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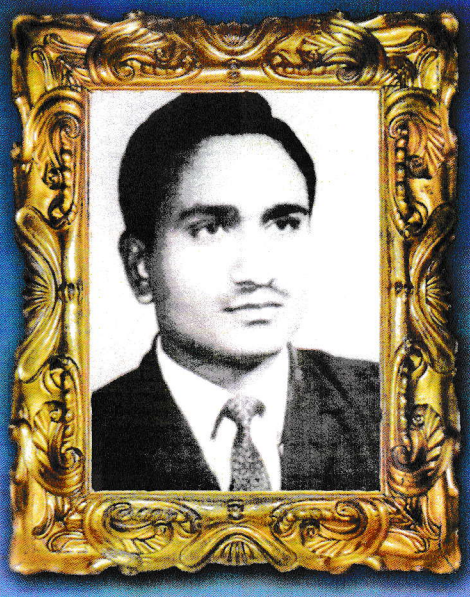
A TRUE VISIONARY

"You see things and you say **Why***? But I dream of things that never were and say* **Why** *not?"*

- George Bernard Shaw



Shri Jagannath Gupta
(1950 - 1980)

Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!

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And more dreams to come!

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Message from Editor's Desk

It is a matter of immense pleasure to publish this issue of JIMS Journal of Law. The Editorial Board is grateful to all the authors who have contributed scholarly articles of contemporary relevance and look forward for more academic endeavors from prospective authors. This issue of JIMS Journal of Law presents multiple facets of contemporary legal issues providing valuable legal insight. It covers evolution of the patent system in India. For the first time in India, a patent administration system was formed in 1911 under the direction of the Controller of patents. Authors suggesting that inventor must provide the description of the invention in return for the privileges and not keep it a secret. This issue also covers a topic in the name of climate change mitigation wherein author has observed that despite international commitments and world class legislations, an institution polices and machinery, India is lagging behind its expectations to improve the environment conditions. One of the articles deals with rise in life insurance frauds in India. Author here is of view that life insurance is a husband's privilege, a wife's right and a child's claim. One of the articles deals with cyber voyeurism. Author is of the view that number of individuals using the social networking sites as a means of social interaction between individuals on the internet is increasing day by day which has led to the increase in the number of infringement cases of individual's right of privacy in the realm of the cyberspace especially of juvenile's persons which constitutes majority of the internet users. This issue also covers the rights of victims in our criminal justice system. Our criminal justice system is more or less centered on the accused and as a result victim is often ignored by the courts. Author is of the view that victims' rights should be treated as main component of the Criminal Justice System. One of the articles deals with patent pooling.

It can be manifested that; patent pools are not per se anti-competitive. Author is of the opinion that some factors are to be considered to determine whether the pools are supportive or unsupportive of the competition prevalent in the market. This issue also covers concept of right to privacy wherein author is of the opinion that the scope of personal liberty has been and is being expanded to a great extent, with the advancement of civilization in the free society. One of the articles deals with concept of merger control in takeover regime in India.

Author is of the view that there are various reasons which can be attributed to the growth in the mergers, acquisition and takeovers in India. I take utmost pleasure and privilege in presenting this intellectual and thought provoking issue of JIMS Journal of Law to Bar, Bench and academia with a huge expectation that this issue will bring reforms in the society by raising legal awareness and achieving access to justice for all.

Thanking You

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EFFECTIVENESS OF RIGHT TO INFORMATION ACT, 2005

Kush Kalra
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ABSTRACT

There can be no dispute that the RTI Act, 2005 is enacted with the avowed objective of conferring a statutory right on the citizens in India to have access to Government-controlled information or to seek information from Central Government/State Governments, local bodies and other competent authorities as a matter of right. The idea is that it would prove to be instrumental in bringing in transparency and accountability in Government and Public Institutions which would help in bringing the growth of corruption in check. The scope of the RTI Act is wide enough to cover all the Constitutional Institutions and subject to exemptions, universally applies to all Public Authorities. Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritizing 'information furnishing', at the cost of their normal and regular duties. Right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt within the Act and secondly the constitutional limitations emerging from Article 21 of the Constitution. Thus, wherever in response to an application for disclosure of information the public authority takes shelter under the provisions relating to exemption, non-applicability or infringement of Article 21 of the Constitution the Information Commission has to apply its mind and form an opinion objectively if the exemption claimed for was sustainable on facts of the case.

Keywords: RTI, Government, Information, Constitutional, limitations, etc.

INTRODUCTION

The basic purpose of the Right to Information Act, 2005 is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governments accountable to the governed. In fact, the RTI Act is meant to serve two fold purposes, viz.,

(i) effectuating the right to know already enshrined in Article 19(1) (a) of the Indian Constitution; and

(ii) Greater access to information in order to ensure maximum disclosure and minimum exemptions.

The Right to Information Act provides for setting out the practical regime of right to information for citizens to secure access to information under the control of public authority.[1]

The fact that the Right to Information is part of the fundamental rights of citizens under Article 19(1) of the Constitution of India has been recognized by various Courts, since the landmark decisions in the Raj Narain's case[2], S.P.Gupta's case[3] and others. The objective of RTI Act, 2005 is to enable citizens to hold all the instrumentalities of the Government accountable. The concept of information under the RTI Act, 2005 has been given a wide scope. It says that information means "any material in any form", which would mean any material concerning the affairs of the Government, e.g. decision, action, plan or schedule. Further, it has been defined in detail including the various modes and forms of information which can be accessed under the Right to Information Act. In other words, section 2(f) of the Act provides an inclusive definition of the 'information' to be sought under the RTI Act but it may be extended beyond the purpose, objective and spirit of the Act.

The main purpose and objective behind the beneficial legislation is to make information available to citizens in respect of organizations, which take benefits by utilizing substantial public funds. This ensures that the citizens can ask for and get information and to know how public funds are being used and there is openness, transparency and accountability. Even though, those private organizations or institutions which are enjoying benefit of substantial funding directly or indirectly from the Governments fall within the definition of public authorities under RTI Act.[4]

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having elected by them, seek to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations. It is by no means absolute. In transactions which have serious repercussions on public security, secrecy can legitimately be claimed because it would then be in the public interest that such matters are not publicly disclosed or disseminated.[5]

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[1] Lalit Dadwal, "Right to Information" M.D.U. Law Journal, Vol. X, Part I, 2005, p. 264.
[2] AIR 1975 SC 865
[3] AIR 1982 SC 149
[4] Krishan Pal Malik, "Right to Information" Allahabd Law Agency, Faridabad, 2013, p. 60
[5] MANU/SC/1138/1997

The Delhi High Court in the case of Secretary General, Supreme Court of India v. Subhash Chandra Agarwal[6] observed that the right to information, being integral part of the right to freedom of speech, is subject to restrictions that can be imposed upon that right under Article 19(2). The revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information and, therefore, with a view to harmonize these conflicting interests while preserving the paramountacy of the democratic ideal, Section 8 has been enacted for providing certain exemptions from disclosure of information. Section 8 of the Right to Information Act, 2005, has provided certain categories of exemptions, where the Government has no liability or responsibility or obligation to give information to any citizen. Ordinarily all information should be given to the citizens but there are certain information's which have been protected from disclosure. It means this is an attempt to harmonize the public interest with the individual's right to information. Though the Act envisages imparting a progressive and participatory right to the citizens in a meaningful manner, still the wider national interest has to be harmonized in it. The words 'Notwithstanding anything contained in this Act' symbolized that this section is an exception to the general principles contained in the Act that it is an obligation of the PIO to provide information to the citizens unless ordered to the contrary by the Central or State Information Commission.

RIGHT TO INFORMATION IN CASES OF LIFE AND LIBERTY

The free flow of information is must for a democratic society *in personam* because it helps in the growth of society. Information ensures transparency and accountability in governance and thus becomes a vibrant component of efficacious democracy. Further, the fundamental right to speech and expression under Article 19(1) of the Constitution of India can never be exercised until and unless the information regarding public matters is being circulated. This makes Right to Information Act, 2005 ('the Act') a very important legislation. The RTI Act, 2005 explicitly authorizes the common man with an instrument to access the information from any public office: the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO) of such public office is bound to provide the information sought. According to Section 7(1) of the RTI Act, information sought via RTI application should be given within 30 days from the request. The exception to the 30-day rule, as laid down in the

[6] AIR 2010 Del 159

proviso of Section 7(1) of the Act, is when the information sought concerns the 'life and liberty of a person', in which case the information should be provided within 48 hours.

As the government machinery is not designed in a way that responds to all RTI applications within 48 hours, the question of 'life and liberty of a person' has to be carefully scrutinized. A broad interpretation of 'life and liberty' would result in a substantial diversion of manpower and resources towards replying to RTI applications which would be unjustified and a narrow interpretation of 'life and liberty' may either lead to death or grievous injury. It is reasonable to expect that when the life or liberty of a person is at stake, the information which might save/help the person should be divulged as fast as it can be. But what are life and liberty? Life and liberty are two of the most important facets of our existence. Right to life means the right to lead meaningful, complete and dignified life. It is something more than surviving or animal existence. Liberty is the immunity from arbitrary exercise of authority. It has also been defined as freedom of choice, enjoyment of rights which belong to us as individuals, freedom from all restraints but such as are imposed by law etc.

However, the term 'life or liberty of a person' has not been explicitly defined in the Act. In this case, one can draw such definition from Article 21[7] of the Constitution which guarantees that '*no person shall be deprived of his life or personal liberty except according to procedure established by law*'. In a barrage of cases, over many years, the Supreme Court has interpreted and widened the scope of the right to life and liberty to include -

Right to live with human dignity, free from exploitation	*Bandhua Mukti Morcha v. Union of India*, [1984] 3 SCC 161
Right to livelihood	*Olga Tellis v. Bombay Municipal Corporation*, 1985 SCC (3) 545
Right to speedy trial	*Hussainaira Khatoon v. State of Bihar*, [1979] 3 SCR 169
The right against solitary confinement	*Sunil Batra v. Delhi Administration*, [1978] 4 SCC 494
The right against bar fetters	*Charles Sobraj v. Superintendent, Tihar Jail*, 1979 SCR (1) 512
The right to legal aid	*Madhav Hayawadanrao Hoskot v. State of Maharashtra*, 1979 SCR (1) 192

[7] Article 21 in The Constitution Of India - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

The right against delayed execution	*T.V. Vatheeswaran v. State of Tamil Nadu*, AIR 1983 SC 361

Unless and until an imminent danger or threat to life and liberty is made out, Section 7(1) of RTI Act, 2005 cannot be invoked and only when disclosure of information would have an effect of saving the applicant from that danger, such information should be given in 48 hours.

In the case of *Ashok Randhawa v. Lok Nayak Hospital, Govt. of NCT of Delhi*,[8] information was sought regarding the child Shanno, D/o. Ayub Khan who breathed her last due to alleged punishment/beating given by the teacher of her school. The Appellant had sought the medical history of the child, cause of death, the status of the child when taken to casualty, treatment given to her in casualty to control seizure, and findings of C.T. scan within 48 hours, terming it as an issue of 'life and liberty'. The Commission accepted the contention of the PIO that the 'life and liberty' (the child) in this case is dead, hence there was no imminent danger to life and liberty.

In the case of N.N. Kalia v. University of Delhi,[9] the Central Information Commission (CIC) passed following observation about section 7(1), which might help in understanding the provision better. This proviso has to be applied only in exceptional cases. Whether the information sought concerns the life or liberty of a person has to be carefully scrutinized and only in a very limited number of cases this ground can be relied upon. The government machinery is not designed in a way that responses to all RTI Applications can be given within forty-eight hours. A broad interpretation of 'life or liberty' would result in a substantial diversion of manpower and resources. The life or liberty provision can be applied only in cases where there is an imminent danger to the life and liberty of a person and non-supply of information may either lead to death or grievous injury to concerned person. Liberty of a person is threatened if he or she is going to be incarcerated and disclosure of the information may change that situation. If disclosure of information would obviate the danger, then it may be considered under the proviso of section 7(1). The imminent danger has to be demonstrably proven. When a citizen exercises his or her fundamental right to information, the information disclosed may assist him or her to lead a better life. But in all such cases, proviso of section 7(1) cannot be invoked unless imminent danger to life and liberty can be proven.

[8] CIC/SG/C/2009/000453
[9] CIC/SG/C/2009/001169/4696

In the case of Mr. J.K. Mittal v. Gnctd,[10] the CIC held that the objective of provision of RTI Act particularly Section 7(1) proviso that life and liberty related information shall be given in 48 hours is to inculcate responsive attitude in the Police Authority. It is pathetic to note that Home Department did not exhibit any concern and remained unresponsive. They simply passed on the back to the Police Authority.

The proviso to Section 7(1) of the RTI Act has to be applied only in exceptional cases. Whether the information sought concerns the life or liberty of a person has to be carefully scrutinized and only in a very limited number of cases this ground can be relied upon. The government machinery is not designed in a way that responses to all RTI Applications can be given within forty-eight hours. The life or liberty provision can be applied only in cases where here is an imminent danger to the life and liberty of a person and non-supply of information may either lead to death or grievous injury to concerned person. Liberty of a person is threatened if he or she is going to be incarcerated and disclosure of the information may change that situation. If disclosure of information would obviate the danger, then it may be considered under the proviso of section 7(1). The imminent danger has to be demonstrably proven. When a citizen exercises his or her fundamental right to information, the information disclosed may assist him or her to lead a better life. But in all such cases, proviso of section 7(1) cannot be invoked unless imminent danger to life and liberty can be proven.[11]

Priority should be given in case of life and liberty issues other than any other issues because Article 21 of the Constitution itself contains a provision regarding right to life and personal liberty. It states that "No person shall be deprived of his life or personal liberty except according to procedure established by law." And it is also significant to note that in case of information pertaining to life and liberty, the complaint should be conspicuously branded as "Life & Liberty-Urgent" so that priority is accorded for its disposal before it is too late.

RIGHT TO INFORMATION IN CASES OF POLICE FIR'S

Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society. The Scheme of Cr.P.C. does not provide for giving copy of the FIR to the accused at any earlier stage than by a Magistrate on commencement of the proceeding under Section 207 of the Cr.P.C. Section 173 of the Cr.P.C. however provides that Officer in charge

[10] CIC/SA/C/2015/000030

[11] N.N. Kalia v. University of Delhi, CIC/SG/C/2009/001169/4696

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of the police station shall forward to the Magistrate a report stating the details as mentioned in Section 173(2). Section 173(6) also empowers the police officer to indicate by appending a note requesting the Magistrate not to provide a part of the statement to the accused by giving reasons. When the FIR is registered against a person, the police has to initiate investigation under Section 157[12] of the Cr.P.C. If from an information received or otherwise an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156[13] to investigate, he shall forthwith send a report to a Magistrate empowered to take cognizance upon such offence on a police report. The Code also empowers the police officer to arrest the accused. Section 438 of the Cr.P.C. provides that where a person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence he may apply to the High Court or the Court of Session for a direction.

For meaningful exercise of the right given to the accused under Section 438 of the Cr.P.C., obtaining copy of the FIR is relevant and necessary. A person who is accused of a cognizable[14] offence by registration of the FIR at the police station cannot be denied the right to know the contents of the FIR to enable him to defend himself and take such steps as provided under law. About a century ago, the Patna High Court in *Dhanpat v. Emperor* (AIR 1917 Pat 625) laid down as follows -"It is vitally necessary that an accused person should be

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[12]Section 157 in The Code Of Criminal Procedure, 1973- Procedure for investigation preliminary inquiry.
(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-
(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;
(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.
(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub- section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

[13]CrPC 158: Section 158 of the Criminal Procedure Code-Report how submitted
1. Every report sent to a Magistrate under section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the Stale Government, by general or special order, appoints in that behalf.
2. Such superior officer may give such instructions to the officer in charge of the police station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

[14]Meaning of cognizable: Generally, cognizable offence means a police officer has the authority to make an arrest without a warrant. The police are also allowed to start an investigation with or without the permission of a court.

granted a copy of the FIR at the earliest possible in order that he may get benefit of the legal advice."

A Division Bench[15] of the Allahabad High Court in *Shyam Lal v. State of U.P. and Others*[16] had elaborately considered the question as to whether an accused is entitled for copy of the FIR and he can obtain it either from the police station or the office of the Superintendent of Police or from the Magistrate. In paragraphs 10.4 and 10.5 the following was stated:

"Court held that the accused is entitled to know what was said in the first information report to connect with the offence so that he may be in a position to protect his interest."

He is therefore, entitled to a copy thereof. He can have it from (i) the police station, or (ii) the office of Superintendent of Police, or (iii) C.J.M./Magistrate, Incharge/Special Judge as the case may be and as per his desire. Ours is a welfare democratic State. It is a Government by the people, of the people and for the people, as said by Abraham Lincoln. It is common knowledge that the office of the Superintendent of Police or for the matter of that the Courts are situated invariably at a distance far from the Police Stations. Imagine the plight of such a person who is required to cover a great distance for having a certified copy of the F.I.R. to know its contents so that he could defend himself. Accordingly, there is no manner of doubt that an accused person or any person who suspects that his name figures in a first information report can file an application or get an application filed through his pairwikar (representative/agent) for supplying certified copy of the first information report either before the S.O./S.H.O. of police Station or the office of Superintendent of Police or the C.J.M. or the Special Judge before whom the first information report is kept or forwarded by the Police Station concerned.

