaders such as its media faces Shazia Ilmi and Kumar Vishwas, were caught recovering money from individuals and getting the land deals done, agreed to extend their support in return for donations in cash. This sting operation created the huge panic and troubles in Aam Aadmi Party. On 22nd Nov 2013, the website crashed after receiving its heaviest traffic ever. He has been writing features, articles, columns on different social and political issues in many national newspapers, magazines and journals. In May 2013 International Magazine Arcade published him on the cover page. Media Sarkar Dot Com is a web portal which is popularly known for conducting one of the biggest and controversial sting operation against Aam Aadmi Party in Delhi. The AAP sting was the Media Sarkar's first investigation since inception. Anuranjan Jha was associated with Anna Hazare since the 13-day movement in 2011 and had high hopes from the AAP when it was launched. But over the time it goes down, people within the party informed him of problems and he conducted the investigation.

Case 5 - Arun Shourie: In 1975, during the Emergency imposed by then Prime Minister, Indira Gandhi, Arun Shourie began writing for the Indian Express in opposition to what he saw as an attack on civil liberties. The newspaper, owned by Ramnath Goenka, was a focal point for the government's efforts at censorship.

He became a fellow of the Indian Council of Social Science Research in 1976. In January 1979, Goenka appointed Shourie as executive editor of the newspaper, giving him a carte blanche to do with it as he saw fit. He developed a reputation as an intelligent, fearless writer and editor who campaigned for freedom of the press, exposed corruption and defended civil liberties such that, in the words of Martha Nussbaum, "his dedication to the truth has won admiration throughout the political spectrum". Shourie has been called a "veteran journalist". Shourie was a winner of the Ramon Magsaysay Award in 1982, in the Journalism, Literature and Creative Communication Arts category as "a concerned citizen employing his pen as an effective adversary of corruption, inequality and injustice." In 2000, he was named as one of the International Press Institute's World Press Freedom Heroes. He has also been named International Editor of the Year Award and was awarded The Freedom to Publish Award.

Case 6 - Tarun Tejpal: is an Indian journalist, publisher, novelist and former editor-in-chief of Tehelka magazine. In November 2013, he stepped down as editor for six months after a female colleague accused him of sexual assault. He was arrested on 30 November 2013 and is currently on bail. He began his career in 1980s with The Indian Express and he moved to New Delhi to join a now defunct magazine called India 2000. In 1984, he joined India Today magazine, then The Financial Express in 1994 and later helped found the rival publication, Outlook, where he worked for several years. Meanwhile he founded a publishing company, India Ink, which published Arundhati Roy's Booker Prize winning novel The God of Small Things in 1998. He left Outlook in March 2000 to start tehelka.com, an online independent news and views magazine which soon came to be known for its sting investigations, mainly for Operation West End. The website was relaunched as a national weekly newspaper, Tehelka in January 2007, it became a weekly magazine. In 2010, He was presented with Award for Excellence in Journalism by the International Press Institute's India Chapter Award. In 2001 Business Week named him as amongst the 50 leaders at the forefront of change in Asia, later in 2009, the magazine named him amongst, "India's 50 Most Powerful People 2009". The Guardian included him in its list of "India's elite" for being a "Pioneer of a brand of sting journalism which has transformed Indian media" in 2006.

Case 7 - Madhu Trehan is an Indian journalist and the founding editor of the leading Indian news magazine India Today. Currently she is the co-founder of a digital media portal called Newslaundry. She founded and started the news magazine India Today, with her father V.V.Purie, owner of Thomson Press. Trehan left the magazine to her brother's stewardship in 1977 during her pregnancy, and returned to New York to start her family. Upon her return to India in 1986, Trehan produced and anchored Newstrack, India's first video news magazine, which earned her a reputation as a pioneering investigative journalist. In 1994, Madhu Trehan took the rare and only interview of Yakub Memon who was convicted in 1993 Bombay bombings. In 2009 Trehan published her first book, Tehelka as Metaphor: Prism Me a Lie, Tell Me a Truth, examining the 2001 Operation West End exposé and its aftermath. Trehan has written for leading news magazines and newspapers such as Outlook India and Hindustan Times. In 2000 she launched *Wah India*, a website and print magazine. She, along with three other colleagues, also launched a crowd-sourced media critique website called *Newslaundry* in February 2012.

Case 8 - S. Hussain Zaidi is an Indian author and former investigative journalist. His works include Dongri to Dubai: Six Decades of the Mumbai Mafia, Mafia Queens of Mumbai, Black Friday, My Name is Abu Salem, Black friday and Mumbai Avengers. Zaidi's began his career in journalism while working for the newspaper The Asian Age, where he became the Resident Editor. Zaidi later worked for several other periodicals, including The Indian Express, Mid Day and Mumbai Mirror. His in-depth research on the Mumbai mafia has been used by international authors like Misha Glenny in McMafia and Vikram Chandra in his book Sacred Games. Zaidi was once kidnapped in Iraq.

Zaidi has covered the Mumbai mafia for several decades. His 2002 book Black Friday detailed the 1993 Mumbai bombings, an attack comprising 13 explosions that killed 250 people. The book was adapted two years later, in 2004, into a film by Anurag Kashyap also titled Black Friday. The film was so controversial that the Indian Censor Board did not allow it to be released in India for three years and was finally released on 9 February 2007 after Supreme Court of India allowed it following the verdict in the '93 Bombay blast case was delivered by TADA court. In Dongri to Dubai: Six Decades of the Mumbai Mafia, a historical account of the

Mumbai mafia, Zaidi conducted an interview with crime boss Dawood Ibrahim, who is suspected of having orchestrated the bombings. The book was adapted into a film, Shootout at Wadala by Sanjay Gupta. Zaidi is also associate producer of the HBO documentary Terror in Mumbai, which is based on the 26/11 attacks in Mumbai. The 2015 Kabir Khan film Phantom starring Saif Ali Khan and Katrina Kaif, is an adaptation of Zaidi's book Mumbai Avengers, and the screenplay of the film has been written in co-ordination with the author.

Yusuf Jameel is a correspondent for the Indian daily The Asian Age, focusing on the conflict over control of the disputed region of Kashmir. Rakesh Kalshian, India, is a former reporter for the weekly magazine Outlook where he focused on science, environment, and development, a beat he has covered since 1991. Murali Krishnan, India, is currently an international broadcaster based in New Delhi, India. Syed Nazakat, India, is an award-winning journalist and editor-in-chief of the Centre for Investigative Journalism, a non-profit organization he founded to promote the cause of watchdog journalism in India. In 2015 he also set-up a data journalism initiative focused on Indian healthcare, called Health Analytics India. Ritu Sarin, India, is Editor, Investigations with the *The Indian Express* group and her areas of specialization include internal security, money laundering and corruption.[44]

7. Ways Forward

A bit of intolerance pervades in Indian scenario, its institutions, political movements, activists groups. This makes it a breeding place for high level of IJ. Its vivid diversity spread in the democratic set up, with population a mixture of literates and illiterates, there exists great scope for IJ. With issues sprawling from clean toilets, drinking water, a roof over their heads, labour, health issues, transport and traffic woes, complicated laws with low level of implementation, IJ has great task ahead. With cruel society, rampant corruption, red tapism and bureaucracy, caste, regional and religious bias, Deprivation, infanticide, slavery, child labour, farmer suicides, communal atmosphere, investigative journalists have a great responsibility on their shoulders.

[44] https://www.icij.org/journalists/by-country/India accessed on 8th October 2017 at 5.54 p.m.

These factors mandate reinventing, strengthening and stretching the boundaries of media freedom. There exists a scope for a new powerful tradition of independent, investigative, path-breaking journalism. Though Indian media has been robust so far, still to achieve the glory of true journalism, to use good reporting as a powerful tool to bring bread to the poorest, liberty and freedom to the oppressed, shed truth in obscure corners of governance and hold leaders accountable, to demolish the castles of plutocracy, to usher in all those values long cherished by many a people around the world, India needs to reinvent and reinforce good reporting. This cannot be expected from profit chasing mainstream media.

India is currently experiencing an extraordinary media expansion due to intense competition. Newspapers and broadcasters are anxious to get the inside story first. Reporters are no longer note-takers; instead they are forced to gain background information, seek out reliable (often anonymous) sources, do painstaking research and investigate the story until the truth is found. Investigative reporting has long been recognized as a public goodby journalists and media houses. Positive externalities as a result of investigations can be changes in policies or government behavior. Investigative journalism of quality and relevance is valuable since it can bring great benefits for ordinary folk and for society by bringing the true facts to the fore. IJ can also play an instrumentalist role in reenergizing and revitalizing the field of professional journalism that often seems to be tired, losing steam and shedding value. Though in India, IJ is still in the growth mode, but it the scope for its development is rather large.

Unfortunately the political set-up has not been always encouraging for IJ. For instance, the first and most oppressive step initiated during the Emergency was suppressing the free media. Further the attitude of most of our present day leaders have been to cajole, harass or intimidate free press. Most Indian corporates have repeatedly exhibited their intolerance for media. NGOs, social movements, caste gatherings all have shared the credit of abusing the media.[45] Despite intimidation, journalists are digging into sensitive issues related to corruption and crime at all levels like never before. Further IJ has its own share of challenges including the costs of commissioning a story or an investigation; doubts relating to whether

[45] http://cij.co.in/article.php?pageID=12 accessed on 19th October 2017 at 11.38 a.m.

to pursue the story at all and the problems ensuing after publishing the story.[46] Journalists and editors in mainstream media are scared of what they will find when they dig too deep, afraid of ruffling the wrong feathers and making the choice of publishing stories which could mean a loss of advertising or incurring the wrath of those in power with consequences to follow.[47] Amidst these environs, several editors have flourished in India.

"There is no question that investigative journalism demands time and resources that many traditional media outlets are not able to honor. However, in an age where superficial journalism reigns in many areas of Asia, the need for investigative journalism is greater than ever," said Kunda Dixit, founder and editor of Nepali Times.[48] *"Investigative reporting is important because it teaches new techniques, new ways of doing things."* aptly observed Brant Houston, the Knight Chair of Journalism at the University of Illinois, who served for years as executive director of Investigative Reporters and Editors.

It is required that IJ is able to uncover the truth and should not be selective in it revelations. It should remain far above and untainted by the persons and organizations who wish to hide the truth. IJ should concentrate on exposing corruption, exploitation and harmful illegal practices. It should avoid sneaking into the personal lives of celebrities, finding out sensational gossips and unwarranted focus on the victims of tragedies. IJ should be used only for protection of the public interest and not for spreading information about matters which are of mere interest to the public.[49] Though the Indian press is remarkably quite vibrant and combative as compared to the press in the world today, still what has been done in the field of IJ touches only the tip of the iceberg.

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[46] https://thewire.in/98322/worth-investigative-journalism/ accessed on 19th October 2017 at 11.47 a.m.

[47] https://www.mediasupport.org/future-hold-investigative-journalism-asia/ accessed on 19th October 2017 at 11.51 a.m.

[48] *Ibid.*

[49] https://www.frontlineclub.com/what_is_the_role_of_investigative_journalism/ accessed on 7th October 2017 at 6.31 p.m.

MEDIA'S PIVOTAL ROLE IN SHAPING HEALTHY GOVERNANCE: INDIAN PERSPECTIVE

*Ms. Savita Deshpande**

1. Introduction:

> *"Free Expression is the base of Human Rights, the root of Human Nature and the Mother of Truth. To kill free speech is to insult Human Rights, to stifle Human Nature and to suppress Truth".* – *Liu Xiaobo*

> *"Freedom of press is not just important to democracy. It is democracy".* – *Walter Cronkite*

Freedom of Speech and expression is very lifeblood of democracy, without which the democratic process will be paralysed. Free speech is a foundation upon which the roots of democracy are laid and which in turn leads to the development of society. Freedom of speech and expression is a fundamental right. It strengthens all other human rights, allowing society to develop and progress. The ability to express our opinion and speak freely is essential to bring about change in society. Thus the Freedom of Speech and expression is indispensable to the effective functioning of democracy.

The Constitution of India under Article 19(1)(a) guarantees to all citizens, the right to freedom of speech and expression. But this is not an absolute right, it is limited right. No modern state can give rights without limitations; it is well accepted principle that the result of absolute liberty would be ruined. Hence Article 19(2) of the Indian Constitution empowers state to put reasonable restrictions on the exercise of freedom of speech and expression in the interest of the security of state, friendly relations with the foreign states, public order, decency, morality, sovereignty and integrity of India or in relation to contempt of court, defamation or incitement to an offence.

The freedom of speech and Expression under Article 19(1)(a) includes within its ambit freedom of press. Free press/media is bedrock of a progressive society in

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a democratic system. Democracy, which is the government of the people, cannot be successful without free press. Free press is very essential because it is the voice of the people. The strength and importance of media is well recognized in democracy. The existence of free media is keystone of the democracy. The pivotal role of the media is its ability to mobilize the thinking process of millions. Thus media undoubtedly emerged as fourth pillar of democracy.

In democratic process, media is a fundamental bridge between the government and people, being a fourth estate of government it acts like a watch dog which keeps an eye on the first three institutions of the government. Thus by highlighting the lacunas of the government, it tries to build good governance which is not only need of the hour but also fundamental right of every citizen of India.

2. Freedom of speech and expression: [Articles 19 (1) (a) and 19(2)]

Article 19(1)(a) states that all citizens shall have the right to freedom of speech and expression. This right is subject to limitations imposed under Article 19(2) which empowers the State to put reasonable restrictions on the grounds of the security of state, friendly relations with the foreign states, public order, decency, morality, contempt of court, defamation or incitement to an offence and sovereignty and integrity of India.

3. Significance of Freedom of Speech and Expression:

Freedom of speech is the bulwark of democratic government. This freedom is essential for the proper functioning of the democratic process[1]. This freedom is considered as first condition of liberty. In a democracy, freedom of speech and expression opens up channels of the free discussion of issues. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. In *Maneka Gandhi* v. *Union of India*[2], Bhagwati, J., has emphasized on the significance of the freedom of speech and expression in these words, "Democracy is based essentially on free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must

[1] M.P. Jain, Indian Constitutional Law 1078 (6th ed. 2010).

