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KASHMIR UNIVERSITY LAW REVIEW

With Best Compliments From

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CONTENTS

Efficacy of Lok Adalats in Revolutionising Access to Justice in Jammu and Kashmir: An Analysis

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Abstract

Lok Adalats and other alternative dispute resolution processes have been increasingly relied on by many courts to increase access to justice and to moderate the confinements of the formal adjudicatory framework. Lok Adalats are seen as providing a form of "informal justice" that is more empowering and participatory, while also less alienating and cheap. Being one of the ADR mechanism Lok Adalats are devised to afford easy access to justice without undue delay and at a lesser cost. In the context of growing dissatisfaction with the formal system of justice, the importance and need of dispute resolution by Lok Adalats to enhance access to justice has become imperative. The paper thus will provide an insight into obstacles that impede access to justice through courts in the UT of Jammu and Kashmir and the role that Lok Adalats can play in overcoming those. The broader issue that will be explored is whether Lok Adalats enhance access to justice or whether it detracts from the promotion of access to justice.

Key Words: *Union Territory*, *Access to Justice, Alternative Dispute Resolution (ADR), Lok Adalat, Civil Court, Awards, Building Blocks.*

I. Introduction

'Access to Justice' generally, implies the person's access to court or an assurance of legal representation. It has numerous principal components which include identification and acknowledgment of complaints, awareness and legal assistance, easy access to court, adjudication, granting of relief accompanied with enforcement of

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the relief so granted. Access to Justice envisages a powerful and efficacious legal system with rights set forth, supported by substantive laws and easily available to general public. The word 'Access' itself connotes a right to proceed towards remedy. It is not a modern concept but is in itself reflective of the primeval principle of Roman law '*ubi jus ibi remedium'*(where there is a right, there is a remedy). Access then is the exercise of this right to get ones due.[3] The Preamble to the Constitution of India also talks about Justice in the entirety of its structures i.e., Social, Economic and Political. Guaranteeing equivalent access to justice is a sacred command under Part III as well as an order guideline under Part IV of the Constitution. Speedy trial, cherished impliedly under Article 21[4] of the Indian Constitution, is one of the components of access to justice. However, real access to justice cannot be ensured unless cases are disposed off promptly. Justice that is rendered late has no significance. Consequently, one of the most important tasks of welfare state is to provide a dispute resolution system in which all citizens have equal access to enforce their rights. People who have suffered physically, rationally or monetarily swing to courts with incredible want to look for Justice. There is a commitment on part of Justice Delivery System to guarantee quick and reasonable justice without settling on its quality and in the meantime sticking to principles of reasonableness, balance and fairness. However, the system is marred by procedural complexity, formal atmosphere of court room, high costs involved, and time consuming litigation. The paper accordingly examines the efficacy of Lok Adalats as means to promote Access to Justice in the Union Territory of Jammu and Kashmir.

[3] Ranbir Singh, "Access to Justice and Legal Aid Services with special refrence to Specific Justice needs of the Underprivileged people", Available at: https:// *www.saarclaw.org/uploads-saarc/publications-images/1019-FILE.pdf,* visited on 20-02-2020.

[4] No person shall be deprived of his life or personal liberty except according to a procedure established by law.

II. Methodology:

Doctrinal research tools have been adopted in the study. The relevant literature available in books, Acts, Research Articles, Law Commission Reports, Government Data Base and Judicial decisions have been discussed and analysed to draw conclusions.

III. Access to justice: Impediments

Any talk on access to justice should definitely address the obstacles to such access. Regardless of existing legal and institutional methods to encourage access to justice, various difficulties arise in the administration of justice in India. One such challenge is faced by way of illiteracy and lack of awareness. A considerable amount of Indian population is illiterate which makes it difficult for them to be aware of the basic rights guaranteed under different laws and to enforce those rights. This to a great extent applies to literate class as well. Barring this, perhaps, the biggest barrier to access to justice are the problems of arrears, delays, disposals and pendency of cases before the courts. These are not sudden eruptions. With society becoming progressively perplexing, the residents have constantly resorted to legal framework for settling their disputes. The outcome has been unmanageable weight on the courts. Expanded urbanization, government interference in routine life of individuals, fading away of non-judicial institutions involved in dispute resolution have all contributed to litigation explosion in the regular courts of law, thus, making justice dispensation by courts a remote dream. According to the information accessible on National Judicial Data Grid there are over 3 crore cases pending in different courts in India and over 1,80,000 cases pending in union territory of Jammu and Kashmir.[5] Low ratios of judges per population, a lack of physical infrastructure, are some of the reasons among others, for inadequate access to justice in India and Jammu and

[5] Available at: https://njdg.ecourts.gov.in/njdgnew/index.php, visited on 5.4.2020

Kashmir in particular. The sanctioned number of judges in India is inadequate to deal with the load of cases at all the levels of courts. Above that there are vacancies even in that number also. There are 20 judges per 1 million people in India[6], The Law Commission in its 120th report submitted in 1987, examined the problem of understaffing of judiciary and recommended 50 judges per million of population instead of that time number of 10[7]. In its 245th report also, Law Commission laid emphasis on adequate judge strength for the subordinate judiciary.[8] These problems have to be solved without any delay, we are racing against time. A problem avoided turns into a crisis; and the crisis not mastered can turn into disaster further down the road.[9] In the context of growing dissatisfaction with the formal system of justice, the importance and need of Alternative Dispute Resolution (including Lok Adalats) to enhance access to justice becomes imperative. The same was emphasized by the Law Commission in its 129th report.[10] The report pressed for the need to look outside the then extant system for remedies and suggested several alternative ways of dispute resolution.[11]

IV. Lok Adalats: Designing and Building Blocks

The Lok Adalat framework is a quick method of redressal. It avoids frequent adjournments, protracted contentions, limits questioning and proof to applicable issues, embraces solid demeanour of co-activity among Bar and Bench and supports bargain, settlements, compromise and assertion. It depends on the rule that it is smarter to settle the issue instead to battle in the court.

[6] Available at: https://www.livemint.com/politics/news/there-are-20-judges-per-10-lakh-people-in-india-govt-15494571641 21.html visited on: 10.2.2020.
[7] Law Commission of India, 120th Report on Manpower Planning in Judiciary: A Blueprint (1987).
[8] Law Commission of India, 245th Report, Arrears and Backlog: Creating Additional Judicial (wo)manpower (2014).
[9] N. A. Palkhivala, *We the People* 42 (Strand Book Stall, Fort, Bombay, 1999).
[10] Law Commission of India, 129th Report on Urban Legislation Mediation as Alternative to Litigation (1988).
[11] *Ibid*

The system is intended to act as a safety valve to relieve the mounting pressure on the courts.[12] The Lok Adalat has social favourable position of seeing the parties returning cheerfully to their particular homes soothed from quibbling and ill will waiting on up to ages. Settlements reached at Lok Adalats are not necessary according to legal principles. They have their eyes consistently on social objectives like ending feuds instead of pending disputes, re-establishing harmony in family and community and furthermore instilling a sense of settling the disputes amicably. The Legal Services Authorities Act, 1987, was passed by the Indian Parliament to ensure free legal services to the weaker sections of society and for the purpose of establishing Lok Adalats on a uniform basis throughout the country. Having emerged as the outcome of consolidated efforts to sub serve the aspirations of equal justice to its seekers, the underlying reason behind its enactment is to effectuate the objectives enshrined in Article 39-A[13] of the Constitution**.** The Act seeks to bring justice closer to home through the instruments of legal aid and Lok Adalats. In August 2019, the Parliament passed the J&K Re-organisation Act 2019, which came into force on 30.10.2019, by which the State of J&K was bifurcated into two Union Territories called UT of J&K and UT of Ladakh. By virtue of the same legislation, J&K State Legal Services Authority Act 1997 was repealed and the Legal Services Authority Act 1987 (Central Act) came into force in the UT of J&K and Ladakh. The first part of the Act deals extensively with the constitution and functions of various authorities and legal aid. The subsequent part lays down the organization, procedure and functioning of Lok Adalats.

