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FOREWORD

I am pleased to present before you Volume IV, Issue I of Nirma University Law Journal (NULJ) – Peer Reviewed Law Journal. The journal is dedicated to highlighting the concurrence of the latest developments in law and society at large. I am happy to share with you that now the articles published in this Journal are now also available on ***Manupatra and SCC online.***

The overwhelming response that we received from across the country for contributing research articles to the current volume is a testimony to the intellectual capital in the legal arena and the potential of new jurisprudential insights from the country. Selected research articles published in this issue display that novel and critical ideas go a long way in highlighting the essential character of challenges that are cerebral to an evolving legal system thereby enshrining justice as the ultimate goal.

Both academicians and practitioners emphasize the need to embody all disciplines in one spectrum in order to analyze problems with creative zeal. Education, in the real sense is the spirit of enquiry resulting in new knowledge and path breaking insights on mundane ideas and ways of living. The Nirma University Law Journal (NULJ) aims to encourage writings that are inter-disciplinary in nature, expounding contemporary issues across discipline. It showcases contemporary issues and challenges specific to law; with an interdisciplinary approach towards knowledge. NULJ aims to serve as a forum where scholars and distinguished legal practitioners alike can share ideas, views and trajectory of thought process on relevant legal themes. NULJ aims to stand up to the highest standards of integrity and professional quality. The choice of articles in this issue reflects this. The articles in this issue are innovative, diverse and present debatable viewpoints. It is the endeavor of the Institute to become the beacon of legal education by encouraging synthesis of knowledge and best practices cutting across academia and research fraternity.

The veritable hallmark of the contributions is indicative of the efforts and ingenuity of the authors. The academic and practical impact on the reader must be credited to the qualitative and insightful writings of the authors. On behalf of University and Institute, I congratulate the authors for maintaining highest standards in academic honesty and purity in thought. We feel pride in being a medium of expression in broadcasting novel ideas being a crucial platform for contemporary legal discourse.

Prof. (Dr.) Purvi Pokhariyal
Chief Executive, Nirma University Law Journal
Director, Institute of Law, Nirma University

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PSYCHOPATHS: AN UNREVEALED AREA IN INDIAN JUDICIAL SYSTEM

Priya Sepaha*

The offenders who are accused of horrendous crimes when under the influence of mental disorders should be first identified for mental disease by a competent psychologist. There are a lot of variants of mental diseases. However, unfortunately, they are all generally categorized as same. There is a serious need to recognize and classify them properly.

All stakeholders: advocates, judges, social workers, the police and doctors not only need to know about different mental diseases and legal provisions, but also need to be aware of treatment options available to the mentally ill persons charged with criminal acts.

Many cases in India have been reported about serial killers, mental illness, incest & other sexual and violent crimes, but no case has been reported as committed by psychopaths. Psychopathy is a dangerous mental ailment which is unrevealed in Indian judicial system. There is an urgent need to identify and classify each mental disease and then take necessary steps. In U.K. and U.S. separate statutes have been made for the psychopaths. There should be proper recognition of psychopaths in India due to the severity of the disease and increasing incidences of psychopathic crime.

* *Assistant Professor, Devi Ahilya Vishwavidyalaya, Indore, Madhya Pradesh (India).*

1. INTRODUCTION

Crime is one of the greatest evils of our society. Crime and delinquency not only continue to plague our society but they are on the increase in spite of our efforts to control them. It is an everyday affair to read about some or the other criminal or delinquent act in the news papers.

The criminal law and criminology endeavor to attempt and understand the demands of knowledge across a wide range of disciplines. The causes of crime are one of the important segments of the problem that require more discussion, investigation, research and call for more social, governmental and judicial action. Writers and researchers from anthropology, economics, jurisprudence, medicine, philosophy, psychology and sociology have all contributed to the study of crime. As the study of crime became more refined it evolved into the specializations of criminology which encompassed an integrated approach to the study of crime wherein the elements of other disciplines were used to develop theories and explanations for the phenomenon of crime.

Due to the alarming increase in the number of crimes in the recent years the problem has attracted the attention of the government and some measures have been taken to prevent crime in general but no genuine attempts seem to have been made in this direction. Researchers commonly identify criminality with emotional illness and look up clinical therapy as a solution to crime. It is no wonder that many sane criminals may be suffering from minor types of mental illnesses which go undetected because these people never get examined by a competent psychiatrist. Mental patients are sometimes detained in jails or sent to mental hospitals for treatment after commission of crime but it includes only those persons who suffer from a very high degree of mental abnormality. Such criminal mental patients have been neglected in India as well as worldwide and very few psychiatrists have worked and researched on various problems relating to such mentally ill

criminals. Study and comparison of the crime rate and the nature of crime committed by persons suffering from different kinds of mental disease was made with that of persons suffering from psychopaths.

The offenders who are accused of horrendous crimes when under the influence of such mental disorders should be identified by psychologists. There is a lot of indistinctness of mental diseases; all are generally identified as same. There is a serious need to recognize and classify them properly and accordingly judgment should be given.

Advocates, judges, social workers, probation officers, the police and doctors need to know not only about mental illness and law, but also what is available to the mentally ill in the form of support, care and treatment. For instance, a judge may have to deal with the case of mental illness; in this regard medical experts will be in a better position to diagnose the same as mental illness thereby strongly recommending for the accused to be subjected to treatment. However, unless the judge is sensitive to this fact he will find it difficult to arrive at a sensible and humane decision. At this stage, some knowledge of psychiatric treatment and the willingness to accept such fact is imperative on the part of the judge.

There are some cases which reflect the contentious decision of the judiciary. In the recent past there had been an infamous incident commonly referred to as the *'Nithari Case'*[1] (gruesome killings of many children and at times eating their flesh), which shook the mind of every sane person. This behavior seems to be pretty abnormal but judging whether a person's functioning is abnormal and whether the person has a psychological disorder can be a complex process that involves weighing several factors.[2] Very few behaviors are inherently abnormal. Abnormality must be judged in the context of a

[1] Surendra Koli v. State of U.P. & Ors, Cr. A. No. 2227 with S.L.P. (Cri) No. 608 of 2010, 15-2-2011 (India).

[2] CRIME LIBRARY, http://www.crimelibrary.com (last visited on Jun. 21, 2013).

particular social situation. Surendra Koli, the main accused had clear traits of psychopathy, initially he was identified as psychopath but later on this important factor became a vague impression and he was awarded capital punishment.

Abnormality must be judged in the context of a particular social situation. In such cases a question will arise as to the validity of the decision made by the judge. Besides, an individual has his own likings and bends toward his choice. It ultimately can put a person at the mercy and prejudices of the judge.

As such, there is no separate law to treat psychopath offenders who in fact are victims of their own minds. Therefore, the study of such diseased minds should be given due importance by the police, advocates and judges. The criminal justice system should seek help from psychologists and follow special codes of procedures in the light of the fact that these offenders are in fact the victims.

In order to integrate law and psychiatry and to affect an inter-disciplinary approach it would be necessary for each discipline to understand the historical development of the other and the link between the two so as to come to logical conclusions. It may further require comparing the background, the generative forces, and the influences from where law and psychiatry evolved.[3]

Dissocial personality disorder is one of several psychopathic personality disorders, each of which has different operational definitions and terminologies depending on the system of classification of mental disorders used. Psychopathy is a general construct that differs from the specific diagnoses of antisocial, psychopathic, dissocial, and sociopathic personality

[3] JOHN BIGGS JR., THE GUILTY MIND PSYCHIATRY AND THE LAW OF HOMICIDE 1 (John Hopkins Paperbacks ed. 1967).

disorders, the various diagnostic classifications for psychopathy.

It is a widespread argument that behaviour classified as psychopathological is caused by mental illness. Pathological behaviour is scientifically proved abnormal criminal behavior, it is a type of disease in which a patient is not only suffering from the disease but due to the disease he is more inclined to commit a crime of a particular nature. In these diseases, patients are not at all aware of the act which they are committing but it is due to a typical mental state of mind of which they are totally unaware of.

2. PSYCHOPATH BEHAVIOUR

First of all it is necessary to understand what psychopath behaviour is. Psychopathy, also known as Antisocial Personality Disorder (APD or ASPD), is a psychological personality disorder. Not only do psychopaths lack emotions of conscience and empathy, but research has shown that these individuals consistently display certain aspects of temperament which include lack of fear, lack of inhibition and a stimulus seeking behavior. Psychopathic adults have also demonstrated physiological idiosyncrasies such as a reduced physical response to negative stimuli, and indifference to the threat of pain and punishment.[4]

Psychopathy has been defined by different thinkers but the greatest contribution was made by Hare and his associates who laid emphasis on assessment and treatment. They were influenced by Cleckley's observations, and evolved a set of diagnostic criteria that offers a practical approach. Hare devised a list of traits and behaviours for his 'Psychopathy Checklist' (PCL). He listed twenty-two items, each of which was to be weighted from 0 to 2 by clinicians working with potential psychopaths. The instrument, with items grouped around two factors narcissistic personality and antisocial behaviour

[4] R. D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF PSYCHOPATHS AMONG US* 25 (Guiford Press 1999).

was tested extensively. In support of Kernberg, but refocusing APD toward personality traits, psychopathy was defined as a disorder characterized by[5]

- lack of remorse or empathy,
- hallow emotions,
- manipulativeness,
- lying,
- egocentricity,
- glibness,
- low frustration tolerance,
- episodic relationships, parasitic lifestyle,
- the persistent violation of social norms,
- need for stimulation and criminal versatility.

According to Hare, "Psychopathy is one of the best validated constructs in the realm of psychopathology." Another group of researchers used the instrument on 653 serious offenders.[6] They noted evidence to suggest that psychopathy emerges early in life and persists into middle age. The "prototypical psychopaths' were responsible for particularly heinous offenses. They concluded that psychopathy appears to be a distinct personality disorder, with childhood behaviour problems serving as good indicators especially when they manifest at an early age. These indicators include drug abuse, theft, aggression, truancy, general problem behaviour, lying, and poor educational achievement. Yet not all children who exhibit these behaviours go on to commit adult crimes, suggesting that:

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[5] R.D. Hare & D.N. Cox, *Clinical and empirical conceptions of psychopathy, and the selection of subjects for research, in* R. D. HARE & D. SCHALLING, PSYCHOPATHIC BEHAVIOR: APPROACHES TO RESEARCH 107-144 (1978); Wiley. R. D. Hare, *Comparison procedures for the assessment of psychopathy,* 53 Journal of Consulting and Clinical Psychology 7-16 (1985).

[6] D.R. Offord, M.C. Boyle & Y. A. Racine, *The epidemiology of antisocial behavior in childhood and adolescence, in* THE DEVELOPMENT AND TREATMENT OF CHILDHOOD AGGRESSION 31-54 (D. J. Pepler & K. H. Rubin eds., Lawrence Erlbaum Associates 1991).

1) not all psychopaths are criminals,

2) some behaviour changes with age, and

3) some intervention may help to redirect behaviour.

Psychopathy provides a theoretical and practical challenge to criminal law and the criminal justice system in general because psychopaths are at a disproportionate risk for persistent criminal behaviour. Their criminal conduct appears to be primarily the product of a mental disorder, and there seems to be little efficacious treatment. They may not understand that what they have done is wrong. Nevertheless, psychopathy *per se* does not undermine cognitive understanding to a degree that would meet the requirements of criminal law for incompetence to stand trial because psychopaths can understand the nature of the charges and are capable of assisting the counsel.

Psychopaths may be at a risk of malingering incompetence if they believe that it would be in their interest to be found incompetent, but the risk of malingering is distinguishable from genuine incompetence to stand trial or from any other criminal law criterion related to mental abnormality.[7]

Psychopaths are very intelligent and hold very elite positions in society. Their intention is to harm anyone without any reason and that harm must be of a grim kind because they have only one thought and that is a pure and simple sadistic feeling. They enjoy watching others in pain. Deceitfulness and fraudulence is their identity. They imitate the finest thing and harm others by making that best part as a weapon. They are very attractive at the same time equally dangerous. To understand and recognize them is a very complicating task because of their significant position in society. If they are not holding the position then, wherever they are, they are considered as nice persons.

[7] H. CLECKLEY, THE MASK OF SANITY ST LOUIS (5th ed. 1976).

Surender Koli[8] *(Noida Serial Murders, Nithari case)*[9]

Noida: D-5, Sector 31, Noida is the second last house on the street. The white building is abandoned. The drain-turned-road at the back of the house leads to Nithari, an urban village in Noida. There was nothing noticeable about that house unless two Nithari residents, in December 2006, claimed that they have seen the remains of the children in the drain behind the house who had been missing since many days.

Reports of some children missing from Nithari turned into the most gruesome serial killings in India. While a number of reports were filed by anxious parents whose children had been missing from the village, many residents claimed that they had been repeatedly ignored by local authorities. So what if child after child went missing?

On December 29, 2006, two Nithari residents claimed that they suspected Surender Koli- the domestic help at D5- had something to do with the disappearances of the children that went missing in two years. They sought help of former RWA President S.C. Mishra. Mishra and the two residents searched the tank drain, and one of the residents claimed to have found a decomposed hand after which they called the police.

Demands were made for an independent probe into the matter. One of the residents asserted that the police were claiming credit for discovering the bodies when it was the residents who dug them up. The police denied having found fifteen bodies. The victims' identities and number could only be established with DNA tests. The central government tried to ascertain the facts behind the discovery of the skeletal remains and whether it had 'inter-state ramifications'.

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[8] Surendra Koli v. State of U.P. & Ors, Cr. A. No. 2227 with S.L.P. (Cri) No. 608 of 2010, 15-2-2011 (India).

[9] DAILY BHASKAR, http://daily.bhaskar.com/article/ (last visited on Jun. 20, 2014).

December 30, 2006 - Moninder Singh Pandher and Surender Koli were detained for questioning in connection with the missing case of 20-year-old Payal. Payal went missing on May 7 and she was not the only one but many such cases had rocked the village in two years. After Koli's confession of having killed Payal after sexually assaulting her, police claimed to have started digging up the nearby land area and discovered the children's bodies.

Notably, an FIR had been filed on October 7, 2006 about the missing 20-year-old Payal. Investigations revealed that Payal's cellphone was being used although the SIM card she owned remained inactive. A rickshaw cart puller affirmed that the phone belonged to someone from the Pandher residence. After the affirmation of the facts by the witness, Moninder Singh was called for interrogation, which subsequently revealed nothing. His aide and servant, Surender Koli was also picked up when he confessed killing the woman and dumping her body behind the house. The police started digging and henceforth recovered the skeletal remains of the missing children instead of Payal.

December 31, 2006 - Two policemen were suspended in connection with the serial murders as angry residents charged the house of the alleged mastermind Pandher. The constables were suspended for dereliction of duty in the wake of the allegations by the locals that the police had refused to take any action when they were informed about huge number of children missing from Nithari.

The situation at Nithari became worse after an agitated mob fought pitched battles with the police, both pelting stones at each other, just outside the residence of the accused. The police had also detained a maid named Maya whom they suspected had a hand in procuring women for the businessman.

3. DURING PRIMARY INVESTIGATIONS

January 1, 2007 - The remand magistrate granted the police custody of the two until January 10, 2007 as the investigators said that further interrogation was required to complete recovery of victims' remains. Police also conducted a raid on Pandher's Chandigarh residence. His wife and son were interrogated and questions were asked about Pandher's habits. However, there were reports that their relationship with him was 'strained', which were later found to be untrue.

January 2, 2007 - Fifteen out of the 17 skeletons discovered in the village were identified. Ten of them were identified by Koli when he was confronted with the photographs of the missing children. Five others were identified by family members after being shown belongings recovered from the scene. Police had said that there were at least 31 child victims. There were also speculations doing rounds in media that motivation of the killings can also be organ trade.

During the preliminary investigations, neither the courts nor the Central Bureau of Investigation (CBI) were involved.

The central government, however, had constituted a high-level inquiry committee to go into the police lapses. The inquiry committee that investigated the serial killings discovered serious lapses on the part of the police in handling the cases of missing persons. The reports were incriminating and claimed that the local police failed in their duty to respond to complaints over the past two years.

After four days of discourse and mounting pressure from the centre, the Uttar Pradesh government decided to hand over the inquiry to the CBI.

January 12, 2007 - The two accused were taken to the CBI headquarters in New Delhi, a day before the investigation was to be transferred to the CBI.

The CBI continued its investigation and discovered three more skulls and human remains at the site of the serial killings.

Meanwhile, the investigators searched the drains outside the house and found three skulls, believed to be of the children and several body parts, including parts of legs, bones, and the torso.

January 20, 2007 – The Uttar Pradesh government submitted a report to the National Human Rights Commission.

February 8, 2007 – A special CBI court sent both the accused to 14 days custody of CBI.

February 12, 2007 – Human Rights Commission formed a committee to inquire the matter.

May 22, 2007 – CBI filed its first chargesheet in a Ghaziabad court in which main charges of kidnap, rape and murder were on Surender Koli.

May 1, 2008 – Family of three victims approached the court against CBI's clean chit to Moninder Pandher.

May 11, 2008 – The court directed the CBI to probe Pandher's role in the killings.

November 1, 2008 – The Supreme Court issued a notice to CBI after the complaint of relatives of one of the victims that CBI was trying to shield Pandher.

December 13, 2008 – A special CBI court in Ghaziabad framed charges of rape of two minors against Pandher.

February 12, 2009 - Both the accused- Moninder Singh Pandher and his domestic servant Surender Koli- were found guilty of the February 8, 2005 murder of Rimpa Haldar, 14, by a special sessions court in Ghaziabad.

February 13, 2009 - Pandher and Surender Koli were given the death sentence as the case was classified as 'rarest of rare'.

September 10, 2009 - The Allahabad high court acquitted Moninder Singh Pandher and overturned his death sentence. He was not named a main suspect by investigators initially, but was summoned as co-accused during the trial. Pandher faced trial in five cases out of the remaining 12, and could be re-sentenced to death if found guilty in any of those killings.

May 4, 2010 - Koli was found guilty of the October 25, 2006 murder of Arti Prasad, 7, and given a second death sentence eight days later.

September 27, 2010 - Koli was found guilty of the April 10, 2006 murder of Rachna Lal, 9, and given a third death sentence the following day.

December 22, 2010 - Koli was found guilty of the June 2006 murder of Deepali Sarkar, 12, and given a fourth death sentence.

February 15, 2011 – The Supreme Court upheld the death sentence of Surender Koli.

December 24, 2012 - Koli was found guilty of the June 4, 2005 murder of Chhoti Kavita, 5, and given a fifth death sentence.

4. LEGAL LACUNA

Taking into consideration the case reported above, and the subsequent arrest, investigation, trial and sentencing in the case, it can be clearly assumed that the vital problem in the case is to recognize the authentic reason for the commission of an offence and the disease of the offender. By and large in India, whenever any offence is committed by the mentally ill offender, first of all it is very difficult to identify whether he is actually a patient or a malicious person. There is no specific *modus operandi* defined (for psychopaths) for the police and even in law to identify the correct

disease in the early stage. Moreover, it is very complicated for the police to understand the concrete motive of commitment of the offence. The police generally center its investigation on only three options in such cases,

a) Offender is insane or of unsound mind,

b) Offender is a monster, or

c) Offender is schizophrenic.

Taking this view in mind, offender is either sent to a mental hospital or kept in custody for further investigation. The investigation is also very inhuman in nature because of the lack of knowledge of exact reason of the gruesome offence committed by patient.

It is the biggest irony of our judicial system that on the basis of investigation and trial an offender is either convicted for life imprisonment or awarded death sentence or he is acquitted as a person with insane or unsound mind. In fact both these are sometimes erroneous ways of judgment. This is due to the lack of awareness of all categories of mental diseases and the seriousness of crime.

Psychopathy is one of the most severe of all mental diseases. Though psychopaths are very dangerous and always commit heinous crime, they should be treated and handled properly. Life imprisonment and death sentence is not the only solution for this problem. Although they know what they are doing, but they do not know the reason behind that which means *means rea* is completely absent in their act. Whatever crime or act they commit is due to their disease and not because of any guilty mind. This is a reason they never conceal their crime. They never show remorse of their action. There is not any sign of guilt or regret on their face whenever they are caught and they openly accept their criminal act without any repentant and sentiment. They always candidly accept their crime and desire to commit it again because of a strong urge to commit them which arises due to disease.

Surendra Koli after arrest said, "I still have an urge to kill". This is a typical sign of psychopathy, which is a stern disease. That's why a sympathetic view should be taken for them. It cannot be taken for granted by the judicial system because ignorance of fact is although not punishable under IPC but ignorance of law due to ignorance of fact must be punished, and this ignorance is in our judicial system which has to be improved.

In the Nithari case the offender was considered as a monster and an animal; some considered him as a 'psycho- killer'. It has become a trend to attach the word 'Psycho' to any abnormal person without having a correct knowledge of the disease. Every anti-social personality disorder is treated in the same manner.

Psychopathic behaviour is an unidentified area in our present judicial system. Only insanity, unsoundness of mind and schizophrenia are known to the system and judgments also depend upon this view. Psychopathy is one of the most dangerous diseases of mental illness which should not be ignored.

It is an irony that even elite people do not have the knowledge of the term 'psychopath' correctly and have pre-conceived notions about them. After going through the interviews with the Doctors of Badganga Mental hospital, Indore and visiting doctors of the Central jail Indore (Psychiatry Cell) and visiting the mental hospital, it is evident that there is no case registered of psychopathy in the past five years. The lower staff of the hospital also cannot identify psychopaths because they have not classified any patient as belonging to this category. Although they know about serial killers, schizophrenic and insane persons who are considered as mental patients they are all kept in the same ward. Now the issues are: whether it is possible that in the past five years psychopaths did not commit any crime; or, whether our legal system does not have proper awareness of the disease; or, they are misinterpreted as ogres and hard core criminals and punished harshly with life imprisonment or death penalty.

In India, some provisions are mentioned in different laws for a person suffering from mental disease for e.g., in IPC, sec. 84 deals with the law of insanity made from the Mc. Naughten rules of England which uses a more comprehensible term 'unsoundness of mind' instead of insanity. It has been criticized of being outdated since they do not provide protection to behaviour out of abnormality of mind, or partial delusion, irresistible impulse or compulsive behaviour of a psychopath. Although under personal laws (sec 5, sec.13 under HMA, 1955) and in Evidence Act, some provisions related to psychopaths are present. The Code of criminal Procedure, 1973, Chapter XXV also mentions the procedure for the trial of insane persons. Still all these laws are inadequate to deal with this problem related to psychopaths. The view of Indian courts also stress on the need for adopting a more progressive attitude in the application of law related to psychopathic behaviour.

In our present system it is not possible to identify any mentally ill offender at the time of arrest. But during the trial it is necessary to know whether the offender is fit for trial or not. If there is any possibility of a mental disorder then they are sent for medical examination. The role of doctors and psychiatrists is to identify whether that offender is fit for trial or not. All types of mentally ill criminals are kept in the same ward. Violent criminals are controlled by sedatives. If they are not fit for trial, they are sent to the mental hospitals for treatment, but still there is no guideline available specifically for psychopaths.

As per procedure almost every offender is subjected to a clinical test and a psychiatric test in selected cases. The problem with psychopaths is that they seem to be fit for trial. Moreover, they do not hide anything and admit their crime with no remorse. This attitude and acceptance of crime commission misleads the case and they are deemed as gruesome offender with no repentance for their act. One should try to know the reason behind this

attitude. They do not understand the word "guilt" and that is why there is no use of giving them such a heinous punishment like death penalty or life imprisonment. Hence, it should be mandatory that such type of behaviour should be immediately taken into account and as a matter of standard procedure such offenders should be subject to a medical test involving a psycho-analysis.