[2] AIR 1978 SC 597 : (1978) 1 SCC 248.

be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matter is absolutely essential.

4. Meaning and scope:

Freedom of speech and expression means, the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one's ideas through any communicable medium or visible representation. Such as, gesture, signs, and a like. The expression connotes also publication and thus the freedom of the press is included in this category[3]. Free propagation of ideas is the necessary objective and this may be done on the platform or through the press. Thus freedom of media is guaranteed right under Article 19(1)(a) of the Constitution.

5. Meaning of 'freedom of press':

"Freedom" means absence of control, interference or restriction. Therefore, in relation to the press, freedom means the right to print and publish without any interference from the state or any public authority.[4] It forecloses the state, in short, from assuming a "guardianship" of the public mind. The liberty of press consists in printing without any previous license, subject to the consequences of law.[5]

Freedom of the press is the freedom of communication & expression through vehicles including various electronic media & published materials. In the popular sense, Media denotes "Press" in print and electronic form. Media is communication channel through which news, entertainment, education, data or promotional messages are disseminated. Media includes every broadcasting and narrowcasting medium such as newspapers, magazines, TV, radio, billboards, direct mail, telephone, fax and internet.[6]

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[3] *Dr. J.N. Pandey, Constitutional Law of India 184 (51st ed. 2014).*

[4] *24 Halsbury's Laws of India, Media, Technology and Communication 21 (Kaveri Mohan, LexisNexis 2005).*

[5] *R v. Dean of St. Asaph* (1784) 3TR 428.

[6] The definition of media http://www.businessdictionary.com/definition/media.html.

6. History of Freedom of Press in India

A. Media in British India – Rise of press in India

The press, in India, rose as an expression of the national struggle for independence and as a critique of the British rule and administration. Along with the growth of newspapers, grew the history of laws directed against the press. It dates back to the period of the East India Company. The first newspaper in India, the "*Bengal Gazette*" or the "*Calcutta General Advertiser*" was published in 1780 by James Augustus Hicky devoted to the scurrilous attacks on the private lives of the servants of the East India Company for which he was tried for libel and sentenced to imprisonment and fine. He encouraged few other newspapers seeing the light of the day from Calcutta. Subsequently, "*The Indian Gazette*" was published in 1782, the "*Calcutta gazette*" in 1784, the "*Bengal journal*" and the "*Oriental Magazine*" in 1785 and the "*Calcutta Chronicle*" in 1786.[7]

Though the press was central force in the movement of freedom in India, there was no fundamental right to freedom of speech and expression or the freedom of press in India prior to independence in 1947. The position of the press was like an ordinary citizen so that it had neither privileges nor any special liabilities apart from the statute law as explained by the Privy Council.

B. Media in Independent India

When India got independence from British rule on 15th August 1947, the press of India celebrated its independence because it was their victory too. The Constitution of India was adopted on 26th November 1949 and came into force on 26th January 1950. The Constitution of India enumerates and guarantees to the citizens certain fundamental rights inter alia, freedom of speech and expression. Supreme Court in no time declared that the freedom of the press was included in that guarantee, that is, freedom of expression.[8]

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[7] *24 Halsbury's Laws of India, Media, Technology and Communication 21 (Kaveri Mohan, LexisNexis 2005).*

[8] Romesh Thappar Case.

7. Freedom of Press (Media) as Fundamental Right: Constitutional frame work

In India, there is no separate provision, legal or constitutional, guaranteeing the freedom of press as in the United States of America. The constituent assembly thought that the freedom of press meant the freedom of expression and no specific mention of the same was warranted.[9] Thus freedom of speech and expression guaranteed under Article 19(1)(a) encompasses within its scope freedom of press also. This has been upheld by the Supreme Court and it has been deemed that the "freedom of expression" comprehends not only the liberty to propagate one's own views but also the right to print matter which has either been borrowed from someone else or is printed under the directions of that person.[10]

8. Freedom of media is not an absolute right: Limitations under Article 19(2)

"Liberty is the right to do what the law permits".

– Charles de Montesquieu

Freedom of media flows from the freedom of speech and expression. The press or media stands on no higher footing than any other citizen and cannot claim any privilege distinct from those of the citizens. The way in which the freedom of speech of limited, in the same way the freedom of media is limited and is not absolute. The freedom of speech and expression does not give right to every possible use of language. It would lead to disorder and anarchy. The Constitution of India under Article 19(2) empowers the State to put certain reasonable restrictions in the interest of the security of state, friendly relations with the foreign states, public order, decency, morality, sovereignty and integrity of India, or in relation to contempt of court, defamation or incitement to an offence. To curb the abuse of freedom by media, the parliament has passed many laws on these grounds as and when time demands.

9. Significance of Freedom of Press:

Blackstonian concept of freedom of press, which was expressed as early as in

[9] Dr. B.R. Ambedkar's Speech in Constituent Assembly Debates, Vol. 7, 40.

[10] *Express Newspapers* v. *Union of India (1958) SC 578.*

1769 contained four basic points which still form the crux of the concept of press freedom. They are as follows:

1. Liberty of the press is essential to the State.
2. No previous restraints should be placed on the publications.
3. That does not mean there is press freedom for doing what is prohibited by law.
4. Every freeman has the undoubted right to lay what sentiment he places before the public, but if he publishes what is improper, mischievous or illegal he must take the consequence of his own temerity.[11]

The freedom of media is *Sine quo non* in democratic countries. It is life blood of democracy which is essential for the proper functioning of the central nervous of the government. In the U.S.A., the First Amendment specifically protects free press, for this American Constitution has specific provisions. The US Supreme Court observed that the freedom of the press includes more than merely serving as a "neutral conduit of information between the people and their elected leaders or as a neutral form of debate. The prime purpose of the free press guarantee is regarded as creating a fourth institution outside the government as an additional check on the three official branches-executive, legislature and the judiciary".[12]

Similarly in India, the judiciary has also upheld the freedom of press when it is demanded. As rightly observed by Patanjali Shastri, J. in *Romesh Thapper* v. *State of Madras*[13], "Freedom of speech and of the Press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for proper functioning of the process of popular government, is possible". The Supreme Court has described this freedom as the "ark of the covenant of democracy".

The expression, 'freedom of speech and expression' in Article 19(1)(a) also includes the right to receive information and disseminate such information through any communicable media whether print or electronic or audio-visual, such as,

[11] Amar Nath Grover, *Press and the Law, 7* (Vikas Pub. House, 1990).
[12] *New York Times* v. *Sullivan, 376 U.S. 254.*
[13] *Romesh Thappar* v. *State of Madras, A.I.R. 1950 SC 124.*

advertisement, movie and article etc., Supreme Court has rightly observed, "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare".[14]

10. Media and Democracy: the vital role of media in achieving good governance

"Good governance is perhaps the single most important factor in eradicating poverty and promoting development". - Former UN Secretary - General Kofi Annan.

Good governance is essential fundamental right of every citizen of India. Good governance is associated with efficient and effective administration in a democratic framework. It is considered as citizen-friendly, citizen-caring and responsive administration.[15] Since good governance comprises of accountability, transparency, responsiveness, equitable and inclusive as well as effective and efficient. Media has a huge role in ensuring that all of these criteria are met from time to time. Good governance essentially means, how public institutions conduct public affairs and manage public resources.

In a democratic process government and people should go hand in hand, but this is very difficult to achieve because there is a gap between these two. Media is a crucial bridge between the gap of government and people. The very first responsibility of media is to reduce the gap between the government and its citizens.

11. Media as the fourth pillar of democracy: a watch dog on first three institutions of democracy

Today undoubtedly, media has emerged as the fourth strongest pillar of the democracy. The main function of media is to have a check and balance on the first 3 pillars of democracy which are the Legislature, the Executive and the Judiciary. Traditionally, this job of media is characterized as a "watch dog". Essentially, this role is to provide information – to be the "eyes and ears" of the public in

[14] *Dinesh Trivedi, M.P. and Others* v. *Union of India, (1997) 4 SCC 306 : (1997) 1 SCJ 697.*

[15] Sandip Bhosale, "Good Governance as Fundamental Right", 26 Legal News & Views 2 (2012).

monitoring what is happening in public life by reporting on daily events as they unfold. It has served as a main source of information, discussion and advocacy to reach the public. There are many instances in which government has taken action on the issue after media throws light upon that.

Securing Justice – social, economic and political is the core objective of the constitution of India. Media assists in achieving this goal in larger extent. Media is playing a role of "social scientist", a "critic evaluator" of plans and schemes of government. Media has a definite role to play in the empowerment of citizens. It gives voice to the needs and aspirations of the people and provides them access to relevant information. When people lack a voice in the public arena, or access to information on issues that affect their lives, and if their concerns are not reasonably reflected in the public domain, their capacity to participate in democratic processes is undermined. Media, in all its varied forms, has opened up the potential for new forms of participation. Thus, the vulnerable and marginalized sections of the society such as the poor, women, weaker sections and socially disadvantaged are also using the media to make their voices heard.[16] Legal literacy is a pre condition to maintain the "rule of law". The media has been rendering great job by showing programmes like "know your rights", "laws for laymen" which depicts legal concepts and create legal awareness among public.

The Supreme Court verdict through TV is another important step taken by Lok Sabha TV to educate people about the functioning of judiciary. By this way media is playing important role in giving legal education.

Media's role in protecting human rights is commendable. Its reports are given due consideration. Judiciary has given a "standing", considering reports by media as writ petition. Media has freedom to write a story in columns to draw attention of courts. For instance, a story has appeared in daily news paper depicting the grievance of a widow for her pension under the heading "Sainik Ki Biwi Chalis Saal se Pension Ke Liye Bhatak Rahi Hai". The Chief Justice of Rajasthan took cognizance of the report[17] and awarded decree stating that she was entitled for

[16] Rahul Deo, "Freedom of Press : Pillar of Democracy", Lawctopus (Dec. 19, 2014) https://www.lawctopus.com/academike/freedom-press-pillar-democracy/

[17] *Ram Pyari* v. *Union of India, AIR 1988 Raj 124.*

benefits which is her right and directed Govt. to pay the widow all the arrears of pension within one month. The media has been successfully exposing various politicians and governments for their activities involving violation of human rights. By this way media guards public interest.

12. Role of Media: A critical evaluation

Freedom or liberty is associated with responsibility too. The impact of media has both sides a bright and a dark side, because media's impact can be assessed positively as well as negatively. The responsibility of the media is greater than the responsibility of an individual because the media has a larger audience. Media has certain flaws such as:

Trial by Media: is a recently coined term and is used to denote a facet of "media activism". It means the impact of television and newspaper coverage on a person's reputation by creating widespread perception of guilt regardless of any verdict in a Court of law. There is no legal system where the media is given the authority to try a case. Trial is essentially a process to be carried out by the courts and is associated with the process of justice. It is the indispensable component on any judicial system that the accused should receive a fair trial. Trial by Media not only tends to miscarriage of justice but it also injures the sanctity of judiciary.

Right to Privacy and Media: The right to privacy is fundamental right guaranteed by the Constitution under Article 21 "right to life and personal liberty". Media, sometime in the name of sting operation and creating sensationalizing news, violates the privacy right of an individual.

The Paid News Culture in Media: Media though established as fourth pillar to have a check on other organs of govt., like other organs it is not free from corruption. Today, the corruption in media has become much more institutionalized and organized wherein media receives funds for publicizing information in favor of particular individuals, corporate entities, leaders of political parties and candidates contesting elections that is sought to be disguised as "news".[18] This paid news culture in media sometimes misleads the public. This perhaps may derive wrong

[18] P. Ashraf, "The Role of Media in Good Governance: Paid News Culture of Media and the Challenges to Indian Democracy " 3 (3) International Research Journal of Social Sciences, pp. 41-43 (2014).

opinion of the public. Because video – audio presentation has much more influence on the minds of human beings.

13. Conclusion

The prime purpose of free speech and expression is to strengthen an individual to participate in decision making and media is playing significant role in achieving participatory democracy by keeping public well informed with all the news. Being a bridge between government and public it is contributing to create a healthy democracy. Media is acting as voice of people in governance by providing a platform to people on which they can share their opinions and grievances. Media depicts the loopholes or lacunas in the policies to caveat the government to act responsibly. It has a role to play to achieve accountability and transparency which are the core values of good governance. Despite having all the glories, media also have blemishes. In the vague of attracting more eyeballs, achieving more TRP media sometimes tends to cross the code of ethics. The role of media in India is not merely disseminating information and entertainment. Educating the masses for their social upliftment needs to be in its ambit as well, media should act responsibly in developing countries like India in which still there are many issues like poverty and unemployment etc. It should not cross the limits of liberty there should be proper ethical code of conduct for media and journalism. Inaccuracy of information, invasion of right to privacy, trial by media and other instances like these are proving that media is creating an unhealthy atmosphere which is to be prohibited in totality. Free press does not mean an uncontrolled press. Uplifting the standards of journalism is the only solution for achieving free press in its true sense.

INTERNATIONAL TRADE, ENVIRONMENTAL CHALLENGES AND WTO

*Mr. Sunil N. Bagade**

1. Introduction

The environment provides in abundance the resources for the progress of the society. Utilising these resources the human society has achieved progress and continuously in pursuit of progress. It is to be noted that the technological revolution and availability of natural resources made the industrialisation possible.[1] The industrialization helped the nations to achieve economic development at a faster rate. Another important outcome of industrialization was the development of international trade.

With the growth of the industries throughout the world the production of goods also increased considerably. It is observed that the domestic market was not sufficient to absorb the products produced in large quantities. This made the nations to explore the trade opportunities with the foreign territories. With the increase in the international trade the demand for the products also increased. This in turn exerted pressure on the industries to produce more. The increased production in turn imposed pressure on the natural resources.

When the nations started realising the effects of environmental degradation, they came up with measures for the environmental protection. These measures necessarily imposed restrictions on trade. This led to the conflict between trade and environment.

This article aims at understanding the environmental challenges posed by the international trade. An effort is also made to study the conflict which exists between trade and environment. The role of WTO in resolving this conflict has also been analysed in this article.