[12] William Mark, "Impression of a Lok Adalat" The Lawyers 8 (1990).

[13] **Equal justice and free legal aid:** The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

V. Statutory Scheme of Lok Adalats

The traditional meaning with which the term Lok Adalat has been associated with has not been altered by the Legal Services Authorities Act, 1987.[14] Although literally the term Lok Adalat means people's court yet there are only few features that resemble with formal courts. Like courts, they too, are official instrumentalities constituted and recognized by the State to deliver justice.[15] They resolve disputes after careful deliberations as courts do thus qualifying as people's courts in letter and spirit.[16] Legal Services Authorities Act envisages creation of two types of Lok Adalats. One constituted under section 19 of the Act discharging only conciliatory functions with no adjudicatory powers and the other under Section 22B of the Act having both conciliatory and adjudicatory functions. This kind of Lok Adalat is called Permanent Lok Adalat.

VI. Constitution of Lok Adalats

The Act provides for establishment of Lok Adalats at State, District and Taluka levels.[17] Albeit no particular mention is made with respect to the association of Lok Adalats at the village level, disputes that emerge at the village level might be taken for settlement by the Lok Adalats established by the District Legal Services Authorities or Taluka Legal Services Authorities.

[14] N.R. Madhava Menon, "Lok Adalat : People's Programme for Speedy Justice" 13 (2) IBR 129 (1986).
[15] K. M. H. Rayappa, "Lok Adalat: Objectives, Prerequisites, Strategies and Organization" 14 (4) IBR 711 (1987).
[16] S. K. Sarkar, *Law Relating to Lok Adalats and Legal Aid* 104 (Orient Publishing Company, Allahabad, 1st Ed., 2006).
[17] Organization of Lok Adalats – Section 19 (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluka Legal Services Committee may organize Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

VII. Organisation of Lok Adalats

Lok Adalats might be held at regular intervals and at such places as authorities deem fit. Despite the fact that Lok Adalats are a fixed and continuous institution, its recurrence of sittings is usually determined by the Legal Services Authorities concerned. [18] Information as to the date, place, time, names of the panel members and the cases to be taken up in Lok Adalats, is made available well ahead of time.[19]

VIII. Composition of Lok Adalats

Lok Adalats are to consist of three members -sitting or retired judicial officer, a member of the legal profession and other person which includes a social worker of repute who is engaged in the upliftment of the weaker sections of the people, including the Scheduled Castes, the Scheduled Tribes, women, children, rural and urban labour and is interested in the implementation of legal services schemes or programmes. It is to be guided by the principles of justice, equity, fair play and other legal principles while determining any reference before it. [20] Thus composition mirrors a reasonable mix of people well versed in law with sufficient experience in social assistance. The main aim behind inclusion of a social worker preferably a woman is to avoid technicalities and focus on ensuring a fair and equitably justice system based on principles of equity, justice and good conscience.

[18] *Ibid.*

[19] Regulations 3-5,NALSA (Lok Adalats) Regulations,2009, where prior intimation of the proposal to hold Lok Adalats to the State Legal Services Authority and notice to the parties concerned is stipulated.

[20] Section 19 (3) and (4) Legal Services Authorities Act 1987. The number qualifications and experience of other members of the Lok Adalats are prescribed by the Central Government or State Government through rules in consultation with the Chief Justice of India or the Chief Justice of the High Court as the case may be.

IX. Jurisdiction and Competency of Lok Adalats

Lok Adalats are competent to decide any matter falling within their respective jurisdictions excluding those specifically barred by the Act.[21] Disputes which are already pending before the court[22] or which are falling within the jurisdiction of the court but are still not brought before it[23], can be brought before the Lok Adalats for settlement.[24] Thus both pending and pre- litigative matters can be brought for settlement before the Lok Adalats.

X. Scope and Ambit of Lok Adalats

Lok Adalats can take cognizance of the case only when a reference is made to it by the court under Section 20 or when the case is referred to it by the concerned authority or committee organizing the Lok Adalat under Section 20(2). Consent and volition of both the parties is a primary requisite for reference and settlement by Lok Adalats.[25] Matter can be referred to Lok Adalat at the behest of one of the parties as well but in such cases a reasonable opportunity of being heard is to be provided to the other party.[26] In *Bachan Kaur & Others v. Mega Lok Adalat & Others*[27], court held that in the circumstances, when neither the parties had agreed for settlement of their dispute by reference to Lok Adalat, nor was there any reference by the Tribunal to the Lok Adalat to settle the petitioner's claim, the Award made by the Lok Adalat, on the statements of learned counsel for the parties, cannot, therefore, be justified, for, the initial reference being bad in law, the subsequent consent of learned counsel for the petitioner's claim, cannot validate the Award of Lok Adalat which was otherwise debarred

[21] Section 19(5) specifies the jurisdiction and competency of the Lok Adalats. See also Regulations 9 and 10 of NALSA (Lok Adalats) Regulations , 2009.
[22] Section 19(5) (i) of Legal Services Authorities Act, 1987.
[23] *Id*., clause 5(ii).
[24] Regulation 12 of NALSA (Lok Adalats) Regulations , 2009.
[25] Section 20(2) Legal Service Authorities Act, 1987
[26] Section 20(1) (i) (a),(b) and (ii), Proviso to Section 20(1).
[27] Available at www.legalcrystal.com, visited on 08-2-2020.

from cognizance of petitioners' claim. In *Kishan Rao v. Bidar District Legal Services Authority*,[28] the question raised before the Karnataka High Court was whether the Lok Adalat could pass a decree when all the parties had not appeared before the Lok Adalat nor was notice issued to them. The Karnataka High Court interpreted Section 20(3) of the Legal Services Authorities Act to hold that all the parties to the suit must be present if the compromise was to be a valid one. The impugned decree was struck down as being a nullity by reason of violation of the principles of natural justice. In *Rajender Kumar Sharma v. Jyoti Sharma*[29], the Jammu and Kashmir High Court held that the object of vesting jurisdiction in Lok Adalat is to arrive at a compromise or settlement between the parties to a dispute in any case pending before any court for which Lok Adalat is organised. A dispute in respect of any case, pending before any court for which Lok Adalat is organised, means a dispute in relation thereto and not necessarily a dispute arising out of the disagreement between parties. It would not be appropriate to hold that unless there is a dispute between the parties in any case pending before any court; Lok Adalat shall have no jurisdiction to arrive at a compromise or settlement between such parties. When there is a disagreement between the parties in any case pending before a court for which Lok Adalat is organised, Lok Adalat shall have jurisdiction.

XI. Expeditious Disposal of Cases

Lok Adalats provide opportunity to the parties to amicably settle their disputes less expensively and most probably within a reasonable time frame. Accordingly, the Act lays down that where a reference is made to Lok Adalat it is required to arrive at a compromise or settlement with utmost expedition.[30] While speedy

[28] AIR 2001 Kar 407.
[29] 2009 (2) JKJ 18.
[30] Section 20 (4): Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the

disposal is one of the objectives of the Lok Adalats sufficient caution is exercised to ensure that justice isn't rushed in as much as the panel is required to be guided by the standards of justice, equity, fair play and other legitimate standards.[31]

XII. Court Fee Exemptions in Lok Adalats

One important merit of Lok Adalat is that no court fee is required to be paid by the parties. If case is first filed in the regular court of law, there is provision of refund of the court fee in case the matter has been compromised or settled.[32] In *S. Manilal Panicker v. Tito Abraham*[33], the Kerala High Court has held that where a dispute is settled upon a reference either under Section 20 of the Legal Services Authorities Act or under Section 89 of the Code of Civil Procedure,[34] it is Section 21 of the Legal Services Authorities Act, which will govern the question regarding the refund of court fee .The Court also mentioned that the entire court fee would have to be refunded in the manner provided in the Central Court Fees Act.