In U.K. and U.S.A. laws have been already framed for psychopaths wherein they not only recognise them but also deal with them suitably. Proper awareness is also there by which they identify those categories of criminals and are more conscious with respect to their protection.

5. PSYCHOPATHS AND JUDICIAL RESPONSE

In India many cases have been reported about serial killings, mental illness, incest and other sexual and violent crimes, but none regarding psychopaths. However, if we take a look at these cases, many of them indicate psychopathic tendencies. For instance, Thug Behram, of the Thugee clan, reportedly killed more than 900 people with his ceremonial cloth. He was one of the world's most prolific killers. Behram was executed in 1840 by hanging.[10]

The Stoneman[11] was a name given by the popular English language print media of Kolkata to an alleged serial killer who menaced the streets of the city in 1989. The Stoneman was charged with thirteen murders over six months (the first in June 1989), but it was never established whether the crimes were the handiwork of one person or a group of individuals. The Calcutta police also failed to resolve whether any of the crimes were committed as a copycat murder. Till date, no one has been sentenced for these crimes, making this one of the greatest unsolved mysteries. Beer Man

[10] HELLHORROR, http://www.hellhorror.com/killers/serial_killer/67/Thug-Behram.html (last visited Jun. 17, 2014).
[11] WIKIPEDIA, en.wikipedia.org/wiki/The_Stoneman_Murders (last visited Jun. 17, 2014).

is the name given to a suspected serial killer who murdered seven people in south Mumbai, India, between October 2006 and January 2007. The nickname was gained due to beer bottles left beside each body, which was the only link between the deaths.

Auto Shankar is the nickname of an Indian serial killer. Shankar and his gang were found guilty of six murders, committed over a period of two years in 1988–1989. The bodies of the victims were either burnt or buried inside residential houses.[12]

Joshi - Abhyanker murder case - Rajendra Jakkal, Dilip Dhyanoba Sutar, Shantaram Kanhoji Jagtap and Munawar Harun Shah were commercial art students of the Abhinav Kala Mahavidyalaya, Pune, India who committed 10 murders between January 1976 and March 1977. The quartet had acquired a reputation for bad conduct in their college campus. They frequently robbed and indulged in drinking[13] and were hanged to death on 27 November 1983.

Raman Raghav was a psychopathic serial killer who operated in the city of Mumbai in the mid-1960s. He was diagnosed with schizophrenia after his arrest.[14] Raman Raghav's sentence was reduced to life imprisonment because he was found to be incurably mentally ill.

Charles Shobraj is perhaps the most high profile criminal from India[15], because of his constant quest for adventure and high-society lifestyle. He served a rather comfortable if not luxurious jail term in the notoriously corrupt Tihar jail. Also known as 'Bikini killer' as few of his victims were found killed wearing a bikini. He killed 12 by strangulation and poisoning.

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[12] RI for jail warders in 'Auto' Shankar case, THE HINDU, http://www.hinduonnet.com (last visited Jun. 28, 2014).
[13] INDIAN EXPRESS, http://cities.expressindia.com/fullstory.php?newsid (last visited July 2, 2014).
[14] *Recalling Raman Raghav*, SIFY, http://www.sify.com (last visited July 9, 2014).
[15] http://www.biography.com/people/charles-sobhraj-236026 (last visited Jun. 20, 2014).

He had the audacity to go to Nepal seeking attention where he is serving a life imprisonment term.

Dandupalya Krishna was the leader of the dreaded Dandupalya gang[16] which operated across Karnataka and Andhra Pradesh from August 1995 to October 1999. They killed 42 (unofficial figures are cited as more than 100) by attacking their victims with crowbar and other weapons. *"I liked to hear the last sounds of life draining away. It is exciting to hear the gurgling sound that emerges from the throat after I slit it,"* Krishna said, without a hint of remorse after he was captured by the police. All members of the gang were convicted and sentenced to death in 1999 along with a fine of Rs. 30,000 each.

In 2004, a total of 23 children, mostly below the age of 10, had gone missing from various parts of Punjab. Of them, six were recovered by the police. **Darbara** was arrested by the police in the last week of October 2004 and he confessed to have killed 17 children, 15 girls and two boys. In the fit of rage he had even tried to rape or sodomise the victims after murdering them[17]. A fast track court pronounced the death sentence for Darbara Singh in these cases.

Apart from these, many cases which have been reported abroad that clearly reflect psychopathic traits, for instance, Jack the Ripper, Carl Panzarm, John Wayn Gacy, Zodiac Killer, Son of Sam etc. Out of these some were punished with life imprisonment and others with capital punishment.

In the above mentioned cases and many more such cases there shall always arise a question as to the validity of the judgment. There is not a single case which specifies the disease psychopathy; although in every one of the above

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[16] *Dandupalyaa name that stuck*, INDIAN EXPRESS, http://www.indianexpress.com/news/dandupalyaa-name-that-stuck/925070/3 (last visited Jun. 20, 2014).

[17] *Serial baby killer held*, TRIBUNE NEWS SERVICE, http://www.tribuneindia.com/2004/20041030/main3.htm (last visited Jun. 22, 2014).

discussed cases the accused persons have clear traits of psychopathy. We should not forget that every human is born with a different psyche. Where some may be reared in a family with rich and nice morals and sound environment they might turn out to be fair people and those who have been reared in strained environments may turn out to be hostile and incompetent in various ways. Moreover, every individual has his own liking and bends toward his choice. At the time of judgment one should understand and identify the disease clearly. A clear understanding should be inculcated in our system especially for psychopathy which is still an un-emphasized area in our legal system.

6. PSYCHOPATHS CONFUSED WITH OTHER SEXUAL CRIMES

It is noted that psychopathy is mostly confused with sociopathy, serial killing, incest, rape and other sexually violent crime. A lot of dissimilarities are also present in them. They cannot be similarly measured for trial and judgments. The *mens rea* behind every crime mentioned is different and distinct. The motive for the crime is totally absent for the offence committed by psychopaths because of their disease.

Psychopaths may be serial killers but every serial killer is not a psychopath. Technically they are different from each other. Some of the patterns of killing are so similar that even experts get confused about the disease. It is confused with other mentally ill patients/criminals and serial killers and with incest offenders. Cases like incest, rape, child molestation, sodomy and serial killing are often confused with psychopathy whereas in reality the former could have occurred due to several reasons like obsession, revenge, pleasure, fun, lust and also psychopathy (occasionally). The cause of crime in the case of the former is not due to disease but in the latter case it is due to disease and hence it is essential that investigation should be made in order to address the existing ambiguity psychopathic behaviour and this will help in

drawing the distinction between psychopathy and other forms of crime, viz. sexual and violent crimes.

There is no confusion in the terminology of sexual criminals, violent criminals, rapists, incest cases, serial killers, sociopaths and psychopaths in U.K. and U.S.A.; a clear demarcation has been drawn between all these categories. So the punishments and treatment are also on the basis of the disease. This is a very essential and urgent requirement in the Indian Criminal Justice system. There is a need to change the whole concept and to deal with and judge psychopaths and all other mentally ill offenders according to their disease and not by the crime committed by them.

7. CONCLUSION

The term 'Psycho' is commonly used by many people today for mentally ill persons but there is no term like this in psychology and neurology, and hence it needs a proper explanation. This confusion and lack of knowledge has to be sorted out.There is a thin line of difference between psychopathy and some other types of crimes, for instance, serial killer, incest, rape and child abuse. This ambiguity has to be solved by the judiciary and legislature by making and passing special laws for this kind of mental illness in order clear the ambiguity on the issue in the minds of the public at large.

One often comes across with different types of crimes being reported in the press which invariably indicate that there has been a steady growth in the number of crimes committed by psychopaths in India. Many cases in India have been reported regarding serial killers- incest & other sexual and violent crimes, but no case has been reported as committed by psychopaths.

Although if we take a close look at some cases, one might argue that many of them indicate psychopathic tendencies, for instance, Charles Shobraj, Raman Raghav, Auto Shanker etc. are some of the infamous cases which might fall in this category.

In the above mentioned cases and many more such cases a question arises as to the validity of the judgment, like in Nithari Case, Koli, the main accused, was sentenced to death as the case was classified as "rarest of rare". After interrogating Surender Koli, it was *prima facie* concluded that "he is a psychopath who used to carry out the killings". The circumstances under which Nithari Case took place: the whole investigative process, the role of the media and the curiosities of the public at large were shambled when the judgment in this case was published in the newspapers. No mention about Koli's disease i.e. psychopathy in the report which should have been primarily the basis of the judgment astonished many. That was a major lacuna in the report and the verdict which should be resolved by our legal system by introducing psychopath behavior as an integral part of the investigation and justice delivery system.

Psychopaths should be properly recognized by the society. U.K., California and many other states in US have passed a special statute for psychopaths[18]. Psychopathic behavior is an unidentified and unrevealed area in our judicial system. The step should be taken by our legal system to educate the public and government about this dangerous disease.

[18] Fredrick J. Hecker and Marcel Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43, 766.

DEVELOPMENT IN LAW AND USE OF TECHNOLOGY: RELEVANCE FOR JUDGE'S RESEARCH

Jasdeep Kaur*

The Judiciary is one of the institutions on which rests the noble edifice of democracy and rule of law. Indian Judiciary has an impressive record. There was a time when law was undoubtedly considered to be manifestation of will of the dominant social class, determined by economic and political motives. A judge is now more conscious of the felt necessities of time. This in turn has increased the burden as well as the responsibility of a judge to look into different matters originating from the case as well as from the new developments. This again realizes the judges of continued introspection and research in to the developing new issues and modern techniques. For giving accurate decisions in the matters where new developments are taking place, there is need for the judge to make research for better understanding of the new developments of law. If the research is carried on by judges for the purpose of decision making then technique can be of a great help. The technology can be helpful in easy accessibility to judgments of various courts which in turn will help in checking up inconsistent decisions by different courts.

1. INTRODUCTION

The Judiciary is one of the institutions on which rests the noble edifice of democracy and rule of law. The judiciary stands as a bulwark against abuse,

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misuse or excess of power on the part of executive and protects the citizens against governmental lawlessness.[1] The judiciary is one of the three basic organs of the state. It has a vital role in the functioning of the state, particularly in democracy based on rule of law. Since time immemorial law and judiciary have played a vital role in Indian Policy.[2] The constitution accords a place of pride to the judiciary by conferring the power of judicial review of legislative and administrative action and entrusting it with the task of enforcement of fundamental rights guaranteed under the constitution.[3] Indian Judiciary has an impressive record. Its success on the constitutional front is without a parallel. The theory of basic structure developed by judiciary has helped to preserve the values underlying the constitution. Its contribution in enlarging and enforcing human rights is also appreciated worldwide. Its handling of public interest litigation has brought the institution close to the have not's. Among the three wings, the judiciary enjoys maximum credibility.[4] The Apex Court of India i.e. Supreme Court in the last quarter of this century has pronounced historic and epoch making decisions. It is a departure from traditional role of judicial passivity and self-restraint. It depicts judicial creativity and fosters a high vision of socio-political and economic visibility.[5]

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[1] Syed Ashfaq Hussain, *Changing Perception of Judicial Function*, 13 Delhi L. Rev. 170, 173, 170-78 (1991).

[2] R. C. Lahoti, *A Conspectus of Judicial System*, 4(1) Nyaya Deep: The Official Journal of NALSA 5, 5-13 (2005).

[3] Pawan Chaudhary, *Indian Judiciary towards 21st Century*, 5 Nat. Capital L. J. 105-114 (2000).

[4] P. P. Rao, *Access of Justice and Delay in Disposal of Cases*, 30(1) Indian Bar Rev. 207, 207-216 (2003).

[5] Maneka Gandhi v. Union of India (1978) 2 S.C.R. 621; People Union for Democratic Rights v. Union of India (1983) 1 S.C.R. 456; Olga Tellis v. Bombay Municipal Corporation (1985) 2 S.C.R. Supp. 51; Jolly George Varghese v. Bank of Cochin(1980) 2 S.C.R. 913; Gian Kaur v. State of Punjab A.I.R. 1996 946; Vikram Deo Singh Tomar v. State of Bihar (1988) 1 S.C.R. Supp. 755, Rural Litigation and Entitlement Kendra v. State of U.P. (1985) 3 S.C.R. 169; M.C. Mehta v. Union of India A.I.R. 1987 S.C. 965; Vellore Citizens Welfare Forum v. Union of India A.I.R. 1996 S.C. 2715; Mohini Jain v. State of Karnataka (1992) 3 S.C.R. 658, Unni Krishnan v. State of A.P. (1993) 1 S.C.R. 594; Sunil Batra v. Delhi Administration (1980) 2 S.C.R. 557; Hussainara Khatoon v. State of Bihar (1979) 3 S.C.R. 532; National Human Rights Commission v. State of Arunachal Pradesh (1996) 1 S.C.R. 278, Rudal Shah v. State of Bihar (1983) 3 S.C.R. 508; Delhi Domestic Working Women's Forum v. Union of India (1995) 1 S.C.C. 14, Vishaka v. State of Rajasthan A.I.R. 1997 S.C. 2011. (INDIA).

There was a time when law was undoubtedly considered to be manifestation of will of the dominant social class, determined by economic and political motives. The ideals of justice have little to do with law which was often an instrument of oppression. Under the traditional approach, judges too paid great heed to the letter of law and mischief that was designed to be removed. Social conditions and economic trends were not supposed to influence him. But this attitude has changed in recent past. A judge is now more conscious of the felt necessities of time. This in turn has increased the burden as well as the responsibility of a judge to look into different matters originating from the case as well as from the new developments. This again realize the judges of continued introspection and research in to the developing modern techniques and issues which are being faced by them during trial, appeal or any other proceeding before the court.

1.1. Meaning of Research:

In order to know what judge's research is, it is essential to know the meaning of term research.

According to Webster International Dictionary, "Research is a careful, critical inquiry or explanation in seeking facts or principles, diligent investigation in order to ascertain something."[6]

According to Encyclopaedia Britannica, "Research is an act of searching in to a matter closely and carefully, inquiring directly to the discovery of truth and in particular the trained specific investigation of principles and facts of any subject, based on original and first hand study of authorities or experiment. Investigation of every kind which has been based on original source of knowledge may be styled research and may be said that without research, no authoritative works have been written, no scientific discoveries or inventions made any theories of any value propounded..."[7]

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[6] S. R. MYNENI, LEGAL RESEARCH AND METHODOLOGY 2 (Allahabad Law Agency 2009).

[7] B. A. Wortley, *Some Reflections on Legal Research*, *in* LEGAL RESEARCH AND METHODOLOGY 2 (S. K. Verma ed., ILI 2006).

1.2. Why Judges Research:

The judges are required to do legal research for the purpose of settling cases. Legal Research means the research in that branch of knowledge which deals with the principles of law and legal institutions.[8] There are different kinds of judgments given by the judges in deciding the dispute. These are mentioned in a pioneer study on 'The Art of Judgment.' In this study, Sir Geoffrey Vickers[9] analyses the various aspects of complexities involved in judgments depending upon its kind. First is reality judgment which is concerned with the appreciation of reality factor. It has a relatively high degree of certainty but generally lower than empirical observation in natural sciences. The second is value judgment which concerns the hierarchy of values and priority, such as relative weight attached to environment. Third is the instrumental judgment which takes in to account the judgment that assumes a problem in full complexity. It is based on the skill which produces apt solutions to the problems. It is set by such surveys of reality which are calculated to change the pattern of expected relationships and responses that have never been tried before. It is combination of reality, value and instrumental judgment which is involved in the process of appreciation by a judge in his judgment.

Moreover Roscoe Pound[10] in an analysis of theory of judicial decision has found out various reasons for research by judges. Firstly, according to him it is required for social engineering. Secondly, it is required to maintain a balance between actual cause and the precedent already establish by the courts. Thirdly, it is required to induce a consciousness of social and legal order. Thus it is due to these reasons that legal research by judges assumes importance.

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[8] H. N. TIWARI, LEGAL RESEARCH AND METHODOLOGY 3 (Allahabad Law Agency 2008).
[9] W. FRIEDMAN, LEGAL THEORY 58, 59 (Universal Law Publishing Co. Pvt. Ltd. 2003).
[10] Roscoe Pound, *The Theory of Judicial Decisions*, 36 Harv. L. Rev. 940, 958 (1923).

2. DEVELOPMENTS IN LAW AND JUDGES RESEARCH

There are number of areas that can be taken in to account by the judges for settling the disputes and for giving decision in different cases. For giving accurate decisions in the matters where new developments are taking place, there is need for the judge to make research for better understanding of the new developments of law.

2.1 Precedent and Research by Judges

The theory of binding force of precedent is firmly established in England. A Judge is bound to follow the decisions of any Court recognized as competent to bind him. It becomes his duty to administer the law as declared by such a Court.[11] The system of precedent has played an important role in the development of common law in England. As the Indian legal system had its roots in the British system, a similar theory has been adopted in India and the binding force of precedents is firmly established.[12] The law reporting is a necessary ingredient of precedents as publication of decisions is a condition precedent. It is only after publication that a judge can inquire in to the case decided by the other court. A Judge therefore, has to acquire all reliable and authentic reports of Courts containing precise records of what they lay down and it is only then the doctrine of 'Stare Decisis' can function meaningfully.[13] It is possible only if the legal research is carried on by the judge in this respect.

2.2 Forensic Science Testimony and Judges Research:

There can be a number of cases in which the testimony of forensic expert has to be obtained to proceed with the matter. A judge is required to obtain information of a scientific discipline in order to determine if the proffered

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[11] P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 181 (Universal Law Publishing Company, 12th ed. 2010).
[12] *Id.* at 163.

testimony is based on scientific principles or methodologies that are generally accepted in the scientific community. Even in this case the responsibility is that of the scientific experts but a judge has to apply the opinion of the expert to the case.[14] Moreover in criminal cases forensic testimony goes well beyond mainstream science or medicine. For example, a forensic dentist in a capital murder case, after removing the victim's fingernails and manually placing them over the scratch marks on the defendant, without making any test marks, testified that the nails indeed and without doubt caused the wounds on the defendant.[15] In yet another case, a psychiatrist, without examining the defendant testified that there was a one hundred percent and absolute chance that the defendant would commit future acts of criminal violence.[16] In another case, which occurred in the metropolitan city of Mumbai, the accused entered the house under the pretext of carpenter and then murdered the old-aged couple staying alone in the house. The accused killed the husband by stabbing with a sharp edged weapon, while the old lady was throttled to death. In the premises pet dog was also found dead. Then with an intention to destroy the evidence the accused tried to burn the house by inserting the lighted agarbatti (essence stick) in to the rubber tube of household LPG gas connection. It was observed in the investigation that, the accused absconded with hard cash and ornaments from the house. In the due course of time the police arrested the accused. Fifty seven different exhibits were collected from the scene of incident and from the accused persons and forwarded to laboratory for biological, serological and physical examination. Some of the garments of victim were soaked in blood whereas some were having few bloodstains, which showed the correlation with case history. Carpentry instruments used

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[13] AWADHESH KUMAR PATEL & BHUPENDRA KUMAR SINGH, APPLICATION OF INFORMATION AND COMMUNICATION TECHNOLOGY IN JUDICIAL LIBRARY SYSTEM 46 (International Caliber, 2008).

[14] Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post- Daubert World*, 85 Georgetown L. J., 3 (1996).

[15] *Id.* at 4.

[16] *Supra* note 14 at 3.

as weapons for causing death were stained with blood. Garments of the accused were stained with the blood. Blood detected on all exhibits was subjected to serological analysis. The result of this forensic test was that the exhibits established the link between crime and accused.[17] After the obtaining of report from the forensic expert, it will be up to the judge to analyse the result on the basis of forensic report. Legal research can be of lot of help in this regard.

2.3 New Trends in Family Law and Judges Research:

The social sciences research is influencing the jurisprudence of family law. [18] However a judge's determination is formed after consideration of the facts of a case and the applicable law. Social science information plays limited role in evaluation of the case. It is thus required to maintain a balance between the role of a judge and new trends disclosed by the social science research.[19] This can only be possible if the judge is having information regarding the trends prevalent in the society. This can be known only by making research in this area.

Further, with the passage of time new issues like live in relationships are coming forward for decision by the judges. The two conflicting interests of modernity and morality have to be synthesized while interpreting these new developments. This can be done on the basis of study or research in to historical as well as modern concepts in family law jurisprudence.[20]

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[17] H. A., Deshpande, V.R. Rathod and R. Krishnamurthy, *Murder Case of A Senior Citizen Couple: A Case Report*, 30(1) The Indian Journal of Criminology & Criminalistics, 75, 75-78 (2009).

[18] Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in The Daubert Era*, 59 (4) University of Miami L. Rev. 3 (2004).

[19] *Id*. at 13.

[20] C. W. Weeramantry, *Towards More Purposeful Legal Research, in* LEGAL RESEARCH AND METHODOLOGY 53, 56 (S. K. Verma ed., ILI 2006).

2.4 Cyber World and Judges Research:

The advancement in technology has brought with it increasing criminal applications. It results in increasing opportunity for committing crime and Internet is no exception to this. It is a fact that development of computer technology has opened new opportunities and possibilities of the perpetration of crime in the field of cyber-world.[21] In reality, the impact of such crimes is so great that it poses a serious threat to personal as well as public security. Taking one example, e-commerce refers to all forms of transactions and activities involving the application of information and communication technologies to production, distribution, marketing etc. on a global scale. It helps in making the way easier for misusing it for many unlawful and illegal purposes, which in fact constitute crime.[22] Further computer crime is having an extra territorial aspect i.e. it involves persons and acts in different countries. The investigation of computer crimes and gathering of appropriate evidence for a criminal prosecution can be an extremely difficult and complex issue. It is primarily due to intangible and often transient nature of data, especially in networked environments. The technique renders the process of investigation and recording of evidence extremely vulnerable to defence claim of errors, technical malfunctioning, prejudicial interference or fabrication. Such claim may lead to ruling from the court against the admissibility of the evidence itself.[23] The accurate decision can be possible only if the judge is having knowledge of all these aspects. This can be possible only through research by the judges.

2.5 Better Understanding of Crime especially Cyber Crimes

The advent of computer technology has brought many kinds of opportunities of criminal offences.[24] The area and scope of these crimes is widened when

[21] LEGAL DIMENSIONS OF CYBERSPACE 231 (S. K. Verma & Rattan Mittal ed. ILI 2004).
[22] Vishwanath Paranjape, *Cyber Crime: A Global Concern*, 44(3) Indian Police Journal 21 (2007).
[23] COMPUTER LAW 292, 293 (Chris Reed & John Angel eds., Universal Law Publishing Co. 2002).
[24] *Id.*

the violators are regular users of computer and technology.[25] The crime associated with advent of information is referred as cyber-crime. It is a specialized branch of criminal law which deals with the etiology of crime through digital mode.[26] It constitutes a crime on the internet. The information Act, 2000 has identified various kinds of cyber-crimes like tampering with computer source documents, hacking with computer systems, publishing of information which is absence in electronic form, publishing digital signature certificate false in certain particular etc. Recently it has been expanded to include forgery, illegal gambling and cyber stalking.[27] There are other categories which are of general types of computer crimes.[28] There can be different ways of committing the crimes by computer. One way is where computer is the target which includes such offences as theft of intellectual property, theft of marketing information, blackmail based on information gained from computerized files. These crime also entail sabotage of intellectual property, marketing, pricing or personal data or sabotage of operating systems and programs with intent to impede a business or create chaos in a business operations. This crime covers changing a criminal history, modifying want and warrant information, creating a driver's license, passport or another document for identification purposes, changing tax records or gaining access to intelligence files.[29] Other is where computer is incidental to other crimes. In this category of computer crime, the computer is not essential for the crime to occur, but it is related to the criminal act. This means that the crime could occur without the technology, however computerization helps the crime to occur faster, permits processing of greater amounts of information and makes the crime more difficult to

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[25] R. K. SURI & T. N. CHHABRA, CYBER CRIME 43 (Pentagon Press 2002).