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[1] R. M. Hartwell, *The Industrial Revolution and Economic Growth*, (New York, Routledge Publications, 1971), pp. 38

2. Development of international trade

During 1800s world witnessed industrial revolution. This revolution brought significant changes in the ways and means of carrying out the business. It resulted into a transition from industries carried in the homes to industries in factories with power-driven machinery.[2] It is to be noted that up to the middle of eighteenth century agriculture was the main occupation throughout the world. Apart from agriculture, in order to generate additional income people used to run industries.[3]

These industries were confined to domestic sphere. In other words, cottage industries were the allied economic activities. Manual labour was the chief source of power. The methods of manufacture of goods were primitive. Transportation system was not so developed. Owing to these circumstances trade use to take place within the provinces. The trade between the provinces or States was very minimal. As such the pace of economic growth was slow.[4]

During those period the poverty, poor standard of life, unemployment, etc. posed sever challenge before the States. In order to achieve economic development the States were under the pressure to address these issues. The only way to come out of these problems was to achieve higher economic growth. These circumstances paved the way for industrial revolution. The growth in the industrial sector contributed towards increase in national income. Another major contribution of industrialization was promotion of international trade.

The international trade was not the immediate outcome of industrialization. Initially the States were reluctant to trade with foreign States. The States were practicing inward looking economy rather outward looking economy. In this system States were inclined to export the products keeping imports very minimal.[5] This hindered the growth of international trade. Subsequently the States realized the importance of international trade and opened the domestic markets for foreign goods. The detailed account of international trade is discussed below.

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[2] A. P. Thirlwall, *Economics of Development*, 9th edn., (Hampshire, United Kingdom, Palgrave Macmillan Publishers, 2011), pp. 118

[3] *Ibid*

[4] *Ibid*, pp.119

[5] Thomas A. Pugel, *International Economics*, 13th edn., (New Delhi, Tata McGraw-Hill Publishing Company Limited, 2008), pp. 16

International trade is understood as "the exchange of goods and services between nations".[6] It is said that international trade allows for a greater competition and more competitive pricing in the market. The competition results in more affordable products for the consumers. It provides leverage to the swift growth of economy of the nations. In the initial phase of development, the pace of development of international trade was slow as the nations adopted the policy of protectionism. The term protectionism means "a system of protecting domestic producers by impeding or limiting, as by tariffs or quotas, the importing of foreign goods and services".[7] During the said period *Mercantilist policy* was followed by many nations. This policy was highly protectionist in nature.

The nations were aiming at becoming self-sufficient. Hence, they relied on *Mercantilist policy* to ensure that domestic industries should flourish and export should increase. The practice of this policy made the nations to adopt protectionism strategy. This hindered the growth of international trade considerably. This not only hampered the economic growth of the nations but also created a tension between them.[8] It is only after the Second World War that nations started realizing that there is a need to abandon protectionism tendency and establish barrier free economic transactions between them in order to achieve prosperity and maintain peace in the world.

This felt need made the nations to think in terms of adopting least barriers or barrier free international trade. The renowned Economists also argued that it is free trade between the nations which will ensure economic prosperity. The concept of free trade is understood as "a policy by which a government does not discriminate against imports or interfere with exports by applying tariffs (to imports) or subsidies (to exports)".[9] However, a free trade policy does not necessarily imply that a nation abandons all control and taxation of imports and exports. The concept of free trade connotes that a nation will impose least barriers in a non-discriminate manner or no barriers on trade with other nations.

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[6] Ghanshyam Sharma, *International Trade: Theory and Practice*, (New Delhi, Centrum Press, 2012), pp. 14

[7] Rajat Acharya and Saibal Kar, *International Trade and Economic Development*, 1st edn., (Oxford, Oxford University Press, 2014), pp. 6

[8] *Ibid*, pp. 9

[9] *Supra* note 7, pp. 32

No doubt international trade helped the nations to achieve economic development at a faster rate but the negative externality which arouse out of increased trade adversely affected the environmental quality. Various environmental problems started coming to lime light and placed challenge before the nations. With respect to the impact of trade on environment there exist a difference of opinion among the free trade advocates and environmentalist. The following paragraphs try to analyse the same.

3. Views on trade and environment linkage

The Free trade advocates opine that economic growth by itself is not environment damaging process. According to them if policy of economic development is pursued in a sustainable manner it can positively contribute towards environmental protection. The following paragraphs present the views of free trade advocates.

3.1 Views of the proponents of free trade

The proponents of free trade are of the opinion that free trade increases the economic growth of the nations. The economic growth result in substantial increase of income of the nation. The higher income result in both higher levels of consumption and associated environmental externalities, and also in higher willingness to pay for environmental improvement.[10] The propositions of the proponents of free trade can be studied under following heads:

3.1.1 Scale, Technology and Composition Effect

The proponents of free trade rely on scale, technology and composition effect to explain the relationship between trade induced economic growth and environment. According to this analysis, scale effect indicates that the international trade leads to a greater scale of economic activity while increasing the demand for products and also consumption of goods. The larger volumes of economic activities result in the over exploitation of natural resources. This results into depletion of natural resources and the degradation of environmental quality.[11]

[10] Philip Lawn, "Globalization, Economic Transition and the Environment: an introduction", published in Philip Lawn (ed.), *Globalization, Economic Transition and the Environment: Forging a Path to Sustainable Development*, (U.K., Edward Elgar, 2013), pp. 10

[11] *Ibid*, pp. 12

The proponents argue that this effect is temporary. They contend that the economic growth does not take place in isolation. Growth is dynamic and responds to new pressures, constraints and opportunities. Hence, growing economy not only results in increase in scale but also trigger changes in the technology and composition or structure of the production. In other words, the international trade helps in the economic growth and resultant increase in national income. This increase in income enables the nation to opt for clean technology and adopt environmental friendly development pattern. This effect is referred to as technology effect.[12]

The third aspect in this analysis is the composition effect. The composition effect stipulates that with the increase in the national income, the nation will be capable of moving from pollution intensive production method to environmental friendly production method.[13]

Thus, the scale, technology and composition effect shows that initially as the trade induced economic growth takes place the pollution level also increases. In due course of time as the economy grows and income increases, the nation will be capable of investing in clean technology and adopting environment friendly production method. Thus, the free trade helps the nation to protect environment in more effective manner. This establishes the positive link between trade and the environment.

3.1.2 Environmental Kuznets Curve

The proponents of free trade contend that the fastest road to environmental improvement is growth in economy. The Environmental Economists argue that the relationship between trade led economic growth and environmental quality, whether positive or negative, is not fixed along a nation's development path. Such relationship changes sign from negative to positive as a nation reaches a level of income at which people demand and afford more efficient infrastructure and a cleaner environment. The inverted- U relationship between environmental degradation and economic growth came to be known as the *Environmental Kuznets Curve*.[14]

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[12] *Supra* note 11.

[13] *Ibid*, pp.14

[14] *Ibid*, pp. 25

Before the advent of *Environmental Kuznets Curve*, there was a debate on the limited ability of the earth to absorb pollution. But the *Environmental Kuznets Curve* shifted the debate from the scarcity of natural resources to the necessity of economic growth in order to overcome the problem of environmental degradation. It is contended that rise in the income helps in the protection of environment.[15]

The *Environmental Kuznets Curve* was popularized by the World Bank's World Development Report, 1992. The World Bank in its report revealed that:

> "The view that greater economic activity inevitably hurts the environment is based on static assumption about technology, tastes and environmental investments. As the income rises, the demand for improvements in environmental quality will increase and also the investment in environmental protection measure."[16]

It can be noted that the *Environmental Kuznets Curve* is indicating that at low levels of development, both the quantity and the intensity of environmental degradation depend upon the nature of the economic activity adopted by a nation. As the economy develops, the demand for the clean technology also increases. This helps in ensuring of protection of environment.

3.1.3 Proposition pertaining to 'Market Failure', 'Ill-Defined Property Rights' and 'Policy Failure'

The proponents of free trade contend that the degradation of environmental quality is not the result of trade induced economic growth. According to them 'Market failure', 'ill-defined property rights' and 'Policy failures' are the root cause of environmental pollution.

The "Market failure" refers to the situations in which the market forces of supply and demand fail to account for externalities. It is said that the "Market failures" occur when producers and consumers do not take into account the full cost of their actions such as environmental pollution (externality). In this regards the environmental damage is often described as an externality, a cost that is imposed

[15] Abid Rashid Gill, Kuperan K. Viswanathan and Other, "Is Environmental Kuznets Curve Still Relevant?", International Journal of Energy Economics and Policy, 2017, 7(1), pp. 156

[16] David I. Stern, "The Environmental Kuznets Curve" available at http://isecoeco.org/pdf/stern.pdf accessed on 12.08.2017

on society at large rather than internalized by the individual causing the damage. The market failures occur where externalities exist when markets do not reflect environmental concerns. The market failures take place due to the failure of the markets to correctly value and allocate environmental assets. In other words, the market prices of the goods do not fully integrate their environmental costs.

It is said that the environmental damage occurs for the inefficient use of environmental goods due to market failure.[17] It is argued that in such cases too much resources are invested in polluting activities and too few in pollution abatement.

The market failure can result from the failure of polluters to take into account the environmental costs of their activities. This results into the environmental costs being externalized rather than internalized in the prices of the goods. The environmental externalities arise from the consumption of products that impose costs on other that are not compensated for via markets. This divergence of the internalized costs of an activity from its total cost may be reflected in the form of environmental degradation. Failure to internalize environmental costs contributes to the environmental problems.

Further, it is argued that ill-defined or undefined property rights over the natural resources are also the cause for environmental degradation. If a person, without restrictions, can extract the resources of forests, collect firewood on common land or pollute rivers, streams without a need to pay for pollution abatement activities that result in the over-exploitation of natural resources. The consequences will be environmental degradation. This phenomenon is referred to as the "tragedy of the commons".[18]

It is argued that environmental externalities occur mainly because of inadequate property rights over common properties such as air, water, etc.[19] The industries that release large amounts of harmful gases into the air or which release effluents into the water are shifting some of their production costs to society. The industries which pollute benefit from paying lower production costs compared with those

[17] Mollie Lee, "Environmental Economics: A Market Failure Approach to the Commerce Clause", The Yale Law Journal, 2006, pp. 459

[18] *Supra* note 10, pp.48

[19] Robert O'Brien, Michael Clarke and Other (Ed.), *Controversies in Environmental Policy*, (Albany, State University of New York Press, 1986), pp. 46

industries which use cleaner technology or installs pollution-control equipment.[20] Society bears the costs of pollution through diminished opportunities to enjoy clean environment and face pollution-related health issues and their associated medical costs.

The point to be understood is when resources are not owned or the property rights are poorly defined, individuals have little incentive to monitor its use or overuse. In such cases, economists suggest property rights can be granted to ensure custodianship of the resource. The economists strongly argue that the well-defined property rights helps in holding individuals accountable and create incentives to maintain and allocate resources efficiently, because owners bear any losses from the mismanagement of their resources.[21]

Another important aspect which economists quote as reason for environmental degradation is "Policy failure". The concept of "Policy failure" contemplates that the Government of a nation has less stringent environmental laws or has failed to effectively implement the environment protection laws.[22] This also contributes to the environmental degradation as the polluter is not regulated under the laws.

It is contended that environmental policy intervention failures or the lack of appropriate environmental policies are also the cause of environmental problems. It is said that policy interventions such as production and export subsidies, trade barriers etc. can potentially harm the environment. For instance, when a government provides incentives through production and export subsidies, the industries try to over exploit the natural resources in order to produce and export more goods. This trend results into degrading of the environmental quality.[23] The OECD study on the impact of trade on the environment supports the above view. The study also suggests that the market failure and policy failure are the root cause for the pollution.[24]

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[20] *Ibid*, pp. 49

[21] Carrie B. Kerekes, "Property Rights and Environmental Quality: A Cross-Nation Study", available at https://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2011/5/cj31n2-8.pdf accessed on 15.8.2017

[22] Michael Howes, Liana Wortley and Others, "Environmental Sustainability: A Case of Policy Implementation Failure?", Journal of Sustainability, 2017, 9, 165

[23] Edward Barbier and Joshua Bishop, "Economic Policy and Sustainable Natural Resource Management", published in Johan Holmberg (Ed.), *Making Development Sustainable – Redefining Institutions*, Policy and Economics, (Washington, Island Press, 1992), pp. 72

[24] Organization for Economic Co-operation and Development report on "The Environmental Effects of Trade' (1994), available at http://journals.sagepub.com/doi/pdf/10.1177/027046769501500431 accessed on 12.8.2016

Thus, it is said that in order to ensure effective protection of environment the market scenario should internalize the externalities, appropriate policy is to be adopted and property rights have to be properly defined. To have a 'Worth-Living Development' which seeks to ensure that "each generation will hand over to the next one a better place to live in"[25] it is necessary that environmental concern should be the part of trade concerns.

3.2 Views of Environmentalists

The Environmentalists hold opposite view on the impact of trade on environment. According to them free trade has resulted in the environmental degradation. The Environmentalists are of the view that the industrialization and free trade have exerted immense pressure on the natural resources, straining the capacity of the environment to sustain itself and has exposed the world to various environmental hazards. In other words, the increase in the volume of international trade has helped the nations to attain economic development at a faster rate. But at the same time the over exploitation of natural resources has resulted in the environmental crisis. The propositions of the Environmentalists can be studied under following heads:

3.2.1 Race to the bottom

It is observed that the effect of trade on environment fundamentally depends on the policy regime. Trade-induced environmental damages can be prevented if environmental policy responds to the challenge by tightening up emission standards, imposing penalty for polluting the environment, etc. But if policy is not responsive, environmental degradation is the natural result.[26]

The "race to the bottom" theory is related to environmental policies of the nations. A nation in order to achieve economic development opens up its market to other nations. In this process if it learns that due to its stringent environmental protection laws the traders, investors are not ready to trade or invest in the nation, then there is a possibility that the nation may relax its environmental standards.

[25] *Supra* note 13, pp. 92

[26] James K. R. Watson, *The WTO and the Environment: Development of Competence Beyond Trade*, (New York, Routledge Publications, 2013), pp. 100

This phenomenon is referred to as "race to bottom".[27] The Environmentalists argue that in this process a nation ignore the environmental concerns and focuses more on trade concerns.