XIII. Lok Adalats Conferred Powers of Civil Court

The Legal Services Authorities Act confers powers of Civil Court on Lok Adalats in respect of summoning and examining of witnesses, discovery of documents, receiving evidence on

parties and shall be guided by the principles of justice, equity fair play and other legal principles.

[31] *Ibid.*

[32] Section 21(1) of Legal Services Authorities Act, 1987 Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court-fees Act, 1870 (7 of 1870).]

[33] AIR 2012 Kerala 51

[34] Section 89 of the Civil Procedure Code, inserted by Amendment Act, of 1999 states: Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for- (a) arbitration; (b) conciliation; (c*)* Judicial settlement including settlement through Lok Adalat; or *(*d*)*mediation.

affidavits and requisitioning public records.[35] All the proceedings before the Lok Adalats are deemed to be judicial proceedings within the meaning of certain provisions[36] of the Indian Penal Code 1860.

XIV. Awards passed by Lok Adalats

Every Award passed by Lok Adalat is deemed to be a decree of the Civil Court and is executable by that court.[37] The Supreme Court in the case of *P.T. Thomas v. Thomas Job*[38], in keeping with legislative intent observed that the award passed by the Lok Adalat is the decision of the Court itself though arrived at by a simpler method of conciliation instead of the process of arguments in court. Holding that the award of the Lok Adalat is fictionally deemed to be a decree of the Court the apex court was of the view that the court would have all the powers in relation thereto as it has in relation to a decree passed by itself and this power would include the power to extend time in appropriate cases. In another case,[39] observing that the Legal Services Authorities Act does not make out any distinction in reference to a Lok Adalat made by a civil court or a criminal court, tribunal, family court, rent control court, consumer redressal forum, motor accident claims tribunal and other forums of a similar nature, the Supreme Court further held that there is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in a case referred to it by a criminal court under Section 138 of the Negotiable Instruments Act and by virtue of the deeming provision, the order of the criminal court has to be treated as a decree capable of execution by a civil court. The Apex Court has therefore favourably regarded the power of the Lok Adalat to pass

[35] Section 22(1) (a) Legal Services Authorities Act, 1987
[36] Sections 193, 219 and 228 of IPC.
[37] Section 21(1) of the Legal Services Authorities Act, 1987.
[38] AIR 2005 SC 3575
[39] *K..N. Govind Kutty Menon v. C.D. Shaji*, AIR 2012 SC 719

an award which is deemed to be a decree capable of execution, in cases falling under the Negotiable Instruments Act. The award made after settlement is reached is final and binding on the parties.[40] In *Ram Ji v. New India Assurance Co. Ltd*[41], the Jammu and Kashmir High Court held that once an award is made by Lok Adalat in terms of settlement arrived at between the parties, it becomes final and binding on the parties as if it is a decree of civil court and no appeal shall lie. It is pertinent to mention here that Award of the Lok Adalat is effective as an estoppel on the parties in the same manner as the judgment of the court of law. The award cannot even be challenged by invoking Article 226 or 227 of the Constitution. However, the Courts seem to be open to the idea of an appeal in exceptional situations where the award is passed by a Lok Adalat without jurisdiction or without a compromise between the parties or in cases of impersonation or fraud.[42]

XV. Procedural Formalities

Lok Adalats are not bound to follow procedural laws. They are empowered to specify their own procedure.[43] Procedure should be flexible and in accordance with the principles of justice, equity, fair play and other legal principles.[44] Coercion or pressure as a means to secure compromise must not be practised.[45]

XVI. Lok Adalats as Catalyst to enhance Access to Justice in JK

The erstwhile State of Jammu and Kashmir has evinced its concern by giving a statutory base to the institution of Lok Adalat through the enactment of Jammu and Kashmir Legal Services Authorities

[40] Section 21(2) of the Legal Services Authorities Act, 1987.
[41] 2008(2) JKJ 492
[42] *Chaluvadi Murali Krishna v. District Legal Services Authority* AIR 2013 AP 41.
[43] Section 22(2) of Legal Services Authorities Act, 1987
[44] Section 22(4) of the Legal Services Authorities Act, 1987.
[45] Regulation 13 (3) of NALSA (Lok Adalats) Regulations, 2009.

Act, 1997 (presently supplanted by Legal Services Authorities Act, 1987). Besides facilitating legal assistance in courts, the Act, like its Indian counterpart had bestowed the institution of Lok Adalat with two wings for settlement of disputes at pre-trial and trial stage. From 1997 besides settling motor accident claims by awarding huge compensation, the institution has propelled its settlement drives in a wide assortment of petty criminal issues. The other areas in which the institution has received a meagre amount of reference are civil, matrimonial and family dispute and bank cases. There has been no reference for the settlement of the cases involving revenue, land acquisition and industrial dispute as shown in the Table-2 below.

Table -2: CASES SETTLED IN LOK ADALATS IN J&K STATE FROM 1991- 1999

Year	No. Of lok Adalats held	MACT cases	MAT cases	Civil cases	PCM	Family Disputes	Bank Cases	others	total	Compensation awarded
1997	13	292	49	38	48	-	-	-	427	Rs.290,65,189
1998	79	576	156	296	1031	28	13	663	2763	Rs.808,85,443
1999	19	106	7	91	808	16	30	-	1058	Rs.167,79,000
Total	123	1735	212	425	1887	14	43	663	5009	Rs.194,78,5303

MAT: Matrimonial Cases, PCM: Petty Criminal Cases
Source: Office of the J&K State Legal Services Authority, Srinagar

In all the cases, reference of dispute has been in respect of pending cases at the initiative of concerned courts and tribunals. One of the reasons behind reference of greater number of pending petty criminal matter and motor accident claims is the involvement of lesser amount of technical and the complex web which is otherwise utilized by the ordinary courts and tribunals for the disposal of such disputes under the legal system, leaving the lesser amount of hostility effects upon the parties which prompts them to lean towards rationality and negotiation. In civil and family disputes

comparatively larger involvement of adversarial complexity results in greater amount of hostility which the court finds difficult to remove. Today Lok Adalats, as one of the alternate dispute resolution mechanisms, have given a respite to people and helped in dealing with backlogs in Jammu and Kashmir. Apart from regular Lok Adalats being organised throughout the state by District Legal Services Authorities (DLSAs), Mega Lok Adalats, Mobile Lok Adalats are being held in respect of various cases like Matrimonial disputes, Motor Accidents Claims Cases, Bank recovery matters, compoundable criminal cases.[46] During the year 2013, 597 Lok Adalats were held in J&K State and 63,659 cases of different nature were settled in these Lok Adalats including 59,267 which were settled in National Lok Adalat held on 23rd November, 2013. In the National Lok Adalat MACT cases, Bank recovery matters, civil cases, forest cases, cases under SERFAISI Act were settled and Rs. 243045990 was awarded compensation in MACT cases and Rs. 455487777 was recovered in bank recovery cases. During the year 2014, 540 Lok Adalats were held in J&K and 1519 cases of different nature were settled and in the National Lok Adalat held on 6th December 2014, 116425 cases were settled and an amount of Rs, 20.73 crore were awarded in 642 MACT cases, an amount of Rs. 58, 09, 57,657 was recovered in Bank debt recovery cases, an amount of Rs. 49,499,357 were given in MGNREGA cases and an amount of Rupees. 63360000 were given compensation in Flood Disaster cases. In the year 2019 a total number of 55055 cases were settled by the Lok Adalats including MACT cases and Rs. 531469329.00 were awarded as compensation. Table 3 below shows the number of Lok Adalats held in UT of Jammu and Kashmir from 2000 to 2019.

[46] Office of the J&K State Legal Services Authority, Srinagar.