[26] RODNEY D. RYDER, GUIDE TO CYBER LAWS: INFORMATION TECHNOLOGY ACT, 2008, E-COMMERCE, DATA PROTECTION AND THE INTERNET 841 (Wadhwa & Co. 2005).

[27] For further details, *see* section 65-78 of *Information Technology Act, 2000*.

[28] BHARAT'S HANDBOOK OF CYBER AND E- COMMERCE LAW 2 (P. M. Bakshi & R. K. Suri eds., Bharat Publishing House 2002).

[29] DAVID BRAINBRIDGE, INTRODUCTION TO COMPUTER LAW 401 (Pearson Education Publications 2005).

identify and trace. Such crimes include money laundering and unlawful banking transactions, organized crime records or books and book making. Cases involving drug raids, money laundering seizures and other arrests also have produced computers and electronic storage media containing incriminating information. All of these situations require unique data recovery techniques in order to gain access to the evidence. In every case, the crimes can occur without the computers, the system merely facilitate the offences.[30] Thus knowledge of all these offences are necessary and inevitable for the judicial officials to decide a case relating to all these crimes. This requires legal research relating to technicalities involved in the commission of cyber-crimes. There are still other crimes associated with the prevalence of computers.

The simple presence of computers and notable the wide spread growth of microcomputers, generates new versions of fairly traditional crimes. In these cases, technological growth essentially creates new crime targets. Software piracy, counterfeiting, copyright violation of computer programs, counterfeit equipment, black market computer equipment and programs and theft of technological equipment fall into this category of computer crime. Thus these crimes related to computer in any of the three ways mentioned above are completely new category of crimes, which are entirely different from the traditional crimes, requires a new understanding of these crimes. Thus this understanding could only be possible by way of research undertaken by the judicial officials about these emerging issues.

3. USE OF TECHNOLOGY AND JUDGE'S RESEARCH

Technology can play a very important role in all human activities. The society which adopted new technology grew and flourished whereas the societies which were lethargic in then response to challenges posed by new technologies remained far behind. The administration of justice is one of the

[30] *Supra* note 25 at 65.

most important activities of human kind.[31] Today, we see the increasing use of computers in various fields of our life like penetration of computers into banking sector, railway reservations, airline ticketing, and many others. Similarly another field in which computers can be used is the judiciary. The basic purpose of computers is to ensure simple, transparent and efficient procedures. It is here that the techniques of modern management can help to achieve the most efficient use of available resources, within the limits of procedures designed to ensure the proper administration of justice.[32]

3.1 Help in Decision Making Process:

If the research is carried on by judges for the purpose of decision making then technique can be of a great help. Courts are sometimes giving inconsistent decisions. It is mainly due to the fact that certain law, case law is not brought to the notice of the court or the lawyer fails to bring the decision or law to the notice of the court. Such practices diminish the credibility of the judicial system.[33] Moreover getting the latest judgments of the Supreme Court and the High Courts in the books and journal etc. is time consuming. Many cases are wrongly decided by the lower courts only because, the latest position on the point could not be brought to the notice of the court and the journals reported the judgments late. A party entitled to get justice in view of the latest judgment is denied the same and he is constrained to approach the higher courts for justice. This in turn results in multiplicity of proceedings, pendency of many undesirable appeals and denial of justice.[34] It can be avoided by research carried on by use of technology. It is possible by use of technology to maintain website where all the cases decided by all the courts can be uploaded on day to day basis. Thus in this way all the recent cases

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[31] S.K. Singh, *E-Enabled Judicial Administration in India*, 89 A.I.R. Journal 100 (2002).
[32] Deepak Gupta & Virendra Gupta, *Courts and Computer*, 17(3) Journal of ILI 470 (1975).
[33] R. Surendran, Access To Justice Through Computerization, 32 Souvenir Of All India Seminars On Access To Justice (26- 27 April, 2003).
[34] *Id.* at 33.

decided by the different courts in different matter can be made available to judges for purpose of research and settling of disputes.[35]

3.2 Legal Research for Judges

While giving a particular decision in a specific case, the judge must also be aware of the other matters connected with the case. Moreover he must also be aware of all the current happenings relevant to the case. For this purpose he is required to research the matter connected with his case. However there can be voluminous amount of literature and he can find it hard to find the applicable law. On the other hand there is always a need of organization and identification of knowledge. Here rapid communication systems assume an imperative role for the smooth and efficient functioning of the judicial process.[36] If the judiciary has quick and reliable electronic access to legal research materials in the courtroom or in chambers then less time needs to be spent in chambers conducting paper based research. The internet is an extremely useful tool for judicial research as it contains a wealth of online legal research material. It also enhances the speed of updating and the dissemination of information. It further facilitates easy access on a reactive basis for immediate need. As computers have almost limitless memories and nearly instantaneous retrieval powers, they constitute an important time saving tool for judges. Moreover computers have ability to expand considerable the area of research. A conventional process such as an indexing system allows the researcher to cross reference a document in perhaps only force or five different ways. But a computer can keep track of an almost unlimited number of reference terms. This feature provides the judges a much more extensive canvas for applying his mind.[37]

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[35] R.S. Pathak, *New Technology in the Practice of Law and the Administration of Justice,* Paper Presented in Seminar of Computer and Law 40 (National Law University, Bangalore, Feb.1989).
[36] *Id.*
[37] *Supra* note 36.

3.3 On-Line library: Journals and Magazines etc.

Internet has thousands of electronic subscriptions, which can be found both for free and at low cost. There are many websites on the internet, which deal with the electronic versions of many journals and magazines. A full-fledged library system has been created in the field of law also. There are different systems like eurolex, lexis, infolex and lawtell etc. which provides services in this matter. Eurolex is published by European Law Centre (ELC). Its database consists of a number of libraries. By and large these reflect existing print series such as the times law reports, scots law times, statute in force etc. Apart from its own libraries, it allows users access to foreign services, the most notable of which is Westlaw. Lexis data base gives access to subject libraries of US federal primary materials, and case libraries for individual states. Some of these materials can also approach through subject libraries for tax, industry, intellectual property and local government.[38] Thus with the use of these systems, a judge or the judicial officer can make use of the cases, judgments etc. in its decision by relying upon the decision given in foreign and other judgments along with legal research in new field.

Moreover technology makes it possible to easily show animated explanations of complex procedures to simply to retrieve text from massive depositions. Computer animation and computer aided design software to make images of auto crashes and crime scenes.[39]

4. CONCLUSION

In the traditional system the function of a judge was simply to apply existing principles of law, whether such principles are conceived in terms of natural law, living law or valid legislative enactments. At that time judiciary does not

[38] *See* GILLIAN BULL, COMPUTER ASSISTED RESEARCH 340.
[39] B. Basu, *Animated Evidence: Taking Computers to Courts,* THE TRIBUNE, Jan. 2, 1997, at 14.

make or create law rather finds it and apply it.[40] But in the modern society judiciary is seen as effective agent. The decision of court is treated as the decision of the god itself.[41] Thus the rules that are on paper are not considered but how rules of law work at the hands of judges is considered now a day. In other words, law that touches man is not legislative letter but judicial manipulation of the legislative letter. Considering this modern tendency, a lot of things are expected from the judges concerned while giving decision or while dealing with issue involved in a case. In such situation if the judge is not well versed with the development of law and technology, he will not be able to provide justice to the people.

[40] Leonard G. Boonin, *Concerning the Relation of Logic to Law, in* LEGAL RESEARCH AND METHODOLOGY 42 (S. K. Verma ed., ILI 2006).

[41] George D. Braden, *Legal Research: A Variation on An Old Lament, in* LEGAL RESEARCH AND METHODOLOGY 16, 17 (S. K. Verma ed., ILI 2006).

DETERMINISM AND THE ANNIHILATION OF MENS REA

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Criminalization is the process of labelling a particular human conduct illegal, involving censorship from the State showing its disapproval of such conduct. The State will often impose a punishment or sanction on the actor who violates the mandate of the State as regards the prohibited act. Philosophers and legislators alike, espouse that each person in society has their own 'individual autonomy' and that the State should restrain itself from interfering with their individual autonomy. However, it may so happen that in the larger interests of society, it may become necessary for the State to curtail certain acts of individuals, this probably constituting a cramp on complete individual liberty.

Individual autonomy involves concepts such as determinism and free will. Free will, simply put, means that man is free to make his own choices, and he does so independent of any rules guiding such choice. Determinism on the other hand is the belief that every event is governed by rules and that there is no 'random'. Through the ages, philosophers have remained largely conflicted about the compatibility and/or incompatibility of free will and determinism. If one were to adopt the determinist view – that every event is governed by laws – would that then mean that there is no scope for individual human choices? Would that therefore, mean that mens rea, an essential constituent of a crime, would be rendered redundant, thereby making no man capable of committing a crime? Or would it force us to go back to the drawing board and rethink the constituent elements of crime?

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This paper seeks to delve into these questions and more; to find out if the adoption of a determinist view would in fact annihilate the concept of mens rea.

1. INTRODUCTION

Consider an individual who is faced with a choice to make. This individual lives in dire penury; is a husband and father of four. In order to provide for them, he is faced with the 'choice' of committing an act which the legal system he is a part of, has made it criminal. His legal system mandates that whoever shall intentionally deprive another of property that is rightfully theirs, commits the offence of theft and such offence is punishable with imprisonment. Our individual has two options before him. The first is that he commits the act (which is illegal according to his legal system) and feed his family. The second is that he does not. How does he choose?

Philosophers state that two concepts crop up for consideration while one is analysing the 'choices' or 'decisions' we make to do or not do something. These concepts are free will and determinism.[1] Going back to our example, let us say that our individual has chosen to steal, does so, is caught, tried, found guilty and sentenced. This whole process is worth looking at in the light of the aforementioned concepts. It is only natural that two sets of views emerge. The first set would believe that it wasn't in his power to do anything else, but steal. The second would believe that the individual had a choice and had it in his power not to commit the offence; and that in choosing to commit the offence he must take responsibility for his actions. Those of us that conform to the first view believe in 'determinism'[2] and those of us that conform to the second, 'free will'.[3]

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[1] FRANK TILLMAN, BERNARD BEROFSKY & JOHN O'CONNOR, INTRODUCTORY PHILOSOPHY 127 (Harper Row Publishers 1967).

[2] Determinism is the belief that all events are governed by laws. These laws are not the kind of laws passed by a legislature, but are a statement of conditions under which events of a certain kind invariably occur. Thus, whenever conditions of kind 'C' obtain, then an event of kind 'E' will occur.

[3] Free will means that actions are determined by desires and beliefs and are not predetermined or governed by any laws. We make our own choices.

The obvious question that will then arise is how free will and/or determinism affect criminal law, criminal liability and criminalisation. This question and more will be answered through the course of this article, after examining the concepts of free will, determinism and mens-rea in detail. The methodology adopted for this article is doctrinal, by means of references made to books and articles.

2. DETERMINISM, FREE WILL AND THE COMPATIBILITY AND INCOMPATIBILITY BETWEEN THE TWO

Determinism

Determinism is the belief that all events are governed by laws.[4] It espouses that there is nothing 'random' and that all events are the outcome or natural consequence of a set of conditions that preceded it. The determinist believes that we can find laws which will tell us what will *always* happen under certain conditions, not just what will *probably* happen.[5] Thus, for every event E that occurs, the determinist believes that there is a set of conditions C which determined or caused E to happen. Given the occurrence of C, the subsequent occurrence of E was inevitable and likewise, the occurrence of C was determined by a set of conditions antecedent to it, and so on.[6]

Thus, if we were to take the initial example of the poor individual, his actions (theft) were a natural consequence of his conditions that preceded his actions. According to determinists, there was no scope for him to choose whether to steal or not as his antecedent conditions had already determined that he would. He had no say in the matter, and his choice to steal was not of his own volition, but was the outcome of certain laws that govern actions.

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[4] It is not clear exactly what these laws may be, but philosophers have come up with three kinds of probable laws. They are –

1. Genetic Laws, in which the conditions determining the decision are earlier events, experiences, reactions, and earlier biological states and occurrences.

2. Structural Laws, in which the conditions for the decision involve some present psychological trait of the person making the decision. The conditions may include his desires, beliefs, character traits, personality traits and goals.

3. Physiological Laws, in which the conditions determining the decision might be complicated neurological or glandular states.

[5] TILLMAN, *supra* note 1 at 128.

[6] *Id.*

Attention may now be drawn to the word 'intentionally' in the law of the legal system he is a part of that defines theft. Is our individual innocent now as he had no intention to steal, but was forced to as he was simply acting out an already determined event, which he had no say in? This question will be analysed in a subsequent portion of this paper.

Free Will

The idea of free will espouses that the choices and decisions we make, are made of our own volition. It means that man as a rational being, is able to determine the choices he should make, independent of the operation of any external laws. It is in some senses, the opposite of determinism.

Free will entails that there are actions that are voluntary (the logical corollary being that there are actions that are involuntary). It is the voluntary feeling or actions for which blame and praise are given. According to Aristotle, it is of utmost importance to the legislator to understand this, especially when he is assigning rewards and punishments.[7] He also goes on to explain what an involuntary act is. He says that it is an act done under compulsion, through ignorance or an act that is compulsory because its origin is from without, being of such nature that the actor contributes nothing to it.[8]

The Compatibility and Incompatibility of Determinism and Free Will

Philosophers are conflicted when it comes to whether these concepts complement each other or are opposed to each other. Three theories have been proposed that seek to explain the relationship between free will and determinism.[9]

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[7] Aristotle, *The Voluntary, in* FRANK TILLMAN, BERNARD BEROFSKY & JOHN O'CONNOR, INTRODUCTORY PHILOSOPHY 132 (Harper Row Publishers 1967).
[8] *Id.* at 133.
[9] *Id.*

A. Incompatibilism

According to this view, free will and determinism are incompatible and cannot exist together. Those who believe this state one of two things.

(i) They accept determinism and believe that there is no such thing as free will (Those who fall under this category are worth studying in light of the fact that their belief would render mens rea redundant).

(ii) They reject determinism and hold that there are at least some human decisions not governed by laws. This is the libertarian approach.

B. Compatibilism

These philosophers believe that there is no conflict between free will and determinism. They believe that they complement each other. Compatibilists include David Hume and J. S. Mill.

C. The Two Level Theory

They believe that free will and determinism are independent. Human actions, they say, cannot be explained in terms of *causes*, but in terms of *reasons*.

3. MENS REA

One of the essential elements required to convict a person is that his guilt be proved beyond a reasonable doubt. In order for an act to be criminal, there must be an occurrence of the external physical act, along with the presence of the internal mental element. An act becomes criminal only when it is done with a guilty mind (mens rea).[10] The external physical act is the conduct forbidden by law which is committed by the accused, also known as actus reus.[11] The state of mind required by the criminal statute that accompanies

[10] K. I. VIBHUTE, P S A PILLAI'S CRIMINAL LAW 53 (Lexis Nexis Butterworths Wadhwa 10th ed. 2009).
[11] THOMAS GARDENER AND TERRY ANDERSON, CRIMINAL LAW 34 (Thomson Wadsworth 2006).

this act is the mental element or mens rea.[12] A person is culpable when he does the act-

- Purposely
- Knowingly
- Recklessly
- Negligently[13]

Hall Jerome defines mens rea as "the mental state exhibited in any conduct or behaviour which violates any penal law."[14] Salmond explains mens rea with reference to the maxim *actus non facit reum, nisi mens sit rea*.[15] He says that a man is not responsible for an act in itself, but for acts coupled with the mens rea or guilty mind with which he does them.[16]

Mens rea can, thus, be said to mean evil intent, criminal purpose and knowledge of the wrongfulness of conduct.[17] Proving mens rea is no easy task, and the lack of expertise exhibited in doing so is often the cause of many acquittals. Mens rea may be attempted to be proved in two ways. The first is by showing the acts of the defendant and the circumstances that existed at the time of the crime so that the judge me draw a *reasonable inference* that mens rea existed.[18] The other is through the production of evidence.[19]

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[12] *Id.*
[13] *Id.*
[14] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70 (The Bobbs-Merrill Company, 2nd ed. 2008).
[15] The act is not culpable unless the mind is guilty.
[16] P. J. FITZGERALD, SALMOND ON JURISPRUDENCE 366 (Universal Law Publishing Company, 12th ed. 2010).
[17] GARDENER, *supra* note 11 at 37.
[18] *Id.* at 38.
[19] *Id.* at 39.

4. DETERMINISM AND THE ANNIHILATION OF MENS REA

Whether mens rea is essential to say that an act is a crime.

An acceptance of mens rea as an essential requirement for an individual to be said to have committed a crime impliedly rejects the determinist view. As mentioned earlier, an act done without the presence of a guilty mind is not a crime.[20] It would mean that in the eyes of the law an individual is said to have free will and is capable of making his own rational decisions, aware of the consequences that would ensue if he were to fail (endorsing the free will belief).

Though statutorily in the Indian Penal Code, 1860, the words 'mens rea' are not explicitly mentioned, it is incorporated through the employment of qualifying words and phrases such as wrongful gain[21], dishonestly[22], fraudulently[23] and reason to believe.[24] There have also been various judicial decisions that have held that mens rea is essential for an act to be a crime. In 1895, Lord Wright in *Sherras v. De Rutzen*[25] held that mens rea was a requirement in order for an act to be a crime.[26] This was upheld in subsequent cases such as *Brend v. Wood*.[27] The Privy Council in *Lim Chin Aik v. Regina*[28] also held that mens rea was an essential ingredient of an offence.

The aforementioned statutes and judicial pronouncements clearly endorse the free will belief, and there is no conflict between the endorsement of this belief and the law, as the law itself provides for the presence of mens rea as an essential for there to be a crime. However, there have been situations

[20] VIBHUTE, *supra* note 10.
[21] PEN. CODE. § 23.
[22] *Id.* § 24.
[23] *Id.* § 25.
[24] *Id.* § 26.
[25] (1895) 1 Q.B. 918.
[26] "... there is a presumption that mens rea or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence..." per WRIGHT J. in *Sherras*.
[27] (1946) 110 J.P. 317.
[28] (1963) 1 All. E.R. 223.

where the actual act was given more credence over the guilty mind of the person. This was elucidated in India in *State of Maharashtra v. Mayer Hans George*.[29]

In this case, the respondent was a German smuggler who left Zurich by plane on 27th November, 1962 with thirty four kilograms of gold concealed on his person to be delivered in Manila. The plane arrived in Bombay on 28 November, 1962 but the respondent did not come out of the plane. The Customs Authorities examined the manifest of the aircraft to see if any gold was consigned by any passenger, and not finding any entry they entered the plane, searched the respondent, recovered the gold and charged him with an offence under sections 8(1) and 23(1-A) of the Foreign Exchange Regulation Act (7 of 1947) read with a notification dated 8 November, 1962 of the Reserve Bank of India which was published in the Gazette of India on 24th November. The respondent was convicted by the Magistrate, but acquitted by the High Court on appeal.

It is pertinent to note here that one of the reasons for the acquittal by the High Court was the absence of mens rea. The High Court stated that the accused could not have committed the crime due to the absence of mens rea. This judgment of the High Court embraces the free will theory, in that it concedes that the accused had no *intention* of committing the crime, and to that extent his actions were involuntary.[30]

The State appealed to the Supreme Court, one of its contentions being that mens rea ought not to be of paramount importance when it comes to making an act criminal as it would, such as in this case, defeat the purpose of the law. This judgment is peculiar as it remains unclear what their Lordships wished to lay down regarding mens rea. Their Lordships found the respondent not guilty, yet allowed the appeal, which is the cause for the vagueness. However,

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[29] A.I.R. 1965 S.C. 722.

[30] CHANDRASHEKHARAN PILLAI, GENERAL PRINCIPLES OF CRIMINAL LAW 3 (Eastern Book Company 2nd ed. 2011).

... mens rea being a necessary ingredient of the offence, the respondent who brought gold into India for transit to Manila, did not know that during the crucial period such a condition had been imposed and, therefore, he did not commit any offence. The respondent is therefore not guilty.

it is easily discernible from this judgment, that mens rea need not be an essential constituent of a crime, where the legislature says so.[31] This reasoning of the court was upheld in *Nathulal v. State of Madhya Pradesh*[32] and *Kartar Singh v. State of Punjab*.[33] It may also be noted here that Lord Wright in *Sherras*[34] went on to say the same thing.[35]

This would imply that the court has acknowledged that there are certain acts that cannot be said to be of one's own volition and are determined by some other, antecedent rules (determinism). This is evidenced by the court (or legislature) annihilating the necessity of mens rea to be present in order for an act to be an offence. However, it cannot be said if any of the Lordships mentioned till now subscribe to a particular theory of the compatibility or incompatibility of determinism and free will.

Whether the adoption of determinism would render no man capable of committing a crime

How would this then affect the nature of crimes? Noted philosopher Bertrand Russell discusses this issue, from which we may try to arrive at an answer. He acknowledges that there is a conflict between the two concepts, determinism and free will, yet does not wish to state his views on the compatibility or incompatibility of the two.[36] What is important to remember is that even if determinism were adopted (and free will rejected), and it was given that there was no voluntary choice exercised by man and his actions were a consequence of prior, existent conditions; determinism, as it were, would not dissolve the difference between right and wrong or good and bad,

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[31] *Id.* at 7.
Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their acts or omission to assist the promotion of the law.

[32] A.I.R. 1966 S.C. 43.

[33] (1994) 3 S.C.C. 569.

[34] (1895) 1 Q.B. 918.

[35] *See* note 20.
"...but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals..." per WRIGHT J.

[36] BERTRAND RUSSELL, PHILOSOPHICAL ESSAYS 36 (Routledge 1996).

even if it did do away with the question of choice (and therefore mens rea).[37] It is this retention of right and wrong which is seminal when it comes to criminalisation (with or without mens rea) as the importance of ethics[38] in criminal justice is widely accepted today.[39]

The practical application of Russell's explanation is seen in legal systems incorporating principles such as *doli incapax*[40] and accordingly different *punishments* to perpetrators of crimes who are minors or who are not of sound mind. These punishments often include remanding the perpetrator to a special institution, such as a juvenile detention facility or a mental institution.[41] This goes to show that the criminalising body realises that such individuals usually have no control over their actions. They act based on their condition. We may extend this to mean prior conditions that resulted in their acts (crimes). This would thus, accept the determinist view. Regarding mens rea, it would already be mentioned by the criminalising authority that it is not required. However, despite this, it is important to note here that the mere adoption of the determinist view would *not* render a man incapable of committing a crime, for even if he does not possess the guilty mind, the determinist view may take away the voluntary and involuntary; but it does not dissolve the differences between a good and a bad act, which the criminalising authority uses to label a particular act a crime. The only requisite for a person to be guilty would be the commission of the act, and not possessing a guilty mind.

5. CONCLUSION

It is clear that the adoption of the determinist view would annihilate mens rea, however, it wouldn't necessarily annihilate the criminal nature of acts.

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[37] *Id.* at 42.

[38] *See generally*, CYNDI BANKS, CRIMINAL JUSTICE ETHICS 3 (Sage, 2nd ed. 2009).
Ethics is also known as moral philosophy and is a branch of philosophy concerned with the study of questions of right and wrong and how we ought to live. It involves making moral judgments about what is right and wrong or good and bad.