The Environmentalists further argue that not only the desire to achieve economic growth makes a nation to reduce its environmental standards, even the international competitions for investment and trade constrains the nation to lower the environmental standards. In other words, two similarly placed nations in terms of environmental quality and economic development in order to attract foreign traders into its territory may lower its environmental standards as compared to the other nation similarly placed.[28]

There is another argument advanced by the Environmentalists based on this theory. They contend that "race towards bottom" may take place in an indirect way also. According to them in the process of achieving the economic growth a nation may set its environmental standards strategically with an eye on the pollution control burdens in competing jurisdictions.[29] Here it is not the price of the products or the desire to achieve economic growth but the objective to staying strategically ahead of other nations which makes the nation to adopt lower environmental standards. These effects might involve not only weakened environmental laws, but perhaps more importantly, lax enforcement of existing rules.

The theory of "race to bottom" clearly contemplates that the concerns of trade, economic growth undermines the environmental regulations. Thus, the Environmentalists argue that there is a negative relationship between trade induced economic growth and environmental protection.

3.2.2 Pollution Haven Theory

The Pollution Haven Theory indicates that the competition resulting from free trade tends to shift pollution-intensive industry to nations with relatively weak environmental policy. This theory is based on the concern that weak environmental policy attracts pollution-intensive industry. This theory suggests

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[27] *Ibid*, pp. 101

[28] Daniel Esty and Maria Ivanova, "Globalization and Environmental Protection: A Global Governance Perspective", The ICFAI Journal of Environmental Law, Oct. 2005, pp. 44

[29] Peter Bartelmus, *Environment and Development*, (London, Allen & Unwin Publishers, 1986), pp. 56

that trade liberalization allows firms to take the benefit of cross-nation differences in environmental regulations, and that falling trade barriers induces pollution-intensive industries to relocate to nations with weaker environmental regulations. The relocation of these industries will not only negatively affect the nation with the high environmental standard, it will further aid in the environmental degradation of the nation with the lax environmental standards.

It is contended that, the notion that stringent environmental policy may reduce productivity and drive away firms from its territory, makes the nation to relax environmental policy. This tendency makes the pollution intensive industries to choose such nations for their operation. Even a nation may relax its environmental policy to favour domestic firms at the expense of foreigners. This makes such kind of nations as pollution heavens.

The Environmentalists argue that environmental policies are often opposed on the grounds that they will cost jobs and reduce the pace of economic growth. There is a notion that the nations which choose to implement strong environmental protection measures may experience *flight of firms* and investment, damaging the economy.[30]

Some empirical studies conducted by the Economists reveal that pollution intensity in developing nations grew fastest when environmental regulations in high-income nations were toughened. This study supported the view that different environmental standards could create pollution havens.[31] Further, the World Trade Organization in its special report on Trade and Environment has categorically noted that all nations cannot specialize in clean industries. The trade is associated with a relocation of pollution problems in the world.[32]

3.2.3 Principle of "Earth's Carrying Capacity"

The Environmentalists rely of the principle of Earth's Carrying Capacity to indicate the negative impact of trade induced economic growth on the environment.

[30] Sunderlal Bahuguna, Vandana Shiva and Other, *Environment Crisis & Sustainable Development*, 1st edn., (Dehra Dun, Natraj Publishers, 1992), pp. 86

[31] *Ibid*, pp. 89

[32] Hakan Nordstrom and Scott Vaughan, *WTO Special Study on Trade and Environment*, (Geneva, WTO Publications, 1999), pp. 3

According to them, the earth can support life only to certain limits. If such limits are crossed then there may be serious consequences threatening the very existence of life. This proposition is referred to as *Earth's Carrying Capacity.*[33] The proponents of this theory contend that resources on earth are finite and human beings have resorted to consume more than the earth's resources. This has resulted into human beings overstepping the earth's carrying capacity. They contend that the relentless drive to produce more in order to meet the rising demand exhausts the resources and pollutes the environment. They argue that the drive to pursue greater economic growth has taken the earth beyond its carrying capacity. They argue that over consumption drawing down the earth's limited resources and one must respect the earth's carrying capacity.

Apart from the above contentions, the Environmentalists argue that measures aimed at protection of environment are not the obstacles to the economic growth. They contend that, if a nation implements the environmental protection measures effectively then it can prompt a variety of new investments and increased organizational efficiency.[34]

The above discussed theories propounded both by Free trade proponents and Environmentalists amply establish the positive and negative impacts of trade induced economic growth on the environment. In reality the negative consequences have outweighed the positive effects of trade induced economic growth. The result is degradation of environmental quality.

4. Trade induced economic growth and environmental pollution

As noted above, the increase in the intensity of international trade exerted more pressure on the industries to manufacture goods in large quantity. To meet the increased demand the industries started overexploiting the natural resources which resulted into severe depletion of those resources. Broadly speaking, the industries cause environmental pollution in three ways. They are[35]:

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[33] Jennifer Clapp and Peter Dauvergne, *Paths to Green World: The Political Economy of the Global Environment*, (London, The MIT Press, 2005), pp. 9

[34] C. V. Rajashekhara, *Environment Policy and Development Issues*, (New Delhi, Discovery Publishing House, 1992), pp.22

[35] Se Hark Park and Walter Labys, *Industrial Development and Environmental Degradation – A source book on the origins of Global pollution*, (USA, Edward Elgar Publications, 1998), pp. 6

(a) The process of manufacturing of goods in the industries generates pollution. The emissions which occur or the effluents generated during the process of manufacturing of the goods causes environmental pollution.

(b) The intended use of the industrial products also causes environmental pollution. For instance, the vehicular exhaust, use of chemical fertilizers, etc. damage the environment.

(c) The products after use generate huge quantity of waste. Due to unscientific disposal of these wastes the environment is adversely affected.

The above mentioned categories clearly indicate that the very process of industrial production is pollution causing activity. The increased industries and the production resulted into various kinds of pollution. Water pollution, air pollution, land pollution, etc. are the direct results of trade led growth. In the initial phase the pollution was confined to the territories. But with the industrialization and increased trade environmental pollution became global.

The global level degradation of environmental quality posed severe challenges before the nations. More specifically the pollution caused by the trade led development resulted into global warming. The term global warming means, increase in the earth's surface temperature due to accumulation of greenhouse gases that trap heat in the earth's atmosphere.[36] The point to be noted here is that, the greenhouse effect is a natural phenomenon. The greenhouse gases such as carbon dioxide, methane, etc. trap the radiations of the sun reflected back from the earth's surface. The radiations are trapped within the earth's atmosphere. This process helps in keeping the earth's temperature intact. This is called as greenhouse effect. The naturally occurring greenhouse effect is beneficial to the earth's environment. But the increase in intensity of arresting the reflected radiations has adverse effect.

Due to the industrialization the emission of the greenhouse gases has increased considerably. Apart from the same industrialization has drastically reduced the forest cover. The forests had the capacity of absorbing the greenhouse gases and keep the environment safe. But the deforestation has drastically affected the environment's assimilation capacity. This has resulted in the increase in

[36] Gurdip Singh, *Global Environmental Change and International Law*, (New Delhi, Aditya Books Pvt. Ltd., 1991), pp.3 - 4

concentration of greenhouse gases in the environment.[37] With the increase in the concentration of greenhouse gases in the environment more radiations is getting trapped and the earth's temperature is gradually increasing. In other words the earth is becoming warmer with the increase in the emission of greenhouse gases.

The scientists are of the opinion that anthropogenic increases in atmospheric carbon dioxide and other greenhouse gases could lead to an increase in the global average temperature of 0.3 to 4.8 °C.[38] This global warming could alter Earth's climatic conditions including extreme situations of drought, rainfall, disruption in food production, rise of sea level, etc.

Apart from the global warming the world witnessed instances of acid rain. The term acid rain refers to a phenomenon where the acidity of rainwater increases beyond that of clean rainwater because of the fact that it gets contaminated with chemicals introduced into the atmosphere through industrial and other emissions.[39] In other words, acid refers to the rain which is acidic in nature due to the presence of certain pollutants in the atmosphere emitted from industrial and other process.

The fossil fuel and industrial combustions emit nitrogen oxides and sulfur dioxide in the atmosphere. When these oxides react with water molecules and oxygen present in the atmosphere, mild acidic chemical compounds such as sulfuric and nitric acid are formed. This results into formation of acid rain. It is observed that when these gases mix with rain, these acids fall as wet deposition i.e. as acid rain. In the absence of rain, the particulate matter gets settled on the ground as dry deposition. This wet and dry deposition of acidic substances together is referred to as acid precipitation.[40] The acid rain has deleterious effect on the environment. It affects the quality of soil, aquatic life, pants, human health, buildings, etc.

Another major environmental problem is the depletion of ozone layer. Ozone layer is a gaseous layer which encircles the earth. This layer exists in the lower part of the stratosphere which exists 15 to 30 km above the earth. The importance

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[37] Savita L. Patil, "Climate Change and Global Warming: A legal Perspective", published in Dr. Chidananda Reddy S. Patil (ed.), *In Honour of the Common Man (Essays in Law)*, (Dharwad, Alumni Association, University College of Law, 2013), pp. 147

[38] Dr. Vijay Chitnis and Dr. Ramesh Tilak, *Changing face of the Planet and Environmental Law*, 1st edn., (Mumbai, Snow White Publication Ltd., 2001), pp. 25

[39] George Smith, "Acid Rain: Transnational perspective", N. Y. L. SCH. J. INT'L and COMP. L., pp.4

[40] *Ibid*, pp. 5

of ozone layer lies in the fact that it protects life on earth from ultraviolet radiation which comes from the sun. The ultraviolet rays have harmful effects on health of the living being and environment. If human beings are exposed to ultraviolet rays then there is a possibility of contracting disorders such as skin cancer, cataracts, etc. Even other living organisms get negatively affected because of the exposure to the ultraviolet rays.

The ultraviolet radiations have adverse effects on the environment. The excessive ultraviolet radiations hinder the growth process of plants. This may lead to a loss of plant species and may possibly reduce food supply to the living beings.[41]

The ultraviolet radiations having these impacts are regulated by ozone layer. It prevents the rays from entering into the earth's environment. Thus, ozone layer protects the life on earth. However, this layer is at peril. The emissions from industries and industrial products have severely damaged the ozone layer. The emissions have reduced the thickness of ozone layer causing depletion of the layer. In some parts of the world the scientists have observed the hole in the ozone layer. In other words, absence of ozone layer in some territories has been identified.

The cogent scientific studies have established that the main reason for the ozone layer depletion is anthropogenic activities. The ozone depleting substances such as chlorofluorocarbons (CFCs), carbon tetrachloride, hydro-chlorofluorocarbons (HCFCs), etc. are the results of industrial production. These substances stay intact in the atmosphere for long period. These substances react with the ozone layer and causes severe damage to it.[42] As the ozone depleting substances remain in atmosphere intact for longer period the intensity of the damage to the ozone layer is more.

Owing to these negative externalities the world is witnessing the climate change phenomenon. The term climate change refers to a change in the climatic conditions that can be identified by changes in the variability of its properties and that persists for an extended period.[43] In other words, it refers to any change in climate over time, whether due to natural phenomenon or as a result of anthropogenic activities.

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[41] *Supra* note 11.

[42] *Ibid*, pp. 12

[43] *Ibid*, pp. 18

The point to be noted here is that climate change is a natural phenomenon. The earth's climate changes from time to time owing to the natural phenomenon. But these changes are nominal and do not affect life on the earth. The climate change caused by the human activities is the major concern. The human induced climate change has deleterious effect on the environment and life on earth.

The above discussed consequences are the result of industry led and trade induced economic growth. These adverse consequences were not known to the world till 1970's. When the environmental consequences came to lime light the world started focusing on the measures aimed at curbing these consequences. This process resulted into the evolution of environmental laws both at national and international level.

These laws enabled the nations to adopt trade related environmental measures in the guise of protection of environment. The nations which were affected by these measures approached the Dispute Settlement Body (DSB) of WTO questioning the validity of such measures. The further discussion focuses on the WTO provisions which promote environmental concerns and the role of DSB in resolving the trade and environment conflict.

5. WTO/GATT and trade related environmental measures

The General Agreement on Trade and Tariff adopted in the year 1947 provides rules regulating international trade. With the objective of ensuring free trade, the GATT constrains governments from imposing or continuing the measures that restrain or distort international trade. To further its objective GATT has mandated the observance of non-discrimination principle in international trade. The GATT has incorporated two non-discrimination principles, namely, the Most-Favoured-Nation principle and the National Treatment principle.

The Most-Favoured-Nation principle provides equal treatment of "like products" originating or destined for all other contracting parties.[44] The National Treatment principle of provides equal treatment between domestic and imported products.[45] These two principles are the core obligations of GATT. Through these

[44] Article I of GATT

[45] Article III of GATT

principles GATT is promoting free trade and also restricted the nations from adopting trade distorting practices.

Any deviation from these core principles of GATT will be treated as GATT inconsistent practice and accordingly DSB of GATT may strike down such practices. This does not mean that a nation cannot adopt a measure which is GATT inconsistent. GATT has recognised certain exceptions. A nation which adopts a measure which is GATT inconsistent has to justify its action based upon any of the exception recognised under the agreement. Article XX of GATT deals with the exceptions which enable the nations to adopt GATT inconsistent measures.

From the perspective of environmental protection when GATT provisions are analysed it has been observed that it does not have any specific provision providing for the same. However, two sub-clauses of GATT, namely Article XX (b) and (g) are frequently invoked by the nations in order to justify their environment protection motivated GATT inconsistent measures. The text of the Article is as under:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …
>
> (b) necessary to protect human, animal or plant life or health; …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;…"[46]

As can be observed from the above cited text, nowhere it mentions the term environment. Even then the nations have invoked these provisions for the purpose of legitimizing their GATT deviant measures. On the other hand, the nations which were affected by the imposition of such measures challenged the validity of the same before the DSB.

[46] Article XX (b) and (g) of GATT

In these kinds of cases DSB was expected to render judgment having implications on trade and environment issues. The following paragraph tries to trace the approach of DSB towards trade and environment issues.

The *Herring-Salmon* case was the first case wherein Article XX was invoked on the ground of environmental protection.[47] In this case the Canadian regulation which restricted the export of certain fish was challenged before the DSB. The United States contended that the regulation was intended to protect the Canadian fishing industry. Canada defended the regulation contending that regulation aims at the protection of native fish stock and thus protected under Article XX (g) of GATT.