Table-3: Information of Lok Adalats held in J&K from 2000-2019

Year	No. of Lok Adalats held	MACT cases Settled	Total Cases Settled including MACT cases	Compensation Awarded (Rupees)
2000	132	331	3295	41169000.00
2001	122	239	2069	29737690.00
2002	148	494	2543	62844487.00
2003	234	633	4587	89759714.00
2004	213	527	3555	78779100.00
2005	295	571	3845	77289216.00
2006	376	604	28523	111581640.00
2007	341	756	7415	142381998.00
2008	287	775	12521	136547600.00
2009	287	801	16254	1444299777.00
2010	333	551	16582	133961269.00
2011	516	559	13474	120683780.00
2012	569	515	10883	139070999.00
2013	597	1033	63659	321402111.00
2014	545	924	132044	355525145.00
2015	538	1020	108792	311296619.00
2016	391	740	41377	286127476.00
2017	267	858	82281	312761519.00
2018	171	925	71264	399773706.00
2019	146	772	55055	531469329.00
Total	**6696**	**14506**	**685618**	**38354486190.00**

Source: Office of the J&K State Legal Services Authority, Srinagar

It is clear that a reasonable number of cases are taken up by Lok Adalats at the Tehsil, district and at the level of the High Court each year. A consistent growth in the number of cases heard by Lok Adalats has occurred since 1999. The data clearly gives us an indication that Lok Adalats can reduce the burden of formal courts thereby enhancing speedy justice. Only thing that requires to be done is to encourage people to settle their disputes through Lok Adalats.

XVII. Conclusions and Suggestions

Along these lines there is honourable endeavour on part of Legal Services Authorities in the UT of J&K to actualize the possibility of Lok Adalats. In spite of the fact that they might be wanting on numerous fronts one can't neglect to offer credit to the endeavours that they have put in. The monetary plausibility and reduced expenditure to parties are factors that advance Lok Adalats and their need in the UT of Jammu and Kashmir. Lok Adalats in Jammu and Kashmir have not only come to stay but have established their permanent role or position as an effective means of Access to Justice. Theoretically speaking, the Legal Services Authorities Acts has laid down a strong framework for effective Access to Justice in the UT of J&K. It is conceded that Lok Adalats in no way form the main compelling instruments of justice and that there are other potential methods for dispute settlement. Be that as it may, treating Lok Adalats only as a supplemental system of dispute settlement will repress their development, thereby denying a successful Access to Justice framework for the State. Lok Adalat may be an initial step towards the vast expanse of alternative dispute resolution systems but it is a harbinger of a new idea and therefore needs to be better stabilized and effectively implemented. Some suggestions that may help in improving the justice rendered by Lok Adalats include:

1. More issues ought to be brought within the purview of Lok Adalats, for example, intellectual property disputes, environment matters, disputes relating to education system, cyber-crimes, taxation matters, disputes relating to professional services.

2. Lok Adalats should be vested with the power of passing interim orders so as to prevent the parties from rendering the Lok Adalat proceedings ineffective.

3. Massive awareness programmes regarding benefits of Lok Adalats should be organised by Legal Services Authorities, Law

Schools and other stakeholders to encourage people to refer their disputes at pre-trial stage itself.

4. Lawyers should rise above their interests to encourage people to settle their disputes through Lok Adalats.

5. The independent monitoring cells should be established at the district, division to monitor the functioning of Lok Adalats as a watchdog in their respective areas.

Trial by Media- Freedom of Speech at Crossroads

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Abstract

Freedom of expression incorporated in in Article 19(1) of the constitution remains an important facilitator for widespread engagement within a democratic atmosphere. Media gets freedom of press under Article 19(1) (a) of the constitution of India which provides for freedom of speech and expression. By virtue of this freedom, media goes on reporting the news and publishing the articles based on the interviews of the witnesses and other parties regarding the matters which are sub judice. This paper mainly focuses on the constitutionality of media trials.

Key words: Constitution, media trial, freedom of expression

I. Introduction

A general perception has started in building that media in the name of freedom of speech and expression is acting as a public court and pronouncing guilt even before the completion of formal investigation and trial in accordance with law. Reconciliation of freedom and authority is said to be the central problem of a modern government. The specific form in which this general issue present itself in democracies today is the conflict between individual rights and the demand of the positive state for modification of these rights in the pursuit of general welfare and rule of law.

Freedom of media or press lies at the foundation of all democratic organisations. It has a special role to play in providing a forum for free discussion for the proper and healthy functioning of democracy. The right to honest and fair criticism on matters of

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public concern is a source of strength to the community. It is an extension of the public eye and its penetrating gaze can not only twist human dignity in life and death but strip its victims of privacy and dignity.

II. Freedom of Press:

The concept of a written constitution is one of the unique contributions that the United States has made to the art of government. The US constitution which has been now in effect since 1789 remains the oldest written constitution in use. It's long life seems even remarkable when we consider the changes that have taken place in the US since the constitutional convention of 1787. The freedom of press was mentioned expressly in the US constitution. The first amendment (1791) provided:

> The congress shall make no laws respecting the establishment of religion or prohibiting the exercise thereof, or abridging the freedom of speech or of the press…….

There were initially no limitations imposed on any of the rights including the freedom of press. However, it was soon realised that for the maintenance of the public order etc. some limitations must of necessity be imposed upon the liberty of the individual. The Supreme Court in interpreting the constitution, had therefore, to invent the doctrine of " Police Power' of the states, under which they had inherent power to impose such restrictions as were necessary to protect the common good.

In India, unlike the American Constitution, Article 19(1)(a) of the Constitution does not expressly mention the liberty of the press. But it is a settled law now in India that the right to freedom of speech and expression in Article 19(1)(a) includes the liberty of the

press.[2] *In Secretary, Ministry of I&B v Cricket Association of Bengal* [3], the court observed that the game of cricket is a form of expression and the right includes the right to telecast and broadcast the matches. The court further pointed out that the government has no monopoly over electronic media and a citizen under Article 19(1)(a) has a right to telecast to the viewers any important event.

Unlike US, the idea of reasonable restrictions under Article 19(2) on the freedom of speech and expression was incorporated in the constitution. The restrictions imposed firstly should be reasonable and it must be in the interest of the general public i.e public order, health, security, morals, economic interests etc[4]. In *N.R.Bajpai v Union of India*[5], it was held that except where the challenge is on grounds of legislative incompetence or restriction imposed is ex-facie unreasonable, arbitrary or violative of the Constitution, restriction would be presumed to be valid and enforceable.

According to H.M. Seervai, Article 19(1)(a) does not present any serious problems or intractable difficulties. The questions which have most engaged the attention of the courts have centred round the restrictions to which they are subject.[6]

III. Constitutionality of Media Trials.

The ever-expanding viewership with the use of modern technologies of news gathering has given media organisations an unprecedented role in shaping popular opinion. However, media freedom also entails a certain degree of responsibility. In an increasingly competitive market for grabbing the attention of the viewers and readers, media reports often distort facts and create

[2] *Sakal Papers (P) Ltd v Union of India* AIR 1962 SC 305. *Brij Bushan v State of Delhi* AIR 1950 SC 129.
[3] (1995) 2SCC 161.
[4] *Municpal Corporation of the City of Ahmedabad v Jan Mohammad Usnambhai* (1983) 3 SCC 20.
[5] (2012) 4 SCC 653.
[6] H.M.Seervai, Constitutional Law of India, Vol. 1 4th edn (1991) P.693.

sensationalistion. The pursuit of commercial interests also motivates the use of intrusive news gathering practices which tend to impede the privacy of the people who happen to be the subject of such coverage. Television channels especially in a bid to increase their television rating points (TRPs) are resorting to sensationalised journalism with a view to earn a competitive edge over the others. Trial is essentially a process to be carried out by the courts of law. Trial by media constitutes the very antitheses of the rule of law which has the potential of leading to a miscarriage of justice. The problem even finds its worst manifestation when the media extensively covers subjudice matters by publishing information and opinons that are clearly prejudicial to the interests of the parties involved in litigation pending before the courts. Sensationalised news stories circulated by media have steadily gnawed at the guarantees of a right to a free trial and posed a grave threat to the presumption of innocence. It is the universal principle that a person accused of a crime should not be punished unless he has been given a trial and the guilt has been proved. Article 10 of the Universal Declaration of Human Rights, 1948 provides:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any charge against him

Article 11 provides:

> "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial in which he has all the guarantees necessary for his defence"

Article 14(1) of the International Covenant on Civil and Political Rights, 1966 provides,

> ……in the determination of any criminal charge against him, or his rights and

> obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law….