When Section 438Cr.P.C. is held to be a device to secure individual's liberty, all means to secure the said liberty has to be held to be available to the accused to fulfill the object which clearly reinforces the right of the accused to receive copy of the FIR. Therefore, court held that the accused is entitled for copy of the FIR. The accused can make an application to the police station concerned or office of the Superintendent of Police or the Court of concerned Magistrate which is required to be provided to him immediately within forty-eight (48) hours. The RTI Act, 2005 Act has statutorily recognized the right of information of all citizens. Application for copy of the FIR can also be submitted by any person under the RTI Act,

[15]A Division Bench is a term in judicial system in India in which a case is heard and judged by *at least* two judges. However, if the bench during the hearing of any matter feels that the matter needs to be considered by a larger bench, such a matter is referred to a larger bench.

[16]Crl. L.J. 2879/1998

2005. If police authorities are claiming exemption under Section 8(1)[17] of the 2005 RTI Act it is a question which has to be determined by the police authorities by taking appropriate decision by the competent authority. In event no such decision is taken to claim exemption under Section 8 of the 2005 Act, the police authorities are obliged to provide for copy of the FIR on an application under the 2005 RTI Act.

RIGHT TO INFORMATION IN FAMILY DISPUTES MATTERS

Under Right to Information Act 2005[18] any citizen of India may get any information from central and statutory public authorities[19]. The public authorities must respond to request for

[17]Section 8 in The Right To Information Act, 2005- Exemption from disclosure of information.—
(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—
(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
(f) information received in confidence from foreign government;
(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
(h) information which would impede the process of investigation or apprehension or prosecution of offenders;
(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;
(j) information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.
(2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.
(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section: Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

[18] Act No.22 of 2005.

[19] Section-6 Request for obtaining information - A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority.

information in 30 days[20]. An independent Information Commission is setup at the national level[21] and Information Commissions at state levels[22].

The institution of maintenance, which is prevalent in Indian since the dawn of ages aiming to provide the support network to the support to destitute females comes as a measure of social justice to women. The Hon'ble Judiciary has developed the law related to 'Institution of maintenance' to the extent as a measure of social justice and fall within constitutional sweep of Article 15(3) reinforced by Article 39. The provisions are intended to provide relief to the destitute.[23] For the development of the Law and the social change, it is required that Judiciary plays an active role by evolving the new principles.

When a destitute female approaches the Court in India, it can never be certainly answered that

(a) If she is entitled to maintenance under the particular law or not? If the answer to this question is yes, then the next question arises

(b) To what extent the other party is liable to maintain her? The next important question arises in the series is

(c) From when and which date she will be entitled to get the relief? And last but not the least, if she has come across the entire hurdles and somehow, she is able to get the award of maintenance in her favor, the next important question arises that

(d) What are the consequences if the person liable fails to oblige with the orders of Court?

The problems in the field of maintenance need to be tackled with a combination of humanitarian as well firm Legal measures, so that the person who seek a helping hand from the institution of maintenance which basically aims to establish and provide a social and financial security, should not feel victimized in order to secure the justice to fulfill the needs on day to day basis.

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[20] Section-7 Disposal of request- The Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request under section 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9: Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.

[21] Section-12 Constitution of Central Information Commission The Central Government shall, by notification in the Official Gazette, constitute a body to be known as the Central Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act

[22] S-15 Constitution of State Information Commission- Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the State Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

[23] Monica Chawla, Gender Justice: Women and Law in India, 99 (2006).

The Central information commission held in the case of Prashansa Sharma vs. Delhi Transco Ltd.[24]

a. the spouses have right to information between them.

b. The husband has duty to provide all that information to his wife and the appellant wife has right to information.

c. Though certain documents like annual returns of assets, investments, IT returns etc were earlier declared as private/personal or third-party information, as far as spouses are concerned, they are not private or personal or third-party information between them, in the context of marital disputes especially for maintenance purposes.

d. The PIO's cannot reject the request for such information, if filed by spouses, on the ground of Section 8(1)(j) saying it is personal information, because the protection of privacy is overridden by the huge public interest in maintaining wives, as provided in the proviso to exception 8(1)(j). The larger public interest in maintenance of wives and children, prevention of domestic violence, etc., for the purposes of the disclosure of such information is to be observed.

Every spouse has a right to information about income, assets, investments, etc from the other spouse regarding the claim of maintenance from the other spouse employed by Government. Under Section 8(1) (j) generally, the information about a spouse happened to be public servant sought by a victimized spouse shall be disclosed in larger public interest. The proviso to Section 8(1) (j) reads with Section 8(2) of the Right to Information Act entitled the destitute wives to information which they sought because of overwhelming public interest in securing their right to life.

CONCLUSION

The right to information is a cherished right. Information and right to information are intended to be formidable[25] tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability[26]. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under Clause (b) of Section 4(1)[27] of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption.

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[24] (03.02.2015 - CIC) : MANU/CI/0014/2015

[25] Meaning of formidable: Arousing fear, dread, or alarm, Inspiring awe, admiration, or wonder

[26] Meaning of accountability:Expected or required to account for one's actions; answerable.

[27] Section 4 in The Right To Information Act, 2005, Obligations of public authorities.—
(1) Every public authority shall—

But in regard to other information that is information other than those enumerated in Section 4(1)(b) and (c) of the Act, equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.).

Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public

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(a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated;
(b) publish within one hundred and twenty days from the enactment of this Act,—
(i) the particulars of its organization, functions and duties;
(ii) the powers and duties of its officers and employees;
(iii) the procedure followed in the decision making process, including channels of supervision and accountability;
(iv) the norms set by it for the discharge of its functions;
(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
(vi) a statement of the categories of documents that are held by it or under its control;
(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
(ix) a directory of its officers and employees;
(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
(xii) the manner of execution of subsidy programs, including the amounts allocated and the details of beneficiaries of such programs;
(xiii) particulars of recipients of concessions, permits or authorizations granted by it;
(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
(xvi) the names, designations and other particulars of the Public Information Officers;
(xvii) such other information as may be prescribed, and thereafter update these publications every year;
(c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;
(d) provide reasons for its administrative or quasi judicial decisions to affected persons.
(2) It shall be a constant endeavor of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information Suo moto to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.
(3) For the purpose of sub-section (1), every information shall be disseminated widely and, in such form, and manner which is easily accessible to the public.
(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

authorities and eradication of corruption) would be counter-productive as it will adversely[28] affect the efficiency of the administration and result in the executive getting bogged[29] down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration or to destroy the peace, tranquility[30] and harmony among its citizens. Nor should it be converted into a tool of oppression[31] or intimidation[32] of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritizing 'information furnishing', at the cost of their normal and regular duties.

Right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt within the Act and secondly the constitutional limitations emerging from Article 21 of the Constitution. Thus, wherever in response to an application for disclosure of information the public authority takes shelter under the provisions relating to exemption, non-applicability or infringement of Article 21 of the Constitution the Information Commission has to apply its mind and form an opinion objectively if the exemption claimed for was sustainable on facts of the case.

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[28] Meaning of adverse:Contrary to one's interests or welfare; harmful or unfavorable
[29] Meaning of bogged: A place or thing that prevents or slows progress or improvement
[30] Meaning of tranquility: The quality or state of being tranquil; serenity.
[31] Meaning of oppression: A feeling of being weighed down in mind or body
[32] Meaning of intimidation: To make timid; fill with fear, To coerce or deter, as with threats

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INTERNET SHUTDOWNS IN INDIA – A CRITICAL ANALYSIS

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ABSTRACT

Right to access internet is one of the most important and basic human rights, especially in the present situation prevalent due to the ongoing COVID-19 pandemic. It is no longer a luxury but a lifeline, which if deniedcan cost people their lives, apart from having profound economic and human rights implications. In such circumstances, imposing internet shutdowns not only denies people of their basic rights but endangerstheir lives by blocking their access to life saving information and essential services.India, the world leader in internet shutdownshas continued to impose shutdowns since 2012 for a variety of reasonsas discussed in the paper, even after the onset of the pandemic, thereby countering the efforts being made to control it. This paper seeks to explore the impact of internet shutdowns, the present legal regime governing the same in India as well as the issues that need to be addressed.

Keywords: Internet Shutdowns, Access to Internet, COVID-19, Right to Information, etc.

INTRODUCTION

"The Internet belongs to everyone and no one." – Bruce Sterling, Short History of the Internetthe Internet, identified as one of the greatest technological advancements of recent times, has become a crucial aspect in enabling social and economic change over the years. The United Nations General Assembly in its Resolution[1] adopted on December 16, 2015 recognized the penetration of information and communication technologies, including the internet, into almost all corners of the globe – having created new opportunities for social interaction, enabled new business models and contributed to economic progress and development in all other sectors, while noting the unique and emerging challenges associated with their evolution and diffusion.

The global internet is growing every day, and with it, is growing the avenues of its usage, be it in terms of expression of ideas, business or simply communication. However, restrictions to Internet access are on the rise globally[2]. Governments all over the world are resorting to 'internet shutdowns' on various accounts which are largely driven by political and national security concerns. The frequent resort to Internet shutdowns by States as a means of mitigation and prevention strategy to curb spreading of misinformation and restoring law and order is extremely

[1]UN General Assembly, *Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information* Society, GA Res 70/125, GAOR, UN Doc A/Res/70/125 (December 16, 2015).
[4] Access Now, "The State of Internet Shutdowns around the World"(2018).

troubling. Not only is India following this trend, but has secured its position as the leader of the league, currently known as the internet shutdown capital of the world[3]. While India has the second highest number of Internet users in the world after China[4], it also leads the world in the number of Internet shutdowns[5], with a total of the 391 Internet shutdowns recorded between January 2012 and May 20, 202[6].

This is particularly concerning at a critical time like this when the world is consumed by a deadly health crisis known as the Coronavirus (COVID-19) pandemic, where the Internet is crucial not only for updates on health measures, movement restrictions, and relevant news to protect themselves, but also for people to communicate with doctors, family and friends. For students seeking an education, it is essential to continue learning as schools are being shut around the world[7]. According to the United Nations, cutting off users from Internet access, regardless of its justification, is considered to be disproportionate and therefore, it urges States to ensure that access to Internet is maintained at all times, even during times of political unrest[8]. Not only is the rampant use of internet shutdown as an administrative tool rather than an extraordinary measure during law and order situations extremely counterproductive to the Government of India's flagship initiative 'Digital India' seeking to transform India into a 'digitally empowered society and knowledge economy', it is also deeply worrying in respect of the present global pandemic which necessitates free and easy access to internet.

DEFINING 'INTERNET SHUTDOWN'

Over the last few years, several organizations have articulated definitions of internet shutdowns with varying degrees of similarity[9]. In general terms, an internet shutdown happens when someone – usually a government – intentionally disrupts the access to internet. According to experts, "an internet shutdown is an intentional disruption of internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information."[10] Alternatively, an

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[3]Asmita Bakshi, "India is the internet capital of the world", *Mint,* December 8, 2019, *available at:* https://www.livemint.com/mint-lounge/features/inside-the-internet-shutdown-capital-of-the-world-11575644823381.html(last visited on May 20, 2020).

[4]Megha Mandavia, "India has second highest number of Internet users after China: Report", *The Economic Times*, September 26, 2019, *available at*:https://economictimes.indiatimes.com/tech/internet/india-has-second-highest-number-of-internet-users-after-china-report/articleshow/71311705.cms?from=mdr(last visited on May 20, 2020).

[5] Megha Bahree, "India Leads The World In The Number Of Internet Shutdowns: Report", *Forbes*, November 12, 2018, *available at:*www.forbes.com/sites/meghabahree/2018/11/12/india-leads-the-world-in-the-number-ofinternet-shutdowns-report/#2ebba38e3cdb (last visited on May 20, 2020)

[6]Internet Shutdown Tracker, *available at:* https://www.internetshutdowns.in/(last visited on May 26,2020).

[7]End Internet Shutdowns to Manage COVID-19, *available* at:https://www.hrw.org/news/2020/03/31/end-internet-shutdowns-manage-covid-19 (last visited on May 25, 2020).

[8]UN General Assembly, *Report of the Human Rights Council for 2011*, UN GAOR, UN Doc A/HRC/17/27 (May 16, 2011).

[9]UN General Assembly, *Report of Human Rights Council for 2017),* UN GAOR, UN Doc A/HRC/35/22 (March 30, 2017).

[10]No more internet shutdowns! Let's #KeepItOn, *available at*: htpp://www.accessnow.org/no-internet-shutdowns-lets-keepiton/(last visited on May 24, 2020).

Internet shutdown may also be defined as "a Government-imposed disablement of access to the Internet as a whole within one or more localities for any duration of time"[11]. Internet shutdowns may vary region-wise. They may take place at national level, where internet access is disrupted across the entire country, or at a local level, where mobile and/or fixed Internet access in a state, city, or other localized area is cut off.

Shutdowns are inherently all-encompassing and do not discriminate between transmission of online data based on its users, kind of content[12], purpose of usage, or on any standards of legality or morality of the content. This means, for example, that searching for contact numbers of emergency services online is treated at par with exchange of incendiary information aimed at creating public disorder. Both being online activities are subject to suspension, but the suspension of the former has more dangerous and imminent consequences than that of the latter.

Taking the example of the recent incident of internet shutdown in Jammu and Kashmir, the longest internet shutdown in a democracy[13], not only are people unable to access information essential to their very lives, but are also unable to connect with their families. The situation continues till date, wherein only certain "white listed" websites can be accessed on 2g network while social media remains banned[14].

GROUNDS OF INTERNET SHUTDOWNS

All over the world Governments are increasingly resorting to internet shutdowns or blackouts for a variety of reasons. A 2018 report attempting to identify the official rationales used for shutdowns showed that these include, *inter alia*, combating "fake news" or disinformation and misinformation, hate speech and related violence, securing public safety and national security, precautionary measures, and preventing cheating during exams[15]. As per the trend up to March 15, 2020, of the 385 Internet shutdowns recorded between January 2012 and March 15, 2020, 237 were observed to be preventive i.e. restrictions imposed in anticipation of a law and order situation and 148 shutdowns were reactive in nature i.e. imposed to contain on-going law and order breakdowns[16]. Interestingly, more often than not, the number of preventive shutdowns matches and sometimes even surpass the number of reactive shutdowns[17].

The most commonly used reason for instituting Internet shutdowns is that law and order

[11] Software Freedom Law Centre India, "Living in Digital Darkness: A Handbook on Internet Shutdowns in India" (2018).
[12] Nakul Nayak, "The Legal Disconnect: An Analysis of India's Internet Shutdown Laws", Working Paper No. 1/2018, *Internet Freedom Foundation Research Series*(2018).
[13] Niha Masih, Shams Irfan and Joanna Slater, "India's Internet shutdown in Kashmir is the longest ever in a democracy", *The Washington Post*, December 16, 2019, *available at*:<https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html> (last visited on May 24, 2020).
[14] *Foundation for Media Professionals & Ors. v. Union Territory of Jammu and Kashmir & Anr.*, Supreme Court of India,Writ Petition (Civil) Diary No.10817/2020.
[15] *Supra* note 7 at 2.
[16] *Supra* note 6 at 2.
[17] *Supra* note 12at 4.

breakdowns worsen by rumors and misinformation circulating online, and curbing access to the Internet is an effective tool in order to restore normalcy[18]. In India, the justifications given for internet shutdowns over the years have been formally reduced to two vague grounds, namely 'public emergency' and 'public safety' under the Suspension Regulations of 2017.[19] The primary aim of any Government while suspending internet services is controlling the exchange of information online. However, in the Human Rights Council report on the promotion and protection of the right to freedom of opinion and expression[20], the Special Rapporteur stated that arbitrarily shutting down Internet services completely is a disproportionate action in any situation. Internet shutdowns, even if justified, negate the possibility of targeted filtration of content and renders inaccessible even content that is not illegal[21].

Given the dependence on internet as a channel of communication, a shutdown on the contrary creates an environment that increases unrest, aggression and sense of insecurity among the people that could possibly culminate in violence much greater than what the government had purported to curb or prevent by way of the shutdown in the very place. There is no evidence as to the effectiveness of internet shutdowns in achieving their intended goals; if anything, Internet shutdowns in India only fuel the fires of violence rather than dousing the flames. Moreover, since law enforcement as an area also does not remain immune from the evils of a shutdown, the government ends up clipping its own wings in the process. As many as 22 out of 29 state governments have resorted to internet shutdowns at least once, which shows that shutdowns are reaching epidemic proportions with state governments willing to employ it as a routine administrative measure[22]. Not only is this wholly disproportionate to the harm intended to be remedied, it is also gravely unjust considering the current situation prevalent due to the spread of COVID-19. This trend has been kept up in several states even in times of a global pandemic and is seriously impacting the citizens' right to health, information, education, business and freedom of speech and expression.

Internet shutdowns put an effective halt to all activity over the internet, indiscriminately affecting each and every transmission of online data regardless of the content of such data, the parties to such transmission and the purpose behind it. The difference between legal and illegal forms of internet usage stands obliterated for the purpose of such shutdowns and both are treated at par. Accordingly, violation of one's fundamental right to freedom of speech and expression becomes inevitable and so does that of the right to information and freedom of press which are treated as concomitant rights enshrined under Article 9(1)(a) of the Constitution of India[23]. In

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[18] *Ibid.*

[19] Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017.

[20] *Supra* note 8 at 2.

[21] Legality of Internet Shutdowns under Section 144 CrPC, *available at*: October 2016)https://sflc.in/legality-internet-shutdowns-under-section-144-crpc(last visited on May 25, 2020).

[22] *Supra* note 12 at 4.