The DSB observed that the salmon and herring stocks were exhaustible natural resource but the challenged regulation was not directly aimed at protecting the fishery and was, therefore, an illegal trade sanction. In reaching this conclusion, the Panel interpreted the phrases "relating to" and "in conjunction with" in Article XX (g) to mean "primarily aimed at." It is observed that the said interpretation of the provisions of GATT is inconsistent with a plain reading of the words of the agreement and considerably decreases the coverage of the said Article to regulations that are solely intended to conserve the natural resource.

The *Thailand-Cigarette* case is another important case which came before DSB for resolution.[48] In this case also Article XX exception was invoked to justify the measures. Thailand came up with a regulation which required the importers of cigarettes to obtain a permit from the government before importing. The United States challenged this regulation on the ground that it amounts to imposition of ban on imports. Thailand defended the regulation contending that it is necessary to protect human, animal or plant life or health and thus protected under Article XX (b). Thailand claimed that that the purpose of the regulation was to protect its citizens from addiction to cigarettes and more specifically, from the chemical additives in American cigarettes.

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[47] Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22,1988, GATT B.I.S.D. L/6268-35 S/98

[48] Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. DSIO/R-37S/200

In this case the DSB interpreted the term "necessary" to mean "least GATT inconsistent" measure and ruled that Thailand measure is not least GATT inconsistent measure. Thus it struck down Thailand measure as violative of GATT obligation. The Panel observed that any measure invoked under Article XX (b) has to be least GATT inconsistent measure. Thus it promoted the free trade interest than the environmental concerns.

Another landmark case which came before DSB was *Tuna Dolphin-I* case.[49] In this case, Mexico and intermediary importer nations challenged certain provisions of the United States' Marine Mammal Protection Act (MMPA). The Act prohibited the importation of tuna caught using purse-seine nets which caused incidental killing of dolphins in huge quantity. It was observed that the dolphins frequently swim directly above group of tuna, and fishermen, knowing that the tuna sought will be below, surround dolphins with purse-seine nets. In this process dolphin used to be killed or got hurt. To prevent such kind of incidental killing of dolphin United States imposed ban on the use of purse-seine nets by the American fisherman and also the importation of tuna caught with such nets which was effective on foreign fishermen.

Mexico challenged this measure before DSB. The United States defended the said regulation under Article XX (b) and (g) of GATT. The United States argued that the regulation was necessary because there was no other alternative and that the regulation was primarily aimed at protection of the dolphins, an exhaustible natural resource. In connection with the exception provided under Article XX (b), the Panel observed that the United States had not attempted to adopt multilateral agreements to protect the dolphins. According to the Panel, until international negotiations were attempted and had failed, trade restrictions could not be found to be necessary. This is a further extension of the interpretation of 'necessary' that the Panel developed in the *Thailand-Cigarette* case.

As per the Panel interpretation, in order to be necessary, the regulation must be "least GATT inconsistent." In order to be least GATT inconsistent, the regulating nation must have *exhausted all other options reasonably available to it to pursue its objectives through measures consistent with the General Agreement, in particular*

[49] United States-Restrictions on Imports of Tuna, Sept. 3, 1991, GATr B.I.S.D. 39S/155 (39th Supp.) (1993)

through the negotiation of international cooperative arrangements.[50] This analysis poses considerable hurdle in adopting a measure aimed at the protection of environment, namely, first, such requirement is nowhere suggested in the GATT and secondly, despite the said fact, a nation intending to adopt a measure for the protection of environment has to overcome said requirement in order to survive DSB scrutiny.

Further, while interpreting the exception under Article XX (g), the panel observed that the criteria wherein the allowable incidental killing rate of dolphin by the foreign fishermen was determined based on the incidental killing of dolphin by the American fisherman was considered to be too unpredictable. On the said ground the Panel held that the regulation could not be considered as primarily aimed at the conservation of a natural resource. The Panel observed that using of such criteria wherein incidental killing of dolphins by the American fishermen has been made yardstick to measure the importers amounts to arbitrary imposition of restriction and thus, violates the requirements specified under the chapeau. The Panel also ruled that the regulation was invalid under Article XX (g) as it was not aimed the conservation of natural resources and was not made effective in conjunction with domestic restrictions.

After few years another case came to be filed before DSB. The said case is known as *Tuna-Dolphin* case II.[51] In this case several nations filed case against the United States for imposing import ban on the intermediary nation under the Marine Mammal Protection Act (MMPA). This regulation required the intermediary nations that exported tuna procured from other nations to the United States to certify that the imported tuna was not caught with purse seine nets. While examining the validity of Unites States measure under Article XX (g), the Panel came up with the method for determining the validity of the regulation. As per this method the Panel has to consider the followings:

1. Whether the alleged regulation was aimed to conserve exhaustible natural resources;

[50] Kazumochi Kometani, "Trade and Environment: How Should WTO Panels Review Environmental Regulations under GATT Articles III and XX", 16 Nw. J. Int'l L. & Bus. 441 (1995-1996), pp. 415

[51] GATT Panel Report, United States – Restrictions on Imports of Tuna, 16 June 1994, DS29/R444

2. Whether the effect of the regulation was related to the conservation and implemented in conjunction with similar domestic regulations;

3. Whether the regulation satisfies the requirement laid down under the chapeau of Article XX. In other words, whether the regulation was arbitrary or unjustifiable restriction on trade.

This method is referred to as bottom-up reading. Under this method in the first place the regulation will be scrutinised under the specific clauses of the exception and then under the chapeau. The Panel observed that the US regulation fulfilled the first test, whereas it failed to satisfy the second test for the regulation was not primarily aimed at the conservation of dolphins. To reach this conclusion the Panel observed that the regulation under the MMPA was primarily aimed at changing the policies of other countries in regard to the harvest of tuna rather than at protecting the dolphins themselves.

The critics of this judgment observed that the Panel concentrated on the extra-territorial application of the provision rather than on the intention behind imposing such provision. They observed that the Panel has failed to appreciate the fact that when the method adopted for catching tuna is the factor that is resulting into the killing of the dolphins, then how one can protect dolphins without changing the method of catching the tuna.[52]

Considering that the MMPA regulated the processes and not the products, the Panel in above two cases held that process related regulations are not justifiable under the Article XX. The DSB's approach was based of the National Treatment principle. In connection with the same, the United States contended that the national treatment requirement has been fulfilled because foreign dolphin-safe tuna was treated in the same manner as domestic dolphin-safe tuna, and foreign purse seine caught tuna was treated like domestic purse-seine caught tuna. Refusing to accept the said contention, the DSB observed that there exists no difference in the tuna itself irrespective of the fact that whether or not it was caught with a purse-seine net. Therefore, there was no justification for the embargo against purse-seine caught tuna.

[52] J. Patrick Kelly, Judicial Activism at the World Trade Organizational: Development Principles of Self-Restraint, 22 Nw. J. Int'l L. & Bus. 353 (2001-2002), pp. 358

It is observed that this ruling makes it impossible for a nation to regulate environmentally detrimental production processes through trade measures. Such a product and process distinction nullifies the purpose of Article XX exceptions aimed at the environmental protection. It is to be noted that the chapeau expressly states that "...nothing in this Agreement should be construed to prevent the adoption or enforcement by any contracting party of measures..." as a guiding proposition with respect to the interpretation of the measures adopted on the basis of the exceptions provided under the sub clauses of Article XX. In spite of this stipulation the adoption of a method of interpretation based on the product and process distinction goes against the GATT.[53]

As noted GATT was a temporary arrangement adopted for the purpose of regulating the international trade. In order to have a permanent body to regulate international trade in the year 1995 World Trade Organization (WTO) was established. The Preamble of the WTO expressly provided for the Sustainable Development principle. Thus WTO came up with the noble objective of promoting trade as well as protection of environment. Despite the same, the trade and environment continued to pose problem to the international trade. This is evident from the fact that DSB was asked to adjudicate the *Reformulated Gasoline* case involving the trade and environment conflict even after the establishment of WTO.

In *Reformulated Gasoline* case[54] Brazil and Venezuela challenged the United States Environmental Protection Agency's Regulation of Fuels and Fuel additives-Standards for Reformulated and Conventional Gasoline (hereinafter referred to as "gasoline rule") promulgated under the 1990 amendments to the Clean Air Act. This regulation stipulated different baseline establishment methods for foreign exporters of gasoline than those used by the domestic refiners. Against this rule it was argued that the gasoline rule discriminated against them in violation of the non-discrimination provisions of the GATT. The United States maintained that the gasoline rule was justifiable under Article XX as it was aimed at promoting lower emissions, maintain cleaner air, and protect public health.

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[53] *Ibid*, pp.360

[54] WTO Dispute Panel Report on United States-Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996, WTO Doc. WT/DS2/R.

Turning down the argument of United States, the DSB ruled against the United States and interpreted exceptions under sub clauses of Article XX based upon the rulings in earlier cases. Holding that the said regulation was not least GATT inconsistent, the Panel rejected the claim of United States under Article XX (b). Further, the Panel rejected the claim of United States under Article XX (g) on the ground that the regulation was not primarily aimed at the conservation of the natural resource. The said judgment of the Panel was challenged before the WTO Appellate Body. While deciding the appeal, the WTO Appellate Body reversed the Panel's finding that the regulation was not a valid exception. The Appellate Body stated that there was nothing in the GATT that indicates that the phrases "related to" and "in conjunction with" should be interpreted to mean "primarily aimed at".[55]

The ruling of Appellate Body is a noteworthy departure from earlier panel rulings. It is observed that the Appellate Body while interpreting the provisions of Article XX has relied upon the methods of interpretation laid down in the Vienna Convention. Broadly the Vienna Convention requires a good faith, plain language reading of treaties.[56] Relying on this plain\ reading interpretation of Article XX, the Appellate Body found that the gasoline rule was applied in conjunction with restrictions on domestic production. While interpreting in such manner, the Appellate Body observed that Article XX(g) required even-handedness but not identical treatment between domestic and foreign refiners. Therefore, the regulation was a valid Article XX(g) exception.

In this case the Appellate body has applied bottom up method devised in *Tuna I* for the interpreting the provisions. After holding that the Gasoline regulation was valid under Article XX (g), the Appellate Body proceeded to examine the validity of the said regulation in pursuance of requirements under the chapeau. The Appellate Body came up with the two-tiered test for interpreting Article XX, namely, first, analysing of the restrictions to check its conformity with the exceptions provided under the sub clauses and secondly, the appraisal of the said measure under introductory clauses of Article XX.

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[55] *Supra* note 54, pp. 367

[56] *Ibid.*

The Appellate Body stated that the chapeau should be interpreted wholly separate from the exception provided under the sub clauses that too after the regulation had satisfied the requirements of the specific exceptions. The Appellate Body observed that as the prescription of different baselines for the foreign refiners and the domestic refiners was not based upon any justifiable grounds, the imposition of such restrictions amounted to unjustifiable discrimination and a disguised restriction on international trade. Thus, although the regulation was found to be valid under Article XX (g), it did not survive scrutiny under the chapeau of Article XX.

The *Shrimp-Sea Turtle* case is another important case in the matter relating to trade and environment issues.[57] In this case, several Asian nations challenged the regulation of United States which prohibited the imports of shrimp that were caught in a manner that threatened endangered sea turtles. The contention of United States was that the incidental killings of sea turtles could be significantly reduced by the use of Turtle Excluder Devices (TEDs) which provide an escape hatch in the net for turtles without reducing the net's ability to catch shrimp. The said regulation was promulgated in consonance with the Endangered Species Act. This regulations provided that the exporting nations, whose fishermen operated in waters where sea turtles and shrimp coexist, have to certify that they are using TEDs or adopted a similarly effective method for catching shrimps before exporting the same into the United States.

This measure was challenged before the DSB. The Panel observed that the claim of United States is not justified under Article XX (b) and (g) of GATT. The Panel while analysing the validity of the said regulation under the chapeau first, observed that unilateral trade measures are inconsistent with the core provisions of GATT and the maintenance of the multilateral trading system. The Panel noted that the object and purpose of the WTO Agreement is to eliminate unilateral trade barriers and the Unites States measure at issue amounts to unilateral trade measure. Thus it held the U.S. measure as invalid. Further, it observed that the said regulation constitutes unjustifiable discrimination between countries where

[57] WTO Appellate Body, United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (98-3899) (Oct. 12, 1998)

the same conditions prevail and thus is not within the scope of measures permitted under Article XX.

On appeal the decision of the Panel was overruled by Appellate Body. It observed that this method of interpretation has no basis in the text of the chapeau. After determining that the sub clauses should be considered before the chapeau, the Appellate Body held that the challenged regulation fell under the Article XX (g) exception. The Appellate Body held that the regulation is related to the conservation of sea turtles which are exhaustible natural resources. The Appellate Body gave broader interpretation to the term natural resource by holding that its meaning is not limited to non-living commodities only.

In considering another requirement of Article XX(g), namely, if such measures are made effective in conjunction with restrictions on domestic production or consumption, the Appellate Body applied the even-handedness of the application test articulated in the *Reformulated Gasoline* case. The Appellate Body observed that the regulation was applied not only foreign fishermen but even to the domestic fishermen as well. Thus, the regulation was found to comply with the requirements of the said Article.

The appellate panel then took up the second portion of the two-tiered test, which tries to examine whether the regulation violated the chapeau. The Appellate Body found that though the regulation itself was not violative of the chapeau but its implementation by the U.S. Government unfairly discriminated against foreign fishermen.

The above cited decisions aptly demonstrate that the Dispute settlement Body evolved several tests to verify the validity of trade related environmental measures. In all these matters the DSB upheld the trade interest rather the environmental concerns. Initially even the Appellate Body followed the same approach. But the *Shrimp-Turtle* case marks the departure from this traditional approach.

6. Conclusion

No doubt the industry led and trade induced economic growth has helped the nations to achieve economic prosperity but the increased industrial activities and trade resulted in the over exploitation of natural resources. Further, the emissions

from the industrial process have severely damaged the quality of environment. The air pollution, water pollution, global warming, acid rain, etc. are the adverse consequences of the industry led and trade induced economic growth. It is to be noted that these economic gains have been achieved at the cost of environment. In this regard, the views of the Environmentalists and Free trade proponents differ from each other.