Article 14(2) provides

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

A number of decisions of the US Supreme Court concern the potentially dangerous impact the media can have upon trials. In the case of Billie Sol Estes[7] , the court set aside the conviction of a Texas financier for denial of 'due process of law' as during the pre-trial hearing extensive and obtrusive television coverage took place. The court laid down that televising of notorious criminal trials is indeed prohibited by the 'due process of law' clause of the fourteenth amendment.

In England, the House of Lords in the celebrated case of *Attorney General v BBC*[8], agreed that medial trials affect even the judges despite the claim of judicial superiority over human frailty and it was observed that a man may not be able to put that which he has seen, heard and read entirely out of his mind and that he may be subconsciously affected by it. In state of *Maharashtra v R.J.Gandhi*[9], in case of a rape of a girl, un-neccesary publicity by media coupled with the processions of the public caused a great harm to the victim. The court transferred the case from Kolapur in Maharashtra to Satara. As regards the freedom guaranteed by the Constitution, the court rightly cautioned that there is a procedure established by law governing criminal trials. A trial by media or

[7] 381 US 532 (1965)
[8] 2004 (72) DRJ 693.
[9] AIR 1997 SC 3986.

public agitation is the very antitheses of the rule of law which can well lead to a miscarriage of justice[10].

The press as the fourth pillar of democracy has the freedom of speech and expression like any other citizen under Article 19(1)(a) of the constitution. This freedom is however, subject to reasonable restrictions mentioned in clause (2) of the Article. It is well settled that a court, be it, subordinate judiciary, the High Court or the Supreme Court is competent to issue preventive injunction directing the media, print as well as electronic, not to publish any defamatory matter which has the effect of violating the privacy, or any other human right of a person or which tends to interfere with, or obstruct the administration of justice[11].

Emphasising on a free trial, the court in Sahara India Real Estate Corp v Securities Exchange Board of India[12] observed that if an aggrieved person genuinely apprehends on the basis of the content of the publication and its effect, an infringement of a right under Article 21 to a fair trial, he will be entitled to approach the appropriate writ court and seek an order of postponement of the offending publication/broadcast[13].

IV. Conclusion

The right to fair trail is an integral part of the Indian Criminal justice system like any other province of centralised jurisprudence. Alongwith the right to privacy, the right to fair trial flows from the broader fundamental right to life guaranteed by Article 21 of the Constitution of India. The right comprises many other rights that include the right to be presumed innocent unless and until proved guilty. These rights are no less important than the right enjoyed by media under Article 19(1)(a).The Law Commission of India in its

[10] Mamta Rao, "Constitutional Law" (1st edn., 2013)P.181.
[11] *Amar Singh v Union of India* (2011) 7 SCC 69 at 90.
[12] AIR 2012 SC 3829.
[13] Ibid at 3846; See, S.N.Singh, Constitutional Law-I SIL (2012) P.195.

200th report released in August, 2006 under the title, " Trial by Media: Freedom of Speech and Free Trial under the Criminal Procedure Code, 1973 elaborately deals with several aspects of the right relating to freedom of speech, freedom of press and freedom of free trial having regard to the extensive prejudicial coverage of crime and information about suspects and accused both in print and electronic media. Though number of measures are advocated and suggested in this regard, yet it is advisable that media requires not to be tamed by the government. The control should come from the courts laying down overseeing the limitations which the media should not cross. The Press Council of India has emerged as a shackled watchdog. There is a conspiracy of silence and clan-feeling which often defeats the peer review.

Copyright Protection in Digital Media: Emerging Challenges

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Abstract

The copyright law in historical annals is known to be the legacy of technology. It has undergone systematic changes keeping in view the nature, extent and domain of technology involved to secure the public interest of creativity, innovation and ingenuity. Its main thrust is to provide adequate incentives to authors and creators of diverse copyright works, on the one hand, and make such works accessible to the public on the other hand. The copyright law had to adjust itself between the need to award the creator and the desirability of making such works public. With the ubiquity of the Internet as a unique and wholly new medium of worldwide human communication all over the world, shrunk into a digital global village, the protection of copyright works has become a serious concern for lawyers, as well as, the other stakeholders. The Internet together with P2P computer networks makes it possible for an increasingly larger number of individuals to participate in collaborative information production, thereby enervate the efforts to provide incentives to original creators of intellectual property. The Internet enables the nearly-instantaneous, original quality reproduction of and world-wide, lightening-speed dissemination of copyrighted works. The above arresting features of Internet make itself emerge as "the world's biggest copy machine" The puzzles and paradoxes underlying the digital dilemma, by nature, are connected with the dichotomy between the notion of "information wants to be free" and the demands for stronger proprietary control of information in the digital environment. Against the above background this paper shall examine and critically analyze emerging issues regarding copyright protection in digital environment.

Key Words: Copyright, Digital Environment, Berne Convention, TRIPS Agreement, WIPO Treaties, Technological circumvention.

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I. Introduction

Law is a response to social challenges. Law while responding, answers such challenges and in the process develops itself. Copyright is the finest example one reaches when delving upon the relationship between law and technology.[1] On the one hand technology was the progenitor of copyright and copyright based industries; on the other hand, every new technology has posed a potential threat to the copyright-based industries. The industry consequently has put every new invention to its advantage in terms of creating newer forms of exploitation of art, widening markets and increasing profits.[2] Digital technology[3] is the latest one in the field at the international scale. The digital Age being the hallmark of the present millennium is a witness to yet another epoch unfurled by the Internet[4] and this junction is, in many ways, a defining moment in the long and chequered history of copyright.[5] The digital technology is a phenomenal impact on copyright works- its creation, dissemination, and protection.[6] Digitization has made it much easier to manipulate, reproduce, and distribute protected works. Digital content can be combined, altered, mixed, and manipulated easily. By enabling the making of perfect copies of copyrighted works for little cost, digital technology threatens to

[1] Mittal Raman: *From Printing Press to the Internet: The Stride of Copyright along with Technology,*vol. 1 I.P.Tech.L.J. (2006) at 21.
[2] *Ibid*. at 23.
[3] Digital technology is "the basic computer code that records all information ….in a series of zeroes and ones ". *See Copyright World Duels with Digital dilemma,*CHI. TRIB., (APRIL 1,1993) at 3.
[4] The Internet is made up of interlinked public communications network to which computers are connected. Anyone can gain access by use of an appropriate modem, usually with an appropriate agreement with an access provider (or an Internet Service Provider ISP), a person who provides a gateway to the Internet. Materials can be accessed, viewed, retrieved, printed and downloaded from all over the world and a vast amount of information is available. Virtually any type of work can be made available via the Internet.
[5] S*ee* Mittal, *Supra* note 1 at 22
[6] See *Visual Artists' Rights in a Digital Age,* Vol. 107, Harvard Law Review (1994) at 1978.