[23] *M. Nagaraj v. Union of India*, 2006 8 SCC 212.

addition, the lack of this distinction is affecting people now more than ever – when the whole world is resting on the Internet for anything and everything, starting from access to accurate information, to online education and transactions, to getting medical help. Attempts by governments to restrict access to the internet, block social media platforms and other communications services, or slow down internet speed deny people access to information, just when it is the need of the hour to stop the spread of the virus.[24] This is a grave violation of the right to access and share information, which are not only a human right but also vital to any public health and humanitarian response to COVID-19.[25]

IMPACT OF INTERNET SHUTDOWNS

Internet today has become a way of life; it has penetrated and transformed our lives so much so that it is hard to imagine our lives without it. Unavailability of internet in a society whose members have grown to become so conditioned to using it in almost every other aspect of their daily lives, has a crippling effect on them. In today's time, with a nationwide lockdown in place and major restrictions on movement, internet access has become a lifeline. As the world deals with COVID-19, internet has become the sole source of crucial information, education, economic transactions. According to Deborah Brown, a senior digital rights researcher and advocate, "internet shutdowns block people from getting essential information and services; during this global health crisis, shutdowns directly harm people's health and lives, and undermine efforts to bring the pandemic under control."[26]

The damage that invariably results from these shutdowns not only has far reaching human rights implications but now poses a threat to the very safety of people. When Internet services suddenly become unavailable at a time when many aspects of people's lives are dependent on it, including their health, it raises various practical problems and creates a state of panic among the masses. Basic human rights such as the fundamental rights guaranteeing freedom of speech and expression, right to conduct business, right to access education and healthcare and right to move freely are compromised, which is in turn adversely affecting people's lives. On the one hand, this consequence is counterintuitive to the reason behind imposition of such shutdowns, and on the other hand, it has a highly demoralizing impact on the people of the country, whose lives are disrupted on account of the nationwide lockdown due to COVID-19. Some of the most affected Indian states and union territories that were impacted by internet shutdowns included Jammu and Kashmir, Meghalaya, Arunachal Pradesh, Assam, Uttar Pradesh and Rajasthan[27]. In recent times, more incidents of internet shutdowns have been found in Jammu and Kashmir, West Bengal,

[24]KeepItOn:Internet Shutdowns during COVID-19 will help spread the virus. ,*availableat*: https://www.accessnow.org/keepiton-internet-shutdowns-during-covid-19-will-help-spread-the-virus/(last visited on May 29, 2020).

[25]*Ibid.*

[26]*Supra* note 7 at 2.

[27]*Ibid.*

Manipur and Madhya Pradesh.[28] The present-day Union Territory of Jammu and Kashmir region has had 184 shutdowns since 2012, accounting for nearly half of the country's suspensions.[29] It is undoubtedly by far the worst affected of all and continues to witness the longest ever internet shutdown imposed in any democracy in the world so far following the scrapping of Article 370 of the Indian Constitution in August 2019.[30]

At this stage, it is pertinent to mention another impact of internet shutdowns with respect to *Aarogya Setu*, a digital service in the form of a mobile application, developed by the Government of India to protect its citizens from COVID-19 primarily through contact tracing. It does so by informing people of their potential risk of COVID-19 infection and the best practices to be followed to stay healthy, as well as providing them relevant and curated medical advisories, as per Ministry of Health and Family Welfare and Indian Council of Medical Research guidelines, pertaining to the COVID-19 pandemic.[31] While the application uses the phone's Bluetooth and location data to inform users if they have been in contact with an infected person[32], in order for it to work internet connectivity is required at the first instance to download it, and thereafter to access its features, since the phone's software requires use of some internet connection to connect to the satellite in order to track live locations of its users. Consequently, an internet shutdown directly impairs the ability of this app to carry out its function in extending information to protect citizens from potential risks of being infected.

LEGALITY OF INTERNET SHUTDOWNS

The legal regime governing Internet shutdowns in India can broadly be divided into two parts – the old regime, prior to 2017, where the business of widespread internet suspension seemingly fell within a regulatory vacuum, and the new regime, post 2017, where the notification of the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 under the Indian Telegraph Act gave unfettered power to the competent authorities to impose internet shutdowns.

The power to suspend internet services can be derived from the following enactments:

1. Section 144 of code of criminal procedure, 1973

Within the Code of Criminal Procedure, 1973, Section 144 resides as the sole occupant under the chapter of 'temporary measures to maintain public tranquility' and gives State Governments the "power to issue orders for immediate remedy in urgent cases of nuisance or apprehended danger".

Under this section, a District Magistrate, sub-divisional magistrate or any Executive magistrate

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[28] Internet Shutdown Tracker, *available at:* https://www.internetshutdowns.in/ (last visited on May 26,2020).
[29] *Ibid.*
[30] *Supra* note 13 at 4.
[31] Aarogya Setu FAQs, India, *available at*:https://static.mygov.in/rest/s3fs-public/mygov_159056978751307401.pdf(last visited on May 26, 2020).
[32] Andrew Clarence, "Aarogya Setu: Why India's COVID-19 contact tracing app is controvertial", *BBC News*, May 15, 2020, *available at*: <https://www.bbc.com/news/world-asia-india-52659520> (last visited on May 26, 2020).

empowered by the State Government in this behalf, has the authority to "direct a person to do or abstain from a certain act" or "to take certain order with respect to certain property in his possession or under his management", if it is satisfied that the ground for proceeding under this section is sufficient and warrants an immediate remedy. Such order must be likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot or an affray.

This provision is applicable to internet shutdowns to the extent that the network architecture under the possession and management of Telecom Service Providers is considered 'property' within the meaning of this section. However, it is pertinent to note that terms such as "obstruction, annoyance, disturbance to public tranquility or an affray" are not defined under the Code or any other legislation, thereby providing for widely heterogeneous interpretations.

In addition, this section does not provide an in-built mechanism of checks and balances to prevent abuse of power, except the mention of a maximum duration of validity of order. This gives Magistrates unbridled power, who are only under the scrutiny of courts in case of a writ petition challenging their order. The ease of imposing shutdowns under section 144 is confirmed a report quoting the view of a District Magistrate, who while speaking on Internet shutdowns at an event expressed that he prefers imposing shutdowns under Section 144 as the process is less cumbersome when compared to other legislations.[33]

2. Section 69 A of information technology act, 2000

Section 69A of the Information Technology Act, 2000[34] (hereinafter the "IT Act"), read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (hereinafter the "Blocking Rules of 2009") framed thereunder, provide for the website blocking law of the country by enabling blocking of access to information on the internet by the Central Government.

Section 69A is a notorious provision of law that empowers the Central Government to block access "*by public any information generated, transmitted, received, stored or hosted in any computer resource*" which essentially means the authority to block access to webpages, websites etc., however, based on an exhaustive number of grounds. Though limited in number, these grounds are nevertheless broadly worded and leave sufficient scope of justification with the Government for taking action under this section, which could be *"in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above."*

This provision reflects the inherent tussle between the freedom of speech and expression of a citizen and State interests and the need to strike a balance between the two in necessary

[33] *Supra* note 11 at 3.

[34] Information Technology Act, 2000(Act 21 of 2000), s. 69A.

situations. The constitutionality of section 69A, was upheld by the Supreme Court in ***Shreya Singhal v. Union of India***,[35] wherein at the same time, Nariman J. held that "*restrictions on the freedom of speech must be couched in the narrowest possible terms.*"[36]

In exercising the power under section 69A of the IT Act, the Central Government has the legal authority to disrupt data services in mobile phones.[37] The language of the provision makes it explicitly clear that the Government can only use this provision to blocking of particular 'information' on the internet as opposed to blocking or restricting access to the internet as a whole. Thus, the Supreme Court in its decision in ***Anuradha Bhasin v. Union of India***,[38] held that section 69A of the IT Act had no role and cannot be relied upon when it comes to blocking or restricting access to internet, thus leaving no room for any ambiguity on this point.

The Suspension Rules of 2009, that lay down the procedure and process in accordance with which the Central Government may carry out the aforementioned blocking and thus allow censorship on the internet by ensuring that it is in consonance with reasonable restrictions on the freedom of speech laid down under Article 19(2) of the Indian Constitution. Those, unlike section 144 of the Code of Criminal Procedure and section 5(2) of the Telegraph Act, leave much lesser room for 'abuse of power' by the Government.

3.Section 5(2) of the Indian telegraph act, 1855

Section 3(1AA) of Indian Telegraph Act, 1855[39] defines "telegraph" to include "any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means." This broad and future-proof definition includes virtually any communication system within its ambit, thus enabling the application of this nineteenth century legislation to the current issue of internet shutdowns.

As per section 5(2) of the Telegraph Act, Central/State Governments or their authorized officers can, *inter alia*, prevent the transmission of any telegraphic message or class of messages during a public emergency or in the interest of public safety, if it is considered necessary or expedient in the interest of (i) sovereignty and integrity of India; (ii) security of the State; (iii) friendly relations with foreign states; (iv) public order; or (v) preventing incitement to the commission of an offence. Since the term "telegraph" can be interpreted broadly enough to include Internet services, the power of the Government under this provision also extends to the Internet.

Interestingly, the terms "public emergency" and "public safety" are not defined under the

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[35](2015) 5 SCC 1.

[36]*Ibid.*

[37]Nakul Nayak, "The Anatomy of Internet Shutdowns – I (Of Kill Switches and Legal Vacuums)", *Centre For Communication Governance*, August 29, 2015, *available at*:<https://ccgnludelhi.wordpress.com/2015/08/29/the-anatomy-of-internet-shutdowns-i-of-kill-switches-and-legal-vacuums/>(last visited on May 25, 2020).

[38]2020 SCC Online SC 25.

[39]Indian Telegraph Act, 1855 (Act 13 of 1885), s.3(1AA).

Telegraph act or any other law. The Supreme Court interpreted these terms in ***People's Union for Civil Liberties v. Union of India***[40] to mean "the prevalence of a sudden condition or state of affairs affecting the people at large calling for immediate action", and "the state or condition of freedom from danger or risk for the people at large" respectively. However, even with clarity afforded by the Supreme Court, these terms are open to broad interpretation by Governments owing to the lack of any standard objective to determine how a given situation qualifies as a public emergency or threatens public safety. In addition, the grounds provided in the section are also not defined anywhere.

Therefore, it is safe to say that section 5(2) of the Indian Telegraph Act, like section 144 of CrPC, is open to wide subjective interpretation. The absence of any procedural guidelines, until the new rules[41] notified under this provision in 2017, further created an anomaly as to the persons authorized to direct an order under this provision, the duration of any order or the procedure to be followed for its issuance, implementation and enforcement. The Telegraph Act is silent on these accounts, thereby vesting the Government with far-reaching powers.

TEMPORARY SUSPENSION OF TELECOM SERVICES (PUBLIC EMERGENCY OR PUBLIC SAFETY) RULES, 2017

While Section 5(2) of Telegraph Act 1855 deals with the substantive law regarding suspension of Internet services, the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (hereinafter "Suspension Rules") lay down the procedure to suspend telecom services and consequently, the suspension of Internet services in India. This legislation is a first of its kind, wherein the Central Government has for the first time conferred a direct and express power on competent authorities to direct internet shutdowns, tracing the source of this power back to section 5(2) of the Telegraph Act.

These rules provide that only a 'competent authority', which shall be the Secretary in the Ministry of Home Affairs in case of the Central Government, and the Secretary to the State Government in-charge of the Home Department in case of State Government, may order directions under these Rules. However, 'in unavoidable circumstances' an officer of the rank of Joint Secretary or above who has been duly authorized by the Union Home Secretary or State Home Secretary may issue such an order, subject to confirmation by a competent authority. Again, the term 'in unavoidable circumstances' has not been defined in these Rules or any other legislation, nor interpreted in any judgment. Consequently, there exists a lack of standard objective to determine whether a given situation qualifies as an unavoidable circumstance, which gets to decide the same, and how.

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[40] AIR (1997) SC 568.

[41] *Supra* note 19 at 5.

These rules mandate that an order passed by the competent authority must "contain reasons for such direction", a copy of which must be forwarded to a Review Committee comprising entirely of members of the Executive. Then this Committee shall meet within 5 working days to verify the compliance of such order with the provisions laid down in the Telegraph Act and Suspension Rules.

Whereas these Rules do provide a legal source, of the Government's power to direct Internet shutdowns, there are major lacunae which are *prima facie* evident upon bare reading of the provisions. The areas of concern are as follows:

i. The Review Committee comprises entirely of members of the Executive, which severely compromises independence and impartiality since the authorization, conduct and review is carried out by a single arm of the Government. This also severely undermines the doctrine of separation of powers.
ii. There is grave failure to accommodate principle of transparency since there is no provision for notification of a shutdown in the press or official gazette.
iii. There is no mention of the mode, duration and nature of internet shutdowns. There is an absence of a sunset clause, which places a time limit on any suspension order and such order automatically terminates upon its expiry.

Upon a broad analysis of the legality of Internet Shutdowns in India it can easily be inferred that too much is left to the vast discretion of the authorities, be it Magistrates or the Central/State Government, resulting in unrestricted power and major likelihood of arbitrariness and abuse of such power. This is a cause for concern, since these provisions, in recent years, are being used to get away with blanket bans on the access to internet services rather than restricting particular practices or kinds of usage of the internet which may be illegal, after clearly defining the same.

ANURADHA BHASIN V. UNION OF INDIA[42] – AN UNDERWHELMING JUDGMENT ON INTERNET SHUTDOWNS

While dealing with the issue of internet suspension of mobile and broadband internet services in erstwhile Jammu and Kashmir and how it curbs the freedom of media in the state, the Supreme Court delivered a rather underwhelming judgment. Although some consider this judgment to be the first step in reforming the telecom suspension process in India, marking the beginning of a long uphill campaign[43], the Supreme Court did not do justice to the opportunity to set things right with respect to internet shutdowns in India, particularly in case of Jammu and Kashmir. While on

[42] *Supra* note 42 at 12.

[43] SC's Kashmir communication shutdown judgement is just the beginning of a long uphill campaign, *available at*: <https://internetfreedom.in/scs-judgement-on-kashmir-communication-is-just-the-beginning/>(last visited on May 27, 2020).

the one hand, the apex court recognizes the need for internet as a medium for expression and conducting business to be constitutionally protected subject to the reasonable restrictions under Article 19(2) of the Indian Constitution, on the other, it allows for these restrictions to extend to a complete prohibition on speech in terms of an internet shutdown.

Although this judgment has given some clarity as to the legal source of the power to impose telecom suspensions, it failed to determine the main issue that is the constitutionality of the communication shutdowns on the futile ground that the State did not produce all orders. Not only has this decision of the Supreme Court failed to help the dire situation in Jammu and Kashmir due to the absence of direction for restoration of communication services, it also went to the extent of reducing the impingement on press freedom and plight of journalists as mere complaints of 'indirect chilling effect' on the functioning of press.

This case presented the Supreme Court with an opportunity to right the illegitimate use of internet shutdowns against the public by imposing some post facto accountability for a measure that increasingly seems less motivated by concerns around national security or law and order, and more by the need to impose mass punishment on a dissenting population.[44] It appears as though the Court has taken the opportunity to miss an opportunity, to the detriment of its own credibility and public's rights.[45]

FOUNDATION OF MEDIA PROFESSIONALS & ORS. V. UNION TERRITORY OF JAMMU AND KASHMIR & ANR.[46]– ANOTHER UNDERWHELMING RESPONSE TO THE ISSUE OF INTERNET SHUTDOWNS

Upon receiving a petition seeking restoration of 4G mobile internet and quashing of the orders restricting internet in the Union Territory of Jammu and Kashmir, the Supreme Court following a similar trend as in case of its judgment in *Anuradha Bhasin v. Union of India*[47], has failed to address the issues faced by the people of Jammu and Kashmir due to absence of direction for restoration 4G internet services, which is affecting their right to health, right to education, right to business and right to freedom of speech and expression amidst the national lockdown. The petitions also pointed out that even doctors were unable to provide online medical services, in addition to the issue of online education of students being disrupted.[48]

Referring to the issue as one of balance between national security and human rights, wherein it is the Court's responsibility to be ensure that national security and human rights are reasonably balanced and stating that the Court recognizes that the "UT has plunged into crisis", the Supreme Court refrained from passing any orders to restore 4G internet services in Jammu and Kashmir,

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[44] Editorial, "Underwhelming Judgment on Internet Shutdowns" Economic & Political Weekly <www.epw.in/journal/2020/3/editorials/underwhelming-judgment-internet-shutdowns.html> (2020) 55(3) accessed 20 January 2020

[45] *Ibid.*

[46] *Supra* note 14 at 4.

[47] *Supra* note 42 at 12.

[48] "SC Refrains From Restoring 4G Services in J&K, Sets Up Special Committee", *The Wire,* May 11, 2020, available at <https://thewire.in/law/supreme-court-jammu-kashmir-4g-internet-special-committee> (last visited on May 26, 2020).

and instead chose to direct the constitution of a 'special committee' by the Centre to examine the contentions raised by the petitioners.[49]

While the counsel representing the union territory of Jammu and Kashmir failed to provide any rational nexus between the restriction of the internet speed and national security50, one of the preliminary contentions was that issues of national security are best left to those in charge of policy making, and courts should not step into such issues. The Centre also contended before the Supreme Court that "access to 4G internet is not a fundamental right and that such high-speed internet services could not be provided in Jammu and Kashmir because of its misuse by terrorist groups backed by Pakistan to spread rumour and panic, even during the Covid-19 pandemic."[51] This case presents yet another missed opportunity where the Supreme Court, being in a position to right the wrong of unjust imposition of internet shutdowns at a time when access to internet has acquired immense importance under the circumstances prevailing in the country, failed to come to the rescue of the people whose very basic rights are in danger.