[39] *Id.*

[40] A legal presumption that a child (usually below seven years of age, although this may vary in different legal systems. It is seven years of age in India) is incapable of committing a crime as it lacks the required mens rea and mental capacity to understand the nature of its actions.

[41] HALL, *supra* note 14 at 458.

In truth, it may be stated that legal systems provide for handling crimes whether a determinist or free will view is adopted. This article does not seek to state whether the two concepts are compatible, incompatible or exist independently, however, upon exploring the existence of one and not the other, it can be safely said that mens rea is not an essential element to be present in *all* acts that the state wishes to criminalise.

This point makes itself conspicuous if one were to cascade through the various provisions of the Indian Penal Code, 1860, some sections of which provide that there be mens rea in order for the act to constitute a crime and others that do not. Thus to answer the question this paper set out to, even if we were to adopt a completely determinist view we would have to concede that given the very nature of determinism and what it comprises, individual choice would not exist and this would in fact render mens rea redundant. However, it must be noted that this would *not* render a man incapable of committing a crime, for the legal system has found a way around this.

All that needs to be done, as Lord Wright has pointed out, is that the law simply states that mens rea be omitted while considering if an act is a crime or not. After all, the law can be what it wants to be, and mens rea, as we have seen, is a fluid concept and not as rigid as it was once thought to be. This has been adopted in the United States where the Supreme Court in *Powell v. Texas*[42] stated that mens rea was not essential for all crimes and therefore, states were allowed to make criminal laws that do not require proof of mens rea. This would make jurists rethink about the essentials of a crime, although, it cannot be denied that mens rea and actus reus are still key essentials. What matters is which element the legal system chooses to give more importance to.

[42] 392 US 514, 535, 88 S. Ct. 2145 (1968).

ECONOMIC IMPLICATIONS OF GROUNDWATER MARKETS IN INDIA

Amrita Sarkar*

Groundwater is regarded as a major source of irrigation in our agriculture sector. Its potential paved the way for the green revolution in our country and we owe our 1960's food security to this blue gold. Keeping in mind the necessity of its preservation and its economic use, the author would try to address one of the most key features of India that is trading of this blue gold. The trading happens between farmers in general for increasing the productivity; nonetheless, it is the initial benefit of access which allows this trade to flourish in a phenomenal way. In simpler terms, we call such trading the 'groundwater markets'. The trading shows a peculiar feature of socio-economic feature of our country especially of the farmers. The trading also forces us to look at our current laws. An economic analysis of this significant yet ignored domain of environment law is taken up where abundant literature review has been done; however, there is hardly any change in the scenario. The author in this paper has simplified the situation with a hypothetical scenario of how big or rich farmers who have access to this blue gold with the use of extraction machines are exploiting the small or the poor farmers. This not only leads to the exploitation of the groundwater but also increase the income gap between the classes. As a conclusion to this governance fallacy, the author has described three

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models which have their own merits and demerits and could be used to situations with their own specific circumstances.

1. IT'S MY WATER. IT'S YOUR WATER. NO. IT'S OUR WATER.

"Even society as whole, a nation, or all existing societies put together, are not owners of the earth. They are merely its occupants, its users; and like good caretakers, they must hand it down improved to subsequent generations."

(Marx, Capital)

Groundwater is a common property resource because of its rivalrous and non-excludable nature. One person's share in the resource subtracts another person's share but at the same time the other person cannot be excluded from getting access to it. 'Because of this open access nature and absence of property right, the private individuals find no incentive to maintain this resource.'[1] 'The data given by NASA and GRACE (Gravity Recovery and Climate Experiment) together showed that one of the areas where there is a serious depletion of groundwater table in the world is Northern India.'[2] In a market with absence of government intervention, a scarcity is addressed by the demand-supply forces which ultimately lead to efficient allocation. This principle applies to the genesis of the groundwater markets in India as well.

'A groundwater market is an informal localized institution where units of groundwater is exchanged in lieu of a certain consideration which can be cash, kind, labour services, etc.'[3] 'Various studies on groundwater have

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[1] Garrett Hardin termed this as the tragedy of commons where the property which is either not owned by anyone or is held collectively, would ultimately lead to its destruction due to its over-use.

[2] NATIONAL GEOGRAPHIC NEWS (May 21, 2013), http://news.nationalgeographic.com/news/2010/02/100217-groundwater-crisis-nasa-satellites-india-environment.

[3] K. Palanisami, *Water markets as demand management option: potentials, prospects and problems* (May 28, 2014) http://www.iwmi.cgiar.org/Publications/Other/PDF/NRLP%20Proceeding-3%20Paper%20-%203.pdf.

shown that such markets have been in existence for a considerable amount of time.'[4] 'In fact, it is considered to be a successful contributor in the agricultural economy of the country.'[5] However, in reality, the groundwater market itself has a fallacious concept. In a market model where property right is clearly defined, the sellers sell those products that they own whereas the groundwater market facilitates the selling of the water without having demarcated property right over it.

India follows tied possession property right system in respect of groundwater which means if you have the land, you get the right to extract water below it. As per the Indian Constitution 'Water' is a state subject under Entry 17 of List-II subject to Entry 56 of List I. Though there is no specific mention of groundwater 98 under the illustration (g) of sec-7 of The Indian Easement Act, 1882, it is said that the landowner has the right to draw water underneath the sub-soil without any limit. The water below the land forms a part of the dominant heritage and is transferable along with the land. 'In short, it is considered as a chattel with the land.'[6] However, this theory has increasingly been discarded due to its unjustifiable and inequitable water claims. 'One of the biggest examples is the Groundwater Model Bill, 2005 which though did not get approved by the Parliament but has been adopted in almost all the states with various modifications.'[7] In 1996, the Supreme Court in *M C Mehta v. Union of India*[8] acknowledged that the groundwater table is depleting and a central board should be set up for the control,

[4] The literature on water markets in India dates back to as early as the 1960s.' studies conducted by K. Palanisami, Water markets as demand management option: potentials, prospects and problems, http://www.iwmi.cgiar.org/Publications/Other/PDF/NRLP%20Proceeding-3%20Paper%20-%203.pdf.

[5] While groundwater water markets are widespread in Gujarat, Punjab, Uttar Pradesh, Tamil Nadu, Andhra Pradesh and West Bengal, they are most developed in Gujarat, (June 5, 2012) http://www.ccsindia.org/ccsindia/policy/enviro/articles/gupta.pdf.

[6] WATER RIGHTS IN INDIA 8 – 31 (Chhatrapati Singh, ed., ILI 1992).

[7] The states which have enacted Groundwater (Control and Regulation) Act, based on the model bill are Andhra Pradesh, Goa, Tamil Nadu, Kerala, West Bengal, Himachal Pradesh, Bihar and Union Territories of Chandigarh, Dadra and Nagar Haveli and Lakshadweep.

[8] M C Mehta v. Union of India, www.ielrc.org/content/e9619.pdf (last visited Jun. 23, 2014).

management, preservation and protection of the resource. 'The CGWA board has been in existence for a considerable amount of time but it has not taken any action and nor is it fully effective yet.'[9] The website of CGWA shows a slogan, *"Ground Water is a Precious National Resource, Protect it, Preserve it and don't pollute it. Save Ground Water - Save Humanity."* 'But there is still no adequate mechanism which provides the groundwater extractor with enough incentive to adhere to this behavior.'[10]

In this paper, a situation would be analysed where the scarcity of groundwater is looming over an area and where the sellers of this common property are the big farmers who can afford to install Heavy Water Extracting Machines (WEMs) and engage in an economic exchange. Buyers are the poor farmers, who do not have access to any other source of water and access to any other source would incur them heavy transaction costs. An analysis has been done regarding what solution can be provided which would aim at stopping environmental degradation, to regulate groundwater market and to find a method to internalize the cost of externality.

2. Whose Profit and Whose Loss in Groundwater Market

In common property resources, there is difficulty in restricting the access for others. Thus, it leads to over-exploitation. But in India, the groundwater market has a very distinct feature. 'Here, the farmers who are having their own land along with enough capital to install WEMs are apparently the owners of this resource. And, by virtue of their initial investment capability, they become the sellers of this water market. 'The first possession law of property is followed in this market regime. 'The poor or the marginal farmers in order to carry on their crop production rely heavily on this water market.'[11] These markets help both the farmers in increasing their potential income

[9] R. IYER, WATER- PERSPECTIVES, ISSUES, CONCERNS 102 (Sage Publications 2003)
[10] *Id.*
[11] Hindustan Coca-Cola Beverages Pvt. Ltd v. Perumatti Gram Panchayat (Plachhimada Coke case) I.L.R. 2005(3) (Kerala) 192.

and also the society as a whole gets benefitted by the increment of social benefit attained on per unit production of food due to such sale. The large farmers sell the surplus water after covering their needs; hence, the value attached to the groundwater by the small farmers is much more than the sellers in the groundwater market. Also, it is a fact that the numbers of large farmers are much lesser in proportion than the small farmers. Therefore sellers end up becoming the price makers of the market. Due to this rent seeking behaviour, extractors would keep on increasing extraction as the market is providing them enough rent and their only initial cost of production is soon compensated by this rent.

3. Cost-Benefit Analysis of Groundwater Market

In India, the absence of clear property rights on groundwater has already begun the conflict of interests and the resulting dispute is proving to be costly for these individuals.[12] The large farmers, by virtue of open access, exploit all the available resource stocks. Finally the time would come when the driller would realize that it is no more economically viable to drill because the extraction rates would go beyond the sustainable yield rates. This may lead to drying up of the aquifers.

The cost that is imposed on government exchequer to remedy the groundwater scarcity and to cure the groundwater pollution by cleaning the aquifers is increasing continuously since there is no prohibition on the usage and the regulations show hardly any improvement. There is also a problem of rational individuals building up profit motives to sell the resource at an inappropriate price. The total social cost (private cost + externality) from the market is very high but it goes unaccountable to both the big farmers and the buyers. Since the market is profitable, there would be few people who in

[12] Anindita Sarkar, Symposium, '*Environmental Degradation and Sustainable Development: Groundwater Mining in Punjab, India: Issues of Intra and Inter-Generational Equity in Groundwater Irrigation*' (Apr. 10,11, 2010).

order to grab a share of rent, would invest on locating the water and it is quite possible that due to low or nil groundwater level, the individual might face a sunk cost. A situation may arise where his capital gets exhausted even before reaching the market. The capital invested gets lost in the midway because of the cost related externality. Also, higher sophisticated technology is required as the well is drilled deeper. This further drilling leads to environmental degradation. In economics, this environmental degradation cost incurred by the society is majorly because of technological externality. This per unit increase in cost of technology used in extraction is added to the per unit price of the water in such market. Thus, this externality leads to excessive cost overriding the benefit. As the price of the water keeps on increasing, the income between the seller and the buyer gets more skewed. It is often seen that in land-water-labour locked relationship, the small farmers mortgage their land to these large farmers to get water to continue farming. And because of their inability to pay the dues, they end up selling their lands at extremely low prices. This further accentuates the problem of poverty. Another area of problem is the emergence of thin markets where lesser number of sellers and buyers enter into bargaining. Due to scarcity, very few sellers would be able to bear the cost of extraction and very few buyers would be able to continue bargaining at the increasing cost. Monopoly or oligarchy through anti-trust method would result in further unequal income distribution and concentration of wealth.

The government in order to ensure crop production in the state has introduced various schemes of subsidy on electricity rates, welfare policy instruments like Jyotirgram Scheme in Gujarat, etc. which again entails infrastructure costs. After analyzing, it could be said that the reason is only the legislative eternality which further strengthens the technological externality, stock related externality and cost related externality.

To summarise, legislative externalities arise when there is no clear-cut legislation demarcating and protecting different types of property. In this case, ambiguous property right system is overriding the benefit. Farmers invest on the extraction of groundwater, thinking that they have absolute rights over it but since it is impossible to delineate the water from the land, therefore in turn it affects the rights of the community as a whole. Their right to get share in the groundwater gets infringed as there is no positive law to stop this infringement. Also, there is no law regarding how to compensate the other land holders who have the equal right to get a share of groundwater but are unable to get access to it. In this case they should at least be compensated. This is one of the shortcomings of not having a law in the first place.

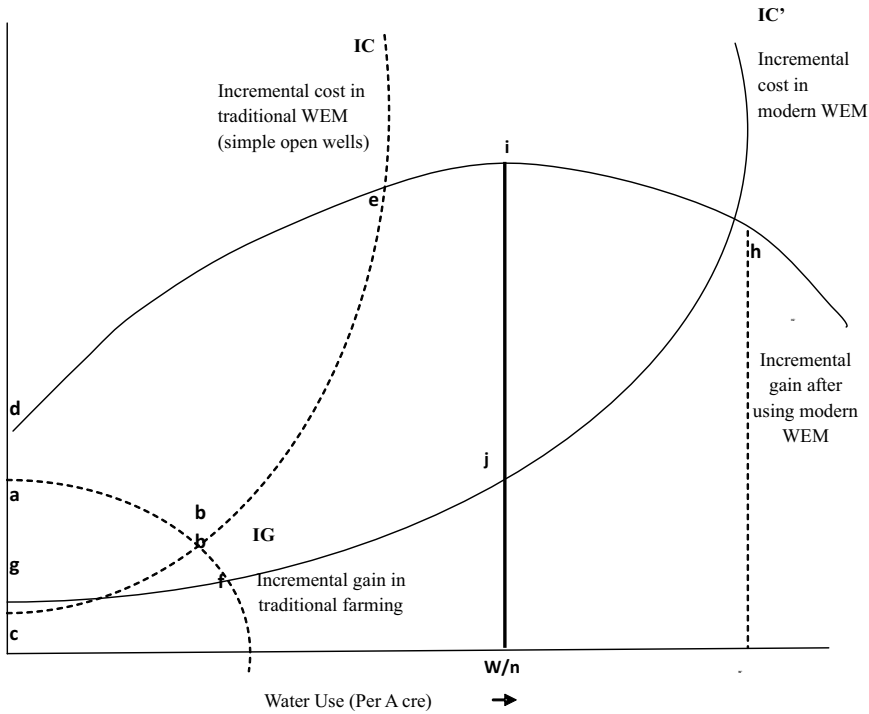
4. LEGISLATIVE EXTERNALITY- A GRAPHICAL EXPRESSION[13]

One of the basic features of the property right is that nobody can interfere with one's property without the owner's consent. The following graph represents the current scenario of property rights division where the property right over the groundwater of small farmers is infringed and the property is enjoyed by the big farmers. In addition to that, there is no proper legal regime to make the big owners compensate the share of the groundwater of the small farmer which he has used. In the following graph, the assumption is that both the small and big farmers are having equal land-holdings and have equal access to groundwater which is W/n (where W is the total groundwater available to the community and n is the total population). But the access is different i.e., there are small farmers who are having simple open wells and there are big farmers who are having modern WEM. In the figure, the area *abc*, enclosed by Incremental Gain (IG) and Water Extraction Cost (IC) curves represent the modest gains under the groundwater use by

[13] The term has been used by Tushar Shah, Sonal Bhatt, R.K. Shah, Jayesh Talati *in Groundwater governance through electricity supply management: Assessing an innovative intervention in Gujarat, Western India,* http://nrlp.iwmi.org/PDocs/pubs/GG%20through%20Electricity%20Supply.pdf (last visited Jun. 23, 2014).

the small farmers. Concurrent opening of both powerful Modern WEM by big farmer (IG') and the profit motive of the groundwater market has increased the gain from groundwater extraction dramatically from *abc* to *ghd*. But in this process of gain augmentation, the owners of powerful WEM (big farmers) expand their groundwater extraction from W/n to W'. Attracted by these profits, the owners of WEM (big farmers) extract more groundwater and with time experience steep rise in pumping cost (IC') as the water table begin to get lowered.

If effective checks are enforced to restrict total withdrawals till W, then each member will be obliged to use only W/n amount of water and forgo *hij* amount of profit. Alternatively if some members (small farmers) are not being able to use their share of resource, they can extract a compensation of up to *hij* from the 'water-lords' by threatening to claim their share. However this could happen only if equal rights over groundwater resources are effectively enforced for all members of the community. Since this does not happen in reality, resource endowed owners (big farmers) are able to appropriate an extra profit of *hij* which they actually get by using the share of others (small farmers who own the neighbouring land holding sharing common aquifer) groundwater. Thus the rich and influential owners (big farmers) of powerful WEM usurp others share of groundwater without compensating, but rather increasing the income gap between them.



5. VICIOUS CIRCLE[14] OF GROUNDWATER ECONOMY

Even after setting up Central Groundwater Boards and a set of various rules and regulations, the problem still persists. Since agriculture is the main occupation of such states, the state governments cannot risk it to just stop or prohibit the supply of the groundwater. The state government in turn devised various methods of licensing, electricity, taxes and obtaining NOC from the pollution board before installing new wells. These steps are aimed towards the judicious usage of the groundwater thereby regulating the supply which in turn increases the price of the water in the market. Most of the farmers engaged in the crop production are small and marginal farmers with low income; therefore at the end they are left with only two choices: either to leave farming or to continue buying water at higher prices. Even the

[14] *Water Brief Policy- IWRM Challenges in Developing Countries: Lessons from India and elsewhere*, Issue No. 24, (Jun. 24 2012), http://www.iwmi.cgiar.org/Publications/Water_Policy_Briefs/PDF/WPB24.pdf.

society loses out as it affects the agricultural production.

To sum up, there is a vicious circle going on in this groundwater economy. The poor farmers depend on the water sold in the market as they cannot afford the heavy cost of installation of WEMs. Due to this initial income inequality (and continuous) the big farmers emerge as water lords (as they have the capital to install machines) with the power of price discrimination and monopoly or oligarchy. Secondly, to stop the over extraction of the groundwater, the government brings out several schemes to restrict the use but it has serious consequences on the groundwater market as well as the production of crops which trickles down to affect the poor farmers' income. If the state government decides to give them subsidies of low electricity rate packages in order to maintain same crop production level, it would benefit the big farmers and thus, lead to over-extraction of groundwater. So, keeping this as the model problem what could be the solution?

VII. SOLUTIONS

Eminent Domain

All natural resources are allotted under the state list subject to Union list. It is possible that the state can acquire the property over the groundwater by blocking the open access. They themselves can provide water in various centres keeping in mind the sustainability and the farmers' welfare. This would mean complete prohibition of usage of groundwater by the private parties. In other words, it supports the application of Public trust Doctrine (first mentioned in *M.C. Mehta* v. *Kamal Nath*) which imposes a legal duty upon the State to protect natural resources. It disallows, any private person to acquire a "vested right to appropriate" these resources in a manner that it is "harmful to the interests protected by the public trust." Thus the State, as a trustee of these resources, cannot turn them for private benefit.

However, this control has several negative effects. Emergence of black markets is one of them. Moreover, constant vigilance and scientific information regarding the optimum extraction is needed otherwise this method would seem futile. If a constant price policy is adopted by the government then it would lead to a constant extraction rate till the resource gets exhausted. Also, if the government price does not rise over a period of time then wastage would increase and individuals would not make a sustainable use of it. If the power is centralized then it would take longer time to react to the changing needs and values of the groundwater in a particular place with a given set of conditions. Here in this case, the goal of the government is to achieve equitable distribution and sustainability. But in this process the economic efficiency gets lost. What the government can do is to create schemes where the amount of water would be distributed according to the farmers' land holding and its annual income capability. This would ensure the continuous flow of agricultural production in that village/area and would keep a record as to how much is the usage required and how much control is needed.

Privatization with Government Intervention

The second option is to give the property right to some private party. Suppose, the right over the groundwater to a particular limit is auctioned out by the government to a private individual and he is also allowed to sell the water to the other farmers. In this case, the step would ensure that the owner has an incentive to conserve it for the future so that he can generate the maximum benefit out of the stock. Also, he can allocate the resource to the highest value being offered in the market which ensures economic efficiency. But, here also the problem lies with equitable distribution. Since income of the buyers is not same as others, many buyers would not be able to get access to the resource. In such cases, the government can intervene as right to property cannot override the public interest. The owner would be

compensated for the subsidy being provided. In this model, the government can make it stricter by setting up a dispute redressal board where the complaints against the persons would be taken and adjudicated upon and if necessary, various penal provisions given in Environment Protection Act, 1986 can be used.[15]Mexico faced the similar problem and then they brought penal charges against the non-compliers. And the problem though still persists but in a lower scale. Currently, there is no conviction rate as nobody knows who the owner is and who should be responsible for the damage caused. Also, future research on this particular model may yield some valuable result.

Cooperative Governance

Under this third model, the Panchayat could be given the right to control the resource by the government. There can be a democratic selection of group leaders assisted by state authority who would take charge of this undertaking. The people in the village would have the incentive to work for the sustainable purpose as well as equitable distribution with the help of assistance from the government officials. The best part is that conservation works could be done easily as the benefit is theirs and they would take direct interest in it without waiting for the state to do it. Common property regime can control the open access to the resource by making it a conditional access. The rights over the property would be jointly exercised by the community where there would a representative from each household and all decisions would be democratically made. The government may impose any administrative rules like reservation according to income capacity, female seats, etc. for ensuring better participation in the decisions made. There is an act on cooperative governance of irrigation water i.e., Orissa Pani Panchayat Act, 2002[16] which is one of the current models of cooperative governance

[15] *See* http://www.dowrorissa.gov.in/PaniPanchayat/paniact.htm (last visited Jun. 18, 2013).
[16] PANI PANCHAYAT, http://panipanchayat.org/ (last visited Jun. 18, 2013).

being supervised by the government authorities. The idea is simple in cooperative system: the incentives would drive the farmers to work towards the sustainability and the problems of access could also be solved as it would be democratic. Since most of the farmers are marginal or small, therefore, their interest would be kept in mind while taking any decision.[17]One of the initiatives that were started in this regard was started by Late Mr. Vilasrao Salunke in 1974 after the government's failure to tackle the drought situation. The cooperative body has community based water schemes, decoupling water rights from the water rights from land rights. The village doesn't allow individual wells; 20% contribution of each member, each from the community and the most remarkable step that they have taken is that they don't allow irrigation rights to be sold along with the land. It is a success in Maharashtra; they have also banned water intensive crops. Moreover, each member from the household take the decisions mutually irrespective of the fact that whether one has a well or not as everybody is conscious of the effects on the sustainable development. 'Currently there are few villages which follow a model known as Water User Association, which could be called as the replica of this model."[18] 'WUAs have a lot of potential to override this legal vacuum which fails to address this depleted common property rights impediment.'[19]

But, in reality the cost of shifting the ownership from private to cooperative would be huge as the large farmers might engage in multiple litigations, creating high transaction cost in the process. Also, the Indian villages are divided into caste and class[20] therefore practically how far it would be

[17] Videh Upadhyay, *A Rights Based Approach to Water User Associations in India*, (Jun. 29, 2014), http://www.ielrc.org/activities/workshop_0612/content/d0620.pdf.
[18] *Id.*
[19] PRAKASH, THE DARK ZONE- GROUNDWATER IRRIGATION, POLITICS AND SOCIAL POWER IN NORTH GUJARAT 209 (Orient Longman 2005).
[20] The World Bank, *Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater Overexploitation in India*, (2010), http://siteresources.worldbank.org /INDIAEXTN/Resources/295583-1268190137195/DeepWellsGroundWaterMarch2010.pdf.

possible to make this cooperative a democratic body is still a matter of concern. An example has been given regarding Sangpura village in Gujarat where 40% of the households do not have access to the water and access is tilted towards the big farmers who are the Patels, the higher caste. Here it is difficult to bring a concept of cooperative governance.

Timely action to save this blue gold.