undermine the distribution systems and increase unauthorized use of copyright works.[7] The Internet experience demonstrates that traditional actors in the communications process (information producer, provider, publisher, intermediary user) take on new roles in the digital networked environment.[8] The Internet is structured as an 'open platform model' as opposed to the 'broadcasting model' of most existing media. On the Internet authors may freely disseminate their works without the intervention of traditional publishers: authors are becoming 'publishers'. Moreover, digital technology enables users to actively search and manipulate information available on the network: users are becoming 'authors'. Furthermore, traditional intermediaries, such as university libraries, may take on new roles as information providers: intermediaries are becoming publishers as well. This convergence of roles may eventually affect the existing system of rights allocation in copyright and neighbouring rights legislation.[9] Thus, in a way the Internet has "scrambled the beautifully arranged, dogmatically duly characterized and justified picture" of copy-related and non-copy related rights under the Berne Convention.[10] Digital interactive transmissions produce a certain hybrid form of making available to an unidentified number of individuals and let them consume the content at any time as they desire.[11]

II. Digital Technology and Copyright Issues

The decentralized nature of Internet makes it possible for any user to disseminate a work endlessly in the cyberspace through an end

[7] Burgess John: *Internet Creates a Computer Culture of Remote Intimacy,*WASH. POST, June 28,1993, at A_1,A_8.
[8] (Ed.) Hugenholtz P.Bernt: *The Future of Copyright in a Digital Environment,* (The Hague: Kluwer Law International,1996) at 84.
[9] *Ibid.*
[10] Ficsor Mihaly: *The Law of Copyright and the Internet,* (London, Oxford University Press, 2002) at 498.
[11] Dmytrenko Olena and Dempsey James X.:*Copyright and the Internet: Building National Legislative Frameworks Based on the International Copyright Law,*available at http://www.internetpolicy.net/practices/20041200copyright.pdf

number of outlets, thereby giving rise to global piracy. Estimates of global losses from pirated books, music and entertainment software range into billions of dollars. The Internet in a way presents a troublesome situation for copyright holders as the users become mass disseminators of others copyright material and creates disequilibrium between the authors and users.[12] The advent of digital technology, therefore presents legislators with a choice: either expand or modify existing 'old media notions' or redefine the catalogue of restricted acts, taking into account the peculiarities of the new environment in multiple facets discussed herein under.

i. The Right of Reproduction

Since the adoption of the Statute of Anne,[13] the mother of modern copyright law, the reproduction right has been at the heart of copyright law for more than three hundred years. Though recognized as a seminal right accorded to authors,[14] the reproduction right *per se* has not been unambiguously delimited by the international instruments for copyright protection.[15] Due to the lack of agreement on the right's scope and content, the original text for the Berne Convention did not include any provision that expressly protected the reproduction right.[16] Under Article 9(1) of the Berne Convention, copyright owners are granted "the exclusive right of authorizing the reproduction of these works, in any manner or form". However, the ambivalence of Article 9(1) of the Berne Convention, particularly the phrase "in any manner or form", has

[12] Gulla Rangit Kumar: *Digital Transformation of Copyright Laws and the Misty Indian Perspective,* Icfai Journal of Intellectual Property Rights, Vol. 6, No. 3 (Aug. 2007) at 20.
[13] Anne. C. 19 (1709) (Eng).
[14] Goldstein Paul: *International Copyright: Principles, Law and Practice,* (New York: Oxford University Press, 2001) at 249.
[15] Spoor Jaap H.: *The Impact of Copyright in Benelux Design Protection Law,* in (Ed.) P. Bernt Hugenholtz: *The Future of Copyright in a Digital Environment, Supra* note 8 at 69.
[16] Ricketson Sam: *The Berne Convention for the Protection of Literary and Artistic Works*: 1886-1986 (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at 370.

resulted in an international rift over the scope of the reproduction right.

The advent of the Internet makes the delimitation of the reproduction right more problematic in the digital age. Given that any transmission of protected works over the Internet involves the reproductions transitorily stored in the connected computers' RAM,[17] the question of whether right owners should be granted with the control over all temporary reproductions looms large amid the dematerialized and decentralized nature of the Internet.

By contrast, the WIPO Performances and Phonograms Treaty, 1996 contains two articles for the protection of the reproduction right enjoyed by Performers and Phonogram Producers respectively.[18] Under the WPPT Performers and Phonogram Producers are vested with "the exclusive right of authorizing the direct or indirect reproduction of their respective protected subjects in any manner or form".[19]

The Agreed statements attached to the WCCT and WPPT make it clear that the Article 9 of the Berne convention shall apply *mutatis mutandis* to the protection of the reproduction right in the digital environment.[20] At first glance, what is clear under these two agreed statements is that permanent digital copies, for example, copies stored in floppy disks or a computer's read only memory (ROM),

[17] Committee on Intellectual Property Rights and the Emerging Information Infrastructure: *The Digital Dilemma: Intellectual Property in the Information Age* (Washington D.C.: National Academy Press, 2000) at 28-31 ("When information is represented digitally, access inevitably means making a copy, even if only an ephemeral (temporary) copy. This copying action is deeply rooted in the way computers work").

[18] *See* WPPT, at Articles 7 and 11.

[19] Agreed Statement concerning Articles 7,11 and 16 of the WPPT.

[20] Neither Articles 7 and 11 of the WPPT nor the Agreed Statement concerning these two Articles elaborate on the relationship between the Article 9 (1) of the Berne Convention and reproduction right under the WPPT. However, given that these two Articles and their agreed statements are worded closely after Article 9 (1) of the Berne Convention or the Agreement concerning Article 1(4) of the WCT, it could be understood that Article 9(1) of the Berne Convention should apply *mutatis mutandis* to the protection of the reproduction right under the WPPT.

are protected by the WIPO Treaties 1996. Moreover, members are free to introduce new limitations or exceptions to the re-delimited reproduction right, subject to the three-step test. Yet the ordinary meaning of the second sentence of the agreed statements, in particular the term "storage", still remains largely ambiguous and obscure. Does it cover the making of temporary copies? One would answer in the negative that "in ordinary usage, 'storage' connotes a much higher level of activity than simple 'temporary' conduct".[21] On the contrary, the counter argument may simply go that the temporarily stored copy does in fact constitute a form of storage of the work. Without the direct reference to the phrase "permanent or temporary", the agreed statements, rather than fulfill the proclaimed ambitious task to provide the clarity, fail to determine the extent to which the reproduction right should be applied in the digital environment. The ambivalence of the treaty language leaves the question as to whether the temporary copies have been covered, potentially unsettled.

ii. The Right of Communication to the Public

Digital technology blurs the line between different categories of copyrightable works[22] and the means of communication to the public as well. On the other hand, in the midst of fast development in digital technology, the computer networks, in particular the Internet, brings forth a point-to-point way of transmitting works on an on-demand and interactive basis. The interactivity and individuality afforded by this new method of exploiting works, makes it possible for any member of the public to have the full

[21] Ginsberg Jane: *Achieving Balance in International Copyright Law* 26 Colum.J.L & Arts 201, 204(2003).

[22] Boon Daniel Seng Keit: *Copyright Norms and the Internet: The Problems of Works Convergence*, 2 SJICL, 76, 116 (1998) (Arguing that "digital technology has greatly blurred the line between the different categories of works that have been recognised under copyright law, so much so that perhaps we need a new perspective to deal with these problems").

discretion in determining the place and the time one is intended to access and use works in digital form. Against this backdrop, a new form of unitary, technology-neutral right of communication to the public is suggested to be ushered in to replace the fragmentary, technology-specific protection to this right.