RIGHT TO ACCESS INTERNET

The Internet is not only an enabler of socio-economic and cultural rights, but is indispensable to the process of imparting, receiving and sending information, which is fundamental to any democratic organization. Moreover, Internet access allows people to lead "minimally decent lives"[52]. This makes the internet more crucial than ever, especially in present circumstances. In May 2011, a United Nations Report[53] went on to give 'Internet access' the status of a basic human right. The Special Rapporteur states that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies[54]. Internet access is a unique and non-substitutable way for realizing fundamental human rights such as free speech and assembly.[55] The United Nations Human Rights Council passed a resolution[56] on July 1, 2016 condemning network disruptions and measures resorted by states to curb online access and/or dissemination of information. The resolution further affirmed that a right in the online sphere, especially the right to freedom of expression requires the same standard of protection as in the offline world.[57] Additionally, the COVID-19 virus shows that

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[49] *Ibid.*
[50] *Supra* note 14 at 4.
[51] Right to access 4G internet is not a fundamental right, J&K tells SC, India, *available at:* https://timesofindia.indiatimes.com/india/right-to-access-4g-internet-is-not-a-fundamental-right-jk-tells-sc/articleshow/75458013.cms (last visited May 24, 2020)
[52] Merten Reglitz, "The Human Right to Free Internet Access", 5, *Journal of Applied Philosophy* 36 (2019).
[53] *Supra* note 3 at 2.
[54] *Ibid.*
[55] *Supra* note 14 at 4.
[56] UN General Assembly, *Report of the Human Rights Council,* Thirty-second session 'The promotion, protection and enjoyment of human rights on the Internet' UN Doc A/HRC/32/L.20
[57] *Ibid.*

internet access is a basic right, and requires more people to be connected via internet.[58] While the Supreme Court in its latest ruling on the issue of Internet shutdown in Jammu and Kashmir[59] declared that the right to freedom of speech and expression and the right to carry on any trade or business using the medium of internet is only constitutionally protected, the High Court of Kerala in ***Faheema Shirin R.K vs State Of Kerala***[60] declared that the right to have access to Internet is a fundamental right under Article 21 of the Constitution of India.[61]

It is essential to understand that while for some internet access is only a medium to exercise other rights, or a means of communication, but for many it is a platform for business, trade, education, livelihood, and for some it is crucial to their very lives, especially in current times. Therefore, a complete shutdown of Internet has implications on the entire population of an area, including innocent people who have no role to play in the cause behind such a shutdown, at a time when access to internet plays a significant role in keeping people safe.[62] At this point, we are not only facing a global health pandemic but also a catastrophic digital divide threatening to deepen offline inequalities.[63] Therefore, it is the duty of the Government to not only provide its citizens with internet access as a matter of right, but also protect it.

CONCLUSION

There is no denying that internet is an essential part of the lives of a large section of people in India, with nearly half a billion users in the country. The expansion of access to internet has led to a paradoxical issue – a society that encourages increased adoption of the internet, but in the absence of any safeguards as to its possible misuse. However, the fact remains that internet is a boon to society, especially in keeping us connected with the world in times of a global pandemic that has resulted in a nationwide lockdown restricting all movement.

With such a large proportion of people dependent on the internet, a shutdown of internet services leaves people in a helpless state, particularly when internet has become the sole source of important information and the sole means to acquire education, carry on business, and even communicate. In such circumstances, a sudden unavailability of internet services when lives are dependent on it impacts its users not just economically, socially and psychologically, but also endangers their lives. Considering the large-scale impact of internet shutdowns on various

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[58] Covid-19 shows why internet access is a basic right. We must get everyone connected, India, *available at:* https://webfoundation.org/2020/04/covid-19-shows-why-internet-access-is-a-basic-right-we-must-get-everyone-connected/ (last visited May 27, 2020)

[59] *Supra* note 42 at 12.

[60] W.P.(C) 19716/2019-L (Kerala High Court, 19 September 2019)

[61] *Ibid.*

[62] *Supra* note 26 at 7.

[63] *Supra* note 60 at 17.

aspects of people's lives, it is of utmost importance that the authorities put a lid on the rampant usage of this tactic in order to prevent it from causing irreversible damage in the long run.

Internet shutdowns or blackouts, disturbingly becoming the 'new normal' all across the world today, are nothing short of a draconian measure undertaken by national governments with complete disregard for the consequences thereof. They are an extremely disproportionate method of curbing resistance increasingly being resorted to by governments these days. Among the various reasons cited by governments for ordering such shutdowns, the most prominent one has been to control the spread of misinformation and disinformation in the form of incendiary messages, hate speech and rumors, targeted at upsetting the law and order situation within any region or regions. As the narratives against internet shutdowns are gaining popularity globally, India stands out as a shining example with the dubious distinction of being the 'shutdown capital of the world'.

In light of the justification given, internet shutdowns appear to be the most counterintuitive and counterproductive choice of tools to prevent as well as control outbreaks of violence and the chaos that ensues. By disrupting the channels of communication through which such propagandas may be given effect to on a mass scale, governments end up clipping their own wings in the process in as much as they prevent themselves from using the same media to engage in effective counter speech with the public, more so in current times, when a lot of relevant information with respect to the situation caused by COVID-19 is made available to people by the Government through the internet, including the mandatory use of the *Aarogya Setu* app. Publishing information online and via the media and then denying access to this valuable information to the population affected by internet shutdowns does not make sense and may further aid and escalate the spread of the virus among the population.

Now, as the world deals with the spread of corona virus, reliable, correct information available on the internet is one of the most important tools for people to protect themselves. Thus, access to accurate information will help save lives, aid people in protecting themselves and their loved ones, and permit them to carry on and care for one another in their communities. During this crisis and beyond, a freely accessible, secure and open internet plays a significant role in keeping everyone safe.

There is no doubt that the growth of internet has resulted in a fresh range of challenges with regard to law and order breakdowns, especially considering the ease with which rumors and misinformation can be spread and malicious efforts to disrupt peace and tranquility can be employed. Accordingly, an internet shutdown may seem as an attractive method for tackling the menace of law and order breakdowns. However, it is truly unfortunate how this excessively disproportionate and unjust measure is being frequently resorted to without any consideration as to its long term societal and economic impacts, and it is imperative that this issue be dealt with at the earliest. Internet shutdowns as a practice causes widespread damage in terms of socio-

economic effects as well as health hazards in present times, thus, making it an unsustainable one. To effectively address and deal with the issue of internet shutdowns, the following measures ought to be taken:

1) Imposition of internet shutdowns should only be prohibited except in extremely extraordinary, rarest of the rare circumstances as a last resort. However, these extreme, extraordinary circumstances must be disclosed to the public, with exceptions allowed in cases of emergency.
2) The current legal regime governing internet shutdowns must place greater importance on transparency and accountability, with only one law as the source of power to impose such shutdowns. This can be done by providing adequate notice to general public before such imposition, clearly specifying its duration and making shutdown orders publicly accessible.
3) Due Process of Law, Proportionality, and Necessity should be the guiding principles behind the action of the authorities before entertaining the use of Internet shutdowns as an administrative tool.
4) In the rare event that an internet shutdown is absolutely unavoidable in an area, alternative means of accessing crucial information must be provided to the people of that area.
5) Affected parties must be provided with a statutory platform to voice their grievances, as opposed to being compelled to invoke the writ jurisdiction of the judiciary.
6) Measures to identify and curb spreading of fake news and misinformation need to be developed, while also differentiating between legal and illegal forms of speech and expression, as well as internet usage.

There is a long way to go in the fight against internet shutdowns, which is currently just in its nascent stage. A lot of ground is yet to be covered before this issue can be properly addressed and an expedient solution can be arrived at through meaningful dialogues and collaborations among those who are experts in this regard. However, if a health crisis of this magnitude has not brought a change in the ongoing internet shutdown regime, it indicates a serious problem that needs to be dealt with. Many conceptual and practical issues have come to light upon analysis of the whole internet shutdown trend rampant in our country, and the legality behind it. Interestingly, there are no secrets on the internet, but a cloud of secrecy hangs over the entire internet shutdown process. The gap between the conceptual and practical aspects needs to be bridged through transparency, and only policy makers can help bring more clarity on the issue.

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RAPE & CONSENSUAL SEX: THE LEGALITY INVOLVED

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ABSTRACT

We all might often hear the word consensual sex in our daily life but even, most of us fail to interpret its actual meaning. Here author has tried making a strong difference between consensual sex and rape or any other sexual assault. It also points out the failure of our judicial system to interpret the word consensual sex. In addition, paper also discusses some more offences like casting couch and marital rape. Does the definition stated in section 375 of IPC clearly define rape? These all words seem to be very different from each other and also have different effects on people involved in it but in reality, there is a thin line difference between them. It is very important to know the difference for every individual. The paper empirically examines that "is having free consent for sex enough for not being termed it as rape or sexual assault"? Author also endeavours to argue that "is rape confined to forced penetration only? And does section 375 of IPC clearly define rape and covers all its aspect or not? It is also investigated here that the law which states that consummation is the sole objective of marriage.

Keywords: Sex, Rape, Consent, Marriage, etc.

INTRODUCTION

Generally, now a days so many questions can be raised like Is having consent for sex means that the boy has the right to rape a girl? How to know that the consent obtained was free or without any pressure? Is the definition mentioned in Sec 375 of IPC enough? Does it cover all aspects of rape? Section 375 of Indian Penal Code, 1860[1] defines rape: A man is said to "rape" someone, besides inside the case hereinafter except, has sexual intercourse with a female under occasions falling below any of the six following:

1. Against her will.
2. Without her consent.
3. With her consent, when her consent has been acquired by placing her or any person in whom she is interested by fear of death and hurt.
4. With her consent, when the person is aware that he isn't her husband, and that her consent is given because she believes that he's another guy to whom she is or believes herself to be married.
5. With her consent, while on the time of giving such consent, by using purpose of unsoundness of mind or intoxication or the management by using him individually or

[1] Indian Penal Code, section 375, No. 45 of 1860

via any other of any stupe-fying or unwholesome substance, she is not able to recognize the nature and results of that to which she offers consent.

6. With or without her consent, whilst she is underneath sixteen years of age.

Suppose, we assume that the definition covers all the aspects of rape, and also that the consent obtained is free but does this definition cover that the consent obtained was free from pressure? Is it right to say that the consent can be obtained only when there is a threat to death or hurt or under intoxication? Let's just take an example to understand it better, suppose A is a girl who goes for an interview of her dream job or say any job and the person who is taking her interview offers her the job on a condition that she has to sleep with him and since her financial conditions were not very good she agrees to his offer and has sex with him. Now in this case the sexual intercourse that happened between the girl and the interviewer was consensual but she was subjected to a pressure of fulfilling the needs of her family and to earn her living. Now will this act not be considered as rape? Just because the interviewer didn't use force for having sex, doesn't mean he's not a rapist. Just because it does not fall in the category of what the law defines.It does not predict that all these girls facing any such problems in their everyday life are not rape victims. There are many questions but hardly any answers. This paper focuses on the legal issues of rape, sexual assault and consensual sex.

CONSENSUAL SEX

Before explaining the meaning of consensual sex it becomes important to understand the meaning of "CONSENT" in the context of sex.The word consent means- the permission of a person to do something and this consent is considered to be valid only when the permission granted is free from any kind of pressure. Consensual sex means "sexual intercourse between two persons with mutual consent of having sex. It's an act which should be free from any pressure and both the persons involved in it should have a free state of mind while having it. It might be done with only intention of having fun and not that of exploiting or taking advantage of the other person.

When between two individuals, if one is in a dominant position, then the act of sexual intercourse will not be considered as consensual sex but would definitely a rape. There are evidences of many such cases where in the beginning, the sex was a consensual but later the victim could not even apprehend that she is being raped. Hence, a consensual sex can be converted into rape without the knowledge of victim any time. There are many instances

where these situations can be observed, for example in case of oral sex, the act of oral sex is usually considered as disgusting but she has to do it to satisfy him. We can quote such instances as "Marital Rape".

MARITAL RAPE

It has been well said by someone that ***"The wolves don't always roam out in the streets, sometimes they shelter in our houses under the skin of a sheep"***. Whenever anyone hears the word rape, he/she usually assumes it as an act, generally caused by a stranger. Normally, it is considered that, why would anyone cause this act of brutality and cruelty to their loved one? But the ground reality is that the one, who is really close to us, often hurt us. We usually ignore the pain given by our loved ones, because we think, it all usually happens in a relationship.

Marital rape is that concept which is most of the time is being ignored by everyone, even in law also. As provided in various personal laws, a girl after marriage is considered to be the property of her husband and so is considered as a single consumable entity. Which means that after marriage a girl doesn't have her own identity. Being the property of husband, the husband has the right to treat his wife the way he wants. There is an exception to section 375 of IPC, 1860 "**marital exemption**" which might mean: -"***A husband has a right to rape his wife whenever he wants without any fear of being tried or punished"?***

Marriage is considered to be a consensual affair. It gives the right to a husband to make physical relations with his wife without asking for her permission, assuming that she has consented to it while getting married. In some cases the woman is lucky as the husband turns out to be a good man and asks for her permission before touching her. But in most of the cases especially in a country like India that works on a patriarchal system the wish of a woman does not stand anywhere and she is not asked before touching her and that is called a marital rape.

Every time a husband touches or tries to make physical relation with his wife without her consent, she is being raped. Research says that a wife is raped by her husband in every third house of our country. Surprisingly in these cases the women do not even know when they are being raped. They think its normal and are supposed to do and so they don't say no to it and just ignoreit most of the time. Marital rape is one of the complex and personal issues in the society. That's why it is one of the unreported offences of our country. The women in our

country do not report because they are usually dependent on their husbands. They have a fear of losing their family and so they quietly bear all the violence being held against them. The exception 2 of Section 375 of IPC violates **Article 14** and **Article 21**of the Indian Constitution.

VIOLATION OF ARTICLE 14

Article 14 of the Constitution of India guarantees that "The state shall not deny to any person equality before law or equal protection of the law within the territory of India".[2] However the law discriminates between a married woman and an unmarried woman by not criminalising the rape of a married woman by her husband. In **Budhan Choudhary vs. State of Bihar**[3]and **State of West Bengal vs. Anwar Ali.**[4] The Supreme Court held that "any classification under Article 14 of the Constitution of India is subject to a test of reasonableness. But Exception II violates the purpose of Section 375. Exempting husbands from punishment is entirely contrary to that objective.

VIOLATION OF ARTICLE 21

Article 21 of the Indian Constitution states that "no person shall be denied of his life and personal liberty except according to the procedure established by law".[5] It guarantees its citizen the right to life with dignity. However, this right of personal liberty guaranteed by our constitution is violated by the exception of Section 375 IPC, 1860 called as "marital exemption" as it takes away the right of a married woman to live with "**personal liberty**" and "**dignity**". Whenever, husband tries to make unwanted physical relations with wife, her right to live life with dignity and personal liberty is violated.

CASE STUDY

State of Karnataka v. Krishnappa[6]**:** The Supreme Court held that "sexual violence apart from being a dehumanizing act is an unlawful interference of the right to privacy and sanctity

[2]Article 14 of Indian Constitution
[3]Budhan v. State of Bihar, AIR (1955) SC 191
[4]State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75
[5]Article 21 of Indian Constitution
[6]The State of Karnataka v. Krishnappa, (2000) 4 SCC 75

of a female." In the similar judgment, it held that sexual intercourse without consent amounts to physical and sexual violence.

Suchita Srivastava v. Chandigarh Administration[7]**:** In this case the Supreme Court compared the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution.

Justice K.S. Puttuswamy v. Union of India: The Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy incorporates "decisional privacy reflected by an ability to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions in respect of intimate relations."[8]

RIGHT TO SEXUAL PRIVACY

The exception also violates the right to sexual privacy of woman. According to this "A person has the right and freedom to decide their own consensual adult relationship which means one has right to decide with whom one wants to have sexual relations." In the case of **Govind v. State of Madhya Pradesh**[9]**,** the right of sexual privacy is violated by the "marital exemption". Apex Court held that right to privacy is included under article 21.

State of Maharashtra v. Madhkar Narayan[10]: In this case the Supreme Court held that every woman has the right of sexual privacy and no one can violate her privacy as and whenever he wished. But the question that stands here is that why our country has failed to recognize this offence as a crime? Why has our law failed to provide justice to the women of our country? Another example of consensual sex is casting couch.

CASTING COUCH

Casting couch is considered to be a practice in which one person satisfies the sexual needs of another in exchange of a promise of employment. The term casting couch is often used in relation with entertainment industry. As it is said "the brighter the light shines, the darker the shadow is" same is the case with our entertainment industry, the happier and entertaining it looks from outside, the more secrets it hides within itself. The powerful movie moguls take advantage of the young vulnerable talents who aspire to be artists in our country. These

[7]Suchita Srivastava v. Chandigarh Administration, (2008) 14 SCR 989
[8]Justice K.S. Puttuswamy v. Union of India, (2017) AIR 2017 SC 4161
[9]Govind v. State of Madhya Pradesh, 1975 AIR 1378
[10]State of Maharashtra v. Madhukar Narayan, AIR 1991 SC 207

young talents have to pay a cost of dreaming big. Various known actors of our film industry have been subjected to such act of shame but just because of this victim blaming attitude of our society no one could gather the courage to speak up and fight against these atrocities of men. After so many years of suppression and being subject to the prejudice of men, the women of our country joined the ***"me too movement"*** and shared their stories of sexual harassment. This movement got some really big known faces of Bollywood exposed. But the sad part is that these monsters hide themselves in such thick layers of hypocrisy that no one has guts to touch them. They have such an impact on people of our country that no one believes it that such act of shame can be done by them and it is from there thisvictim's blame game begins. Most of the fans (mostly men) of these monsters say that, all these allegations are false and that it is just a "publicity stunt" that these girls usually do for fame. It is because of these people that monsters like them slip away from the situation very easily without anyone knowing about it. In these cases of casting couch the sexual intercourse that takes place between two individuals is consensual but does that mean it is free from pressure? The woman working in a construction field asked (not forced) by her supervisor to sleep with him for a night if she wants a pay hike in her job or else, she will be fired. This is not a fair choice, but anyway few has to do it if, breadis needed. Is this not rape?