Further, the above study reveals that when nations started adopting the trade related environmental measures, their actions were challenged before the Dispute Settlement Body. The GATT agreement did not contain any provisions aimed at the protection of environment. The efforts of the nations to protect their environmental measures under the specific exceptions provided under Article XX of GATT had to face challenge before the DSB. The decisions of DSB in striking down such measures further aggravated the trade and environment debate.

Now that WTO has come up with Sustainable Development principle the Dispute Settlement Body and also the Appellate Body have to analyse the trade and environment issues in the light of Sustainable Development principle rather than just advancing the trade interests of the nations.

A CRITICAL STUDY ON NEXUS BETWEEN MEDIA AND JUDICIARY IN GOVERNANCE

Dr. Anita A. Patil

**Ms. Soumya N.M*

I. Introduction

Media is regarded as one of the four pillars of democracy. Media plays a vital role in molding the opinion of the society and it is capable of changing the whole view point through which people perceive various events. The press and media can be applauded for opening a trend where the media plays an active role in taking the accused to hook. Particularly in the last two decades, the arrival of cable television, local radio networks and the internet has significantly boosted the spread and influence of the mass media. The movement of newspapers and magazines in English as well as the various vernacular languages has also been uninterruptedly growing in our nation. This ever-expanding distribution and viewership united with the use of modern technologies for newsgathering has given media organizations an unparalleled role in shaping prevalent opinions[1]. However, media liberty also entails a certain grade of accountability.

II. Role of Indian Constitution

Freedom of Press is not explicitly mentioned in Part III of Indian Constitution, yet the Hon'ble Apex Court in a numeral of decisions has documented that freedom of speech and expression also comprises freedom of press[2]. In rapidly changing socio-economic conditions of a country like India, the role of media/ press has gained prominence and hence it is often quoted that "Media" is the fourth pillar of Indian Democracy. According to criminal jurisprudence, a suspect/ accused is entitled to a fair trial and is presumed to be innocent till proven guilty by a Court of Law. Nobody can be permissible to anticipate or prejudice his case

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[1] Nimisha Jha, "Constitutionality of Media Trials in India: A Detailed Analysis", Bhopal, 2015; available at https://www.lawctopus.com/academike/media-trials-india/

[2] *Indian Express Newspapers* v. *UOI* 1985 SCR (2)287

till the conclusion of trial. However, media on account of extreme coverage goes beyond its domain and prints and covers discussions of witness or relative of a victim and prejudges the issue of conviction of the accused while the matter is still pending adjudication in a Court of Law. This tends to prejudice the mind of Court, prosecutor and general public at large. Article 19(1)(a) of the Constitution of India guarantees, freedom of speech and expression and Article 19(2) permit reasonable restrictions to be imposed. No doubt, the Article 19(2) does not mention about 'administration of justice' but interference of administration of justice is clearly mentioned in 'criminal contempt' in Section 2 and 3 of the Contempt of Courts Act,1971 there of as amounting to contempt. Therefore, newspapers/coverage which inhibit or tend to affect with the administration of justice amount to criminal contempt under the Contempt of Court Act and if in order to prevent such interference, the provisions of that Act impose reasonable restrictions on freedom of speech, such limitations would be valid.

Under Article 19(1)(a) of the Constitution, the rights of the freedom of press have been recognized as Fundamental Rights and under Article 21 of the Constitution the accused/suspect and under trial and the civil litigant have Fundamental Right to have a free and fair trial[3]. Therefore, balancing between the two fundamental rights has become inevitable and the time has come that court should give appropriate directions with regard to reporting of matters (in electronic and print media) which are *sub-judice*. When privileges of equivalent heaviness clash, courts have to evolve complementary measures based on re-calibration under which both the rights are given equal space in the Constitutional Scheme.

In the Constitution of the United States of America, freedom of press is absolute and any interference with right of media to report, comment upon pending trial is illegal[4]. The Law Commission of India in order to harmonize the aforesaid two rights Freedom of Press versus Right to free and fair trial, in its 200th Report[5] submitted on 31st August 2006 recommended various amendments to the Contempt of Court Act, 1971 and measures of postponement of proceedings and further said

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[3] *Maneka Gandhi* v.*UOI* 1978 SCR (2) 621

[4] Mithilesh Kumar, "India: Media Trial versus Free And Fair Administration of Justice: Need For Guidelines", 2013. Available at http://www.mondaq.com/india/x/262920/Human+Rights/Media+Trial+Versus+Free+And+Fair+Administration+Of+Justice+Need+For+Guidelines

[5] Law Commission Report available at www.lawcommissionofindia.nic.in/reports

that such powers cannot be vested in the subordinate courts where the criminal proceedings are 'active'. This is since under the Contempt of Court 1971 Act, the secondary courts have no power to act for contempt.

Media also plays a good role while divulging corruption in government exchequer and in bringing out the government's inaction on many occasions to the lime light and eventually action is taken. Nonetheless at the similar period battles arise when media misbehaves its domain and tries to appropriate the power of judiciary and make judgmental comments on pending trials.

But balancing between the rights of persons to know and belief of the accused to be innocent till he is found guilty by a competent court, has become unavoidable but neck to neck competition regarding publication and coverage among various media houses tending to interfere with administration of justice has become matter of concern for parliament as well as bench.

The Hon'ble Apex Court in the matter *Sahara India Real Estate Corporation Ltd. and Ors.* v. *Securities and Exchange Board of India and Anr*[6] constituted the five judge Constitution Bench when during the pendency of appeal despite the interim order of the court some of the news papers published the proceedings of the judgment, the Hon'ble Court laid down appropriate guidelines with regard to reporting in electronic and print media of matters which is *sub-judice* in court including public disclosure of documents forming part of court proceedings and also the manner and extent of publicity to be given by print/electronic media of pleadings/documents filed in proceeding in court which are undecided and not yet adjudicated upon and the court recommended sub sequent actions:

1. Prior Restraint

The concept of "Open Justice" is the basis of our judicial system. It stimulates faith in the legal system. But, the right to open justice is not absolute. It can be restricted by the court in its intrinsic jurisdiction as done in *Mirajkar's* case[7] if the necessities of administration of justice so demand. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under

[6] (2012)10 SCC 603

[7] *Naresh Shridhar Mirajkar* v. *State of Maharashtra* AIR 1967 SC 1

the inherent powers of the court when the court is content that interest of justice so requires. Such a provisional exclusion of publication of court proceedings in the media under the intrinsic powers of the court cannot be said to offend Article 19(1)(a).

2. Contempt of Court Act, 1971

The press and media have a right to know what is happening in courts and to broadcast the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trial. In such cases, there is no other practical means short of postponement on such cases orders that is capable of avoiding such risk of prejudice to the later or connected trial. The erroneousness of commentary of court proceedings will be contempt only if it can be supposed on the facts of a particular case, to amount to considerable interference with the administration of justice. The reason behind Section 4 is to grant a privilege in favour of the person who makes the publication provided it is fair and accurate. This is grounded on the assumption of "open justice" in courts.

3. Order of Postponement of Publication

Under US Constitutional Law, Right to freedom of expression under the First Amendment is absolute which is not like wise as in Indian Constitution in view of such right getting constrained by the test of reasonableness and in view of the Heads of Restrictions under Article 19(2). Accordingly, the *clash model* is more suitable to American Constitution rather than Indian or Canadian jurisprudence, since First Amendment has no equivalent of Article 19(2) or Section 1 of the Canadian Charter. This has led the American Courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive prejudicial publicity, there is usurpation of court's functions. Techniques such as the retrials are ordered in case of change in the venue, ordering acquittals at the appeal stage etc. Such postponements & delays should be avoided. Thus, it would be progressed by the courts as a preventive step to defend the press from getting impeached for contempt and also to prevent administration of justice from getting perverted or prejudiced.

4. Right to approach the High Court/ Supreme Court

In the light of the law pronounced herein above, anyone, be an accused or an aggrieved person, who sincerely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an suitable Writ Court and seek an order of rescheduling of the criminal publication/broadcast or postponement of reporting of convinced segments of the trial (including individuality of the victim or the witness or the plaintiff), and that the court may grant such preventive relief, on a harmonizing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the above mentioned principles of necessity and proportionality and seeking this into consideration such orders of postponing should be avoided and applied only in the real cases where substantial risk of prejudice for the proper administration of justice and fair trials are held.

III. Criminal Contempt

The Contempt of Court Act defines contempt by identifying it as civil[8] and criminal[9]. Criminal contempt has further been divided into three types such as Scandalizing, prejudicing trial and Hindering the administration of justice.

Prejudice or interference with the judicial process:

This provision owes its source to the principle of natural justice; '***every accused has a right to a fair trial***' clubbed with the principle that '***Justice may not only be done it must also seem to be done***'. There are numerous ways in which efforts are made to prejudice trial. If such cases are permissible to be effective will be that the persons will be convicted of offences which they have not committed. Contempt of court has been familiarized in order to prevent such unjust and unfair trials. No publication, which is calculated to poison the minds of adjudicators, intimidate witnesses or parties or to create an atmosphere in which the administration of justice would be difficult or impossible, amounts to contempt[10]. Commenting on the pending cases or abuse of party may amount to contempt only when a case is

[8] Section 2(b)

[9] Section 2(a)

[10] AIR 1943 lah 329(FB)

triable by a judge[11]. No editor has the right to assume the role of an investigator to try to prejudice the court against any person[12].

Fair trial parties have a constitutional right to have a fair trial in the court of law, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamour[13]. What would materialize to this right if the press may use such a language as to influence and control the judicial process? It is to be stood in mind that the democracy demands fair play and transparency, if these are shortened on weakest of grounds then the very concept of democracy is at stake.

IV. Regulatory Measures

As we concern with the restrictions imposed upon the media, it is clear from the above that a court evaluating the reasonableness of a restriction imposed on a fundamental right guaranteed by Article 19 relishes a lot of discretion in the matter. It is the legitimate and constitutional obligation of all courts to ensure that the restrictions imposed by a law on the media are reasonable and relate to the purposes stated in Article 19(2).

In ***Papnasam Labour Union*** v. ***Madura Coats Ltd***[14], the Supreme Court has laid down some principles and guidelines to be kept in view while considering the constitutionality of a statutory provision imposing restriction on fundamental rights guaranteed by Articles 19(1)(a) to Articles 19(1)(g) after challenged on the basis of unreasonableness of the restriction imposed by it.

In ***Rajendra Sail*** v. ***M. P. High Court Bar Assn***[15], the editor, printer and publisher and a reporter of a newspaper, along with the petitioner who was a labour union activist, were summarily punished and directed to suffer a six months imprisonment by the High Court. Their liability was that on the basis of a report filed by a trainee correspondent, they published disparaging remarks against the judges of a High Court made by a union activist at a rally of workers. The comments were to the effect that the decision given by the High Court was rubbish

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[11] *Subhash Chandra* v. *S. M. Agarwal*, 1984 Cri LJ 481(Del)

[12] *DM* v. *MA Hamid Ali Gardish*, AIR 1940 Oudh 137

[13] *Cooper* v. *People* (1889) 6 Lawyers Report Annotated 430(B)

[14] (1995) 1 SCC 501

[15] (2005) 6 SCC 109 per Y.K. Sabharwal, J. (for himself and Tarun Chatterjee, J.)

and fit to be thrown into a dustbin. In appeal the Apex Court upheld the contempt against them, but modified and reduced the sentence.

In ***D.C. Saxena (Dr.)*** **v.** ***Chief Justice of India***[16] the Supreme Court has held that no one else has the power to accuse a judge of his misbehaviour, partiality or incapacity. The reason of such a protection is to confirm independence of judiciary so that the judges could decide cases without fear or favor as the courts are created constitutionally for the dispensation of justice.

By these above observations and the judgment we can say that restrictions imposed by Article 19(2) upon the freedom of speech and expression guaranteed by Article 19(1)(a) counting the freedom of press serve a two-fold purpose viz. on the single hand, they specify that this freedom is not absolute but are subject to regulation and on the other hand, they puta restriction on the power of a legislature to restrict this freedom of press/media. But the legislature cannot restrict this freedom beyond the requirements of Article 19(2) and each of the restrictions must be reasonable and can be forced only by or under the authority of a law, not by executive action alone.[17]

The Press Council of India (PCI) was established to preserve the freedom of the press and to improve the standards of news reporting in India. Underneath the Press Council Act, 1978, if somebody believes that a news agency has committed any professional misconduct, the PCI can, if they agree with the complainant, "warn, admonish or criticism the newspaper", or direct the newspaper to, "publish the contradiction of the complainant in its forthcoming issue." Given that these measures can only be enforced after the publication of news materials, and do not involve predominantly harsh punishments, their efficiency in averting the publication of detrimental reports seems to be limited.[18]

Along with these controls, the PCI has established a set of suggested norms for journalistic conduct. These norms emphasize the standing of accuracy and fairness and encourages the press to "eschew publication of inaccurate, baseless, graceless, misleading or distorted material." The standards urge that any criticism

[16] (1996) 5 SCC 216

[17] (1994) 6 SCC 632

[18] http://presscouncil.nic.in/OldWebsite/NORMS-2010.pdf

of the judiciary must be published with excessive attention. These standards further endorse that reporters should avoid one-sided inferences, and attempt to maintain an impartial and clearheaded tone at all times. But suggestively, these norms cannot be legally enforced, and are largely observed in breach.

Finally, the PCI also has criminal contempt powers to restrict the publication of prejudicial media reports. Nevertheless, the PCI can only exercise its contempt powers with respect to pending civil or criminal cases. This restraint overlooks the extent to which pre-trial reporting can affect the administration of justice[19].

V. 200th Law Commission Report

Article 19(1)(a) of the Indian Constitution guarantees freedom of speech and expression and Article 19(2) allows reasonable restrictions to be imposed by statute for the purposes of various matters including 'Contempt of Court'. Article 19(2) does not refer to 'administration of justice' but interference of the administration of justice is clearly mentioned to in the definition of 'criminal contempt'[20] and in Section 3 thereof as amounting to contempt. So, publications which interfere or tend to interfere with the administration of justice amount to criminal contempt under that Act and if in order to preclude such interference, the provisions of that Act levy reasonable restrictions on freedom of speech, such restrictions would be valid.