Paradoxically, it seems that the Berne Convention has become an incomplete and outdated international instrument for the protection of the right of communication to the public, unable to respond to the challenges posed by the shift in the ways of exploiting works. First and foremost, the Berne Convention has lagged behind the trend in the digital conversions of the telecommunications, media and information technology. The right of communication to the public is regulated in a fragmented manner by the Berne Convention in terms of the means of communication.[23] Second, the scope of the right of communication to the public does not cover all the categories of copyrightable subject-matter, including computer programs, photographic works, works of pictorial art, graphic works.[24] These works however, have been and are being widely disseminated over the Internet yet are vulnerable to the unauthorized access and use. Further, it remains ambiguous under Berne Convention as to whether the traditional right of communication to the public would regulate interactive, on-demand transmission of works over the computer networks. Concern has been expressed that the Berne Convention may only be able to squarely regulate the point-to-multipoint communication

[23] The Berne Convention grants a fragmented right of communication to the public to the author. Article 11(1)(ii) gives the authors of dramatic, dramatico-musical works a right to authorise "any communication to the public of the performance of their works". Article 11^{biss} vests authors of literary and artistic works with a right to authorise any communication to the public" by wire or by broadcasting of the broadcast of the work", and "by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work". Article 11^{ter} grants authors of literary works with a right to authorise" any communication to the public of the recitational of their works". Articles 14 and 14^{biss} , accords a communication right to the authors in respect of cinematographic works and works underlying the cinematographic adaptation.

[24] *See* WIPO: *Basic Proposal, Supra* note 18 at Para 10.06.

of works, leaving right owners in the grey area where they probably do not have the right to exclude others from communicating their works to the public on a point-to-point basis with the interactive, on-demand nature.[25] The perceived loopholes or ambiguities within the Berne Convention, therefore, make it evident that relevant obligations need to be clarified by providing a unitary, technologically neutral right of communication to the public.

After rigorous debate on the WIPO Diplomatic Conference 1996, a broad right of communication to the public was eventually established by the WIPO Treaties 1996. Article 8 of the WCT provides that:

> Without prejudice to the provisions of Articles 11(1) (ii),11bis (1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(i) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

The WPPT contains two similar provisions that accord performers and phonogram producers with the right of making available to the public of fixed performances and phonograms respectively.[26]

Under the WIPO Treaties 1996, two categories of the minimum standards for the protection of the right of communication to the public have been set up. First, regarding the point-to-multipoint communication routinely involving an active sender and passive recipients, they usher in a unitary right of communication to the

[25] *Ibid.* at Para 10.13.
[26] *See* WPPT, at Articles 10 and 14.

public by wire or wireless means, technologically neutral in terms of copyrightable subject-matter and means of communication as well. This right fills up the lacunae existing in the Berne Convention and is designed to apply all copyrightable subject-matter, including computer programs and databases that are not protected by the fragmented right of communication to the public under the Berne Convention. By supplementing the relevant provisions in the Berne Convention[27] the new right of communication to the public is able to fully accommodate all communication of copyrighted subject-matter that may be developed in the future.

With respect to point-to-point communication routinely involving an active sender and an active recipient, the new right has been embedded in to the general right of communication to the public. The main objectives to establish this new right are first "to make it clear that interactive on-demand acts of communication are within the scope of copyright protection"[28]; and second "to harmonize the obligations" in order to "avoid any discrepancies that may be caused by different interpretations" of the traditional communication right under the Berne Convention.[29] Excluding the physical distribution of works, fixed performances and phonograms[30], the right of making available to the public specifically regulates interactive, on-demand online communication that is shiftable both in terms of place and time. Acts of communication subject to this new right, include those that enable members of the public to access protected subject-matter

[27] These provisions include Articles 11(1)(ii), 11^{bis}(1)(i) and (ii), 11^{ter}(1)(ii), 14(1)(ii) and 14^{bis}(1) of the Berne Convention.
[28] *See* WIPO: *Basic Proposal, Supra* note 18 at Para 10.11.
[29] *Ibid.,* at Para 10.14.
[30] The right of communication to the public would not apply to and would be distinguishable from the distribution of physical copies of copyrighted material, such as books and sound recordings. This mode of dissemination is regulated by the distribution right and rental right under the WIPO Treaties. *See* WCT, at Articles 6 and 7; WPPT, at Articles 8,9,12 and 13.

from "a place and at a time individually chosen by them". In this way the control over the interactive means of exploiting copyrightable subject-matter is conferred upon copyright owners under the rubric of the right of making available.[31] However, any other form of "exploitation by way of offering, at specified times, predetermined programs for reception by the general public"[32], fall outside the ambit of this new right.

Although the WIPO Treaties 1996 significantly expand the scope of the right of communication to the public, the following two issues have been left unsettled. First and foremost, the term "the public", has not been given a clear cut definition in the context of new right of communication to the public. The Endeavour's to delimit this term for the protection of the right of public performance have sparked much controversy just because technological developments in digital dissemination of works carry the effect of blurring the public-private distinction.[33] Given the increased difficulty to draw the line between private and public transmissions, it is understandable that the WIPO Treaties 1996 are silent on the benchmark with which the public-private distinction could be decided and leave the discretion to determine the scope of public communication to each contracting party.[34]

Moreover, the issue concerning the secondary liability of those who facilitate the infringing communication of works to the public, including Internet Service Providers (ISPs), has not yet been

[31] *See* IFPI: *The WIPO Treaties: Making Available Right*, available at: www.ifpi.org.sitecontent/library/wipo_treaties_making_available_right.pdf .
[32] Reinbothe J. and Lewinski S.:*The WIPO Treaties 1996:The WIPO Copyright Treaty and The WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002) at 109.
[33] *See* Goldstein, *Supra* note 14 at 5.7.2 .
[34] *The Basic Proposal* generally stated that the new right "excludes mere private communication by using the term 'public'", and furthermore "the public" consist of "individual members of the public who may access the works from different places at different times". However, it also admitted that it is a matter of national legislation and case law to define what is 'public'.*See* WIPO: *Basic Proposal, Supra* note 18 at Paras 10.12 and 10.17.

addressed.[35] The Agreed Statement concerning Article 8 of the WCT emphasizes that the mere provision of physical facilities, such as server space, communication connections, or facilities for the carriage and routing of signals, for enabling or making a communication "does not in itself amount to communication within the meaning of this Treaty or the Berne Convention".[36] What has been made clear by this statement is that ISP should not be held liable as passive conduits that merely offer "physical facilities" to bring the communication of information to fruition.[37] It does not, however, deal with the issue pertaining to the indirect liability of those who normally act as passive conduits for communication yet in fact actively participate in the infringing transmission of protected works.

iii. Legal Protection of Technological Measures

In response to the increasing ease of reproduction and disseminating works over the internet, copyright owners and their technology have designed entirely novel and more effective technological measures, to constrain physical access to and use of their copyrighted works. Early in 1991, the E.U. took the lead to provide legal protection against circumvention of technological measures applied to protect computer programs.[38] In the wake of this directive, the North America Free Trade Agreement (NAFTA)[39] provides for criminal and civil remedies against decoding the encrypted program carrying satellite signals and related acts.[40]

[35] *Ibid.,* at Para 10.21.
[36] *Ibid.,* at Para 10.10.
[37] *See* Ginsberg, *Supra* note 25 at 509-510.
[38] Council Directive 91/205/EEC of 14 May 1991 on the Legal Protection of Computer Programs (OJL 122, 17.5.1991). Article 7 (1)(c) of the Directive provides: "Any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose o which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program".
[39] North American Free Trade Agreement, December 17, 1992.
[40] *Ibid.,* at Article 1707.

The advent of Internet facilitates the manufacture and trafficking of circumvention devices, and the subsequent dissemination of copies of works whose technological protection measures have been circumvented, at a global scale, posing formidable challenges for the effective protection of copyright owner's interests. Therefore, an ambitious agenda to provide an effective and adequate protection for the technological measures deployed by copyright owners was adopted at the WIPO Diplomatic Conference 1996. Article 11 of the WCT provides that:

> Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Likewise, the WPPT contains a parallel provision for the protection of technological measures employed by performers and phonogram producers.[41]

(a) Circumvention of Digital Copyright Material

Under the WIPO Treaties 1996, contracting parties are duty-bound to provide "adequate and effective" legal protection against the "circumvention" of effective technological measures. At the same time, contracting parties are also obligated to prohibit circumventor's initial act of manufacturing devices primarily for the purpose of circumventing technological measures, as a sequel to pre-empt action leading to any illicit act of direct circumvention. However, it remains disputable as to whether the third party's manufacture and distribution of protection-defeating devices will be subject to the anti-circumvention provisions.