Just because someone is not physically forced or has received any kind of death threats does that make an act consensual? What about the mental pressure? Why does our government not count it? There is just a thin line between consensual sexual activity and forced sex. This line sometimes overlaps and gets blurred and ambiguous.[11] This is exactly what has happened with our judiciary system. They have failed to interpret the word consensual. Just because a sexual intercourse is consensual doesn't mean it is not rape. Just because consent is obtained without any force or threat of death does not mean that the consent obtained is a free consent. The reason for giving consent should be taken in account. The reason, how this consent is obtained should also be known. The act of marital rape and casting couch has already been criminalized in several countries. The judicial system of these countries must have seen something immoral in these activities which are against the well-being of the society that's why they criminalized it. If all these countries can see the wrong in these activities, then why can't ours? Why has our judicial system been so ignorant that it couldn't even conceptualized

[11] Indiatogether.org

the idea of marital rape and casting couch? Is it because the men of our country don't want to do so?

CONCLUSION

As quoted by honourable Justice V.Krishnaiyer in **Rafiq vs. State of Uttar Pradesh**[12] **"A murderer kills the body but a rapist kills the soul**[13]**".** A person can survive without food, shelter or money but cannot without self-respect. A rapist kills the self-esteem of a girl. He takes away the pride of a girl. According to a research done, out of 10 rape cases only two victims survive whereas 8 of them either die or kill themselves. According to the doctors the victims in these cases lack zeal to live and so the chances of survival are minimal. **A rapist kills the soul of the girl**. Henceforth, in most of the cases even when the victim survives it is seen that after few days she commits suicide. Our judicial system has failed to properly interpret the word consent. Prof. PSA Pillai rightly wrote, in his book, that explanation III of section 375 of IPC, allows a husband to exercise, with impunity, his marital right of (non-consensual or undesired) intercourse with his wife. But what if the consent was taken without any fear of death or hurt. What if the consent that was given was under some sort of emotional pressure? Is it right to say that a consent that is taken without any fear of death or hurt is free from any pressure or is a consent given wilfully. What about the pressure that a woman holds to protect her family from starvation. What about the woman working at a construction site who has to sleep with her boss because if she will not, she will have to lose the job and won't have breading her plate that night. Is it right to say that the woman in this case is not raped? Just because she wasn't forced or didn't have any fear of death or hurt does not mean that the consent given was wilful and free from pressure. Why is it always that a sexual intercourse that takes place without use of any physical force or coercion known as consensual sex? Why are the conditions where the consent obtained through emotional and mental pressure not taken into account? It is here where our government has failed to interpret the word consent. While considering a sexual activity as consensual, the manner in which the consent is taken should be known.

Under section 375 of IPC the scope of the word consent should be broadened and consent given under emotional and even psychological pressure should be included. Even after 73

[12]Rafiq vs. State of UP, 1981 AIR 559
[13]Quote by Justice Krishnaiyer in Rafiq vs.State of UP

years of independence the women of our country have failed to enjoy their freedom, they are still considered to be the property of men. How ironical it is that in our country even a company has a separate legal entity but not our woman. A citizen after being completely exhausted and hopeless is left with the only hope that the government will help them and will provide justice. But in the cases of offences against women our judiciary has miserably failed to protect them and ensure their safety. On the other hand, our judiciary protects these offenders by exempting them from the punishment of raping their own wives and also by making consummation as the ultimate goal of marriage. Consummation being one of the grounds of divorce has doubled the rate of domestic violence in our country. The irony that our country holds is that the idol of woman in a temple is worshipped like a goddess but outside it is subjected to the prejudice of men. Mere recognition of the rights doesn't bar the law maker from their responsibility to deliver justice. Justice can only be delivered through proper implementation and monitoring of the laws. Our judicial system has clearly ignored the barbaric activities of marital rape and casting couch.Until and unless our country does not recognize these barbaric acts of casting couch and marital rape committed against woman, all these rights of freedom given to them remains just as useless. It is high time that the government should finally open up its eyes and conceptualize the idea of activities like marital rape and casting couch as an offence and should also criminalize them. At last, an appeal to the judicial system of our country to amend the definition of rape mentioned under Section 375 of IPC, 1860 and broadens the scope of the word consent and also to criminalize the acts of marital rape and casting couch.

Further, it is also requested to the government of our country to make better and stricter laws for the protection of the safety of the women. Woman should be given a safe and healthy environment to live. They should be given the power to take their own decisions. Anyone who tries to take this power or make them feel unsafe or insecure should be punished with the most painful punishment.

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RIGHT TO PRIVACY AND DATA PROTECTION IN INDIA IN THE AGE OF DIGITALIZATION: A COMPARATIVE AND ANALYTICAL STUDY

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ABSTRACT

Under the Constitutional law of India, Right to Privacy of individual is a basis right attributable to one's identity, but in recent years there has been a growing fear about the large amount of information about individuals being processed and monetize. An individual can be harmed by the existence of electronic data about him/her which is not accurate and which could be transferred to the third parties at high speed and at low cost. Personal information could be in the form of personal interests, habits and activities, family and educational records, communications (including mail and telephone records), medical records and financial records, national identities, etc. The Hon'ble Supreme Court of India disallowed the use of individual Aadhar numbers by any private entities for establishing the identity of the individual concerned for any purpose pursuant to a contract, on the basis that it was contrary to the fundamental right to privacy.[1] Individual privacy becomes vital in this digital age where human world is substantially dominated by internet of things. Form the point of collection of data till it's secure disposal/deletion, entities are now being required to comply with data protection laws to ensure the protection of personal data. The conjunction of technologies has originated a different set of issues concerning privacy rights and data protection.[2] As per growing requirement different countries have introduced different legal framework but a codified law on the subject of data protection is still to be introduced in India. The study aims at filling the gap of the specific law in relation to protection of personal data and also at analysing the existing laws in relation to data protection and its effectiveness.

Keywords: Privacy, Data Protection, Personal data, Constitution etc.

INTRODUCTION

The Constitutional Law of India provides a right to freedom of speech and expression,[3] which implies that a person is free to express his will about certain things.[4] A person has the freedom of life and personal liberty, which can be taken only by procedure established by law.[5] These provisions improvably provide right to privacy to individuals or groups of persons. The personal liberty mentioned in article 21 is of the widest amplitude and it covers a variety of rights *viz.* secrecy, autonomy, human dignity, human right, self-evaluation, limited and

[1] *Justice Puttaswamy (Retd.) and Anr. v Union of India, 2017 SCC 1.*
[2] http://law.dypvp.edu.in/two-days-advanced-training-programme-on-legal-regime.aspx
[3] Constitution of India, Art. 19 (1) (a)
[4] Art.19 (2) Constitution of India
[5] Art. 21 Constitution of India

protected communication, limiting exposure of man *etc*. And some of them have been raised to the status of fundamental right, *viz* life and personal liberty, right to move freely, freedom of speech and expression, individual and societal rights and are given protection under Article 19. Article 21 as such protects the right to privacy and promotes the dignity of the individual. Privacy implies an ability to control the dissemination and use of one's personal information. In recent years, there has been a growing fear about the security of large amount of personal data attributes, which are stored electronically or in physical form. Right to privacy refers to the specific right of an individual to control the collection, use and disclosure of personal information concerning them. Personal information could be in the form of personal interests, habits and activities, family and educational records, communications (including mail and telephone records), medical records and financial records, national identities, etc. The Hon'ble Supreme Court of India disallowed the use of individual Aadhar numbers by any private entities for establishing the identity of the individual concerned for any purpose pursuant to a contract, on the basis that it was contrary to the fundamental right to privacy.[6] Individual privacy becomes vital in this digital age where human world is substantially dominated by internet of things. Form the point of collection of data till it's secure disposal/deletion, entities are now being required to comply with data protection laws to ensure the protection of personal data. The conjunction of technologies has originated a different set of issues concerning privacy rights and data protection.[7] New technologies make personal data easily accessible and communicable. As per growing requirement different countries have introduced different legal framework like General Data Protection Regulation (GDPR) European Union, ECPA (Electronic Communications Privacy Act of 1986) USA etc. from time to time.[8] In the USA, some special privacy laws exist for protecting student education records, children's online privacy, individual's medical records and private financial information. Self-regulatory framework of these countries improved the privacy surroundings.[9] But in India has no express legislation governing data protection or privacy, few provisions in Information Technology Act, 2000; Information Technology (Reasonable

[6] *Justice Puttaswamy (Retd.) and Anr. v Union of India, 2017 SCC 1.*
[7] http://law.dypvp.edu.in/two-days-advanced-training-programme-on-legal-regime.aspx visited on 19 February 2020.
[8] https://www.researchgate.net/publication/50273874_Privacy_and_Data_Protection_in_Cyberspace_in_Indian_Environment visited 22 February 2020.
[9] http://www.supremecourtcases.com/index2.php?option=com_content&itemid=65&do_pdf=1&id=23269 visited 22 February 2020.

Security Practices and Procedures and sensitive Personal data or information) Rules, 2011 deal with data protection and privacy and also provides the provisions to protect personal dataan essential facet of the information privacy. A codified law on the subject of data protection is still to be introduced in India.

RIGHT TO PRIVACY AND DATA PROTECTION

Right to Privacy: Under the Indian constitution right to privacy vested within right to life and personal liberty under Art. 21. Under this Article person has right to protect and safeguard the liberty of his own and his family, marriage, procreation, motherhood, education etc., and in the age of digitalization after the judgement of the Supreme Court safeguard of the personal information and data is also a part of the right to privacy of the individuals.

The question of right to privacy is a fundamental right was first considered by the Hon'ble Supreme Court in the case of *M. P. Sharma and Ors. v Satish Chandra, District Magistrate, Delhi and Ors.*[10], under this case the warrant issued for search and seizure under Sections 94 and 96 (1) of the Code of Criminal Procedure was challenged and the court was held that the power of search and seizure was not in contravention of any constitutional provision. Further, the Hon'ble Supreme Court denied from giving recognition to right to privacy as a fundamental right guaranteed by the Constitution of India and contended that-*"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction. Nor is it legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches."*

After that, in the case of *Kharak Singh v. State of Uttar Pradesh and Ors.*[11], the matter considered by the Hon'ble Supreme Court was, whether the surveillance by domiciliary visits by the Police at night to the private house of the accused would be an abuse of the right guaranteed under Article 21 of the Constitution of India, thus raising the question as to whether Article 21 was inclusive of right to privacy. The Hon'ble Supreme Court held that

[10] 1954 SCR 1077
[11] (1964) 1 SCR 334

such surveillance was, against the provision of the Article 21. The majority judges further went on to hold Article 21 does not expressly provide provision for right to privacy, and thus the right to privacy cannot be construed as a fundamental right. The Hon'ble Supreme Court observed as under:-

"*Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*"

Subsequently, in *Govind v. State of M.P.*[12] the Supreme Court held that M.P. Police Regulations 855 and 856 authoring domiciliary visits were constitutional as they have force of law. The petitioner challenged the validity of those Regulations on the ground that they were violative of his fundamental right guaranteed in Article 21 which also includes the 'right to privacy'. The Supreme Court held that Regulations 855 and 856 have the force of law and therefore, they were valid. As regards the 'right to privacy' the Court said that the right to privacy would necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an examination from them which can be characterised as a fundamental right, the right is not absolute. Depending upon the character and antecedents of the person subject to surveillance and the object and limitations under which surveillance is made, it cannot be said that that surveillance by domiciliary visits would always be unreasonable restriction upon the right to privacy.

A similar proposition has been upheld by the Hon'ble Supreme Court in the case of *R. Rajagopal and Anr. v. State of Tamil Nadu*[13] popularly known as "Auto Shankar case" the Supreme Court has expressly held the "right to privacy" or the right to be let alone is guaranteed by Art. 21 of the Constitution, A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other

[12] AIR 975 SC 1379
[13] (1994) 6 SCC 632

matters. None can publish anything concerning and would be liable in an action for damages. However, position may be differed if he voluntarily puts into controversy or voluntarily invites or raises a controversy.

Subsequently in the case of *People'sUnion for Civil Liberties (PUCL) v Union of India*[14] the Hon'ble Supreme Court clearly held that we have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution.

Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law". Recently, this issue was once again raised before the Hon'ble Supreme Court in the case of *K. S. Puttaswamy (Retd.) v Union of India*[15] the nine-judge bench held that unanimously the Right to Privacy is inseparable part of the right to life and personal liberty under Art. 21. The court overruled M.P. Sharma and Kharak Singh in so far as the latter did not expressly recognize the right to privacy as a fundamental Right.

While discussing the right to information privacy in present scenario the Hon'ble Mr. Justice D.Y. Chandrachud concluded as under: -

"Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment."

[14](1997) 1 SCC 301
[15]2017 SCC Online 996

DATA PROTECTION

The information Technology Act enforced by the parliament in the year 2000 this Act basically covers the key issue of data Protection. After the IT Act Indian Parliament implemented the first legislation which provides the provisions for the data protection. As per the IT Act the definition of "Data" includes a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed or is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer".[16] The IT Act doesn't provide any particular definition of personal data and, the definition of "data" which would be more relevant in the cyber-crime related matter. Further, after the amendment of 2008, IT Act defines certain key provisions with respect to data protection, like access,[17] communication device,[18] Computer,[19] Computer network,[20] Computer resource,[21] Computer system,[22] Computer database,[23] Electronic form,[24] Electronic record,[25] Information,[26] Intermediary,[27] Secure system,[28] and Security procedure.[29]

The purpose behind the aforesaid provision is this to protect from the access of information and unfair advantage of it by the third parties without the consent of the concerned party. 'Third party information' is defined to mean 'any information dealt with by an intermediary in his capacity as an intermediary', and it may be arguable that this limitation also applies to 'data' and 'communication'. Section 79 provides that an intermediary shall not be liable for

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[16] Information Technology Act, 2000, s. 2(1)(o).
[17] Id, s. 2(1) (a)
[18] Id, s. 2(1) (ha)
[19] Id, s. 2(1) (i)
[20] Id, s. 2(1) (j)
[21] Id, s. 2(1) (k)
[22] Id, s. 2(1) (l)
[23] Id, s. 43 Explanation (ii)
[24] Id, s. 2(1) (r)
[25] Id, s. 2(1) (t)
[26] Id, s. 2(1) (v)
[27] Id, s. 2(1) (w)
[28] Id, s. 2(1) (ze)
[29] Id, s. 2(1) (zf)

any third party information, data, or communication link made available or hasted by him except in the conditions provided in sub-section (2) and (3) thereof.

After the analysis of the provision of the IT Act, it clear there is no provision of the personal data. Moreover in the age of technology and digitalization the definition of data should be more relevant and for the protection of personal data and information of the individual legislature take steps to define the term "personal data". Data protection consists of a technical framework of security measures designed to guarantee that data are handled in such a manner as to ensure that they are safe from unforeseen, unintended, unwanted or malevolent use.

VIOLATIONS OF RIGHT TO PRIVACY IN DIGITAL AGE

a) Search and Seizure of Digital Property

In the digital age from the developed countries to developing countries in the name of internet security users analysed for characteristics that predict problematic. During the major protest in the world government were obtained data from the users mobile. Through the social media and other online technology continuously blocked or tracked to prevent the protesters. In the most of the countries law relating to search and seizure of physical property is exist but there is no provision for digital property. As a result without the search warrant, it becomes permissible to forfeit and access to social media account to get the information of the individuals.[30]

b) Profiling of Marginalized Groups

In the modern age Police can target specific gender, groups, and age groups. Persons can frighten and arrested on the basis of characteristics about them. There is a dangerous potential for big data mining to be used to repress minorities. Online profiling enables police to conquer the digital property of strategic subjects.[31] These practices of police increases disproportionate restraint of marginalized groups. China has started a "Police Cloud", which

[30]https://mafiadoc.com/the-right-to-privacy-in-the-digital-age-ohchr_5cb7fff3097c476a188b4593.html visited 24 February 2020.

[31] Patton, D. U., Brunton, D. W., Dixon, A., Miller, R. J., Leonard, P., and Hackman, R. (2017). Stop and Frisk Online: Theorizing Everyday Racism in Digital Policing in the Use of Social Media for Identification of Criminal Conduct and Associations. Social Media+ Society, 3(3), 2056305117733344: http://journals.sagepub.com/doi/full/10.1177/2056305117733344.

appears capable of tracking social and ethnic groups.[32] Not only the police profile marginalized groups but also legal and illegal organizations do so as well. Some of them aim to exploit, such as for prostitution or forced labour. These marginalized groups are easy targets for financial scams.

c) **Biometric Dangers**

We have a throughout concern for the fate of the free world in a computer, cloud-driven society that preserves biometric data. Such data will develop the capability to penalize vast amounts of the population for minor violations, especially those they don't have any financial and technological means to protect their privacy. Biometric data is a centralized command that pretends to have complete control, but in reality open the door for data to be hacked and abused. In Brazil, it is now obligatory to be included in the biometrical database, which also enables voting in elections.[33]

d) **Business Surveillance**

In the present time on the Facebook have over two billion users. It allows people to share their private data themselves with others. The company protects a large amount of user data. However, owing to unclear consent and sharing of data with third-party applications, such as contacts, phone numbers, and likes, was being collected and shared without their consent or awareness.[34] Moreover Facebook provided administrative staff controls to erase messages, while users do not have the same controls over their own information.[35]Facebook is not only accused of violating users privacy but also Health insurance companies buy big data from hospitals and health care facilities to make predictive formulas for identifying risk and determine risks.[36] More and more businesses are utilizing big data for customer analytics. The USA, once a leader of restricting invasions of privacy, adopted regulations in 2017 that will remove the tradition of net neutrality. The consequence of this decision will reduce freedom of expression[37] and increase the power of big data businesses to conduct mass surveillance and sell information about users' viewing content, purchases, and other personal information.