"In this world which is so respectful of economic necessities, no one really knows the real cost of anything which is produced. In fact the major part of the real cost is never calculated; and the rest is kept secret."

Debord, The Society of the Spectacle

Groundwater market by providing water to these farmers has contributed largely to the agricultural production. Simultaneously, confronted with high social cost, market monopoly and rent seeking behavior of the individuals, the need of the hour is to suggest the government to find the best solution. A World Bank report[21] has described India to be the largest user of groundwater in the globe, claiming that India is a user of estimated 230 cubic km of groundwater every year which is more than a quarter of the global total. This is because of its high elastic demand. It is predicted that by 2025, an estimated 60% of India's groundwater aquifers would be in critical condition."[22] 'On the other hand, the government's licenses, permits, electricity taxes, various other regulation and Groundwater Boards are not giving enough incentives to the individuals to conserve the property as their own property and make the best use of it.'[23] The farmers are unaware of the opportunity cost of the lost groundwater as they keep on extracting the

[21] *Id.*

[22] Annie Zaidi, *Punjab, deeper and deeper tube wells are sunk as the water table keeps going down*, THE HINDU, http://www.hinduonnet.com/fline/fl2414/stories/20070727001709300.htm.

[23] Annie Zaidi, Punjab, deeper and deeper tube wells are sunk as the water table keeps going down, THE HINDU, http://www.hinduonnet.com/fline/fl2414/stories/20070727001709300.htm.

water. Addition of one seller in the market burdens the existing sellers with a cost that they do not realize while they are entering the market. This leads to over-crowding and congestion. Ultimately, there is no resource left to be exploited.

Currently, out of the three possible solutions, the government can try any of the three solutions depending upon the place and other conditions prevailing. Sec-7(g) of The Indian Easement Act, 1882 should be amended so that there is no ground of right to property claims on the part of groundwater extractors. Timely action has to be taken to manage this endangered resource on the principle of inter and intra-generational equity, the precautionary principle, conservation of natural resources and environmental protection.

CLOUD COMPUTING AND ITS LEGALITIES IN INDIA

Pritish Sahoo and Taruna Jaiswal*

1. INTRODUCTION

Cloud computing refers to mode of storage of data and information that concerns providing hosted services over the internet. Basically, it refers to the activity taken on by IT service companies for delivering storage necessities as a service to a company of end-recipients. All cloud computing modes depend greatly on resource and data sharing. This type of data centre setting authorize organizations to get their applications up and running quicker, with simpler manageability and barely any maintenance, and eases IT companies to regulate more promptly, its IT assets namely servers, storage and networking to meet irregular and unpredictable business requirement. The negative side is that vast concentration of information at single centre makes it more susceptible to cyber attacks; and the excessive power given to cloud companies to manage resources, amplifies the threat of a potential untrustworthy conduct. The system seems to be in emerging stages in India. The fact, although, is that, cloud computing is doubtful in India since cloud providers do not take cloud computing due diligence very sincerely.

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The technical meaning of cloud is an infrastructure that provides on demand resources or services over the Internet, which depends on the scale and reliability of a data centre. Storage cloud meaning which provides for storage services (block or file-based services); similarly a data cloud is one which provides for data management services (record-based, column-based or object-based services); also there is compute cloud which provides for computational services. Usually these are stacked together to serve as a computing platform for developing cloud-based applications.

For instance Google's Google File System (GFS), Big Table and Map Reduce infrastructure; Amazon's S3 storage cloud, Simple DB data cloud and EC2 compute cloud;[1] and the open source Hadoop system,[2] consisting of the Hadoop Distributed File System (HDFS), Hadoop's implementation of MapReduce and HBase and implementation of BigTable. The implicit assumption with most high-performance computing system is that the processors are the scarce resource, and hence shared. When processors become available, the data are moved to the processors. To simplify, this is the supercomputing model. An alternative approach is to store the data and to co-locate the computation with the data when possible. To simplify, this is the data centre model.

Cloud computing platforms (GFS/MapReduce/BigTable and Hadoop) that have been developed thus far have been designed with two important restrictions. First, clouds have assumed that all the nodes in the cloud are co-located, i.e. within one data centre, or that there is relatively small bandwidth available between the geographically distributed clusters containing the data. Second, these clouds have assumed that individual inputs and outputs to the cloud are relatively small, although the aggregate data managed and processed is very large. This makes sense since most

[1] AMAZON WEB SERVICES, http://aws.amazon.com/ (last visited Mar. 3, 2014).
[2] HADOOP, http://hadoop.apache.org/ (last visited Mar. 3, 2014).

clouds to data have targeted Web applications in which large numbers of relatively small Web pages are collected and processed as inputs and outputs consists of search queries that return relatively small lists of relevant pages. Although some e-Science applications have these characteristics, others must ingest relatively large datasets and process them. In addition, queries for certain e-Science applications also result in relatively large datasets being returned.[3]

Discussing the above issues, this article looks to comprehend the appropriateness of cloud computing in India, bearing in mind that India does not have any devoted regulatory framework to maintain the same. The basis for careful acceptance of cloud computing in India can be credited to jurisdictional issues, inadequate data security, and absence of data protection laws, erasing mechanism, lack of privacy laws poor watch over data handling, inadequate data security, licensing and jurisdictional issues. This paper broadens look for to propose certain systems and events that may be approved to overlay road for more substantial adoption of cloud computing in India.

2. PRIVACY ISSUES: WHAT CAN THE CLOUD PROVIDER DO WITH THE USER DATA

Cloud providers often manage huge amount of personal data from millions of users of cloud service, and the data from one user commingles with the data of other users.[4] There was a debate on cloud computing and privacy from a settlement in Author's Guild, Inc. v. Google Inc.[5] The stipulations of the agreement permitted Google to keep on offering copies of books on their cloud-based Google Books platform in return for a stipulated amount to the authors. Although privacy was not the main concern in the settlement, many

[3] YUNHNG GU & ROBERT L. GROSSMAN, SECTOR AND SPHERE: THE DESIGN AND IMPLANTATION OF A HIGH-PERFORMANCE DATA CLOUD 2429-2431(The Royal Society, 2009).

[4] William Jeremy Robison, *Free at What Cost? Cloud Computing Privacy Under the Stored Communications Act*, 2010 GEO. L.J. 1195.

public interest organizations were alarmed that the agreement did not acknowledge the security of the privacy of its users.

The issue raised by Consumer Watchdog in 2010 was that the settlement "still contained no restrictions on what data could be gathered, and contained only limited restrictions on how that data cloud be shared". The settlement agreement did not address whether a user's reading preferences could be shared with news outlets or governmental units acting without a search warrant. Consumer Watchdog was concerned that the settlement gave Google a monopoly over the book-search and book-subscription markets and at the same time gave it unrestrained authority to share private information about users with outside entities.

A group of objecting class members to the Google settlement, Privacy Authors and Publishers, asserted that the lack of privacy protection in the Google settlement agreement would deter readers from reading and purchasing their works.[6] According to the Privacy Authors if readers were worried that information about their reading habits could be disseminated to the government, divorcing spouses, or other interested third parties, these readers would be less likely to view books on controversial topics. Not surprisingly, the Privacy Authors included several authors who had had penned books on sensitive or controversial subjects.

JURISDICTION CONFUSION: WHICH LAWS APPLY TO THE DATA IN THE CLOUD ?

The amorphous nature of the collection of servers, applications, and data that makes up "the cloud" lends itself to potential jurisdiction conflicts. The jurisdictional question is an important one because of the display in privacy laws; if a company does not know which jurisdiction its data is subject to,

[5] Author's Guild, Inc. v. Google Inc., No. 058136(DC), 2009 WL 5576331(S.D.N.Y. Nov. 13, 2009).
[6] *Id.*

how can it know which laws apply? In the United States, for example, the Patriot Act gives the government broad latitude to intercept suspicions electronic data that comes through the country.[7] "European and Asian companies have expressed concerns about having their data stored on computers in the U.S.A. which fall under the jurisdiction of the USA Patriot Act, allowing the U.S government to access that data very easily."[8] In the European Union, on the other hand the data protection directive puts stringent standards on the collection of electronic data by the government and by any other entity.[9] Because of these distinctions, it is important that cloud computing or SaaS (Software as a service) agreements specify where the data is physically located and which laws apply.

Yet another statutory hurdle to cloud computing in the United States is the Health Insurance Portability and Accountability Act ("HIPAA").[10] HIPAA places substantial restrictions on the transfer and disclosure of private health information. For example, entities that are covered by the Act must enter a business associate agreement with cloud providers before the providers can store records containing health information in the cloud.[11] Because of HIPAA'S requirements, it is important for foreign entities to know where their data is located.[12] This knowledge ensures that they can enter the necessary agreements with the cloud provider to avoid liability under HIPAA.[13]

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[7] H. R. Cong. Res. 3162 107th Cong. (2001) (enacted).

[8] Roger Smith, *Computing in the Clouds,* http://www.questia.com/library/journal/1P3-1864072981/computing-in-the-cloud (last visited Mar. 2, 2014).

[9] European Union Privacy Directive 95/96/EC O.J. (L.281) 31. *available at* http://searchsecurity.techtarget.co.uk/definition/EU-Data-Protection-Directive (last visited Mar. 3, 2014)

[10] Health Insurance Portability and Accountability Act of 1996.

[11] Lisa J. Sotto "Privacy and Data Security Risks in Cloud Computing", 15 Electronic Com & L. Rep. (BNA) 186, 187 (2010).

[12] Lin Grimes & Simmons "Where Is the Cloud? Geography, Economics, Environment, and Jurisdiction in Cloud Computing *available at* http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2456/2171. (last visited Mar. 1, 2014).

[13] Lisa J. Sotto, *Privacy and Data Security Risks in Cloud Computing*, 15 Electronic Com. & L. Rep. (BNA) 186, 187 (2010).

Cloud computing agreements do not just cause jurisdiction confusion internationally. Privacy Laws also vary from state to state within the United States. For example, a law in Massachusetts requires anyone who holds personal information belonging to a Massachusetts resident to implement a detailed written security program to protect the data.[14] Companies subject to these regulations that want to implement cloud computing must determine whether the cloud provider maintains adequate security measures to protect its electronic data. Because a Massachusetts resident's data could be commingled with the data of many other users in the cloud, it would be difficult for cloud providers to know which state regulations applied to such providers. With the business world rapidly embracing cloud computing solutions, it is only a matter of time before litigation arises that directly addresses the jurisdictional problems with cloud computing.[15]

3. CONTRIBUTORY LIABILITY FOR INFRINGEMENT

In addition to concerns about violations of privacy and decisions about jurisdiction, cloud providers have another burgeoning problem on their hands: contributory liability. Online auction site and cloud provider eBay recently defended itself against a claim by Tiffany Inc. ("Tiffany") for contributory trademark infringement.[16] Tiffany alleged that several of eBay's users were using the site to sell counterfeit Tiffany merchandise with the Tiffany mark and that eBay should be liable for these actions by its users. In Tiffany (NJ) Inc. v. ebay Inc., the district court utilized the Inwood test to determine eBay's contributory liability, the first time that the Inwood test was applied to an online marketplace. Under Inwood, a service provider is liable for contributory trademark infringement if one of two conditions is met: (1) the provider "intentionally induced another to infringe a

[14] Mass. Gen. Laws Ann. Ch. 93 H & 2 (West Supp. 2010).
[15] Mark L. Austrian, *Internatinal Cloud Computing Meets U.S.E-Discovery*, *available at* http://www.kelleydrye.com/publications/client_advisories/0865 (last visited on Mar. 1, 2014).
[16] Tiffany (NJ) Inc. v. ebay Inc., 600 F.3d 93 (2d Cir 2010).

trademark," or (2) the provider continued to supply its services to a user who it knew or had reason to know was infringing on trademarks.[17] Tiffany asserted that eBay was liable under the second provision because Tiffany brought the infringement to eBay's attention and eBay certainly knew or should have known that users were selling counterfeit items on the site. The district court determined that eBay's generalized knowledge of infringement did not trigger the second provision of the Inwood test because eBay did not have knowledge as to specific incidents of infringement.

However, a recent case from the U.S. District Court for the Northern District of California resulted in an opposite decision to that of Tiffany. In August 2009, Louis Vuitton Malletier, S.A. ("Vuitton") prevailed in an action against internet service provider Akanoc Solutions, Inc. ("Akanoc") for contributory infringement of Vuitton's trademarks and copyrights.[18] Akanoc's services included the rental of server space, IP addresses, and bandwidth to foreign resellers of the same services, who then resold the services to companies which sold counterfeit Vuitton items. Vuitton claimed that the defendants had been placed on notice of the infringing activities many times and had failed to discontinue the provision of services to the offending companies. The court in Louis Vuitton Malletier, S.A. v. Akanoc Solutions, inc. applied the Inwood test, with the determinative issue being whether Akanoc knew or should have known of the infringement.[19] Ultimately, the jury awarded Vuitton $ 32.4 million is statutory damages for the contributory infringement.[20]

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[17] Inwood Labs. Inc v. Ives Labs., Inc., 456 U.S. 844, 854 (1992).

[18] Louis Vuitton Malletier, SA v. Akanoc Solutions, Inc., No. C 07-03952 JW, 2009 WL 3062893.

[19] Brad R. Newberg, *Louis Vuitton: A potential Game- Changer for Contributory Infringement Liability*, Intell. Prop & Tech. Alert (Holland & Knight, McLean, Va.) *available at* http://www.lexology.com/library/detail.aspx?g=611614a0-cff6-42c9-bd05-bd1719d64e1a (*Visited on* March 1, 2014).

The obvious question becomes: why were the judgments in these two cases so different? Apparently, despite their similarities, the outcomes of these cases of contributory liability for infringement turned largely on the jurisdiction in which the case was heard. The court in Tiffany determined that the warnings that eBay got from Tiffany gave eBay only generalized knowledge of infringement, whereas the court in Louis Vuitton found that Vuitton's letters to Akanoc were sufficient to find that Akanoc knew or should have known of specific incidents of infringement.[21]

4. INTEGRATION AND SERVICE LEVEL ISSUES

The data centers of cloud service provider are located in various jurisdictions and all the information of individuals and organizations are spread across the world and need to be integrated. If the integration is not made, it will be a hurdle for individuals and organizations to get full access of their files. It is so often that the infrastructure of a customer is not compatible with the applications provided by the cloud service provider and which in result will have an impact on working of cloud computing and the whole purpose of cloud computing gets defeated in the first place.

From a single service provider, multiple customers can have access to cloud services. The level of service can vary from provider to provider, the organizations have to make sure that the services given to them by a cloud service provider is right on time and the response is quick, this is done because the data centres are located in different jurisdictions and it will be hard for any organization to commit to cloud computing when the services given to them will not be guaranteed.

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[20] Louis Vuitton Malletier, SA v. Akanoc Solutions, Inc., No. C 07-03952 JW, 2009 WL 3062893.

[21] Bruce Goldner, Stuart D. Levi & Rita Rodin Johnston, *ISPs Immunity from Contributory Infringement Not Abcolute, Skadden available at* http://www.martindale.com/internet-law/article_Skadden-Arps-Slate-Meagher-flom-LLP_804278.htm (last visited Mar. 1, 2014).

Cloud computing services are very easily available online and any individual or organization can take up the service by accepting a legal contract offered by the service provider. In most of the cases the contracts favour the service provider instead of securing the interest of the customer for the value he paid for the services offered to him. The scope of negotiation is restricted down to make very little or no changes on the terms and conditions on which the customer affixed his signature agreeing to the contract. The contracts barely acknowledge or give any guarantee of data protection of a customer or also any backup, security, etc. The contracts generally have a saving clause and give a clean chit to service provider for any kind of liability arising out of such situation, wherein any case the customer is at loss and the contract absolutely stays in the favour of the service provider.

5. CLOUD COMPUTING LAWS IN DIFFERENT COUNTRIES

In EU: Directive 95/46/EC of the European Parliament and of the Council of the European Union (of 24th October 1995) - on the protection of individuals with regard to the processing of personal individuals with regard to the processing of personal data and on the free movement of such data; applicable to cloud computing as well. Though the directive is very comprehensive, covering as much questions like who is the controller of data, what the scope of authority of sub-processors is, and what happens when data is transferred outside the EU. Cloud computing emphasizes the reduction in the level of direct control over data; while the EU legislation talks volumes about keeping control of data.

In the United States the Act of Stored Communications (Electronic Communications Privacy Act, 1986)[22] - a regulation that deal with intentional and compelled discovery of "stored wire and electronic communications and transactional records" held by third-party internet service providers (ISPs).

[22] H.R. Con. Res. 4952, 99th Cong. (1986) (enacted).

Also, The Health Insurance Probability and Accountability Act, (HIPPA) of 1996 enacted in the United States contains a 'privacy rule' which controls, utilize and leakage of Protected Health Information (PHI) and instruct that practical steps be taken to ensure the privacy of communications with individuals. The Financial Privacy Rule of Gramm–Leach–Bliley Act of 1999, compels financial organizations to present each customer with a privacy notice which must describe the data collected about the consumer, where that data is shared, how that data is used, and how that data is protected.

6. LAWS IN INDIA RELATING TO CLOUD COMPUTING

The legal fraternity in India has been in front of a range of complexities in dealing with technological advancements, and the brisk growth of the internet and its influence all over the world. Time and again technology diminishes the necessity for physical communication in the formation of important relationships in legal terms between the parties. Hence, it is to the legal fraternity to settle the code of behavior to be followed by such parties in sustaining such legal relationships.

Until the Information Technology Act, 2000 was enacted, there was no law with respect to the usage of computers, computer systems and computer networks, as well as data and information in an electronic form in India. The primary aim of the Information Technology Act 2000 is to present legal gratitude to e-commerce, which involves the use of electronic means of communication and storage of information, and to facilitate the electronic filing of documents with government agencies. The Act has extra-territorial jurisdiction so it also covers offences committed outside India.

The IT Act deals with a range of computer related works such as digital signatures, electronic governance, electronic records, regulation of certifying authorities, duties of subscribers, cyber regulations, the appellate tribunal, etc., and also offer for legal identification of electronic documents and

transactions, the admissibility of electronic data/evidence in a court of law, penalty for cybercrimes, and the institution of an appellate tribunal and advisory committee for regulating cybercrimes and regulations regarding the maintenance of electronic records.

Nonetheless, the Act also has numerous grey areas, i.e. it does not grant for shield against copyright infringement, defense of domain names, taxation on e-transactions, stamp duty payable and the jurisdictional aspect of e-contracts. However, efforts are being made through a number of amendments to do away with the ambiguities.

The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules of 2011 were notified by the Government of India, for the protection of sensitive personal data or information of individuals or organisations by the entity who possesses, deals with or handles such data in a computer resource owned, controlled or operated by it.[23] But various provisions of the Rules are not applicable to entities providing services under a contractual obligation with any other entity located extraterritorially, unless such entity ensures the same level of data protection as laid down in the Rules.[24] So a cloud computing service company, before trading with "sensitive personal information"[25] having a link to India, has to make sure to be in observance with the Rules as any non-compliance would invite penalties, and imprisonment in the case of any breach of contractual obligations under the Information Technology Act 2000. Hence, cloud service companies have to make sure that both the rules and terms of contract entered into with the customers are complied with.

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[23] Reema Patil, *Notification of the Rules with respect to Protection of Sensitive Personal Data and Information under the Information Technology Act, 2000, available at* http://www.narasappa.com/resources/InformationTechnologyRules.pdf (last modified Jan. 14, 2014).

[24] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, Gazette of India, part II section 3(1), R.7 (Apr. 11, 2011).

[25] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, Gazette of India, part II section 3(1), R. 3 (Apr. 11, 2011).

The IT Act of 2000 enforces a compulsion on a corporate body to provide for a privacy policy and disclosure of information. The entities dealing with any "sensitive personal data or information", or any other personal information, shall provide for a privacy policy published on its website. The corporate body has to make certain that such personal data is available at all time to its clients.

When it arrives to the security of the information stored, the companies are supposed to make sure that they protect such information by implementing the "Reasonable Security Practices and Procedures". This states that the International Standard on "Information Technology - Security Techniques - Information Security Management System -Requirements" has been adopted by the government of India. Any corporate body implementing such standards is said to have obeyed with the said act with regard to practical security practices and procedures. The law also requires a complete information security programme, standard information security plans including the managerial, technical, and operational charge of security, and physical actions which are proportionate with the secluded information possessions and which obey with reasonable security exercise and standards.

Rule 6 of the said act sets down the mode in which the data can be revealed to a third party. It asserts that no leakage of any sensitive personal data shall be made without the former approval which has been contractually agreed between companies by the corporate.[26] No data shall be passed on by the corporate to any third party, unless such third party has acted in accordance with the minimum security criteria's as specified under the rules. It specifies that government outfits can collect any sensitive information, for the purpose of authentication of identity, or for prevention, detection, investigation, prosecution and punishment of offences.[27] Nonetheless, any individual who in pursuance of his powers conferred by the Act gains access

[26] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, Gazette of India, part II section 3(1), R. 6 (Apr. 11, 2011).

to any data and reveals such information without the approval of the person concerned, triggering a wrongful damage to such a person, shall be likely to be proceeded for imprisonment, which may extend to two years, or to a fine, or to both.

One of the foremost loopholes of cloud computing services in India is that there is no precise law prevailing over the possession of data on a cloud. Generally the service providing companies possess the data unless it has been contractually agreed between the parties. This depicts the customer's information to various perils as the rights of such data are vested with the cloud provider. Under the Information Technology Act of 2000, a cloud service provider is not accountable for any third-party data made available by him, if he shows that such infringement or offence was committed without his awareness or that he has exercised due diligence as may be prescribed by the Government for the prevention of such offence.[28]

In the Information Technology Act, 2000, amended section 10A has been placed which says that a contract which has been made electronically shall not be regarded to be unenforceable. Yet, there is still elusiveness as to if an electronic contract is to be stamped, as the process of payment of stamp duty as envisaged under the Stamp Act is not possible in cases of electronic contracts unless they are printed.

In particular situations the parties entering into a contract have a choice to prefer the law which shall preside over them in the case of any difference of opinion arising in the future. But this is not the same in all matters. As a result the applicable law and the authority of the court remains a loophole as the contract entered into between the parties lacks clarity on such matters.

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[27] Rahukar, *The Information Technology Rules*, 2011 CLUB HACK MAGAZINE, *http://chmag.in/article/apr2011/information-technology-rules-2011* (last visited Jan. 12, 2014).

[28] The Information Technology Act, No. 21 of 2000, INDIA CODE.

7. CONCLUSION

The chief rationale why companies choose cloud computing over any other course of storage is because the information is being stored online, eliminating the risk of data being lost or destroyed. Cloud computing also has many shortcomings which need to be taken care of, for example there are a number of privacy and security issues associated with the storage of data on the internet. Additionally, there is always a danger of losing internet connectivity which could cause interruption in the workflow of a company.

Experts in the field maintain that cloud computing is more safe than the many traditional means of data storage such as hard disks, servers etc., though companies still take the menace of data being stolen by any outsider hacking into the security scheme of the cloud. The foremost ground why companies are not selecting cloud services is the lack of protection or security. Then again, the traditional storage means also present dangers like the servers can also be hacked into by outsiders and hard disks could crash and destroy the stored data.

Coming to the Indian aspect, cloud computing is a new notion and there is no law which exclusively governing it and the law currently lacks clearness. Queries as to the applicable law and jurisdiction still remain unanswered. Nonetheless, companies are substituting from traditional methods of storage to cloud computing because of the cost effectiveness.