At present, under Section 3(2) as in the Contempt of Courts Act, 1971 read with the explanation below it, full protection is granted to publications even if they prejudicially interfere with the course of justice in a criminal case, if by the date of publication, or by a charge sheet or challan is not filed or if summons or warrant are not issued. Such periodicals would be contempt only if a criminal proceeding is actually pending i.e. if charges sheet or challan is filed or summons or warrant are issued by the Court by the date of publication. But the Question raises whether this can be permitted to remain so under our Constitution or whether periodicals relating to suspects or accused from the date of their arrest should be regulated?

The 200th report of the Law Commission mentioned, ***Trial by Media: Free Speech versus Fair Trial under Criminal Procedure (Amendments to the***

[19] *Supra* note 18.

[20] Section 2 of The Contempt of Courts Act, 1971

Contempt of Courts Act, 1971), has recommended a law to exclude the media from reporting whatever prejudicial to the rights of the accused in criminal cases, from the time of arrest to investigation and trial.

It has suggested an amendment to of the Contempt of Courts Act[21]. Under the present provision such publications would come within the definition of contempt only after the charge sheet is filed in a criminal case, whereas it should be invoked from the time of arrest.

In another controversial recommendation, it has suggested that the high court be empowered to direct a print or electronic medium to postpone publication or telecast pertaining to a criminal case.

In the US, the *O J Simpson case*[22], attracted a lot of pre-trial publicity. Roughly few people even confirmed in judges' robes outside the court and lampooned Etoo, the trial judge. Yet, Simpson was acquitted. The judge was not biased by media campaign or public opinion. The Supreme Court has ruled in many cases that freedom of the press is a fundamental right sheltered by the right to freedom of expression under Article 19 of the Constitution. But the right to fair trial has not clearly been made a fundamental right. That does not mean that it is a less important right. More than a legal right, it is basic principle of natural justice that everyone gets a fair trial and an opportunity to defend oneself[23].

The NHRC, in its special leave petition filed before the Supreme Court against acquittal of the accused in the *Best Bakery case*[24], contended that the concept of a fair trial is a constitutional imperative recognised in Articles 14, 19, 21, 22 and 39-A as well as by the Cr.P.C. It is true that contempt of court is a ground for restricting the freedom of speech, but the media has not tried to lower the dignity of the judiciary by exposing loopholes of the investigation and the prosecution. If court verdicts also appear to be arbitrary, they must be subjected to ruthless examination. It will be risky to gag the press in the term of contempt of court. If the appellate court senses that the media publicity affected fair trial, it can always reverse the decision of the lower court.

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[21] Section 3(2)

[22] Case no. BA097211

[23] Nimisha Jha, Constitutionality of Media Trials in India: A Detailed Analysis, Bhopal , 2015. Available at https://www.lawctopus.com/academike/media-trials-india/

[24] (2005) 2 SCC (Jour) 75

In the US, in 1965, Sam Sheppard was convicted for murder of his pregnant wife in their Cleveland suburban home. As this case received a huge amount of pre-trial publicity, the US supreme court ruled that Sheppard's conviction[25] were violated and overturned the trial court's decision. In the 1970s and 1980s, the US supreme court began focusing more on the media's First Amendment rights the right to freedom of the press.

The Supreme Court's pronouncement in *Rajendra Sail case*[26], though given in context of criminal contempt, provides the proper guideline: *"For rule of law and orderly society, a free press and independent judiciary are both indispensable".*

VI. Conclusion

Exposure to criticism can only strengthen the judiciary not weaken it or subject it to indignity. A mature and broad-shouldered approach by the court to criticism, no matter how outspoken, can only inspire public confidence, not denigrate the judiciary. The dignity of the judicial system cannot be lowered by slights or even sarcasm. Ironically, rather than serving the object of the jurisdiction, to uphold the dignity of the courts, a frequent use of the jurisdiction, will itself compromise that dignity. Finally, truth and good faith have been recognized as statutory defences to charges of contempt. The other two organs of the government, the legislature and the executive, perhaps smarting under countless court orders, pulling them up for corruption and inaction brought into effect a long overdue legal defence to contempt action. An Amendment has been made to the Contempt of Courts Act, 1971, making truth a valid defence to a charge of contempt[27]. This change is of pressing relevance in an era of judicial activism that brings with it the inevitable demand for accountability.

Though Media is the fourth pillar of Indian Democracy and under Article 19(1)(a) of the Constitution it has a fundamental right, but at the same time it cannot be allowed to transgress its domain under the garb of freedom of speech and expression to the extent as to prejudice the trial itself and the time has come to

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[25] Sixth Amendment rights

[26] (2005) 6 SCC 109

[27] The Contempt of Courts (Amendment) Act, 2006, Section 2 substituting Section 13 of the Contempt of Courts Act, 1971

legislate to control the unfettered power of media. Unlike American Constitution, Indian Constitution has wide power to impose restriction and control the power of media under Article 19(2) of the Constitution. Recently it has also come to light that the media houses are arranging with corporate houses for not reporting anything against them for immoral consideration. Thus, while balancing between the two fundamental rights on account of excessive coverage in an appropriate case mode of prior restraint and self-regulation should be effectively invoked and those who violate the basic code of conduct must be punished under Contempt of Court Act, 1971. When privileges of equivalent heaviness crash, courts have to evolve harmonizing techniques or measures based on re-calibration under which both the rights are given equal space in the Constitutional Scheme.

DISSECTING WORLD TRADE ORGANIZATION: INDIA PERSPECTIVE

*Dr. Japhet Kariuki Kimondo**

1. Introduction

The advent of World Trade Organization (WTO) takes us through the age of history when due to the disastrous effect of the war across all the western countries which resulted in the advent of the General Agreement on Tariffs and Trade. It was a sort of unifying multilateral international treaty as the nations concerned were looking into remedial measures due to the economic woes that were a disastrous outcome of the World War II. In due course of time General Agreements on Tariffs and Trade (GATT) played a vital role until 1995 when WTO came into existence there by replacing the GATT, 1947.

The World Trade Organization was established as a direct outcome of the strong discussions and negotiations by global leaders that perceived to usher in a new order in terms of trade. WTO indeed streamlined a number of aspects which its predecessor had not settled. Furthermore it has paved way for liberalization privatization and globalization in the international trade arena. Economic liberalization and globalization have stirred reformation of economies as well as amplification of economic competition universally. There has arisen a new treatise within the ambit of international power and the global order is in a state of turmoil due to the same. The private sector has not lugged behind in fact it has propelled forward to have a share of the commerce, social growth and dominion. However there still largely exist deep rooted engagement between the third world nations and developed nations despite electoral capacity of all towards strengthening the representative governance of organization. Kenya has been among the many signatories to the GATT 1947, its post independence policy stance towards a closed economy notwithstanding the globalization. GATT was as an exertion of the developed world faced with dilemma at the end of the war, to castigate themselves in good trade of goods/services and to limit the blowout of proactive protectionist policies by governments. The government of India cognoscenti stayed

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cynical about the potential vulnerabilities of the nation from the sudden exposure to the world economy across the board. It is true that WTO mostly benefits the developed nations but the same remains true for third world countries like Kenya which definitely has benefited tremendously as signatory country.

The enshrining principles of WTO have been set in such a way that the developing nations tend to bend on the assumption that the benefits accrued are more inclined towards developed nations, which in a way has created rifts in the organisation. Recent developments seem to focus much on negotiations which are in line with bilateral, regional and plurilateral enterprises leading to forecasting of down grading role of the WTO which may take the form of administration, surveillance and enforcement of existing multilateral agreements rather than the drafting of new ones.

2. Principles of WTO

The WTO is a silhouette of global governance.[1]The objectives of the WTO has been that of raising the living standards as well as all round progressive development of the economies of member nations. The enrishned principles of WTO can be looked into as:

National treatment

This implies both foreign and national companies are treated the same, and it is unfair to favour domestic companies over foreign ones. Some countries have a most favoured nation treatment, but under WTO the policy is that all nations should be treated equally in terms of trade.[2] Any trade concessions etc., offered to a nation must be offered to others. It prohibits discrimination against imported products. Generally speaking, it prohibits members from treating imported products less favourably than like domestic products once the imported product has entered the domestic market. For example in 1958, in Italy, Agricultural Machinery, a dispute concerning an Italian law providing special conditions for the purchase on credit of Italian produced agricultural machinery, the Panel stated with regard to Article III;

[1] Swapneshwar Goutam, 'World Trade Organisation & Effective Global Governance System', Law Z, August 2009, vol. 9, Issue 96, pp. 28.

[2] Article III , GATT, 1994.

'that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they have been cleared through customs. Otherwise indirect protection could be an alternative [3].

The products of the territory of any member imported into the territory of any other member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. This provision sets out a two-tier test of consistency of internal taxation,[4] which are (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is violation of Article III.

Non discrimination

Non-discrimination is a key concept in WTO law and policy. In simple terms, the Most Favoured Nation (MFN) treatment obligation prohibits a country from discriminating between countries; the national treatment obligation prohibits a country from discriminating against other countries. Discrimination in trade matters breeds resentment among the countries, manufacturers, traders and workers discriminated against. Such resentment poisons international relations and may lead to economic and political confrontation and conflict. In addition, discrimination makes scant economic sense, generally speaking, since it distorts the market in favour of products and services that are more expensive and/or of a lesser quality[5].

The MFN and national treatment obligations prohibit discrimination on the basis of 'nationality' or the 'national origin or destination' of a product, service or service supplier. WTO law also prohibits discrimination based on criteria other than 'nationality' or 'national origin or destination'. GATT 1994 sets out a three-tier test of consistency to determine whether there is a violation of the MFN treatment obligation.

a. Whether the measure at issue confers a trade 'advantage' of the kind granted by any Member with respect to customs duties, other charges on

[3] GATT Panel Report, Italian Agricultural Machinery, para 11

[4] Article III.2, GATT, 1994

[5] Article 1, GATT, 1994

imports and exports and other customs matters, internal taxes, and internal regulation affecting the sale, distribution and use of products.

b. Whether the products concerned are 'like' products. 'Like' suggests that 'like products' are products that share a number of identical or similar characteristics.[6] Three things are kept in mind by deciding bodies while stating whether the product is like product which are, the characteristics of the products, and their end-use and tariff regimes of other Members. For example, In Spain Unroasted Coffee,[7] the Panel had to decide whether various types of unroasted coffee ('Colombian mild', 'other mild', 'unwashed Arabica', 'Robusta' and 'other') were 'like products' within the meaning. Spain did not apply customs duties on 'Colombia mild' and 'other mild'; while it imposed a seven percent customs duty on the other three types of unroasted coffee. Brazil, which exported mainly 'unwashed Arabica', claimed that the Spanish tariff regime was inconsistent with Article I.1 of GATT. In examining whether the various types of unroasted coffee were 'like products' to which the MFN treatment obligation applied, the Panel considered the characteristics stated above. The Panel concluded that unroasted, non-decaffeinated coffee beans listed in the Spanish Customs Tariff should be considered as "like products" within the meaning of Article I:1.

c. Whether the advantage at issue is granted 'immediately and unconditionally' to all like products concerned. Article I:1 requires that any advantage granted by a member to imports from any country must be granted 'immediately and unconditionally' to imports from all other Members.[8] Once a member has granted an advantage to imports from a country, it cannot make the granting of that advantage to imports of other members conditional upon those other members 'giving something in return' or 'paying' for the advantage.

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[6] Article 1.1, GATT, 1994

[7] GATT Panel Report, Spain, Unroasted Coffee, para. 4.6 - 4.9.

[8] Article I: 1 also requires that any advantage granted by a WTO Member to exports to any country must be accorded 'immediately and unconditionally' to exports to all other WTO Members.

Rule Based Trading System

The WTO stands for rule based trading system. It sets and enforces rules necessary for conducting world trade fairly. The principle proposes 'fair' trade and 'free' trade. Its task is to establish an international trading system based on a free and open market, and competition policy that covers both domestic and international markets.[9]It is more accurate to say it is a system of rules dedicated to open, fair and undistorted competition. The tariff reduction and elimination exercises go hand in hand with measures to reduce or eliminate subsidies. The 'level playing field' between foreign and local goods encourages and fosters competition with the corresponding positive effect on efficiency and consumer welfare.

Transparency

It aims at achieving transparency in international trade relations by obligating members to notify changes in trade regulations, technical and phyto-sanitary standards well in advance. Negotiations and process must be fair and open with rules equal for all. This helps exporters to plan their business and safeguards them against unnecessary harassment. Under this it specifies to conduct periodic review of trade policies of its members. The principle works out with free market access for which trade barriers are dismantled. Physical restrictions on the import and export of goods are specially prohibited. Tariff can be used only to protect domestic industries. It specifies the precise tariff commitment that has been accepted.[10]

3. Spirit embodiment of the WTO

Representatives and supporters of the organization convey a strong sense of a mission to promote open trade across the world and free markets in every locality. There is a touch of radical efforts towards this mission, as open trade and free markets are seen as the natural connection on globalization.[11] Whilst the

[9] Mitsuo Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy', Washington University Global Stud. Law Review, U.S., 2004, pp. 363.

[10] Arun Goyal & Noor Mohd, 'WTO in the New Millennium', 5th Ed., Academy of Business Studies, New Delhi, pp.7.

[11] Christopher Arup, 'The New World Trade Agreements-Globalizing Law though Services and Intellectual Property', Cambridge University Press, Cambride, U.K., 2000, pp.43.

international negotiations were often specific and hard-headed, it's imperative to remember that the rules were made possible because the idea of one world and free trade are amenable to International trade. It speaks on specific issues relating the intellectual property, agriculture, manufactured products, medicines, textile and clothing, services and many more that can be traded.

Knowledge and Ideas are increasingly important part of trade. Trade Related Intellectual Property Rights of the Uruguay Round provides for protection of Intellectual Properties Rights. Intellectual Properties Rights includes trademarks, copyright, patents, geographical indication, etc. Creators can be given the right to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. TRIPS agreement is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules.