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[32] Human Rights Watch. "China: Police 'Big Data' Systems Violate Privacy, Target Dissent" November 19, 2017: https://www.hrw.org/news/2017/11/19/china-police-big-data-systemsviolate-privacy-target-dissent.
[33]https://mafiadoc.com/the-right-to-privacy-in-the-digital-age-ohchr_5cb7fff3097c476a188b4593.html visited 24 February 2020.
[34] Id.
[35] Id.
[36] Id.
[37]Id.

Google and other large internet search sites already engage in such practices. They sell our information to advertisers, insurers, and lobbying groups, crafting the world that we are exposed to with almost no external ethical oversight.

After the analysis above point we can say that for the protection of the right to privacy on the internet, social media, and websites etc., there is a need of specific law on the protection of individual's personal data and personal information. In India, there is no specific and strict law in this reference so it is duty of the legislature to take necessary step on this matter.

LAW RELATING TO DATA PROTECTION IN EUROPEAN UNION, U.S.A. AND AUSTRALIA

a) European Union

European Union has passed the General Data Protection Regulation (GDPR) it is a set of regulations for the whole of the European Union (EU)that is define the data protection rights of individuals and that place consequent obligations on organizations. Formally adopted on April 16, 2016, organizations had two years to comport with the law. So, on May 25th, 2018, the GDPR will become officially enforceable.

The GDPR originated from the Charter of Fundamental Rights of the European Union.[38] In the subject matter and objectives of the GDPR explain "this Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."[39] The development of the digital economy and the proliferation of data in the past twenty years caused the EU to establish a new set of laws governing privacy and data. For the consumers GDPR has strengthened rights. Now individuals have the power to demand companies reveal or delete the personal data. Moreover GDPR makes provisions which stipulate that data protection law will become identical throughout all EU member states.

b) U.S.A.

Unlike the other countries, the US does not have any specific data protection law at the federal level, but instead regulates privacy firstly by industry, on sector to sector basis. After that there are various law and regulations developed at both the federal and state levels. These

[38]https://www.americanactionforum.org/insight/explaining-the-eus-general-data-protection-regulation/visited 25 February 2020.

[39]Art. 1, General Data Protection Regulation

laws enforced by federal and state authorities and in case of breach of private right bring law suits against the organizations who violating the law. In the year of 2018 legislative activity at the state level focus toward the broad level consumer privacy protection law in the United States. California became the first State to enact the law on the privacy California Consumer Privacy Act (CCPA) which is inspired by the European Union General Data Protection Regulation that is aim to protecting personal information of consumers. Since then, many comprehensive privacy bills have been introduced in federal level.[40]

c) **Australia**

In the Australia, data protection and privacy policies are mix of federal and state government's legislation. The Australian government Federal Privacy Act, 1988 and Privacy Principle apply to all the Commonwealth Government agencies, Australian Capital Territory Government agencies and Private Sector Companies. Australian Government has following data protection legislations:

- Information Privacy Act, 2014 by Australian Capital Territory
- Information Act,2002 by Northern Territory
- Personal Information Protection Act, 2004 by Tasmania
- Privacy and Personal Information Protection act, 1998 by New South Wales
- Privacy and Data Protection Act, 2014 by Victoria
- Information Privacy Act, 2009 by Queensland

There are some other legislation which is related to the data protection and privacy for specific data. They are:

- Telecommunications Act, 1997 by Commonwealth
- National Health Act, 1953 by commonwealth
- Health Records and Information Privacy Act, 2002 by New South Wales
- Health Records Act, 2001 by Victoria
- Workplace Surveillance Act, 2005 by New South Wales

[40]Lisa J Sotto and Aaron P Simpson, Data Protection & Privacy, August 2019, gettingthedealthrough.com/area/52/jurisdiction/23/data-protection-privacy-united-states/ visited 26 February 2020.

Under the privacy Act includes, organization, body corporate, individuals, partnership, trust, etc.[41]

Conclusion

After the above study we can say that Individual privacy becomes vital in this digital age where human world is substantially dominated by internet of things. Privacy implies an ability to control the dissemination and use of one's personal information. In recent years there has been a growing fear about the security of large amount of personal data attributes, which are stored electronically or in physical form because of that and the privacy of the individuals is in danger, after the judgement of the *Justice Puttaswamy case* Supreme Court held that right to privacy is fundamental right under the Article 21 of the Indian Constitution. On the other hand in the same case Justice Chandrachud pointed out Information privacy is a part of right to privacy and in the information age privacy is in danger, so it is necessary Union Government examine and robust regime for data protection. If we see in EU, U.S.A., Australia these countries has specific law on the data protection but in India many times Parliament draft the bill relating to data protection like Personal Data Protection Bill, 2018 and Personal Data Protection Bill, 2019 but not passed yet. So, it is a growing requirement in India to enact the law relating to data protection of the individuals.

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[41]DLA PIPER (2013),pg. 11-12 Data Protection Law of the World. https://www.dlapiperdataprotection.com Visited 26 February 2020.

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SEDITION LAW IN INDIA: BOON OR BANE?

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ABSTRACT

The Indian Constitution provides its citizens freedom of speech and expression, which means citizens of the country are free to speak and express themselves. However, under the Indian Penal Code, 1860, S. 124A[1] talks about the law of Sedition, the law of sedition has gained limelight in the recent times because of the controversies regarding the Citizenship Amendment Act, 2019[2]. Also, there have been multiple instances where the law of sedition has come into conflict with the fundamental freedom of speech and expression of the citizens, the change in the body politic has caused awareness among the nationals. The law of sedition as we see now is present in the IPC, however, it was not a part of the earliest legislation, it was inserted into it in the year 1870 by way of amendment. Multiple nations have scrapped out this particular law due to it being violative of citizens' freedom of speech and expression and its high time it gets out of the Indian constitution as well.

Keywords: Sedition, Citizen's Freedom, Constitutionality, Government, etc.

INTRODUCTION

S. 124A[3] of the Indian Penal Code propounds the law of sedition, the provision[4] was there in the draft prepared by the Indian Law Commissioners in 1837 but it was omitted when the IPC was enacted for some unaccountable reason, it was inserted by Indian Penal Code (Amendment) Act.[5] This provision was later on replaced by the present Section 124-A, by an amendment of 1898. The earlier provision is different from the present provision in the way that in the former one the offense consisted of exciting or attempting to excite feelings of 'disaffection' but in the latter, 'bringing or attempting to bring into hatred or contempt the Government of India' is also punishable. Section 124-A of the Indian penal code, 1860 was introduced by the British in India in the British colonial government in the year 1872, because a specific section was needed to

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[1] Sedition.—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, [***] the Government established by law in [103] [India], [***] shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

[2] The Citizenship (Amendment) Act, 2019 was passed by the Parliament of India on 11 December 2019. It amended the Citizenship Act of 1955 by providing a path to Indian citizenship for illegal migrants of Hindu, Sikh, Buddhist, Jain, Parsi, and Christian religious minorities, who had fled persecution from Pakistan, Bangladesh and Afghanistan before December 2014.

[3] *Ibid.*

[4] "Whoever by words weather spoken or intended to be read attempts to excite feelings of disaffection to the government established by law in the territories of the East India company, among any class of people who live under the government shall be punished with imprisonment for life of any term... to which find me be added, or with simple imprisonment for a term which may extend to three years, to which fine may be added or with fine.."

[5] Section 5 of Act XX\VII of 1870.

deal with their radical Wahabi movement[6] of the 19th Century, it was led by Sir Syed Ahmed in order to tackle with the Wahabi movement, this anti- sedition or the sedition law was introduced. According to Section 124-A, whoever by words, either spoken or written, brings in any hatred or any contempt towards the government established by law shall be punished.

RESEARCH METHODOLOGY

The researcher has followed secondary data collection. This is a doctrinal study. The researcher has also utilized commentaries, books, treatises, articles, notes, comments and other writings to incorporate the various views of the multitude of jurists, with the intention of presenting a holistic view. The researcher has made extensive use of Case Laws in this paper, so as to discern a trend in the judicial pronouncements.The courts introduced guiding principles so as to govern the judges in deciding the cases. In ***R. v. Sullivan***[7] which was later approved and quoted in ***R. v. Burns and Others***[8], it was held in that case that-

"Sedition in itself is a comprehensive term and it embraces all those practices 'whether by word, deed, or writing which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavor to subvert the Government and the laws of the Empire. The objects of Sedition generally are to induce discontent and insurrection, and stir up opposition to the Government and the very tendency of sedition is to incite the people to insurrection or rebellion."

By far the largest number of cases take the view that exciting or attempting to excite feelings of disaffection hatred or contempt is punishable as such irrespective of whether or not disorder follows is likely to follow. In ***Q.E. v. Balagangadhar Tilak***[9] Strachey, J., pointed out that S. 124-A I.P.G. is a statutory offence and differs in this respect from its English counterpart which is a common law misdemeanor elaborated by the decisions of the judges. He observed that "the amount or intensity of the disaffection is absolutely immaterial if a man excites or attempts to

[6]The Wahabi movement was a revivalist movement which tried to purify Islam by eliminating all the un-Islamic practices which had crept into Muslim society through the ages. It offered the most serious and well-planned challenge to British supremacy in India from 1830's to 1860's.

[7] 11 Cox. C. C.

[8] 16 Cox. C.C.

[9] I.L.R. (1897) 22 Bom 112

excite feelings of disaffection great or small, he is guilty under this section."[10]

The observations of Strachey, J., in Tilak's case[11] on the scope of S. 124-A were approved by the Privy Council as having indicated the correct law on the question of sedition. The rule as laid down in that case was followed by the High Courts[12] in India and was again affirmed by the Privy Council in the case of ***K. E. v. Sadashiv Narayan***[13] The other view rejects the strict and literal interpretation of S. 124-A Indian Penal Code and attempts to bring the offence of sedition in line with the English law on the question. Ranade, J., was the first Judge to give expression to it in Q.E. v. Ramachandra as follows: [14]

"Disaffection is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when, it is not defiant makes men indisposed to obey or support the laws of the realm, and promote discontent and public disorder."

FREEDOM OF SPEECH AND EXPRESSION AND THE LAW OF SEDITION

The freedom of speech and expression given under Article 19(1)(a)[15] of Indian constitution guarantees every citizen the freedom of speech and expression, this is a fundamental right guaranteed by the constitution of India, though the government can impose reasonable restrictions[16] still Article 19 is a fundamental rights oven criticism against sedition law is that it is against freedom of speech and expression secondly Gandhiji was a great opponent of the sedition act and this can also be used to band certain publications so this is also against the freedom of speech and expression and also in the ***Ram Nandan v. The State***[17] 1958 the Allahabad High Court held that S. 124A National so this was declared as unconstitutional by the

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[10] Strachey, J., further observed: "The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak Was caused by these articles is absolutely immaterial. I f the accused intended by the articles to excite rebellion or disturbance; his act would doubtless fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section."

[11] B. G. Tilak v. Queen Empress I.L.R. (1897) 22 Bom. 528 (P.C.)

[12] *Queen Empress v. Amba Prasad* I.LR. (1897) 20 All. 55

[13] L.R. 74 I.A. 89

[14] I.L.R. (1897) 22 Bom. 152.

[15] 19. (1) All citizens shall have the right—
(a) to freedom of speech and expression

[16] 19(2). Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause 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.

[17] AIR 1959 All 101

Allahabad High Court in 1958 stating that it is respect the fundamental is freedom of speech for this is also important here and also coming in the modern democracy is the Modern construction democracy is like the United Kingdom, the United States, New Zealand, etc. have scrapped anti-sedition laws from there it is high time that India follow such type of modern constitutional democracy scraps which kind of law and in case of India we will see that in many instances S. 124A is misuse and the law commission has also called for reconsideration of the section in in in the medium term the provision can get a narrow definition but in the long run, it should be scrapped out. Recently sedition charges were slapped against an Assamese scholar and two others for remarks made against the proposed citizenship, it's an example where the sedition law has been slapped on a few individuals in India.

The Citizenship (Amendment) Act[18] was the reason for slapping of sedition law on these three people on the charges that they had made some remarks against the then proposed citizenship law, when the Citizenship Amendment Bill was declared by the Lok Sabha, the Bill was proposed to hasten or speed up the process of legalizing the stay of non-Muslims from Afghanistan, Bangladesh, and Pakistan who allegedly fled religious persecution and came to India till December 31st, 2014, so, this seeks to legalize the stay of non-Muslims, that means Muslims are excluded from the list and the bill had already faced strong resistance from many sites saying that this bill paves a way for granting citizenship mostly the illegal Hindu migrants from Bangladesh. About 40 lakh people were excluded from the final draft of National Register of Citizens[19] in Assam that was published last year in the month of July, so the citizenship bill seeks to negate the NRC and the recent sedition case filed against the scholar after he allegedly said that seeking Independence from India could be an option for the indigenous people if the center went ahead with the bill in a protest rally, for making such a remark that we need to seek Independence from India if the bill is passed, the scholar and the two others were charged with sedition and also in addition to Section 124-A[20] which deals with sedition they also have been accused of entering into criminal conspiracy[21] so criminal conspiracy to wage a war against the

[18] supra Note 2.

[19] The National Register of Citizens is a register of all Indian citizens whose creation is mandated by the 2003 amendment of the Citizenship Act, 1955. Its purpose is to document all the legal citizens of India so that the illegal migrants can be identified and deported.

[20] *Ibid.*

[21] supra Note 16.

[22] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—Whoever, wages war against the [Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or [imprisonment for life] [and shall also be liable to fine].

government which include under section 121[22] and also they were accused of concealing design to facilitate such a war[23].

The constitutionality of S. 124A has faced legal challenges. In 1962, a five-judge bench of the Supreme Court ruled in the case of ***Kedar Nath v. State of Bihar***[24] that S. 124A was valid and constitutional. The Supreme Court held that "public order", which forms one of the restrictions to freedom of speech and expression under Article 19, should be kept in mind while deciding upon the validity of the section. The court stated that laws that are enacted keeping in view of public order could be saved from the "vice of constitutional infirmity".

Further, it is an established principle, that if a legal provision has multiple interpretations, with one interpretation rendering it unconstitutional while the other one renders it constitutional; the court would favor the latter. Going by this logic, the court concluded that the objective of S. 124A was to penalize only those actions that have the tendency to breach public harmony. Keeping in view the interest of public order, the court upheld the constitutional validity of the section.

CONCLUSION AND SUGGESTIONS

The desirability of having such a law as S. 124-A has been questioned in the present context of events.[25] Thus, it may be observed that the courts appear to be differing in their viewpoints with regard to its constitutional validity. The desirability of having a law of sedition in our statute book may be examined and its proper meaning and scope determined so that a law of sedition, if it is necessary must fit in not only within the four corners of the constitutional provisions but must also be in consonance with the democratic spirit and traditions which pervade our Constitution. A suitable amendment, therefore, of S. 124-A in the light of the Federal Court

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[23] Concealing with intent to facilitate design to wage war.—Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the [Government of India], intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[24] 1962 AIR 955.

[25] See Report of Press Commission. The Press Commission has recommended that S. 124-A should be repealed. See also the observations of Beg, J., In Ram Mandan V. State A.I.R. 1959 All.

decision in ***Niharendu Majumdar's***[26] case would perhaps remove the conflict which appears to confront the problem of freedom of speech in this country. It can be worked out separately in the short run and long run, for short run:

(i) the judiciary must check that the police does not act on politically motivated complaints;

(ii) prior sanction of the judiciary before scrapping the anti-sedition law;

(iii) the burden of proof

(iv) The court should take action against those who bring malicious complaints and irrelevant complaints, for example, the courts charge a penalty on bringing malicious PIL[27], this can be done in the sedition cases as well.

The fundamental freedom of speech and expression is the essence of democracy and hence, the anti-sedition law must be struck down and scrapped out of the Constitution of India. It has been constantly mentioned by the Hon'ble Supreme Court of India in numerous judgments.

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[26]NiharenduDutt Majumdar And Ors. V.EmperorAIR 1939 Cal 703

[27]Public interest litigation (PIL) is litigation for any public interest. Public interest litigation is a litigation which can be filed in any court of law by any public-spirited person for the protection of "public interest.

SHAREHOLDERS RIGHT'S IN INTERNATIONAL INVESTMENT TREATIES

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ABSTRACT

Shareholders have started to emerge as the most active investors in the international scenario. In the recent years, there has been an overwhelming increase in the number of cases that have been brought by the foreign shareholders of subsidiaries incorporated in Host States before the International Centre for Settlement of Investment Disputes (ICSID). However, their position is very controversial when it comes to remedies in International Law. The ICSID Convention does not define investment. Naturally after the shareholders suffer losses, they seek out damages and for that they apply to international laws and demand compensation like any other natural and juristic person. However there right to claim of compensation is not that easy and simple. More so over, the judiciary has also not been able to sort this tricky situation. Therefore, it is imperative for the protection of the interest of the Host nations that investment is properly and narrowly defined so as to leave sufficient regulatory and policy space for the governments so that they can take necessary measures to protect their environment and work for their public welfare. Dealing with the issue of a foreign investor, a detailed and in-depth study of the concepts as to what is an investment, which is a foreign investor, what are the rights and liabilities of the investor, what are the rights and liabilities of the Host State, etc. needs to be done.There has been an ever-increasing debate and scrutiny over the issue as to whether the investment treaties are well balanced when it comes to maintaining a balance of the benefits and the costs. The paper will attempt to take an in-depth look into this debate.