The suggestion the authors offer is that cloud computing may not be idyllic for all companies because of the various issues brought about in the article, but it is cost-effective and suitable for global companies to use in order to store data which can be retrieved at any time from any part of the world.

A COMPARATIVE STUDY OF THE APPLICATION OF STRICT LIABILITY PRINCIPLES IN SPORTS: CRITIQUING ANTI-DOPING POLICIES; EXAMINING 'ILLICIT CROWD CHANTING' AND MATCH FIXING

Shivankar Sharma* and Pranav Menon*

Sports are an integral part of our lives and are constantly looked at for encouraging the values of competition, integrity and team work in our lives. In the modern day and age with the increase in the various forms of sports played and the application of various scientific and technological principles come more complications than we could have ever imagined. With mammoths amount of money riding on these sports, winning has become all the more important. The reason athletes, teams and their managements are resorting to more unethical means of finishing on top, making sure no means (how much ever illicit or disdainful) are left unexplored. These gives rise to questions of regulating such behavior of these sportsmen and women. How should the questions of doping and using banned substances be addressed from a legal perspective? What are the bodies at the international and domestic sphere to address these issues? The principle of strict liability and its application to these above-mentioned questions are some of the issues which have been addressed in this paper. The researchers during the course of this study would like to make a comparative study on how are principles of strict liability applied differently in cases of doping, illicit chanting by the crowds and how are the managements of teams often held vicariously liable with no fault or

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negligence when their players are accused of match fixing, the latter becoming ever important specially after the recent allegations on spot fixing on some cricketers and their managements.

I. INTRODUCTION

Since the inception of Olympics more than a century ago, the human race has gained impetus in not merely actively playing sports but also passively watching it for means of entertainment. Apart from the frenzy, patriotic fervor and passion generated by sports, the economic activities surrounding and emanating from it, has facilitated numerous calls for its stricter regulation and conduct. For example, Cricket in India, despite not being the national sport, commands popularity of almost entire of its population. However, sports regulation at the national level in India has two primary barriers: *first*, for addressing any sports law reform, it must be undertaken by the state legislature;[1] *second,* the interference of any national government in the conduct of any Olympic sport is not agreeable as per the International Olympic Association.[2]

Sports law can be characterized as a range of legal issues which may be encountered both in amateur as well as professional sports. Such issues may overlap with concerns surrounding labour law, competition law, antitrust law, contracts, tort or criminal law between players, agents, sporting bodies or government regulators. This nascent but emerging interdisciplinary field requires appropriate knowledge concerning the rules of every game, functioning of professional leagues and other sports related statutes.[3] With the advancement in technology and the lucrative monetary nature for

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[1] INDIA CONST. list II, entry 33; Mentions sports in the State list, along with activities such as theatre, entertainment and amusement.

[2] Vidushpat Singhania*, Sports Law Reforms in India: Agenda for 2014*, LAKSHIKUMARAN & SRIDHARAN ATTORNEYS *available at* http://www.lakshmisri.com/News-and-Publications/Publications/articles/Corporate/sports-law-reforms-in-india-agenda-for-2014.

[3] DARREN HEITNER, HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW (2014).

participation in sports, athletes nowadays are willing to put ethics aside to gain a competitive advantage or enhance their physical performance over others.[4] In order to prevent such 'cheaters' from engaging in anti-sporting practices, there was a requirement for certain legal presumptions to be developed that ran against the ordinary notion of culpability which is prevalent in criminal law.[5]

Among several such governing regulations for sports, lies the principle of 'strict liability' which is applied in cases of certain sporting offences. Although this principle applies to scenarios around betting and match fixing as well, the primary focus of this piece will be to analyse its applicability in cases of doping by athletes and critique the same, then making a comparative study with the application in the other branches of sports. For the convenience of the reader, the authors would like to divide this piece into five parts: a) understand the concept of strict liability and vicarious liability; b) Application of strict liability principle in anti-doping laws c) Need for strict regulation of sports law violations; d) Inconsistencies in applying these principles by courts; e) Suggest changes to pave way for a balanced approach for dealing with sporting offences; and f) strict liability, illicit crowd chanting and match fixing.

2. STRICT LIABILITY PRINCIPLE AND VICARIOUS LIABILITY

The general elements of strict liability entails that a legal obligation is cast upon a person, without a fault of the person having to be proved. This can be reformulated to mean that a person who causes danger to another is entitled to do so, but must take into account the potential obligation to compensate

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[4] Vidya Narayanaswamy, *Regulating Doping in Sports*, SPORTS@LAWNK, July 2011 *available at* http://lawnk.wordpress.com/2011/07/02/regulating-doping-in-sport/.

[5] Frank Oschütz, *Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARQ. SPORTS L. REV. 675 (2002) *available at* http://scholarship.law.marquette.edu/sportslaw /vol12/iss2/7.

[6] Janno Lahe, *Regulation of Strict Liability in the CFR and the Estonian Law of Obligations Act*, XVII JURIDICA INTERNATIONAL (2010), http://www.juridicainternational.eu/public/pdf/ji_2010_1_167.pdf.

for no-fault damage.[6] This rule was evolved in the case of Rylands v. Fletcher, where it was held that no *mens rea* was required in order to prove liability.[7] Thus, there is no finding of fault, which can be in the nature of negligence or tortious intent. Similarly this rule was later extrapolated in other common law jurisdictions as well. More so, even civil law jurisdictions like France also have similar principles. In France, until the end of the 19th century, fault as a pre-requisite to liability was not questioned until 1896, when a French court ordered the payment of compensation to the widow where no liability on part of the factory was proved with regards to the accident which took place.[8] Similarly, this was introduced in other jurisdictions like Germany as well in 1838 with the passing of the Prussian Railways Act.

Like most legal systems, anti-doping jurisprudence is not perfect. A strict liability system, while promoting integrity among athletes, can lead to injustices at the individual level. Although the principle of strict liability, where the burden lies on the sportsperson to ensure that his/her body is not intoxicated with banned substances, is seen by the international sport body as an effective measure to clean up sports, authorities must be mindful of the serious repercussions that inevitably arise of such a system. The livelihood and reputation of sportspersons can be greatly hampered by the levying of doping allegations and therefore, it is incumbent on the authorities to encourage a fair, trustworthy and transparent system.[9]

Strict liability also has overlapped with vicarious liability, which is usually an area dominated by fault based liability; as making an innocent party pay for the damages of another may appear unjust on the face of it, on perusing the legal system of the common or civil laws however, we can see it is necessary.[10]

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[7] [1868] UKHL 1.

[8] *Supra* note 6.

[9] Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5(2) VIRGINIA SPORTS AND ENTERTAINMENT LAW JOURNAL (2006).

[10] PAULA GILIKER, VICARIOUS LIABILITY IN TORT A COMPARATIVE PERSPECTIVE (2013).

Therefore there exists some special relationships between parties where one party for no apparent fault of its own has to compensate as it is vicariously held liable for the acts of another, this is found in the legal orders of England and Wales, Australia, Canada, France, Germany and others such as United States, New Zealand and Spain.[11] In the context of sports law also, such a vicarious principle will be examined in the later sections.

Further, every athlete, by participating in sport and/or by affiliating himself to a sporting federation accepts its constitution, bye laws and regulations of such a federation and rules of that sport. This embodies to constitute a contract between the athlete and the concerned federation and thus, must comply with the terms and conditions by virtue of an institutional affiliation. This association thus automatically entails compliance of anti-doping provisions by virtue of membership, accreditation or participation in such sports organizations or sports events subject to the code.[12]

3. STRICT LIABILITY IN ANTI-DOPING LAWS

Legal Regime for Anti-Doping

The use of performance-enhancing substances in sports is not merely a recent phenomenon. As far back as 3,000 years ago in Ancient Greece, naked athletes would reputedly step up to the starting line after ingesting anything from mushroom and plant seed extracts to stimulating potions.[13] However, the present regime for doping control in the international arena, finds its

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[11] *Id.*

[12] Annelize du Pisani, *A contractual perspective on the strict liability principle in the World Anti-Doping Code,* DE JURE, *available at* http://www.dejure.up.ac.za/index.php/volumes/46-volume-4-2013/36-volumes/46-volume-4-2013/217-a-contractual-perspective-on-the-strict-liability-principle-in-the-world-anti-doping-code.

[13] Australian Sports Drug Agency, *History of Drugs in Sport*, *available at* http://www.asda.org.au/media/history.htm (on file with the Virginia Sports and Entertainment Law Journal); Mark Stuart, *The war on drugs in sport – a perspective from the Athens Olympics*, 273 PHARMACEUTICAL J. 320 (2004), http:www.pjonline.com/pdf/articles/pj_20040904olympic.pdf.

roots in the modern Olympic movement. Anti-doping principles, like any rules of a competition, are sports rules governing certain conditions under which any sport ought to be played in its true spirit.

The fight against anti-doping in sport gained traction following the criminal investigation conducted during the Tour de France scandal in 1998 and the Salt Lake City Olympics in 2002, which exposed systematic drug use among the participants.[14] It seemed like international sporting authorities such as the IOC were soft on drug use and there was no active commitment on part of other sporting organizations to fight against doping in sport. The decision by the Olympic Movement Anti-doping Court in 1999, however, laid down the foundation of the anti-doping regulations. It expounded that doping in sports constitutes two circumstances: a) the use of an expedient (substance or method) which is potentially harmful to an athlete's health and/or capable of enhancing their performance; or b) the presence in the athlete's body of a prohibited substance or evidence of use thereof or evidence of the use of prohibited method.[15]

Apart from clarifying what constitutes doping, the need is felt for a more dynamic approach to tackle the menace of doping in sports. This was remedied when the International Olympic Council conducted World Conferences on Doping in Sport in Lausanne (1999) and Copenhagen (2003), to create a robust framework preventing athletes from engaging in doping tendencies.[16] These conferences involved participation among all major sports federations and around 80 government bodies to ensure uniform application of regulations against doping in sports. The outcome of these conferences was creation of World Anti-Doping Agency (WADA) as the

[14] Saul Friedman, *Contador, Doping and Strict Liability*, Sports Law e-Journal, art. 16 (2012).
[15] International Olympic Committee, Olympic Movement Anti-doping Code, Lausanne: IOC (1999).
[16] Sooraj Sharma & Shujoy Mazumdar, *A Critical Appraisal of the Concept of Strict Liability in WADA Code*, National Seminar on Recent Development in Sport, ILI New Delhi (2011).

principal institution to regulate the concern of doping in sports and effectively curb it. One of their key activities include the monitoring of World Anti-Doping Code (WADC), a document which seeks to harmonize regulations regarding anti-doping in sports, scientific research concerning doping, education and training of athletes, keeping track of developing technologies in sports to suggest revisions to the code, updating the list of prohibited substances in sports, etc.[17]

The WADC is the fundamental and universal document upon which the World Anti-Doping Program in sports is based. The Code applies to the Olympics and Olympic sports and by virtue of government's endorsement to its objectives, compliance is also sought from national sports authorities.[18] It plays a crucial role in harmonizing and coordinating actions, by setting out rules which governments will implement on ratification of the International Convention against Doping in Sport. Apart from setting out mandatory rules, which need to be incorporated verbatim by sporting bodies in various governments, the Code also sets out rules which are considered guiding principles.[19] Such a framework ensures the fundamental regulations of anti-doping are consistent across national sporting bodies around the world, while the other sections of the Code accommodate for slight substantive amendments that may be necessary in different contexts and in different jurisdictions.

It works in conjunction with five International Standards aimed at bringing harmonization among anti-doping organizations in various areas: testing, laboratories, Therapeutic Use Exemptions (TUEs), the List of Prohibited Substances and Methods, and for the protection of privacy and personal

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[17] Vidya Narayanaswamy, *Regulating Doping in Sports*, SPORTS@LAWNK, July 2011 *available at* http://lawnk.wordpress.com/2011/07/02/regulating-doping-in-sport/.

[18] Paul Hovrath, *Anti-Doping and Human Rights in Sport: The case of AFL & the WADA code*, 32 (2) MONASH UNIVERSITY L. REV. (2006).

[19] *Supra* note 17.

[20] World Anti-Doping Code, *available at:* http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/.

information.[20] This harmonization works to address the problems that previously arose from disjointed and uncoordinated anti-doping efforts, such as, among others, a scarcity and splintering of resources necessary to conduct research and testing, a lack of knowledge about specific substances and procedures being used and to what degree, and an uneven approach to penalties for athletes found guilty of doping. The adoption of the Code led to several significant advances in the global fight against doping in sports, including the formalization of certain rules as well as the clarification of stakeholder responsibilities. Additionally, the Code introduced the concept of 'non-analytical' rule violations, meaning that a sanction can be applied in cases where there is evidence that an anti-doping rule violation occurred but where there is no positive doping control test.[21]

A participant, which includes not only the athlete but his support personnel as well, when agreeing to participate in any international or national event of a body affiliated to the WADA, undertakes to conform to the norms of WADA, and submits to testing conducted by it.[22] Anti-doping provisions and rules have now become mandatory in the athlete participation forms and the rules of membership for the various sports governing bodies. Participants under the code are obliged to adopt and implement policies and rules against doping that conform to the Code, and assure that all members also fulfill the same. These sport specific rules and procedures must be understood as distinct and must not be limited by any national requirements and legal standards applicable to criminal proceedings or employment matters.

The near universal acceptance of the WADC thereafter, has facilitated in enshrining principles of anti-doping into governing legislations for sports in most countries. However, there are several sporting bodies like the AFL

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[21] *Id.*

[22] Roshan Gopalakrishna, *Sentence Construction – Recent case on doping bans*, Sports@NKLaw, October 2011 *available at* http://lawnk.wordpress.com/2011/10/22/sentence-construction-recent-case-on-doping-bans/.

(Rugby), FIFA (Football), ICC (Cricket), etc. that do not claim complete adherence to the code, despite national support for curbing anti-doping tendencies.[23]

Further, the UNESCO has facilitated the development of the first truly global anti-doping instrument i.e. the International Convention against Doping in Sport, and has played a crucial role in actively promoting its implementation by supporting governments in the development of national anti-doping programs.[24] It has also contributed heavily to development of anti-doping education and prevention programs aiming at promoting sporting values and increasing awareness among the young athletes on the moral, legal and health consequences of doping activities.

In India, the National Anti-Doping Agency (NADA) has formally adopted the WADC to pursue efforts to eradicate doping in India. It is the entity designated by India as possessing the primary authority to adopt and implement anti-doping rules, direct the collection of samples, the management of test results and the conduct of hearings, at the national level.[25]

Understanding of Strict Liability under Anti-Doping laws

The principle of strict liability, enshrined in Article 2 of the WADC, is one of the primary pillars in ascertaining guilt in cases of doping among athletes. Prior to the codification of this principle in the WADC, it was widely prevalent, both in CAS cases as well as majority of existing anti-doping rules.[26] The principle is applied in situations where urine/blood samples collected from an athlete have produced adverse analytical results. Under

[23] *Supra* note 18.
[24] NANCY MCLENNAN, TOGETHER AGAINST DOPING, UNESCO (2012).
[25] The Anti-Doping Rules, National Anti-Doping Agency, India (Revised as per 2009 WADA Code).
[26] International Olympic Committee Anti-Doping Code (1983) was prevalent prior to the WADA.

this regime, the question of fault or negligence only comes into play in the determination of the sanction. The drafters opted for this system because they believed it to be the best way to fight doping in an effective manner.

As per this principle, an athlete is responsible for what is detected in his bodily specimens and an anti-doping violation occurs whenever 'a prohibited substance is found' in an athlete's sample.[27] The mere presence of a prohibited substance or its markers in any bodily specimen will also entail strict liability on part of the athlete. This offence also includes situations of attempted use of prohibited substances or applying a prohibited method for consumption of such substances. The violation occurs whether or not the athlete intentionally or unintentionally consumes such a substance or was negligent or otherwise at fault.[28] This rule creates a personal duty upon the athlete for ensuring no prohibited substance enters his/her body, at any cost. When an athlete commits an anti-doping violation by testing positive for a sample in connection with an in-competition test, this automatically leads to disqualification of the individual's result obtained in that competition, including forfeiture of any medals, points or prizes.[29] This rule helps to establish fairness for the other athletes in the competition.

Any refusal or failure to provide for any compelling justification to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection will also entail responsibility on part of the athlete.[30] The violation of applicable requirements regarding athlete's availability for out-of-competition testing including failure to provide whereabouts information and missing tests which based on reasonable rules, also constitutes violation as per the code.

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[27] *Q & A: Strict Liability in Anti-Doping*, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/Documents/News_Center/News/QA_Strict_Liability.pdf.

[28] Article 2.1 WADC; PAUL DAVID, A GUIDE TO THE WORLD ANTI-DOPING CODE: A FIGHT FOR THE SPIRIT OF SPORT (2011).

[29] *Supra* note 9.

[30] *Supra* note 5.

Further, the burden and standards of proof in such cases is specified in Article 3 of the WADC. The initial burden of proof to establish the athlete has indulged in doping tendencies is placed upon the relevant anti-doping association which is conducting the tests of prohibited substances.[31] However, this standard can be easily established since a positive result for a prohibited substance satisfies that burden. Further, it is assumed that any WADA accredited laboratory is presumed to follow proper procedures for conducting sample collection and analysis. The WADC states that only a 'comfortable satisfaction' of evidence must be shown before a hearing body to establish guilt. The standard for an athlete to rebut any presumptions or establish any fact or circumstance in based on the balance of probabilities principle. However, owing to the application of the strict liability principle, once tested positive, it is extremely difficult to shift the burden of proof from the athlete, due to no requirement of intention or defense of negligence available to him.

If an athlete is found guilty of any of the aforementioned violations, sanctions may be imposed under Article 10 of the WADC. The punishments entailed range specifically with bans and periods of ineligibility from ongoing or future competitions for a minimum period of 3 months and maximum of two years for athletes following a positive drug test.[32] In situations wherein the athlete can prove that such a violation' was not intended to enhance performance, the requisite ineligibility period may be amended ranging from merely a warning and monetary reprimand without any disqualification from future events till a maximum ineligibility of one year. However, the code is extremely strict concerning the cases of repeat offenders, wherein in case of 2nd and 3rd violation athletes may be imposed with lifetime bans.[33]

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[31] *Supra* note 16.

[32] P Charlish & R Heywood, *Anti-Doping Inconsistencies snare American star*, 8(1) TEXAS REV. OF ENTERTAINMENT AND SPORTS LAW, 79 (2007).

[33] Roshan Gopalakrishna, *Doping in Professional Cycling: Legends of the Fall or the Fall of Legends?* Sports@NKLaw, February 2012, available at http://lawnk.wordpress.com/2012/02/22/doping-in-professional-cycling-legends-of-the-fall-or-the-fall-of-legends/.

Recognizing the need for balance between the goals of anti-doping and athlete's rights, the WADC does offer a chance to reduce or waive the period of ineligibility based on truly exceptional circumstances.[34] As relates to subsequent sanctions, the athlete has the possibility to avoid or reduce sanctions if he or she can establish to the satisfaction of the tribunal how the substance entered his or her system, demonstrate that he or she was not at fault or significant fault or in certain circumstances did not intend to enhance his or her sport performance. However, the burden of proof in such cases shifts on the athlete to prove why an exception must be made to absolve him of his liability. The guidance note within the WADC clearly suggests that this principle merely applies to reduction of sanction and not for determining the occurrence of an anti-doping violation and cannot be exercised in a vast majority of cases.[35]

The WADA is constantly involved in updating and amending the 'prohibited substances list' on an annual basis. This list is categorized into four categories namely (i) Substances and methods prohibited both in and out of competition; (ii) Substances and methods prohibited in competition; (iii) Substances and methods prohibited in any particular sport; and (iv) Specified substances.[36] Further, for any substance to be included in the prohibited drug list enlisted by the WADA, it must satisfy two of the following requirements: *a)* the substance or method has the potential to enhance sport performance; *b)* the utility of the substance or method will have actual or potential impacts upon the health of the athlete; *c)* the agency believes that the use of substance or method violates the spirit of the sport which the code seeks to preserve.[37]

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[34] *Supra* note 16.
[35] Guidance Note, World Anti Doping Code.
[36] *Supra* note 18.
[37] *Id.*

In circumstances wherein the first requirement i.e. seeking performance enhancement, is fulfilled requires much more serious intervention and liability than the other two standards. For example, the most common drug used for enhancing performance is steroids has a stringent prohibition in both scenarios of competition and otherwise. However, recreational drugs such as amphetamines, cocaine, heroin, and cannabinoids would fall under the second category and thus, must have lesser punishment. However, the application of the strict liability principle uniformly across all prohibited substances often negates the categorization of these substances.

If the medication an athlete is required to take to treat an illness or condition happens to fall under the Prohibited List, a Therapeutic Use Exemption (TUE) may give that athlete the authorization to take the needed medicine.[38] The purpose of the International Standard for Therapeutic Use Exemptions (ISTUE) is to ensure that the process of granting TUEs is harmonized across sports and countries.

4. APPLICATION OF STRICT LIABILITY PRINCIPLE

It was in one of the first doping cases examined by a CAS Panel where the arbitrators first qualified the provision in the International Equestrian Federation (FEI) laws providing for automatic disqualification from an event as being a case of 'pure strict liability'.[39] As long as only a disqualification was at stake, the arbitrators have always felt prepared to apply the strict liability regime without any alteration.[40] Despite being in complete violation of natural justice principles of athletes and possibility for restraint of trade, the strict liability standard was upheld for meeting the high objectives and practical necessities in the fight against doping in sports.[41]

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[38] Therapeutic Use Exemptions, *available at* http://www.wada-ama.org/en/Science-Medicine/TUE/.

[39] G. v. International Equestrian Fed'n, CAS Award No. 91/53 (1992).

[40] Leipold v. Federation Intemationale des Luttes Associees, CAS No. 2000/A/312, slip op. at 11 (Oct. 22, 2001).

[41] C. v. Federation Internationale de Natation Amateur, CAS Award No. 95/141 (1996).

Despite providing for a straight out regime to deter doping in sports, with more increasing regularity, the application of the strict liability principle is being challenged. This is primarily owing to the inconsistent application of 'exceptional circumstances defense' to reduce sanctions. Although the presence of this exception is desirable, but frequent application of this idea in disputes is undermining the notion of strict liability for curbing doping in sports. On one hand, it appears that the defense is invoked quite readily in situations where it should have not been granted and on the other, it has been subject to strict interpretation, thereby violating rights of athletes and creating unrealistic expectations among competitors.

The arbitration panel in Mariano Puerta v. ITF[42] stated that the problem with a 'one size fits all' solution is that there entail scenarios wherein it might be discriminatory and in this remorseless war against doping in sports, there may be occasional innocent victims.

The reality of the strict liability standard in practice can be lost when discussing lofty concepts such as proportionality and fundamental rights.[43] Any strict liability standard will invariably capture instances with low levels of culpability, so presenting cases will cover the following discussion on athletes' rights. The issue of proportionality rests on a characterization of the offense and the effect of the sanction relative to the objective of the regulation; presenting cases that cannot be characterized as instances of cheating will be useful in assessing how well international courts have accounted for accidental violations.[44] Cases often arise from unknowingly ingesting contaminated supplements and medications.[45] Other cases bring

[42] Mariano Puerta v. ITF, CAS Award No. A/1025 (2006).

[43] Houben Jannica, *Proportionality in the World Anti-Doping Code: Is There Enough Room for Flexibility?* THE INTERNATIONAL SPORTS L. J. No. 1-2 (2007) http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf.

[44] Matthew Hard, *Caught in the Net: Rights of Athletes and the World Anti-Doping Agency*, 19 SOUTHERN CALIFORNIA INTERDISCIPLINARY L. J., 533 (2010).