Agriculture has been on the map of consideration since advent of GATT. It permitted countries to use export subsidies on agricultural primary products. In the lead-up to the Uruguay Round negotiations, it became increasingly evident that the causes of disarray in world agriculture went beyond import access problems which had been the traditional focus of GATT negotiations. The Agreement on Agriculture came into force on January, 1995. In principle, all WTO agreements and understandings on trade in goods apply to agriculture, including the GATT 1994 and WTO agreements on such matters as customs valuation, import licensing procedures, pre-shipment inspection, emergency safeguard measures, subsidies and technical barriers to trade. The agriculture products covers basic agricultural products such as wheat, milk and live animals, and the products derived from them such as bread, butter and meat, as well as all processed agricultural products such as chocolate and sausages. It also includes wines, spirits and tobacco products, fibers such as cotton, wool and silk, and raw animal skins destined for leather production as well as food processing industry.[12]

Like agriculture, textile was one of the most contentious issues on WTO platter, as it was in the embedded in the earlier GATT system. Textile and clothing are closely related both technologically and in terms of trade policy. Textiles and

[12] Mamta Ranga & Deepti Sharma, 'WTO and Indian Agriculture', Indian Journal on Applied Research, vol. 4, Issue 6, June 2014, pp. 80.

clothing are among the first manufactured products an industrializing economy produces. From 1974 until the end of the Uruguay Round, the trade was governed by Multi-fibre Arrangement. The WTO's Agreement on Textiles and Clothing (ATC) took over the same in 1995. A decade later 2005, the sector was fully assimilated into normal GATT rules. In particular, the quotas came to an end, and importing countries are no longer able to discriminate between exporters. The Agreement on Textiles and Clothing no longer exist: it's the only WTO agreement that had self-destruction built in mechanism[13].

The General Agreement on Trade in Services (GATS) is grund norm of all multilateral rules governing international trade in services. The advent of the General Agreement on Trade in Services marked a new stage in the history of the multilateral system (1995). Given the peculiarities of services trade, the Agreement contains a variety of conceptual innovations, including its extension to transactions beyond conventional cross-border trade, and various types of non-tariff restrictions.[14] Negotiated in the Uruguay Round, it was developed in response to the huge growth of the services economy over the past 30 years and the greater potential for trading services brought about by the communications revolution. The General Agreement on Trade in Services has three elements namely the main text containing general obligations and disciplines; annexes dealing with rules for specific sectors; and individual countries' specific commitments to provide access to their markets, including indications of where countries are temporarily not applying the "most-favoured-nation" principle of non-discrimination.

For manufactured products, a WTO member may restrict imports of a product temporarily if its domestic industry is injured or threatened with injury caused by a surge in imports. Here, the injury has to be serious. Safeguard measures were always available under GATT.[15] The WTO agreement broke new ground. It prohibits "grey-area" measures, and it sets time limits "sunset clause" on all safeguard actions. The agreement says members must not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.

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[13] Further reading available at https://www.wto.org/english/tratop_e/texti_e/texintro_e.htm#MFA

[14] Rudolf Adlung, et. al., 'FOG in GATS Commitments – Why WTO Members Should Care', *World Trade Review*, vol. 12, Issue 1, January 2013, pp. 1.

[15] Article 19 of GATT.

4. India's Approach to WTO

Majority of the World Trade Organisation members are the developing countries. In the discourse of the Uruguay Round over 60 countries implemented trade liberalization programmes. Some were obliged on account of their compliance to GATT while others acted on an independently. Meanwhile, developing countries and transitioning economies took a much more active and prominent role in the Uruguay Round negotiations than in any prior round. This trend effectively killed the notion that the trading system existed only for industrialized nations. Nonetheless, the provisions of the GATT envisioned favouring developing countries, particularly, by reading Part IV of GATT that encourages industrial countries to assist developing member nations in their trading conditions without reciprocity as a concession towards them during negotiations.

All nations irrespective of their natural, financial, human, industrial resources they can engage to produce goods and services for their domestic markets or to compete overseas. "Comparative advantage" means that countries prosper by taking advantage of their assets in order to concentrate on what they can produce best. This happens naturally for firms in the domestic market, but that is only half the story. The other half involves the world market. Most firms recognize that the bigger the market the greater their potential in terms of achieving efficient scales of operation and having access to large numbers of customers. In other words, liberal trade policies which allow the unrestricted flow of goods, services and productive inputs multiply the rewards that come with producing the best products, with the best design, at the best price. India is on the cross road to produce best and protect its own industries.

India as a developing nation, is yet to stand the effect of liberalization and globalization that have caused restructuring of the economy and increase in competition. In the corridors of international power, there is a new discourse emerging. The global order is in the state of turbulence. The conflict is between globalization and self content. India's interest is not in further trade liberalization but in correcting the drawbacks in implementation of existing agreements, putting at rest apprehension about the fairness of the WTO system and giving all

the members of the WTO an equal and effective role in the multilateral trading system.[16]

The country has contributed effectively in formulation of all major trade agreements. The country as a whole deserves world-class infrastructure and greater engagement with the global economy.[17] India has so far listed its commodities that can be traded fairly including agricultural products manufactured through biotechnology. Nonetheless, the overall basket of the export has increased equally. It is unable to reduce its import which is creating unfavourable balance of payment. The Indian export basket, consisting of agro-based products and manufactured items suffer from considerable supply side problems. So far as agro based products are concerned, the question of surplus is the most critical. In case of manufactured products, there are serious problems of competition relating to high cost, inefficiency in production, outdated technology, problem relating to delivery schedule and product specification.[18] Some of the Indian agro-products have significant demand in the world market such as basmati rice, and spices. But, the export of these products, have been difficult as there is lack of preservative facilities, inadequate transport linkages and poor access to market. And then, in the global market fastest growth is seen in manufactured products such as automobiles and ready to eat food and beverages. India is yet to make its share in these areas too.

Another concern that crops up is the tariff concern. The first rudimentary principle relates to treating goods of all the countries with equality. It is common knowledge that while the industrialized countries reduced tariff barriers on a number of items as a result of negotiations under the GATT, non-tariff barriers have escalated as a measure of protective device. Non-tariff barriers may relate to health, safety, labelling, packaging, environment, standardization requirements, etc. This is very important area for the small and medium exporters from our country and will become even more important whenever there is a plan for expansion of export items like drugs, food grains, spices, leather and wooden furniture and toys.

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[16] *Supra* note 2 at pp. 203

[17] G.R. Krishnamurthy & Awadhesh Kumar Singh, '*India in Global Economy*', Serial Publication, New Delhi, 2007, pp. 1

[18] Jayanta Bagchi, 'World Trade Organisation- An Indian Perspective', Eastern Law House Pvt. Ltd.., Calcutta, 2000, pp. 25 - 26.

To protect the standard of products and encourage export, Technical Regulation and Certification System has been introduced. WTO does not develop or prepare standards nor does it insist that members have product standards. What it insists upon, as provided in the GATT 1994 is that the Agreement on Technical Barriers to Trade [19] aims at ensuring that compulsory technical regulation, voluntary standard and testing certification of products do not constitute unnecessary barriers to trade. The Agreement on Technical Barriers to Trade is premised on an acknowledgement of the right of WTO Members to develop technical requirements, and to ensure that they are complied with. Here the member states have to ensure discipline, testing, transparency and certification. With all these adoption of principles and discipline, the question arises whether being WTO founder member has been a boon or a ban.

5. WTO and India

India at the WTO has endured major changes since the establishment of the Uruguay Round. Originally when it was established the country was disinclined to embrace this transformation. But the idea of Make in India to be a self-reliant economy has rekindled a sea change in the Indian Trading Principle. The idea of self-reliance has gone through a transformation as to how it is to be achieved domestically as well as how it is to be signalled to the rest of the world. More so India has experienced an enhancement in the mark of speciality in some of the most dynamic sectors of world trade system.[20]

Agreement on agriculture had four main components, concessions and commitments on market access, domestic support and export subsidy, agreement on sanitary and phyto-sanitary measures and a ministerial declaration concerning least developed countries and developing countries importing net food. During the last two decades its agricultural exports of the total merchandise exports has been waning from the preponderant position it occupied in the pre-independence era.[21] India's stance on agriculture has always been defensive. Achievement of self-sufficiency in food grains and some other major agricultural commodities, which

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[19] Entered with WTO in 1995.

[20] Michele Alessandrini, et. al., 'The Changing Pattern of Foreign Trade Specialization in Indian Manufacturing', Oxford Review of Economic Policy, vol. 23, Issue 2 , 2007, pp. 270.

[21] Sheshagiri, B, et.al., 'Impact of W.T.O on Indian Agriculture: Performance and Prospects', International Journal of Current Research, vol. 3, Issue 10, September, 2011, pp. 66.

used to account for large portion of import bill, overall imports of agricultural commodities have sharply declined. Food processing industries have to undergo a world class technology adoption and the farmers too are required to be equipped with modern technology if India has to stand the weather of global competition in agriculture.[22]If India is able to diversify its production and add value by food processing, then this is a win-win deal for India as a number of commodities are exported to the West which benefit its home suppliers.

The agreement on sanitary and phyto-sanitary measures[23] sets out the basic rules for food safety, animal and plant health standards. As already stated the WTO does not set the standards. The standards are developed by leading researchers in the field and governmental specialists on health protection and are subject to international scrutiny and review. It is paramount for the country to develop policy wise and infrastructural wise in order to adhere to the sanitary and phyto-sanitary measures in their target markets as well as expectations of the consumers, by providing good quality and safe products at rational prices. To achieve this objective the country must ensure that: farming remains competitive and profitable; export policy is aggressive; domestic capabilities are strengthened for implementing sanitary and phyto-sanitary measures; products which we do not wish to enter our markets, because of the potential negative impact on health, agriculture or environment, are identified proactively. All this will be necessary to ensure free and safe trade in agriculture.

The textile and clothing has been predominant industry of India. Being labour intensive and related to law technology activities, India's market share is comparatively low. The first related to speed which signifies our readiness to complete delivery schedules and our readiness to respond to market changes. Second issue is to quality which has been a major concern. And the third cardinal issue is productivity. Globalization has had a positive impact on textile exports of India.[24] Indian textile exporters have been protesting that the demand is decreasing

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[22] *Supra* note 16 at pp. 29.

[23] Understanding the WTO Agreement on Sanitary and Phytosanitary Measures available at https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm

[24] Noopur Tandon & E Eswara Reddy, 'A Study on Emerging Trends in Textile Industry in India', *International Journal of Advancements in Research & Technology,* vol. 2, Issue 7, July, 2013, pp. 267.

and the time is therefore for an accelerated phase-out.[25] Countries producing and exporting textiles have increased investment in spinning and weaving equipment. Even though Developing countries have comparative cost advantage in domestic and international market still they are implementing structural changes to meet the needs of the global stringent buyer. Now textiles industry and its labour relations are undergoing profound changes. The retail market has opened and the producers' control over the product market has increased. Innovations in Supply chain management, professional services, branding will soon be key to sustainable growth in the textile industry.

India initially had a strong disagreement in including Intellectual Property Rights within the ambit of trade negotiations. However, in time it became more temperate but remained steadfast on some other aspects. The first is the protection some of products grown in India such as *basmati*, *neem* and *turmeric*. And the second is on protection of indigenous knowledge. The special products issue showed the need for stronger protection for the products. The rules also were amended to give owners of traditional knowledge sufficient reward for the use of the know-how in modern bio-technology.[26] Indian medicine system which is based on traditional knowledge such as *Ayurveda*, *Siddha* or *Unani* is protected under Intellectual property Rights. Intellectual property can travel effortlessly from one country to another. Piracy of Intellectual Property has become International character.[27] Hence, this traditional knowledge should receive protection from being pirated. India will have to grant greater protection to patent and for much longer period. Further, it has to grant national treatment to foreign firms. On the matter of purchase too it should not discriminate.

On to the service sector, India as an emerging global power in Information Technology and business services, the country is, in fact, a demander in the WTO talks on services as it seeks more liberal commitments on the part of its trading partners for cross-border supply of services, including the movement of human beings to developed countries.

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[25] *Supra* note 2 at pp. 204.

[26] *Ibid* at pp. 205.

[27] D. N. Mishra, 'International Investment Law, WTO & IPR with Special Reference to WTO: DSU in Developing Countries', *Indian Bar Review*, vol. XXXI, 2004, pp. 92.

In manufacturing there are many goods which are specially manufactured and exported but the problem is of use of new technology. For example, when analyse car manufacture in India and its sale abroad there is lot of difference. Joint venture companies have satisfied domestic passenger car vehicle needs, but price and quality problems have left the industry open to some challenge in a free market post-WTO world. Domestic manufacturers would rise to the challenge of WTO membership, and producers would make world-class vehicles competitive in most ways with imported cars and trucks. A middle ground course would see the industry muddling along with characteristics similar to the status quo. If India has to position itself in the world market then it is indispensable that world class products are produced which shall have demand in the world market at large.

6. Conclusion and Suggestions

India must become proactive in the world arena by evolving itself into a formulator of visions and a leader of the WTO. India must play a much larger and important role in global trade and now is the time for it to take a prominent position and role at the multilateral trade institution.

The parameters of India's WTO policy have been by and large determined by its domestic imperatives fulfilling the country's best interest as perceived by the policy makers from time to time. The trend of industrial restructuring and consolidation that is taking place in the developed countries is clear from the recent spare of Multinational company formation through mergers and acquisition. There is a consolidation at the regional and global level with the mergers and acquisition between national champions. In this era of globalization, the only plausible way for deficit nations like India is to put the economy back on rails would be to industriously chase an export led growth polity rather than depending merely on the domestic market happenings.[28]

1. Intellectual Property and Make in India has facilitated Simplified procedure for filing, e-filing facilities and incentives. But more care has to be taken in patenting products of Indian Origin including medicines.

[28] V. K. Bhalla, 'World Trade Organisation-Converting Crisis into opportunities', Chartered Secretary, January, 2002, pp. 35

2. Food processing and make in India should be the theme of every manufacturer and hence the country should target International Standards of quality for both industrial and agricultural produce which ensure self-sufficiency by producing more quality and standard goods.

3. The country's service sector ought to properly plan and utilize its cheap and abundant natural resource and man power if it is to stand out.

4. Agriculture research must be carried and application of biotechnology in agriculture must be invigorated.

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