Keywords: International Law, ICSID, BITs, Foreign Investor, Investments, etc.

INTRODUCTION

Shareholders have started to emerge as the most active investors in the international scenario. In the recent years, there has been an overwhelming increase in the number of cases that have been brought by the foreign shareholders of subsidiaries incorporated in Host States before the International Centre for Settlement of Investment Disputes (ICSID).[1] The shareholders of a company are in a very controversial position as far as their remedy in the International law is concerned. Furthermore, the ICSID Convention[2] also does not define investment. Therefore, it is imperative for the protection of the interest of the Host nations that investment is properly and narrowly defined so as to leave sufficient regulatory and policy space for the governments so that they can take necessary measures to protect their environment and work for their public welfare. The International Centre for Settlement of Investment Disputes (ICSID) between investors and states was established in 1965 with the adoption of the Washington Convention, establishing a specific arbitration mechanism under the auspices of World Bank to resolve a very peculiar kind of disputes: the disputes between a state and a foreign investor. The rights which are embodied in

[1] Dolores Bentolila, *Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration,* 2(1) TRADE L. & DEV 87 (2010)
[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966

the treaties are made to protect the investors against the losses which are suffered on their investment. Thus, a loss incurred on the value of the share should grant the shareholder a right to claim reparation regardless of whether the shareholder maintains free disposal and full exercise of the rights he has by virtue of the lexsocietatis.[3]

Naturally after the shareholders suffer losses, they seek out damages and for that they apply to international laws and demand compensation like any other natural and juristic person. States started to enter into various Bilateral Investment Treaties ("BITs") by the 1990s which have been regulating how the treatment of foreign investors and their investments in the host countries where the investment is made is governed. However there right to claim of compensation is not that easy and simple. More so over, the judiciary has also not been able to sort this tricky situation. The judiciary; in deciding various claims under BITS have formulated the new rules regarding the position of the shareholders in bringing the international claims. Thus, due to the rise in the number of the BITs, shareholders as 'investors' in international investment treaties have also increased. Shareholding as "Investment" has not been specifically defined anywhere in the ICSID convention, even the term "investment" has not been defined in the convention itself and therefore it has granted significant discretion upon the parties to the contract. But the BITs in general have the definition of the term 'investment' and in general these do include the shareholding as investment in their contracts.

Dealing with the issue of a foreign investor, a detailed and in depth study of the concepts as to what is an investment, which is a foreign investor, what are the rights and liabilities of the investor, what are the rights and liabilities of the Host State, etc. needs to be done. One of the most important elements of an investment treaty is the definition of investment as it plays a key role in determining the protection, which the investor can get against direct and/or indirect expropriation in their host countries. Most investment agreements that are currently in operation include a broad definition of investment. These treaties usually cover "every kind of asset", which is usually followed by a non-exhaustive list of covered assets.[4]

In fact, it was such a broad definition of investment, which landed India in trouble in a dispute

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[3] *Ibid.*

[4] "Investment shall comprise every kind of asset, in particular: Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
Shares of companies and other kinds of interest in companies; Claims to money which has been used to create an economic value or claims to any performance having an economic value; Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will; Business concessions under public law, including concessions to search for, extract and exploit natural resources."

involving an Australian firm in the UNCITRAL arbitration. The tribunal in *White Industries vs. Republic of India*[5] adjudicated the dispute raised by the Australian firm, White Industries, claiming denial of its rights as an investor in India. The claims of the investor were based on a contract with the public sector Coal India for the supply of equipment and technical services for the development of a coalmine.[6]

HISTORICAL BACKGROUND

The issue of the shareholders right first came around in the case of *Barcelona Traction, Light and Power Company (Belgium V Spain)*[7], Barcelona Traction, Light and Power Company (BTLP) was originated in Canada that operated light and power utilities supplies in Spain. Belgian citizens owned 88 percent of the shares in BTLP Company. The Spanish government after the Spanish Civil War imposed currency conversion restrictions and as a result BTLP was unable to pay the interest to the shareholders. The Belgian government bought an action for damages against Spain for the expropriation of the assets of the Traction, Light and Power Company Ltd, in which the Belgian Government sought reparation for damage claimed to have been caused to Belgian Nationals, shareholders in the Canadian BTLP by the conduct of various Spanish State.

The Court disposed of the case on a very constricted ground that the Belgium shareholders lacked of ***jus standi*** to claim compensation and get relief against the Spanish Government. The decision has been criticized by various scholars all over the years as it has ignored the realities of modern International business and denying fair treatment to the investors. One of the main reasons for the criticism of this judgment was that the Court did not cite any authority in support of their proposition that why was their "confusion and insecurity" by allowing a multiple number of shareholders claims. Another reason for the criticism was that the application of municipal law of corporations was the basis for the judgment in deciding the international claims of the shareholders, thus this approach was restrictive and was completely absurd. There was no test done to distinguish shareholders from the company and thus there was no consideration for

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[5] In the Matter of an UNCITRAL Arbitration in Singapore under the Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, between White Industries Australia and The Republic of India, Final Award, 30 November 2011, http://www. iareporter.com/downloads/20120214.

[6] Biswajit Dhar, Reji Joseph, TC James, INDIAS BILATERAL INVESTMENT AGREEMENTS: TIME TO REVIEW, Economic and Political Weekly, Vol. XLVII, No. 52, 2012

[7] [1970] I.C.J. REP. 44

equity. The position of the shareholder now is contrary to what it used to be in the international customary law, and has changed with the treaties which are formulated between the parties. Now, the legal protection for shareholders of the companies is made sure of by way of investing abroad through the formation of a rising bilateral and multilateral investment treaties between the states.

In the case of *Ahmadou Sadio Diallo (Republic Of Guinea V. Democratic Republic Of The Congo) ICJ 2010,* The Court stuck to the interpretation given by the Barcelona Traction judgment and declared the 'fundamental rule' that *'[s]o long as the company is in existence, the shareholder has no rights to the corporate assets'*. But the court also observed that now in the modern international investment scenario the question of rights is ruled by the treaties rather than the customary diplomatic protection law. Thus it can be assumed that the investment treaties have by and large replaced diplomatic protection in terms of legal protection offered to the corporations and their shareholders investing abroad.[8] We can see from the judgment of *Diallo* that in the case of diplomatic protection the rule of Barcelona Traction has been still pertinent, but it is no longer applicable to determine the rights of the shareholders who are governed by the treaties.

LEGAL STANDING OF SHAREHOLDERS

In many countries, there is a requirement of the foreign investments to channel through the locally incorporated companies in the host states. We can see generally those corporations which are locally incorporated *does not* have standing to file an arbitration claim against the host State under the ICSID Convention because it is not considered as a "foreign" investor.[9] The exhaustion of local remedies comes into play and the state thinks that these matters should be solved before the local courts of the host state. Thus, in these cases the locally incorporated companies are not considered a "foreign" investor company. However, we find an exception in Article 25(2)(b) of the ICSID Convention. It says that even in cases of locally incorporated companies if there is a presence of the foreign control over it then it will be deemed to be a national of *another* Contracting State and be allowed to submit a claim under ICSID. This can be made possible if any of these two conditions are fulfilled:

1. There must be BIT where it is agreed that the locally incorporated company will be treated as foreign controlled entity and

[8]Patrick Dumberry, Michigan State Journal of International Law, [vol. 18:3, 2010] "The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?"

2. There must be an effective control over the locally incorporated company by the foreign state and only then it will be possible to claim.

There can be two different types of shareholders, one is direct where the shareholders have the direct share in the local company controlled by foreign, and another method of investment for a foreign investor is to have an interest in a locally incorporated corporation *indirectly* through its participation in *another corporation* (an intermediate corporation), which, in turn, has an interest in this local corporation[10]. ICSID has given the right to submit claim for damages which are suffered by the local corporation located in the host state no matter it is held directly or indirectly. The corporation which is the intermediate may be having the nationality of any state, the host state, investor state or any other third state.

In the cases of investment indirectly an "intermediate" or "holding" corporation is involved for the purpose of investment. These companies are often called as shell companies or holding companies. Usually these companies have no major assets or operations of their own, but these are just formed for the sole purpose of owning shares of other corporations. ICSID as we can see from above has recognized the rights of the indirect shareholders to submit a claim for damages which are suffered by the local company located in the host state. This right is unconditional right and it does not matter that the intermediate corporation belongs to the nationality of any third country apart from the nationality of the host or the investor state. In addition to this ICSID has also recognized the right of the shell companies to submit their own claim for arbitration for the damages which are suffered by locally-incorporated corporation. These intermediate corporations are normally integrated in the favorable tax jurisdictions to have a tax benefits and other benefits of relaxed laws and regulations of the state of the shell company. Thus, ICSID has permitted the intermediate corporations to directly submit their claims to arbitration when the parties are governed under the BIT or treaties.

All the treaties can generally cover all types of national legislations and the governments can be subjected to different sorts of claims made by the investors. The different measures of the government which can be subjected to the review shall cover the provisions of statutes brought into force by the parliaments of the States in question. They shall include the regulations of different kinds. Further, regulations or laws made by federal states can also be subjected to review. Even the Constitutional provisions can be brought into question.

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[9] *Martin J. Valasek&PatrickDumberry* Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes, Volume 26, Number 1, Spring 2011,International Centre for Settlement of Investment Disputes

[10] *Ibid.*

Recently, there has been an increase in treaty provisions specifically providing higher levels of protection in fields of taxation, services, finances etc. Over the course of time it was realized that foreign investors are subjected to certain discriminations due to the nationality clause. Investment treaties now give the investors the right to file claims against the nation in which they have invested, at the ICSID tribunal, which has been formed under the Convention for Settlement of Investor State Disputes. An added benefit under most of these treaties is that they do not require for the investor to first exhaust the domestic remedies available to them under the host nations legal system. They have the right to proceed directly to international arbitration system.

There has been an ever-increasing debate and scrutiny over the issue as to whether the investment treaties are well balanced when it comes to maintaining a balance of the benefits and the costs. The investment treaty system came into force with the sole purpose of promoting trade and to create an environment which would facilitate trade and reduce the presumed risks which would then attract the foreign investors to invest in other nations and there by lead to their economic development. Investor State Dispute Settlement System has been an important step towards creation of a system of providing remedies, which was an element found to be missing in the international legal system regulating international trade.

The proponents of the Investor State Dispute Settlement Mechanism see it as a neutral system in which the parties involved, that is the foreign investor and the host nation can solve their issues without the involvement of the judicial mechanism of the host nation as is the case in a State to State dispute resolution mechanism. However, over the period of time, this system has also been questioned and politicized in major jurisdictions and has been rejected as well by a few nations. Another issue in debate is the balance, or rather the lack of it, between the investor's rights of protection versus the Host nations right to regulate. Most of the criticism of this mechanism flows from its alleged impact on the nations right to regulate its policies. However, in contrast to this thought, the proponents of this mechanism claim that the treaties protect the foreign investors from illegal actions of the governments of host nations. They describe the treaties as means for ensuring enforcement of rule of law in host nations because they make the governments accountable, the critics counter this line of thought by saying the hidden manner in which the proceedings take place in the international arbitration mechanism is something which is opposed to the standards of rule of law. At present, many governments while formulating their

international trade policies aim at addressing the issue of balance between the rights of investors and that of their own government.[11]

CONCLUSION & SUGGESTION

Now-a-days investment treaties provide shareholders who are investing overseas with unparalleled substantive and procedural legal protection against any hindrances which might occur in their investments by the host States and their government. BITs have been entered into to regulate the relations between the host state and the investor. These treaties generally do have "national treatment" and "most-favored-nation treatment" clauses, which is a part of an obligation on the host State to provide a "fair and equitable treatment" to the investor. Therefore, the specific BITs in each different agreement defines what will the word investor and investment include and thus in most of the cases it does allow any foreign investor which has either a majority or a minority shares in the local company of the host State to submit an arbitration claim against that State for any damages.

Thus, we can see that it is safe to say a new customary international rule has been emerging which provides protection to the shareholders legally along with the procedural rights. These developments have affected and made a positive impact for the foreign investors and shareholders. But even when emerging trends show otherwise, still no customary rule of protection of the shareholders has been made, the benefit however with the formation of BITs is that it has an impact on the treatment received by all foreign all investors, even those who are not governed by it. Despite the positive impact of the protection of shareholders, there are certain tribunals who have expressed their difficulty in applying this protection. They warn that there might be a danger of double recovery when the order of compensation is given against the company in which the shareholder has shares. Another problem they express is that in cases of acceptance of indirect claims that the rights of other creditors of the company would be affected. Indeed, if the compensation corresponding to revenues lost by the company goes not to itself but to its shareholders (and maybe not to all of them), what happens with all the other parties that may have a legitimate interest in the company's assets?[12] This will amount to expropriation of

[11] "The impact of investment treaties on companies, shareholders and creditors", OECD Business and Finance Outlook (2016), OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/9789264257573-13

[12] gabriel bottini, indirect claims under the icsid convention [vol. 29:3 2008] u. pa. j. in t'l available at: https://www.law.upenn.edu/journals/jil/articles/volume29/issue3/Bottini29U.Pa.J.Int%27lL.563%282008%29.pdf (last visited on March7, 2020)

the company's funds and the share of other non-claiming parties and creditors who also have an equal right to the compensation received by the injury to the corporation.

Thus, in case where the company has gone bankrupt the claims of other creditors should not be prejudiced by application of such one-sided laws. This problem might be solved when the claimant shareholder asks for the claim in the company either direct or indirect then the tribunal must look at the actual losses and the overall position of the company. Another requirement which can be added by BIT would be to add that the investor company must be controlled by the nationals of the contracting party along with incorporation in a contracting party. States can also include a "denial of benefits" clause in their treaties. These clauses will give an option to the party to reject the benefits of the legal protection provided in the treaty to an investor when it is either owned or controlled by non-party and where the claimant does not have substantial business activities in the territory of the other party to the treaty. Resorting to these measures is an effective way to secure such protection and to further the development of international investment law, without creating legal perplexities that may diminish the confidence of states in this important area of international law.[13]

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[13] *Ibid.*

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SUBSIDIES AND COUNTERVAILING MEASURES IN THE WTO

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ABSTRACT

This paper presents about the agreement on Subsidies and Countervailing Measures which provides the rules regarding whether or not a subsidy may be provided by a member. These rules are enforced through invocation of the WTO dispute settlement mechanism. The WTO is an intergovernmental organization that is concerned with the regulation of international trade between nations. Today, world economy is an open economy, both developed and developing countries urge to increase the free trade among them to minimize the expenses. Free trade is a trade policy that does not restricts imports or exports. Developing countries with the goal of expansionism of trade by the products which needs subsidies and extra measures to ensure to provide colossal competition to the products of developed countries opts to become signatory of agreements provides so. The ideas of subsidies have been in trading system since the beginning. Article XVI of GATT consisted of original rules for subsidies and Article VI consisted of original rules for countervailing measures and against anti- dumping. To institute a proper code for subsidies and countervailing measure, a Code of subsidies was formulated but that didn't fulfill the main purpose of the agreement which provoked the need of further negotiations. Therefore, in the Uruguay Round this becomes a negotiating agenda, finally accomplishing the WTO Agreement on subsidies and Countervailing Measures.This paper seeks to discuss the elaborate meaning of subsidies and countervailing measures in obedience to the agreement. This paper strives for the categorization of subsidies and countervailing duties in accordance with the actions and procedural rules respectively.

Keywords: Subsidies, Free Trade, Dispute Mechanism, Countervailing Measures, etc.

INTRODUCTION

Subsidies and countervailing measures in the WTO: The WTO Agreement on Subsidies and Countervailing Measures ("the SCM Agreement") both disciplines the use of subsidies, and regulates the actions countries can take to counter the effects of the subsidies of other countries. Under the SCM Agreement, a Member (government) can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the Member can launch its own investigation and ultimately charge an additional import duty ("countervailing duty") in the case of subsidized imports that are found to be causing injury to the domestic industry.

THE HISTORICAL BACKGROUND TO THE SCM AGREEMENT

Rules on the use of subsidies and countervailing measures have been part of the multilateral trading system since the beginning. In particular, Article XVI of GATT 1947 contained the

original rules on subsidies, and Article VI[1] (which also covers anti-dumping) contained the original rules on the use of countervailing measures.

These original rules were, however, relatively general. For instance, Article XVI of GATT 1947 did not define the term "subsidy" and contained little detail as to the types of adverse effects that might be caused by subsidies or as to the actions other Contracting Parties could take in response. Article VI contained only three paragraphs regarding the use of countervailing measures. In response to the need to elaborate on the GATT rules on subsidies and countervailing measures, the Tokyo Round of multilateral negotiations, which took place between 1973 and 1979, saw the creation of the Agreement on Implementation and Application of Articles VI, XVI and XXIII of the General Agreement, generally known as the "Tokyo Round Subsidies Code", or "Subsidies Code".

Unfortunately, the Subsidies Code, which was a plurilateral agreement, did not fully achieve its purpose. It was ratified by only twenty five Contracting Parties, and under it there were a number of disputes including over fundamental concepts that were not defined in the Code. Therefore, in the Uruguay Round, the rules on subsidies and countervailing measures were once again put on the negotiating agenda. The *Punta del Este* Ministerial Declaration, which launched the Round, called for a fundamental review of all of the rules on subsidies and countervailing measures: Articles VI and XVI of the GATT 1947 and the Subsidies Code. The final result of these negotiations was the SCM Agreement.