[45] Arbitration CAS 2002/A/376 Baxter/International Olympic Committee (IOC), award of 15 October 2002.

into question the bureaucratic shortcomings of anti-doping and how this risk is placed wholly on athletes. In cases as unsettling as these, one cannot help but wonder how a non-governmental organization can disqualify and suspend an athlete for such trivial violations.

5. NEED FOR STRICT LIABILITY PRINCIPLE IN SPORTS?

It has been stated at numerous occasions that doping practices have at all times been contrary to the fundamental principles of ethics in sport.[46] It artificially amends the physical conditions of athletes who claim to evaluate their natural differences of performance against each other. Doping is an issue, which is able to change fair competition into a spectacle for the mere amusement of the spectator.

For an effective anti-doping regime to exist, there must be a legal principle that allows that regime to efficiently operate and punish athletes that engage in prohibited conduct. Adherence to a negligence standard would likely prove unworkable for anti-doping officials.[47] A merit of the strict liability principle lies in not the actual application of the principle but the lacuna which it otherwise fills up. It is argued that in the absence of such a principle, the burden of proving the use of dope in the athletes would go up. The panel in USA Shooting & Quingley v. UIT,[48] while upholding the strict liability principle clearly stated that a requirement of intent for consumption of prohibited substances would invite costly litigation and an overwhelming burden of proof on sporting federations, which may cripple their efforts to fight doping in sport. Acknowledging that this principle might be unfair in individual cases, the CAS stated, however, that in the vicissitudes of fair

[46] Communication of the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Plan for the Community contribution to the fight against doping in sport - Statement by Ms Reding in consultation with Mr Byrne at 3.
[47] Brent Hadley, *Doping and Sport: Guilty and Never proven Innocent,* Embry-Riddle Aeronautical University (2007), http://www.lunarpoodle.com/dopingandsport.pdf.
[48] CAS 94/129, USA Shooting & Quigley v. UIT, award of May 23, 1995.

competition such acts cannot go unpunished under law, even though accidental in nature.

The broad rationale for the WADA and the Code is (1) to ensure a level playing field, (2) to ensure the protection of the athletes' health, (3) to ensure the social and economic standing of the sport, and (4) to provide role models.[49] The WADA draws on the Olympic Charter to delineate the spirit of sports: Ethics, fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants, courage, and community and solidarity.[50] The spirit of sport element rests on three premises: that (1) there exists a trans-historical entity of 'sport'; (2) which rests on a fair and level playing field; and (3) embodies "healthy, ennobling, and virile activity."[51]

The most appropriate justification for banning Performance Enhancement Drugs for competitive reasons is their ability to transform the nature of competition by reducing the challenge of the game to an unacceptable extent.[52] These innovations reflect firmness and fairness which the Code ought to promote in a bid to strengthen the fight against doping in sports.[53]

6. CRITIQUE OF PRINCIPLE OF STRICT LIABILITY

a) Inadvertent Occurrences

Critics of the application of the principle of strict liability to cases of doping argue that such a presumption could lead to unfair results for the athletes,

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[49] Gabrielle Kaufman-Kohler & Antonio Rigozzi, *Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes*, (Nov. 13, 2007), http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf.

[50] *Supra* note 44.

[51] *Id.*

[52] Thomas Cox, *The International War Against Doping*, VANDERBILT JOURNAL OF TRANSNATIONAL LAW (2014).

[53] World Anti-Doping Agency, *Q&A: World Anti-Doping Code Review: Consultation Process & Major Envisaged Changes*, http://www.wada-ama.org/rtecontent/document/QA_Code_Consultation_En.pdf.

wherein the athletes were subject to inadvertent doping and had no intention to increase or enhance their performance. Therefore, a positive result may not highlight the fault of the athlete. Instances where such a scenario could occur include acting on the advice of the team doctor, an error made by the prescription dispenser or a pharmacist, a reasonable belief that the item in question was in fact not prohibited, and in extreme cases, athletes could become easy targets for being 'set up', meaning that interested parties could spike the food or drinks of the athlete, leading to inadvertent consumption without any knowledge. Thus such a principle makes it easy for the athletes to become sitting ducks, targets for third parties, who could plant one instance of a prohibited substance to tarnish the record, pasts and future of an athlete.[54]

b) Procedural Issues

The idea of due process is absent in anti-doping hearings where procedural rights are not respected in the name of expediency, convenience and without the real consent of working athletes.[55] Working athletes will lose their livelihood if they do not consent to anti-doping rules and therefore, the consent is 'non-voluntary'. Likewise, the consequence for working athletes of imposed sanctions and public shaming can be a loss of their livelihood. In its quest for reducing doping tendencies among athletes, such a regime qualifies as an unreasonable restraint on trade for earning a livelihood, besides being an invasion of their rights of privacy.[56]

Also, athletes can expect little relief from their respective domestic courts if the established arbitration process proves inadequate. There are few appeals an athlete can make to a domestic authority, so the checks on doping law

[54] *Supra* note 12.
[55] *Supra* note 49.
[56] Jan Willem Soek, The Strict Liability Principle And The Human Rights Of Athletes In Doping Cases (2006).

remain with the international athletic organizations and challenges under international law.[57]

Strict liability within the anti-doping framework assumes that scientific testing for prohibited substances is effective. A false positive from these new tests could have severely damaging consequences to anti-doping programs, presenting somewhat of a paradox to anti-doping authorities.[58] Without tests that can actually detect doping, the strict liability principle has no use. Conversely, unreliable tests that detect cheaters but produce false positives will undermine the use of strict liability and weaken the current regulatory system.

c) Impossible Standards

Of all the arguments against doping that have been put forward, the argument that the use of doping substances endangers the user's health is used the most. The majority of international federations concentrate on safeguarding the mental and physical health of athletes in their particular branches of sports. Recent scandals involving clenbuterol in the foods in China and Mexico highlight the difficulties that athletes face in ensuring that "no prohibited substances enter his or her body". It is simply impossible to expect that athletes are able to control every step of the food and pharmaceutical processing chain.[59] The case of Ryan Napoleon, an Australian swimmer, who was sanctioned for taking an asthma medication that was wrongly labeled by a pharmacist is another recent example.

The use of dietary supplements by athletes is a concern because in most countries manufacturing and labeling of supplements may not follow strict rules, which may lead to circumstances where a supplement containing an

[57] Matthew Hard, *Caught in the Net: Rights of Athletes and the World Anti-Doping Agency*, 19 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL, 533 (2010).
[58] *Id.*
[59] *Supra* note 14.

undeclared substance that is prohibited under anti-doping regulations.[60] However, the WADA's stand on supplements is clear – taking poorly labeled dietary supplements is not an adequate defense in a doping hearing. Athletes are required to be fully aware of the dangers of potential contamination of supplements and of the significant effect of the principle of strict liability. Since the WADA does not engage in the preparation of any commercial materials, the testing of dietary or nutritional supplements is not conducted prior to its use by athletes.

d) Other criticisms

The strict liability principle has been criticized for ruining the careers of many athletes, who were not necessarily maliciously involved in doping. The principle creates a power imbalance between WADA and athletes, by automatically creating a negative presumption upon the latter. An alternative suggested by *Blumenthal* seeks to shift the burden from the athletes, by allowing pharmaceutical experts to testify in cases to clarify the probability that a doping violation was committed with the intent to enhance the athlete's performance.[61]

Perhaps beyond the purview of the Code review, athletes need to have a voice in the drafting of the 'prohibited substances' list, which will create awareness regarding such substances and prevent liability from sanctions.[62]

It is important to note that athlete support personnel, including doctors, coaches and support staff, are also subjected to anti-doping policies and can be sanctioned if they are involved in any anti-doping rule violation. When

[60] Paul Horvath, *Anti-Doping and Human Rights In Sport: The Case Of The AFL And The WADA Code*, 32(2) MONASH UNIVERSITY L. REV. (2006), http://www.austlii.edu.au/au/journals/MonashULawRw/2006/16.pdf.
[61] *Supra* note 49.
[62] *Palmer and Hoffman*, *WADA Code Review, 2012*, EU COMMISSION, http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/WADA-Code-Review-2015-1st-Consultation-Part-1-Article-06-Analysis%20of%20Samples.pdf.

practically applied, it is not an adequate defense to state that the athlete placed complete trust in the physician and/or coach.[63]

As a coach, it is his duty to remind athletes to take complete responsibility prior to ingesting or using any substance, even if done unintentionally. They must encourage positive athlete values and behavior to foster anti-doping attitudes. Further, medical personnel must be aware of their obligations towards sportsmen and not use prohibited methods or substances merely for gaining fitness or added advantage over other athletes.

It is however, often groused that a principle like the strict liability, which has application in civil law should not be made applicable to the domain of privately regulated activities. The Court of Arbitration for Sports has recognized that this is a clear transportation of civil (tort) law concept of strict liability.[64] Authors have also held that the remedies by the private contractual law, even though finding wide application in the doping law, are more likely than not 'fall wide off the mark'.[65]

7. INCONSISTENCY IN THE APPLICATION OF THE WADA CODE

Although the Code is supposed to be applied uniformly, there is large deviation which occurs in the execution of the code, enforcement is largely the responsibility of the International Federations and the National Anti-Doping Organizations. However, each organization is responsible for testing the athletes at the competition it holds, the example being that IOC is supposed to test the athletes in the Olympic competition. It is therefore, a task for the Court of Arbitration of Sports and the WADA body to bring in uniformity and conformity with the WADA code.

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[63] Torri Edwards v. IAAF, CAS/OG/003 (2004).
[64] CAS Award Number 98/222 (1999-08-09).
[65] Janwillem Soek, The Strict Liability Principle And The Human Rights Of Athletes In Doping Cases 220 (2006).

In this two cases will be examined which will bring to light some of the inconsistencies which arose on the implementation of the WADA Code. The first case is concerned with that of Alberto Contador, a Spanish cyclist who was one of the few athletes to win the 'grand tours' of France, Italy and Spain. During the 2010 Tour de France, he however tested positive for Clenbuterol, which was a substance which could be used as a fat-metabolizing agent.[66] Contador did not deny the positive finding but attributed it to the consumption of contaminated meat.[67] Clenbuterol presence is completely prohibited by the WADC and does not have a limit to which it can be tolerated, therefore Contador was provisionally suspended by the Spanish Cycling Federation (RFEC). The RFEC concluded in the course of the hearing that Contador had committed a doping violation but that he had no fault or negligence, which meant a one year suspension as well as stripping him of the Tour de France title.[68] This was in contrast to the WADC penalty, which would mean stripping him off his Tour de France title along with a two year suspension. Contador decided to fight the RFEC accusations and was successful in proving that the meat had indeed contained the substance and that Contador was without fault or negligence. This was because he had been successful in proving the source of the contaminated meat. Thus, the disqualification which was provided under the code was ignored by the REFC.

This did not go well with WADA which decided to appeal the decision citing that Contador had not met his burden of proof. The CAS's gave a decision which was opposite to the one given by the REFC, holding that Contador had not sufficiently proved that contaminated meat was more likely than other sources from which the clenbuterol could have originated.[69] This is because

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[66] Gordon S. Lynch, *Beta-2 Agonists*, *in* PERFORMANCE ENHANCING SUBSTANCES IN SPORT AND EXERCISE 47, 51 (Michael S. Bahrke & Charles E. Yesalis eds., 2002).
[67] Juliet Macur, *2nd Failed Test Puts Heat on Contador*, N.Y. TIMES (Oct. 4, 2010), http://www.nytimes.com/2010/10/05/sports/cycling/05cycling.html.
[68] Contador, Case No. 2011/A/2384.
[69] *Id.* ¶ 512, at 92-93.

clenbuterol was banned for use on the livestock in Europe and the contaminated cases were rare and too far in between. Moreover, evidence related to the fact that the supplier of the beef had indeed fed the cattle with clenbuterol was hard to prove. Consequently, the Spanish cyclist was stripped of his title and became ineligible for the standard two-year period associated with the first time doping offense.

Another case is that of Dwain Chambers, who was handed over a lifetime ban from representing Britain in the Olympics by the British Olympic Association (BOA), which had in place a by-law which prohibited any athlete with a doping record to represent Great Britain in the Olympics.[70] This BOA regulation was in *pari materia* with an *apriori* rule of the IOC which mandated a lifetime ban from the Olympics for any athlete convicted of doping; which had been struck down by the CAS, for levying a harsher fine than that prescribed under the WADC.[71] Chambers had been a British sprinter who had clocked in the fastest time in the 100 meter dash at Sydney for a European, but was implicated in the Bay Area Laboratory Cooperative scandal where he was tested positive for a designer steroid. According to the erstwhile IOC rule and the BOA bylaw, Chamber was banned from the Olympic for life.

Prime facie, it seemed like the BOA by-law clearly was in violation of the WADC, which mandated a two year suspension. In stark contrast to the Contador case, the BOA had enacted a more stringent punishment to protect only clean athletes from competing in Olympics. In light of the WADC, and the overturning of the IOC rule, it seems unlikely that the BOA's bylaw would be upheld, which is why the CAS held that the bylaw, effectively was a double sanction and that it could not preempt the uniformly adopted WADA code for meting out punishments.[72] Therefore, we can see that substantive changes

[70] British Olympic Association (BOA), Case No. 2011/ A/2658.
[71] United States Olympic Comm. v. Int'l Oympic Comm., Case No. 2011/O/2422, ¶ 8.37, at 32 (CAS 2011).
[72] British Olympic Ass. (BOA), Case No. 2011/A/2658.

implemented by the governing body which counteracted the purposes of the WADA and CAS to have a uniform approach and system.

8. THE FUTURE OF ANTI-DOPING: CLARITY, TRUST AND CERTAINTY

The legitimacy of a sport's anti-doping isn't a dichotomous issue, with a clear villain and a winner; rather it is a grey aspect, which can have damaging consequences to the sport itself.[73] Trust is crucial for the smooth functioning of any sport and in this regard the efficacy of a doping mechanism depends both on the ability of administrators to run the system in a just and fair manner; and on the athletes to maintain their level of integrity and the faith their fans place in them. In addition to trust, there should also be a need for clarity, consistency and certainty in the rules.

a) Sports bodies practice what they preach

Sporting bodies should ensure that the rules that they promulgate in the best intentions of the sport are duly followed by them and not besmirched by vested interests. Abiding the rules not only results in greater consistency in the system but rather ensures people's trust in the system that the authorities orchestrate. Ambiguity in the anti-doping mechanism came to light, when in August 2005, accusations were levied at the seven-time Tour de France champion Lance Armstrong. A French newspaper published a story about the research performed on Armstrong's urine sample from seven years; although the data suggested that Armstrong had taken EPO, there was no indication that proper chain-of-custody procedures were followed, that there was proper specimen storage and handling or a B-sample was permitted that would ensure Armstrong the retesting rights that any accused would normally have. Instead of denouncing the newspaper's tactics as untenable and assigning fault to the laboratory with regard to its breach of anonymity, WADA's Chairman, Richard Pound implied support for the

newspaper's accusations which other notable sport originations, namely USA Cycling described as 'completely without credibility'.[74] The International Cycling Union (UCI) also condemned WADA for not ensuring that its own guidelines should be followed. Such a failure of an anti-doping organization's leadership to validate its own regulations cannot be repeated if the organization strives to promote trust and legitimacy in the system.

b) Ensuring clarity and consistency

The onus lies on the authorities to oversee that anti-doping law is not a source of ambiguity and instead is impartial and based on the principle of *nullum crinem sine lege certa*.[75]

Similar to most arbitration panels, CAS is not bound by prior arbitration precedents nor is it obliged to follow the principle of *stare decisis*. However, in the past decade there has been a certain consensus in the CAS panel to follow the precedents of previous tribunals except when there is strong reason to not do so in the interest of justice;[76] this body of case law has been referred by many as *lex sportiva*.[77] While this recent inclination of CAS to rely on precedents has furthered the cause of consistency and clarity of anti-doping rules, disagreements among CAS panels still occur. To improve the predictability of anti-doping laws, simple advisory opinions can be formulated to help guide athletes and arbitration panels along with developing a 'supreme' panel to conclusively resolve such contentions.

CAS must continue in its endeavour to maintain the clarity of anti-doping rules and consistency in their application so that an athlete who is already

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[73] *Supra* note 9.

[74] USA Cycling Strongly Backs Armstrong, ASSOCIATED PRESS (Aug. 27, 2005) *available at* http://msnbc.msn.com/id/9050722/.

[75] Aanes v. FILA, CAS 2001/A/317, Award of 9 July 2001, Digest of CAS Awards III.

[76] A.C. v. FINA, CAS 96/149, Award of 13 March 1997.

[77] Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sport Disputes,* 35 VAL. U. L. REV. 379 (2001).

burdened by strict liability principle doesn't get further aggrieved. Without this trust, the outcomes of doping cases will be blanketed in doubt and the integrity of the sport as a whole will suffer.

9. STRICT LIABILITY FOR THE CLUBS IN CASES OF 'ILLICIT CHANTS'

The paper tracing the principle of strict liability and its relations with doping cases would also like to mention some other instances of the application of strict liability to other facets of sports. Chanting by fans is common in most of the arenas where sports are played live or in the stadium in front of audience. Usually instances are seen where the team which is playing at 'home' (meaning at the stadium/city/country) where they are based have the confidence of the crowds. This is not exhaustive though, a team can enjoy the crowd support even in third party neutral venues, and this is seen as an integral part of the sports culture. It is not of surprise then that some venues have earned the reputation for being host to notorious fan bases, Turkish club Galatasaray SK's former home stadium, the Ali Sami Yen in Istanbul has earned the sobriquet 'Hell', because of the atmosphere it has in the past.[78] In this scenario, it is although true that chanting by fans has its own merits of making the sport more competitive, racial chanting, violence by fans, threats to players and managers are posing new questions about the depth to which such standards can stoop.

In 2011, UEFA (Union of European Football Associations), fined the Scottish football club Celtic FC for indulging in pro-IRA (Irish Republican Army) chants by its fans in the match against French club Stade Rennais.[79] The Scottish club was found culpable under the strict liability approach of the UEFA where the clubs are liable for the conducts of the players, officials, members, supporters and any other persons exercising a function at a match

[78] Roshan Gopalakrishna, 'Illicit Chanting' and Strict Liability, (Apr. 27, 2012) *available at* http://lawnk.wordpress.com/2012/04/27/illicit-chanting-and-strict-liability/.
[79] *Id.*

on behalf of the members association or club.[80] This responsibility was present as UEFA's rules outlaw the *"use of gestures, words, objects or any other means to transmit any message that is not fit for a sports event, in particular if it is of a political, offensive or provocative nature."*[81] The UEFA statute, thus empowers it to implement any measure appropriate to fulfil its objective, inspite of the fact that there is no definition of 'illicit chanting' anywhere in the UEFA rules. Thus, the Scottish club had to bear strict liability for the actions of their supporters, even though the club itself was not at fault. This is to be contrasted with the fact that in 2006 UEFA had stated that pro-IRA chants were actually a nationalist issue, similar to Basques and Catalans in Spain and were therefore not prohibited.[82]

In a similar case in PSV Eindhoven v. UEFA,[83] the Dutch club PSV was fined and given a severe warning for racist behaviour by their fans during a Champions League match against Arsenal in 2002. The same club PSV had been found in breach previously for failing to prevent behaviour by its fans, the club PSV went on to challenge the strict liability which was upheld by the CAS, although it held that the club had not infringed any rule as it had made adequate security arrangements.

Feyenoord Rotterdam v. UEFA,[84] addressed the issue of the consequences of strict liability when the supporters of the club are not officially recognised to be so. Feyenoord fans resorted to violence against the French club Nancy and within the stadium. Feyenoord claimed that the fans in questions were not official supporters as they were not given tickets through the official channels of the club, were not transported to the stadium by the club, or could not be identified from their looks as fans of Feyenoord. The CAS

[80] Article 6 of the UEFA Disciplinary Proceedings.
[81] UEFA's rule under Article 11.2 (e).
[82] *Supra* note 78.
[83] CAS Award Number 2002/A/423.
[84] CAS Award Number 2007/A/1217.

aligned with UEFA in holding that supporter was an undefined term, the reasonable and objective observer should be able to determine who is a supporter of the club.[85]

In another case, a lapse of the security personnel to adequately screen spectators, which led to racist and discriminatory behaviour by its fans during a UEFA league match was attributed to the club Athletico Madrid.[86]

It is therefore not surprising that after the 2010-11 Season the Scottish Premier League enacted the Offensive Behaviour at Football and Threatening Communications (Scotland) Act, 2012 to address sectarianism and offensive behaviour in the sport. This would give additional tools to the police and the prosecutor to crack down on sectarian songs and abuse during football matches and the internet. As stated the Act will only criminalize behaviour likely to lead to public disorder which expresses or incites hatred, is threatening or is otherwise offensive to a reasonable person. Many other governing bodies of sports (like The ICC's Anti-Racism Code) have also adopted stringent measures to check racism in sports, it remains to be seen whether these policies also have the same underpinning of strict liability as is present in other codes like the UEFA.

10. STRICT LIABILITY AND MATCH FIXING

The highly controversial decision by the Court of Arbitration for Sports that dealt with the case of match fixing involving ten individual players and two clubs, namely the Metalist Kharkiv and Karpaty Lviv witnessed the application of principle of strict liability in an instance of match- fixing.[87]

The facts of the instant case pertained to the match between the two clubs- Metalist and Karpaty that took place on 19th April, 2008 and witnessed a

[85] *Supra* note 78.
[86] Club Atletico de Madrid SAD v. UEFA, CAS Award Number 2008/A/1688.
[87] CAS Issues its decision in the case of FC Karpaty and FC Metalist, http://www.tas-cas.org/d2wfiles/document/6999/5048/0/Media20Release20_English_20Metalist.pdf.

score of 4-0 in favour of Metalist. The irregularities arising out of the match gave rise to a series of proceedings in Ukraine and Switzerland.[88] Karpaty, inspite of evidences of such fixing did not report this to the authorities, and merely used it in a dispute with the player concerning payment of his salary. The Football Federation of Ukraine, as a party to the dispute received the digital evidence which was used to institute charges of match-fixing between the clubs.

The Control and Disciplinary Committee (CDC) declared the match was fixed and several sanctions were levied as against the clubs, its officials and the concerned players. The CDC, furthermore, did not consider the Ukrainian defense of presumption. Match fixing was held to constitute wider infractions than bribery that was indictable under Ukrainian law. The Appeal Committee, confirming the decision, changed and reduced the sanctions imposed by CDC.[89] Upon further appeal by the clubs to the CAS, match-fixing was confirmed and the tribunal applied the principle of strict liability upon the clubs, the officials and the players for the conduct of the individual players.

This decision was consequential in the UEFA Champions League that had a policy barring the admission of clubs involved directly or indirectly in instances of match fixing. Pursuant to the CAS decision, FC Metalist was barred from UEFA competitions. An appeal to this decision was overturned by the Deputy President of the Appeals Arbitration Division and the UEFA decision was upheld. Though the decision before the Swiss Supreme Court is pending, the UEFA clearly upheld the CAS decision of holding the club liable for the individual acts of players.[90]

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[88] Olena Perepelynska, *CAS Confirmed Strict Liability Principle in Match-Fixing, available at* http://cisarbitration.com/2013/08/26/cas-confirmed-strict-liability-principle-in-match-fixing/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link.
[89] *Id.*

Hence, the application of this principle of strict liability has been witnessed in cases against match-fixing that held clubs liable for the acts of its individual players indulging in match fixing since such illegal acts may have serious consequences in the arena of organized sport.