WHY DO COUNTRIES USE SUBSIDIES AND WHY DOES THE WTO HAVE AN INTEREST?

Governments use subsidies for a number of reasons. **One is market failure, where the market provides less of certain things than the economically optimal level**. For example, a new environmental regulation may require businesses to clean up their sites to reduce the level of pollution (following the "polluter pays" principle). An investor considering purchasing and restarting a defunct plant may find that the cost of the required clean-up (of pollution that was caused by the plant's previous owner) is so high that the investment would not be profitable. A government might, in that circumstance, offer a subsidy to the investor to offset some or all of the clean-up cost, in order to ensure that the investment is made. Another example could be where the market does not provide long-term financing, and the government steps in a lender. Depending on the interest rates and other loan terms, the government-provided financing might or might not be subsidized.

[1] GATT, 1947

Governments also use subsidies as instruments of economic and social policy. For example, a government may wish to ensure that particular stretches of coastline, or particular border areas, are inhabited. It thus may offer subsidies of various kinds for investment and job creation in those areas. Or a government may seek to even out regional economic disparities by offering subsidies for investment and job creation in disadvantaged regions. Or a government may wish to encourage the adoption of certain technologies, or the use of certain kinds of equipment, and thus may offer subsidies to enterprises that do so. Under the SCM Agreement, most forms of subsidies are allowed, although subject to rules and disciplines.

Why does the WTO regulate the use of subsidies? Because regardless of whether they are intended only to correct market failures or to address policy priorities of the government involved, subsidies can distort international markets. In particular, a subsidy can introduce a structural competitive imbalance into the market for a good which is unrelated to the natural comparative advantages of the different countries producing that good. Where this occurs, an unsubsidized good can find it impossible to compete with the subsidized good (as it in effect is competing with the treasury of the subsidizing country), even where the unsubsidized good has the intrinsic comparative advantage.

STRUCTURE OF THE AGREEMENT

The SCM Agreement contains 11 parts:

- Part I contain the fundamental definitional provisions, of "subsidy" and of "specificity", and further provides that only measures constituting specific subsidies in the sense of these definitions are covered by the SCM Agreement.
- Parts II and III divide all specific subsidies into one of two categories: prohibited and actionable, respectively, and establish certain substantive disciplines, as well as dispute settlement rules, with respect to these categories.
- Part IV, applicable to non-actionable subsidies, expired at the end of 1999.

Article 1 of the SCM Agreement defines the term "subsidy" as:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a) (1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

i. a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

ii. government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[2];

iii. a government provides goods or services other than general infrastructure, or purchases goods;

iv. a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or

(a) (2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be present for a subsidy to exist. Remember, however, that not all "subsidies" are covered by the SCM Agreement. Rather, only those that are "specific" are covered.

[2]In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

CATEGORIES OF SUBSIDIES UNDER THE SCM AGREEMENT

The SCM Agreement adopts what is sometimes called a "traffic light" approach in categorizing different types of subsidies:

1. Prohibited. "Red light" or "red" subsidies: Prohibited on the basis of their (irrefutably) presumed adverse effects on trade. There are two types of prohibited subsidies:

- Subsidies contingent, in law or in fact, upon export performance, ("export subsidies").
- Subsidies contingent upon the use of domestic over imported goods ("import substitution" or "local content" subsidies).

Prohibited subsidies are subject to special and additional dispute settlement rules (i.e., in addition to those in the Dispute Settlement Understanding). One such special rule is that if a challenged subsidy is found to be prohibited, the remedy is that the subsidy must be withdrawn immediately.

2. Actionable. "Yellow light" or "amber" subsidies: Actionable, i.e., subject to challenge, on the basis of evidence that they have caused specified adverse effects, in particular cases.

There are three types of adverse effects on the basis of which a Member can bring a dispute against another Member's subsidies:

- **Serious prejudice** - this can take a number of specified forms, including: displacement or impedance of imports of a "like product" into the market of the subsidizing Member; displacement or impedance of exports of a "like product" into a third country market; significant price undercutting, price suppression or depression, or lost sales; in the case of a primary product, an increase over historical levels in the world market share of the subsidized product.
- **Injury** - injury to the domestic industry producing the like product in the importing country, caused by subsidized imports.
- **Nullification or impairment of benefits** - Where the effect of the subsidy in the territory of the subsidizing member is to prevent trading partners from enjoying the benefits of multilateral market access concessions that they have received from the subsidizing Member.

Members considering that they are subject to serious prejudice, injury or nullification or impairment of benefits can refer the matter to the Dispute Settlement Body. In the area of actionable subsidies, the SCM Agreement contains certain special and additional dispute settlement rules. One such rule is that if a challenged subsidy is found to be causing specified adverse effects, the subsidizing Member must withdraw the subsidy or remove the adverse effects.

3. **Non-actionable, or "green"**[3].

ACTIONABLE SUBSIDIES - GENERAL

Under the actionable subsidies' provisions, there are a number of forms of adverse effects caused by subsidies that a complaining Member can allege before a WTO dispute settlement panel. In all cases, the assessment is fact-specific. It is not sufficient (as in the case of prohibited subsidy disputes) to establish that the subsidy in question, as alleged, exists. Rather, for actionable subsidies, not only must it be established that there is a specific subsidy, it also must be demonstrated that the subsidies provided benefit the production, sale, marketing, etc. of the product in question, and that the subsidized competition causes harm to the trade 18 interests of the complaining Member, in respect of the same product. The causation analysis must include a non-attribution analysis, to ensure that harm caused by other factors is not attributed to the subsidies at issue.

ACTIONABLE SUBSIDIES - SERIOUS PREJUDICE

One of the kinds of adverse trade effects contemplated by the SCM Agreement is *"serious prejudice to the interests of a [...] Member"* caused by another Member's subsidies, which includes both present serious prejudice and threat of serious prejudice. The Agreement contains provisions on a number of particular forms of serious prejudice, the **first** two of which are based on the concept of "displacement or impedance" of trade flows. In particular, there can be displacement or impedance of a Member's exports of a "like product" into a subsidizing Member's market, or displacement or impedance of a Member's exports of a "like product" into a third country market. In both cases, a causal link needs to be established between the subsidized product and the negative effects on the exports of the like product.

The **second** basis of serious prejudice provided for in the SCM Agreement is significant price undercutting by a subsidized product compared with the price of a like product of another Member, in the same market (whether the market of the importing Member, a third country market, or the world market). This involves a comparison of the prices of the two products, and the establishment of a causal link between the subsidy and the price undercutting.

The **third** basis of serious prejudice provided for in the SCM Agreement encompasses significant price suppression or depression, or lost sales, in the same market. Price suppression is where the price competition from a subsidized product prevents the prices of the complaining

[3] Lapsed 31 December 1999

Member's like product from increasing as much as they otherwise would in the absence of the subsidized competition. Price depression is where the competition from the subsidized product causes the prices of the complaining Member's like product to fall. Both of these require an analysis of price trends of the subsidized product and the like product, of the subsidy or subsidies in question, and of the other conditions of competition in the market for the goods in question. Finally, "lost sales" refers to the situation where particular contracts or sales are awarded to subsidized producers, due to subsidies, instead of to the producers of the complaining Member. Again, to establish a situation of lost sales requires detailed information as to both the subsidies and the sales contracts at issue.

The **fourth** basis of serious prejudice provided for in the SCM Agreement pertains only to primary products or commodities. In particular, serious prejudice can arise where the subsidy gives rise to an increase in the world market share of the subsidized primary product, compared to the average share that it held during the previous three years, and the increase follows a consistent trend over a period when subsidies have been granted. This would involve a panel obtaining information as to the size of the world market for the product in question, and of the relative market shares, and movements thereof, of the allegedly subsidizing Member and other countries. The panel also would need to obtain and analyze information about the alleged subsidy or subsidies, including the timing thereof, and the degree to which those subsidies benefited the product in question.

ACTIONABLE SUBSIDIES - INJURY

A second basis for action under the actionable subsidies provisions is "injury", which has the same meaning as for countervailing duty investigations. That is, this refers to material injury or threat of material injury to the domestic industry producing the product that is "like" the subsidized product imported into the territory of the 19 complaining Member, or to material retardation of the establishment of a domestic industry producing that product. Thus, if an allegation of injury were brought before a WTO dispute settlement panel, the panel would have to gather all of the necessary information about the condition of the domestic industry, the like product, the alleged subsidies, the allegedly subsidized product, the conditions of competition for that product in the market of the importing (complaining) Member, etc., exactly as would be required for a national countervailing duty investigation.

ACTIONABLE SUBSIDIES - NULLIFICATION OR IMPAIRMENT OF BENEFITS

The final kind of adverse effect provided for in the SCM Agreement is nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994, in particular under multilateral tariff bindings. This provision reflects the reality that under certain circumstances, a subsidy provided within the territory of a Member may directly undercut the market-opening concessions that that Member has negotiated with its WTO trading partners.

MEASURES AGAINST CERTAIN SUBSIDIES: COUNTERVAILING MEASURES

Article VI[4] and footnote 36[5] to the SCM Agreement define a countervailing duty in the following way: A special duty levied for the purpose of offsetting any subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

FORMS OF COUNTERVAILING MEASURES:

As is the case for anti-dumping, the SCM Agreement provides for three kinds of countervailing measures:

- provisional countervailing duties;
- definitive countervailing duties; and
- Voluntary undertakings.

PROVISIONAL COUNTERVAILING DUTIES:

Pursuant to the SCM Agreement, provisional countervailing duties may be imposed before the conclusion of an investigation, provided that there has been a preliminary affirmative finding of subsidization, injury and causation. In no case, however, can such provisional duties be applied until at least sixty days have elapsed from the date of initiation of the investigation. Furthermore, provisional countervailing duties must be limited to as a short a period as possible, and under no circumstances can they be applied for longer than four months.

DEFINITIVE COUNTERVAILING DUTIES:

Definitive duties can only be imposed on the basis of a final determination in an investigation. In particular, before it can apply a definitive duty, the importing Member must have initiated[6] and

[4] GATT 1994

[5] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidybestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

conducted an investigation in full conformity with the applicable provisions of the SCM Agreement, and in the investigation, it must have arrived at affirmative final determinations of subsidization, injury and causation.

VOLUNTARY UNDERTAKINGS:

Voluntary undertakings represent an alternative to definitive duties. In particular, a countervailing duty investigation can be suspended without the imposition of countervailing duties if the Member and/or exporter being investigated give the investigating Member a satisfactory voluntary undertaking under which:

- the government of the exporting Member agrees to eliminate or limit the subsidy or to take other measures concerning its effects; and/or
- the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated.

RULES ON THE APPLICATION OF COUNTERVAILING MEASURES

SCM Agreement, PART V

Article 10 (Application of Article VI of GATT 1994)

- Members shall take all necessary steps to ensure that the imposition of a countervailing duty[7] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI[8] and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.
- No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

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[6] The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

[7] Supra note 5

[8] GATT 1994

SUBSTANTIVE RULES

Similar to anti-dumping, a Member cannot impose a countervailing measure unless it determines that three elements are present:

- subsidized imports;
- injury to a domestic industry; and
- a causal link between the subsidized imports and the injury.

The concepts of *injury* and *causal link* in anti-dumping investigations have almost the same meaning in the countervail context.

The key difference between anti-dumping and countervailing measures, of course, is that for a countervailing measure, the imports in question must be subsidized. In this regard, the investigating authorities will need to collect detailed information about the alleged subsidies, to determine whether in fact these measures involve a financial contribution by a government or public body, whether they confer a benefit, and whether they are specific. If these conditions are fulfilled, the authorities will then need to determine the extent to which the subsidies in question can be attributed to the particular product under investigation. This will involve calculating the total amount of the subsidy, and then allocating or apportioning that subsidy amount over all of the products that it benefits, so that only the amount attributable to the investigated product will be taken into account in the investigation.

- With respect to the amount of countervailing duty that can be imposed on subsidized imports, the SCM Agreement[9] sets forth two requirements:

1. that no countervailing duty can be levied on an imported product in excess of the amount of the subsidy found to exist; and
2. that the subsidy amount is to be expressed as an amount of subsidization per unit of the subsidized and exported product.

- Thus, in the first place, no countervailing duty can ever be for an amount greater than the amount of the subsidy.
- Furthermore, these rules make clear that finding an absolute amount of subsidization received by an enterprise is not necessarily the end of the calculation process. Rather, that total subsidy amount will need somehow to be translated into a per unit or *ad valorem* amount on the particular investigated product, which in turn will form the basis of the countervailing duty.

[9] Article 19.4

Also, like anti-dumping measures, countervailing measures are not of infinite duration. Rather, the SCM Agreement provides that such measures can be kept in place only for as long as and to the extent necessary to counteract subsidization which is causing injury. In this regard, the SCM Agreement contains similar provisions to those of the Anti-dumping Agreement regarding expiry or sun setting of measures, as well as regarding changed circumstances, and the related reviews.

PROCEDURAL RULES

As stated above, the procedural rules in the SCM Agreement covering countervailing duty investigations and application of measures are very similar to those contained in the Anti-Dumping Agreement. The following main differences should be noted:

- **Consultation requirement:** As soon as possible after an application is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation must be invited for consultations with the aim of clarifying the situation and arriving at a mutually agreed solution.
- ***De minimis* subsidization, negligible import volumes:** The SCM Agreement contains its own levels for *de minimis* subsidization and negligible import volumes. Countervailing duty investigations and measures must be terminated immediately in cases where the amount of a subsidy is *de minimis* (generally, less than 1% *ad valorem*) or where the volume of subsidized imports, actual or potential, or the degree of injury, is negligible. Separate thresholds are established for developing country Members.
- **Undertakings**: These are not limited to "price" undertakings by the exporting companies, as in the Anti-Dumping Agreement. Rather, the SCM Agreement also contemplates undertakings under which the government of the exporting Member agrees to eliminate or limit the subsidy or to take other measures concerning its effects.
- **Other**: The SCM Agreement does not contain specific rules on issues such as sampling of exporters, duty collection systems, or individual rates. Nor, unlike the Anti-Dumping Agreement, does it contain an Annex setting forth the detailed rules on the use of facts available (although recourse to facts available is permitted under the same circumstances as apply in the case of anti-dumping).

DISPUTE SETTLEMENT MECHANISM UNDER SCM AGREEMENT.

The SCM Agreement generally relies on the dispute settlement rules of the DSU. In addition, however, the SCM Agreement contains a number of special or additional dispute settlement rules

and procedures as discussed above in the sections pertaining to multilateral subsidies disciplines. These special rules provide for, among other things, expedited procedures relative to standard DSU procedures, particularly in the case of prohibited subsidy allegations. The SCM Agreement also contains a special fact-gathering mechanism for serious prejudice claims, which can be used by a panel, at the request of a party.

THE SCM COMMITTEE

The operation of the SCM Agreement is overseen by the Committee on Subsidies and Countervailing Measures, which is composed of representatives of all WTO Members. The SCM Committee is tasked with reviewing all notifications submitted by Members. It also provides a forum where Members can discuss any issue related to the operation of the SCM Agreement.

The SCM Committee meets twice per year in regular session, and its meeting agendas tend to be similar to those of the Anti-Dumping Committee. In fact, for the review of legislative notifications, because many Members enact legislation and other legal instruments that regulate both anti-dumping and countervailing measures, one of these Committees (usually the Anti-Dumping Committee) generally conducts the primary review of these legislations, with the other Committee (usually the SCM Committee) reviewing only those elements of legislative notifications that pertain specifically to its particular subject matter.

The SCM Committee of course conducts its own primary review of the subsidy notifications of various types, and of the semi-annual reports and *ad hoc* notifications of countervailing actions taken.

THE PERMANENT GROUP OF EXPERTS

The SCM Agreements establishes a Permanent Group of Experts ("hereinafter referred as PGE"), the members of which are to be elected by the SCM Committee, and one of whom is to be replaced each year.

- The Permanent Group of Experts is charged with three responsibilities:

1. To assist a dispute settlement panel, at the panel's request, with regard to whether a measure before the panel is a prohibited subsidy. The panel must accept without modification the conclusions reached by the PGE.
2. To provide the SCM Committee, upon request of the Committee, advisory opinions as to the existence and nature of any subsidy.
3. To consult with any Member and to provide confidential advisory opinions, upon request, as

to the nature of any subsidy proposed to be introduced or currently maintained by that Member. When the PGE was first constituted, following the entry into force of the SCM Agreement, its original members drafted a set of working procedures for how the PGE would carry out the above functions. The draft procedures were debated by the SCM Committee, but the Committee failed to reach a consensus to adopt them. The lack of working procedures almost certainly is a major reason why, in practice, the PGE has never been called upon to perform any of its statutory tasks.

CONCLUSION

The SCM Agreement contains rules to determine which programs, measures, etc. are subsidies covered by it. The SCM Agreement disciplines the use of the subsidies it covers, and regulates the actions countries can take to counter the effects of those subsidies.

It does not prohibit members from granting subsidies. The SCM Agreement is, in fact, "two agreements in one". Under its multilateral track, the SCM Agreement gives Members the right to challenge certain subsidies of other Members under the Dispute Settlement Understanding of the WTO. Under its national, or unilateral, track the SCM Agreement establishes that if certain conditions are met, a Member may carry out an investigation and impose countervailing measures on subsidized imports into its territory that are injuring its domestic industry. The measures must fulfill the substantive and procedural requirements set forth in the SCM Agreement. There are many requirements for imposition of any countervailing measures which are similar to those contained in the Anti- Dumping Agreement.

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