11. CONCLUDING REMARKS

The application of strict liability in the war against doping has been with its costs, it has burdened international athletes for the sake of preserving competition in the international arena. Cleansing sports of performance-enhancing drugs is an uphill task with inherent complexities and competing justices. Such a virtuous task often entails sacrifices and it should be the duty of the people in charge to assure that these sacrifices are reduced to the fullest extent possible.

The blanket submission to the code, is not without complications, there are plenty of genuine reasons for the athletes to have some defense to their side, to plead non-guilty to doping. The very lists that defines what substances are considered for the purposes of the WADA code, needs revision too, to be better updated and allowing to exclude other cases of supplements, and other substances found in common medication. It is, therefore, particularly burden on for athletes who might not have unequal bargaining power against international bodies like the WADA. Therefore, till this balance of power is restored to a stage of equilibrium, such an application will continue to see more innocent victims for the larger picture of preserving integrity by the athletes.

However, in application of this very principle, in cases of illicit chanting by the fans or match fixing different results can be witnessed. This is because if team has an official fan base, who they facilitate in the procurement of tickets, transportation and encourage to actively cheer for the aforesaid team, the team should be held strictly liable for any messages which can be

transmitted orally or otherwise which are offensive or provocative. It would only seem fair, that the other team should not be allowed to suffer in terms of lost confidence, or moral, especially in cases where the other team is playing in a 'away from home' venue.

Similarly, in cases of match fixing, in today's changing world, where the upper echelons of the sports teams managements are decision makers and are privy to the information which is being exchanged between the athletes and bookies, the application of the strict liability principle seems just and fair. Indeed if one peruses the Indian Premier League scandals which rocked the country recently– Rajasthan Royal's team owners Raj Kundra was also alleged to be involved in the same[91], and in another instance Chennai Super Kings (CSK) Team Principal and BCCI president N. Sreenivasan's son-in-law Gurunath Meiyappan was involved with the bookies, after which team CSK immediately disowned him for fear of termination of the franchisee from the league[92] – do more to dent the image of sports in the country and belittle the confidence of the fans.

For sports to exist as we know, ensuring vigilance remains paramount otherwise the modern day sports industry will become a commercialized product, bereft of fairness, and competitive spirit and strict liability will indeed play a vital role in that part.

[91] IPL 7: Rajasthan Royals Trying to Recover After Spot-Fixing Scandal, PRESS TRUST OF INDIA, NDTV.COM, (May 7, 2014) *available at* http://sports.ndtv.com/indian-premier-league-2014/news/223910-ipl-7-rajasthan-royals-trying-to-recover-after-spot-fixing-scandal.

[92] Alok Deshpande, *CSK's Meiyappan arrested*, THE HINDU, (May 25, 2014) *available at* http://www.thehindu.com/todays-paper/csks-meiyappan-arrested/article4748705.ece.

UNSHIELDING THE GOVERNMENT
Subramaniam Swamy v. Director, CBI: A case analysis.

Gibran Naushad*

Corruption is one of the major challenges that India is facing today. The change in the political dynamics of the country in light of the general elections of 2014 is a clear indication that the people of India are fed up with this problem.

It is in this context that the recent judgment of the Supreme Court in the case of ***Dr. Subramaniam Swamy v. Director, Central Bureau of Investigation*** *becomes important. This judgment of the constitutional bench, delivered on 6th May 2014, explores the problematic arena of prior sanctioning in case of prosecution of public servants. Moreover the judgment extensively focuses on article 14 of the Constitution of India, which ensures equality and equal protection of law to each and every citizen of this country, and delineates as to what could be called arbitrary as per this article.*

This judgment by the apex court becomes important as it sets a precedent that is likely to have a substantial impact on the bureaucratic decision-making and the dangerous nexus of politicians and bureaucrats which becomes a major cause of corruption. The aim behind this case analysis is to extract the perks and follies of this decision and analyze the judgment in light of the earlier decisions of the apex court on similar subject matter.

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1. BACKGROUND

A combined decision of two writ petitions, namely, *Dr Subramaniam Swamy* v. *Director, CBI*[1] and *Centre for Public Interest Litigation* v. *Union of India*[2] has been given through this particular judgment. The main issue of contention in these writ petitions was the constitutional validity of section 6-A of the Delhi Special Police Establishment Act, 1946. This particular section came to be inserted through section 26(c) of the Central Vigilance Commission Act, 2003.

The insertion of this section came after the controversial Single Directive No. 4.7(3) of the Government of India was struck down in the case of *Vineet Narain and Ors* v. *Union of India*.[3] The single directive was a set of instructions that had been issued by various ministries and departments of the Central Government to the Central Bureau of Investigation entailing the mode in which inquiry or registration of the case was to be done with regards to certain category of civil servants. As per the directive, if the officer was of the level of Joint Secretary or above in the Central Government, then prior sanction of the Secretary of the concerned ministry or department would have to be taken before the Central Bureau of Investigation started an inquiry.[4] Moreover officers of the Reserve Bank of India of the level equivalent of Joint Secretary and above, Executive Directors and above of SEBI, and Chairman along with Managing Director and Executive Directors and such officers who are one level below the board of Nationalized Banks also fell within the purview of this directive.[5] The objective of this directive

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[1] Writ Petition (Civil) No. 38 of 1997, *available at* http://supremecourtofindia.nic.in/outtoday/41503.pdf.
[2] Writ Petition (Civil) No. 21 of 2004, *available at* http://supremecourtofindia.nic.in/outtoday/41503.pdf.
[3] A.I.R. 1998 S.C. 889 (India).
[4] Single Directive No. 4.7(3), Government of India.
[5] *Id.*

was to protect officers who were involved in decision-making and who would otherwise be subjected to malicious and vexatious complaints.

Owing to the mandatory sanction of the government before any enquiry, the Single Directive became problematic for the effective implementation of the Prevention of Corruption Act, 1988. The Central Bureau of Investigation, as constituted through the Delhi Special Police Establishment Act, 1946 could not proceed in its actions against senior government officers owing to this single directive.

As a result of these anomalies, the constitutional validity of this directive i.e. Single Directive 7.4(3) was challenged in the case of *Vineet Narain and Ors* v. *Union of India*.[6] The court tried to deconstruct the constitutional validity of the directive through the analysis of various legal postulates.

The Supreme Court emphasized on the point that the directive would be applicable if the investigation of the offences was being done by the Central Bureau of Investigation and would not have any application on the exercise of power by the state police. Thus an anomaly is prevalent in this regard. Emphasis was also paid to the word 'superintendence' used in section 4(1) of the Delhi Special Police Establishment Act, 1946. The Supreme Court stated that once the policing agency is empowered to carry out investigation as per section 3 of the act, the central government could not exercise any control over the investigative process and the word 'superintendence' could not be used to extend the control and power of the government to that limit.

The court also referred to the N.N. Vohra Committee that was constituted in 1993 and provided information related to the links between mafia organizations and government functionaries. The comments of the committee, which came out in the same year were quite shocking. They

[6] A.I.R. 1998 S.C. 889 (India).

emphasized on the nexus between politicians, bureaucrats and criminals and how it was resulting in a huge amount of corruption in the country.[7]

The court also emphasized on the fact that the constitution of investigating agencies such as the Central Bureau of Investigation needs to be looked into as these agencies had been showing inability in prosecuting powerful people which was a dangerous sign. The case of *Abhinandan Jha* v. *Dinesh Mishra*[8] was also referred to by the court to emphasize on the aspect of separation of powers. It was stated that investigation was the domain of the police and the final step in the process of investigation needed to be taken by the police only.[9] The executive influence in the domain of the police was condemned through reference to this judgment.

The court also took up the case of *K Veeraswami* v. *Union of India and Ors*,[10] but did not go into a deep analysis of the case. The Court stated that the above mentioned case did not have relevance in the present case as it dealt with the protection of the position of the judges of the High Court and the Supreme Court and thereby dealt with the aspect of independence of judiciary, an aspect that is not relevant to the case at hand. Thus the Court did not accept the contentions relating to this case.

On the basis of the above-mentioned points, the judgment of the *Vineet Narain case* was decided. It is clear from the analysis of the case that the protection for public servants, as had been created from the directive, was struck down, by interpretation of the existing act i.e. the Delhi Special Police Establishment Act, 1946 to that effect, An elaborate discussion on the constitution flaw behind this directive was not done, as was done in the

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[7] *Id.*
[8] (1967) 3 S.C.R. 668 (India).
[9] *Id.*
[10] (1991) 3 S.C.R. 189 (India).

present case, which would be discussed by me in the later part of my analysis.

Subsequent to the *Vineet Narain* judgment, an attempt was made to insert section 6-A through the Central Vigilance Commission Ordinance in 1998. But upon the intervention of the court, the ordinance was deleted by promulgation of another ordinance in the same year. Thus from the date of the passing of the *Vineet Narain* judgment till the insertion of section 6-A in 2003, there was no requirement of seeking of previous approval except for a period of two months.

In 2003, the Central Vigilance Commission Act came into being. A Central Vigilance Commission was constituted as per the act and the commission was given the power to conduct inquiries into offences alleged to have been committed under Prevention of Corruption Act, 1988. Section 26 of the Central Vigilance Commission Act becomes important in this respect as it provides for amendment to the Delhi Special Police Establishment Act, 1946. Clause (c) of section 26 provides for the insertion of section 6-A into the Delhi Special Police Establishment Act, 1946.

As per section 6-A of the Delhi Special Police Establishment Act, 1946, a prior approval of the central government needs to be taken for inquiry or investigation of any offence alleged to have been committed under Prevention of Corruption Act, 1988 by certain classes of officers.[11] Thus this provision takes back the law to the same position that was prevalent at the time the Single Directive 4.7(3) was applicable to offences committed under Prevention of Corruption Act, 1988.

The constitutional validity of the above-mentioned section, i.e. section 6-A was challenged in the both the writ petitions that had been filed in the Supreme Court as per article 32 of the Constitution of India, 1950.

[11] Delhi Police Establishment Act, No. 25 of 1946, § 6-A, INDIA CODE.

2. THE JUDGMENT: CRITICAL ASPECTS OF REASONING

a) Section 6-A is arbitrary as per article 14 of the Constitution of India, 1950.

The Supreme Court, in its judgment, laid huge emphasis on article 14 of the Constitution of India. As per article 14, every citizen needs to be ensured equality and equal protection before law.[12] Various case laws were referred to by the court to analyze as to whether section 6-A is outside the purview of article 14 or not.

Bhudhan Choudhry and Ors. v. *State of Bihar*[13] was one of the cases that were referred to by the court. It was emphasized that the above-mentioned case does not forbid reasonable classification, but for the classification to be reasonable, the following two tests would have to be satisfied:

i. The classification must be founded on reasonable differentia that distinguishes persons or things that are grouped together from others that are left out of the group.[14]

ii. The differentia must also have a rational relation to the object sought to be achieved.[15]

The case of *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar and Ors*[16] was also referred to in this light as the above-mentioned principles were emphasized upon in that case too. Moreover the case of *Nagpur Improvement Trust and Anr* v. *Vithal Rao and Ors*[17] was also brought into the discussion to emphasize on the fact that the object sought to be achieved

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[12] INDIA CONST. art. 14.
[13] (1955) 1 S.C.R. 1045 (India).
[14] *Id.*
[15] *Id.*
[16] (1959) S.C.R. 279 (India).
[17] (1973) 3 S.C.R. 39 (India).

should be lawful.[18] If the object is discriminatory, then the classification could not be called reasonable classification.[19]

On analysis of the above judgments, the Supreme Court emphasized on the fact that a privileged class of officers above the level of joint secretary and above had been created through section 6-A of the Delhi Special Police Establishment Act, 1946. According to the Supreme Court, the aspect of intelligible differentia had been lacking in this section. A certain level of officers who were working with the central government were given protection as per section 6-A, but the same level of officers who were working with the state government were not given any such protection. Thus the differentiation did not sound intelligible, as officers at both the levels, i.e. the Central and the State, were involved in decision making.

The Supreme Court emphasized on the fact that a differentiation when made, should not be artificial, and two public servants cannot be treated differently just because one of them is senior to the other.

The Supreme Court also tried to link the classification that was made with the object that was sought to be achieved by the Prevention of Corruption Act, 1988. The main objective of the act is to find *prima facie* truth into the allegations of corruption. Section 6-A, as per the Supreme Court, creates a big hindrance in the achievement of this objective by preventing prosecution of certain class of officers without prior sanction. This classification, as per the court, was not fulfilling the task of eliminating the mischief, and helping in achievement of public good.

Hence, since section 6A of the Delhi Police Establishment Act, 1946 could not satisfy the two inherent dimensions of article 14, the court held that it was bad law and could not be sustained.

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[18] *Id.*
[19] *Id.*

b) Section 6-A interferes with the investigative powers of the police machinery.

The Supreme Court laid emphasis on the fact that the the powers of investigation of the police should not and cannot be curtailed by the executive. The Supreme Court in this respect referred to the case of *State of Bihar & Anr.* v. *J.A.C. Saldanha & Ors,*[20] wherein the Supreme Court had explicitly held that investigation is the domain of the police and there should not be any interference in the process of investigation by the executive.[21]

Section 6-A of the Delhi Special Police Establishment Act, 1946 gave sanctioning power to high-ranking bureaucrats for the start of an investigation or inquiry by the Central Bureau of Investigation into an offence under Prevention of Corruption Act, 1988. Thus, it can be inferred that the decision-making authority has been given to the same officials whose misdeeds and illegalities may have to be inquired into. The Supreme Court herein referred to the cases of *Centre for Public Interest Litigation* v. *Union of India*[22] and *Manohar Lal Sharma* v. *Principal Secretary*[23], wherein the Supreme Court had repeatedly emphasized on the fact that the rule of law needs to be preserved by preventing the CBI from any kind of executive influence.[24] Such influence, the court felt, could derail the process of investigation and result in inaction on part of the CBI.

The Court thus found the influence of the executive on the investigative process quite discomforting and felt that this structure of sanctioning goes against the very essence of rule of law.

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[20] (1980) 1 S.C.C. 554 (India).
[21] *Id.*
[22] (2012) 3 S.C.C. 1 (India).
[23] (2014) 2 S.C.C. 532 (India).
[24] *Id.*

c) The necessity for eradication of the evil of corruption

An elaborate discussion on the issue of corruption took place during the course of the judgment. The Supreme Court stated that corruption was the biggest menace that the country was facing and efficient policy decisions for tackling corruption were the need of the hour.

The Supreme Court reflected on the case of *State of M.P.* v. *Ram Singh,*[25] which emphasized on the fact that a huge sum of public money had always stayed in the hands of public servants and these public servants have always had wide amount of discretion in the usage of this public money.[26] This wide discretion had lured them to the glittering shine of wealth and property.[27] The case of *Shobha Suresh Jumanji* v. *Appellate Tribunal, Forfeited Property and Anr.*[28] was also taken note of and the Supreme Court emphasized on the fact that in the mad race to become rich, the moral standards of the people had declined, which had led to the growth of corruption.[29] The Supreme Court also discussed the fact that the case of *Sanjiv Kumar* v. *State of Haryana*[30] had brought to the forefront the rampant corruption that was prevalent in the corridors of politics and bureaucracy.

The Supreme Court stated that any policy decision that hinders the prevention of corruption couldn't be allowed to exist. In this light, the recommendations of the N.N. Vohra committee, which was constituted in 1993, were also discussed.The committee had observed the prevalence of a strong link between criminals and senior government functionaries that was leading to huge corruption in the country.

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[25] (2000) 5 S.C.C. 88 (India).
[26] *Id.*
[27] *Id.*
[28] (2001) 5 S.C.C. 755(India).
[29] *Id.*
[30] (2005) 5 S.C.C. 517(India).

The court emphasized on the fact that section 6-A of the Delhi Special Police Establishment Act, 1946 would act as a barrier in the prevention of corruption that is rampant in government administration. The prior sanctioning power that is given to the government would put the criminal-bureaucratic nexus in a position to block inquiry against a public servant and thus would aid in the continuation of their activities.

Hence the court stated that the said section goes against the very objective for which The Prevention of Corruption Act, 1988 came into existence and thus should be struck down.

Thus the above-mentioned aspects were the major themes on the lines of which the decision in the case was given. From the analysis of the judgment, it becomes amply clear that the major theme throughout the course of the judgment remained article 14, and the arbitrariness that was caused as a result of the section. A long and engaging discussion on the constitutional doctrine of article 14 took place, through which, the protection given under section 6-A was declared unconstitutional.

3. FLAWS IN THE JUDGMENT AND THE UNATTENDED LANDSCAPE

The judgment in this particular case dealt with a subject that was being constantly debated since a long period of time. This judgment would become highly important in terms of the precedent that it would set for the future judgments. Thus the emphasis on the judgment should have been on covering all aspects of law that affects prior sanctioning in case of prosecution of public servants. However the judgment has not dealt with certain crucial aspects that it could have easily covered during the course of its discussion on the prior sanctioning power of the government. The judgment also appears to be shallow in certain aspects, where the Supreme Court could have easily taken a different stand that appears more logical.

Since the facts mostly revolved around prior sanctioning by the government, the court, apart from section 6-A of the Delhi Special Police Establishment Act, 1946, could have also concentrated and cleared its position on section 197 of The Code of Criminal Procedure, 1973. Section 197 creates a bar with respect to prosecution inasmuch as it talks about a prior sanction of the government, while prosecuting officers who cannot be removed without sanction from the government, if the offence was committed while the person was employed in connection with the affairs of the state and while acting or purporting to act in the discharge of his/her official duty.[31]

Certain cases become important in this respect such as the case of *B. Saha* v. *M.S. Kochar*,[32] where it was emphasized that any offence committed by a public servant during the discharge of his/her official duties would be covered by this section.[33] The case of *Baijnath* v. *State of Madhya Pradesh*[34] reiterated the same principle and held that the acid test for attraction of section 197 of The Code of Criminal Procedure, 1973 is whether the act was done by the virtue of the office of the public servant or not. Further it was also held that this inference would vary with the facts and circumstances of each and every case.[35] The inseparability of the act from the official duty was also emphasized in the case of *Centre for Public Interest Litigation* v. *Union of India*.[36]

Thus two questions arise in the context of section 197 in this particular case:

i. Whether sanctioning provision as provided in section 197 of The Code of Criminal Procedure, 1973 extents to corruption cases.

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[31] CODE CRIM. PROC. § 197.
[32] A.I.R. 1979 S.C. 1841 (India).
[33] *Id.*
[34] A.I.R. 1966 S.C. 220 (India).
[35] *Id.*
[36] A.I.R. 2005 S.C. 4413 (India).

ii. Whether a sanction can be denied for an offence committed under The Prevention of Corruption Act, 1988, as per section 197 of the Code of Criminal Procedure, 1973.

It appears to be clear from the reading of the Prevention of Corruption Act, 1988 that a check on frivolous complaints against government officials has already been put in the form of section 19 of The Prevention of Corruption Act, 1988. This section is similar to section 197 of The Code of Criminal Procedure, 1973 and provides for a prior sanction while prosecuting a person who cannot be removed from his/her office without the sanction of the government.[37] While section 19 of the Prevention of Corruption Act, 1988 only deals with sections 7,10,11,13 and 15 of the Prevention of Corruption Act, 1988,[38] section 197 deals with any act that is done in discharge of the official duty.[39] Thus in this context, section 6-A becomes quite redundant. Hence the Supreme Court should have discussed the irrelevance of section 6-A of the Delhi Special Police Establishment Act, 1946 vis-à-vis section 197 of The Code of Criminal Procedure, 1973 and should have made the law clear on that aspect.

The Supreme Court in its judgment did pay emphasis to the fact that a screening mechanism is required to ensure that government servants do not get harassed by frivolous complaints, but it did not make it clear as to what and who could constitute this screening mechanism. In the case of *Vineet Narain* v. *Union of India*[40] also, the Supreme Court had emphasized on the fact that in cases where corrupt motive cannot be proved from direct evidence, the help of people who are experts in the same field as the accused need to be taken to ascertain the motive.[41] It stated that the Central Bureau of Investigation should have people having expertise in analyzing and

[37] Prevention of Corruption Act, No. 46 of 1988, §19, INDIA CODE.
[38] *Id.*
[39] A.I.R. 1979 S.C. 1841 (India).
[40] A.I.R. 1998 S.C. 889 (India).
[41] *Id.*

ascertaining the motive behind bureaucratic decision-making.[42] If such an infrastructure is absent, then independent experts of such fields need to be consulted but the final word would be that of the Central Bureau of Investigation.[43]

Moreover the case of *R.S. Nayak* v. *A.R. Antulay*[44] also becomes important in this light as it emphasized on the fact that the authority competent to remove a public servant should be higher in the vertical hierarchy to the person as such authority would only have the information about the nature and work of the public servant and would be able to judge whether the public servant has abused his/her position or not.[45]

A problematic situation is created in relation to this aspect as a result of the judgment delivered on 6th May 2014, as the only screening mechanism that is now left after the judgment is that of the Central Bureau of Investigation, which does not have the required expertise to screen such complaints. Thus this can result in a huge number of frivolous complaints against the government employees and subsequent harassment. Thus the Court should have taken note of this aspect and should have given the judgment accordingly.

More amount of emphasis should have also been paid on the case of *K Veeraswami* v. *Union of India and Ors.*[46] This case was one of the first cases to emphasize on the aspect of requirement of sanctions for prosecution in certain cases but mostly dealt with such sanctioning required for the prosecution of judges. It was clearly held in this case that for prosecution of judges of the High Courts and the Supreme Court, the sanctioning authority would be the President, but the President could only give such sanction after

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[42] *Id.*
[43] *Id.*
[44] (1984) 2 S.C.R. 495(India).
[45] *Id.*
[46] (1991) 3 S.C.R. 189 (India).

consultation with the Chief Justice of India.[47] The main reason given for such a stand taken by the Supreme Court was the protection of harassment of constitutional authorities, in this case being the judges, and for the protection of the independence of judiciary, which could be hampered if unabated prosecution power is given to the executive.

There are various sanctioning protections that have been constitutionally available to the judges such as section 77 of the Indian Penal Code, 1860, which prevents prosecution of the judges when the judge is acting judicially in the exercise of any power, which he believes in good faith to have been given to him.[48] Judiciary, since long, has been seen as a moral and sanctified institution in India. I think it's time we depart from this notion, especially in light of recent events such as the sexual harassment cases against two prominent judges of the Supreme Court. Moreover, the allegations of corruption and subsequent impeachment proceedings against judges such as Justice Soumitra Sen and Justice P.D. Dinakaran have further diluted the ethical fiber of judiciary.

The Supreme Court had a good opportunity in the present case to analyze the sanctioning criteria in matters relating to the judiciary also, as in my opinion, the excessive protective layer formed around the judiciary needs to be relaxed a bit, while at the same time giving due regard to the independence of judiciary.

The Supreme Court should have also paid attention to the master-servant relationship that was highlighted in the *K Veeraswami case*. As per the contentions that were raised in that case, the relationship between the superior authority and the accused public servant was that of that of master and servant, as the superior authority's order could not be disobeyed at any cost.[49]

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[47] *Id.*
[48] PEN. CODE. § 77.
[49] *Id.*

The above-mentioned point becomes quite important in terms of the various pressures, which the bureaucrats face from officers who are superior to them as well as their political masters. Thus, many a time their actions are unintended and due to the irresistible pressure mounted on them by their seniors.

Although at the stage of trial or inquiry, such pressure can be taken note of, there needs to be appropriate changes in laws so that explicit provisions can be made for the protection of government officers against such pressures.

Although the judgment elaborately elucidates on an important and contentious point of law, certain changes in its scope and ambit along with the fixation of certain anomalies could have made it better and could have given more clarity to the stand of the constitutional bench.

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