[41] *See* WPPT, at Article 18.

Article 13 of the *Basic Proposal* for the draft of WCT provided affirmative and unequivocal answers to the above controversy, by solely banning the preparatory activities that facilitate direct circumvention.[42] Obviously, the *Basic Proposal* focused on the prohibition of the preparatory activities rather than the direct circumvention.

Given that the acts of circumvention are not amenable to detection and control in the digital environment[43], the legal protection of technological measures can hardly be enforced in an effective manner if it focuses exclusively on the act of circumvention.[44] The absence of an effective oversight of the downstream supply of circumvention devices in the market place would result in considerable difficulties to deter the acts of circumvention thereby put the right owners' interests to serious prejudice. The absence of the protection against preparatory activities will arguably disturb the balance of copyright protection as proclaimed in the preambles of the WCT and WPPT. In terms of the required effective and adequate protection of the technological measures,

[42] The proposed Article13 provided:

1. Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not not authorised by the rightholder or the law.
2. Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred in Paragraph (1).
3. As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

See WIPO: *Basic Proposal, Supra* note 18.

[43] Marks Dean S. and Turnball Bruce H.: *Technical Protection Measures: The Intersection of Technology, Law and Commercial Licences*, 22 E.I.P.R. (2000) at 198, 201.

[44] *See* Reinbothe and Lewinski, *Supra* note 36 at 144.

contracting parties are therefore obligated to outlaw preparatory activities in the national anti-circumvention regulations.[45]

(b) Eligible Technological Measures for Protection

The WIPO Treaties 1996 mandate that the eligible technological measures for protection should be "effective" in nature, and differentiate the types of such technological measures employed by the right owners. Article 11 of WCT states that technological measures protected should be effective and used by authors in connection with the exercise of their rights under the WCT or Berne Convention. Moreover, the WIPO Treaties 1996 divide the protectable technological measures into two categories: access-control measures (effective technological measures "that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law") and rights-control measures (effective technological measures "that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention").[46]

(c) Knowledge Requirement

Under the WIPO Treaties 1996, there is no explicit knowledge requirement in the anti-circumvention provisions. By contrast, the *Basic Proposal* made it clear that a person would be penalized if he or she knew or had the reasonable grounds to know that the device in question would be used for or in the course of the unauthorized access to and use of works.[47] This knowledge requirement, therefore, focused on the purpose for which the device would be used.[48] However, it was not incorporated in the final texts of the WIPO Treaties 1996.

[45] *See* Ginsberg, *Supra* note 25 at 212.
[46] *See* Marks and Turnball, *Supra* note 47 at 201.
[47] *See* WIPO: *Basic Proposal, Supra* note 18 at para 13.02.
[48] *Ibid.*

(d) Effective Remedies

Finally, contracting parties are required to provide effective remedies against the circumvention of the technological measures. The WIPO Treaties 1996, however, are silent on concrete criteria to evaluate the effectiveness of remedies. According to the *Basic Proposal* contracting parties are free to choose appropriate remedies according to their own legal traditions.[49] National enforcement system, under the WCT and WPPT, should be effective and at least include expeditious remedies to prevent infringements and remedies which constitute deterrence to further infringements.[50] Therefore remedies against circumvention should be effective enough to "constitute a deterrent and a sufficient sanction" against illegal acts of circumvention.[51]

III. Legal Protection of Rights Management Information

It is important that whenever a work or an object of related rights is requested and transmitted over the network, the fact of the use is registered together with all the information necessary to ensure that the agreed payment can be transferred to the appropriate right owner(s). Various technologies in this respect are available or being developed which will enable the necessary feedback to the right owners. Such information may also function in conjunction with technological measures, as where a watermark serves to identify a work but may also be a requisite component for enabling the authorized use of a copyrighted work. It can also serve to facilitate online licensing. It is crucial, however, that such information is not removed or distorted, because the remuneration of the right owners would in that case not be paid at all, or it would be diverted. From a practical point of view, this would be as

[49] *Ibid*., at Para 13.04.
[50] *See* WCT, at Article 14; WPPT, at Article 23.
[51] *See* WIPO: *Basic Proposal, Supra* note 18 at Para 13.04.

prejudicial to the interests of the right owners as an outright infringement of rights.

The emergence of Rights Management Information (RMI)[52] facilitates the efficient exploitation of works of authorship, and offers a myriad of new opportunities for right owners to protect their moral rights in the digital age.[53] The RMI's vulnerability to unauthorized alteration or removal casts a long shadow on the protection of the integrity of RMI. Aimed to provide right owners with the sufficient protection of RMI attached to their works, the WIPO Treaties 1996 oblige contracting parties to provide effective protection against the manipulation of RMI and other relative acts that unreasonably prejudice right owners' interests.

Contrary to the general and nebulous language used in the anti-circumvention rules, the RMI-related provisions in the WIPO Treaties 1996 usher in a set of new minimum standards for the protection of the integrity of RMI. First, the treaties make it clear that the illegal acts of manipulating RMI include: (1) the removal or alteration of any electronic rights management information without authority[54]; and (2) the non-permissive distribution, importation for distribution, broadcast or communication to the public of works, knowing that electronic rights management information has been removed or altered without authority.[55] Second, the RMI provisions expressly provide for a two-layered knowledge requirement. With respect to the first layer of the knowledge requirement, persons with actual knowledge committing the aforementioned illegal act would be subject to the penalty. The person liable for second layer information of contents,

[52] 'Rights Management Information' is information relating to a protected work and any applicable protection scheme. *See* Olena Dmytrenko and James X. Dempsey, *Supra* note 11 at 18.

[53] Schlachter, Eric: *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet ,* (1997) 12 Berkeley Tech. L.J at 15.

[54] *See* WCT, at Art. 12; WPPT, at Art. 19.

[55] *Ibid.*

must have the knowledge or have reasonable grounds to know that his act will "induce, enable, facilitate or conceal an infringement of any right" covered by the WCT and WPPT, or the Berne Convention.[56] This, in fact, adds an additional benchmark to determine whether the aforementioned manipulation of RMI shall be penalized. It will exempt those who inadvertently make alteration or removal of RMI, and cause no threat to the legitimate interests of right owners.[57] Third, the scope of protectable RMI is unequivocally delimited. Under the WCT, the RMI eligible for protection includes the information which "identifies the work, the author of the work, the owner of any right in the work", or deal with "the terms and conditions of use of the work, and any numbers or codes that represent such information".[58] Moreover, such information should simultaneously be "attached to a copy of a work or appears in connection with the communication of a work to the public".[59]

Additionally, the agreed statement concerning Article 12 of the WCT further makes clear that the rights protected include both exclusive rights and rights of remuneration set forth in the WCT or Berne Convention. Meanwhile, contracting parties are not allowed to rely on Article 12 "to devise or implement rights management systems that would have the effect of imposing formalities", prohibiting the free movement of goods or impeding the enjoyment of rights under the WCT. This agreed statement is applicable *mutatis mutandis* to the RMI provision in the WPPT.[60]

[56] *Ibid.*
[57] This includes, for example, an alteration to the RMI attached to licensed copies of works for the purpose of correcting the RMI in question after a change in copyright ownership. *See* Samuelson Pamela: *The US Digital Agenda at WIPO,* 37 Va. J. Int'l (1997) at 417-18.
[58] *See* WCT, at Art. 19.
[59] *Ibid.*
[60] *See* Agreed Statement concerning Article 19 of the WPPT.

IV. Limitations and Exceptions

From earliest times in the history of copyright, it has been recognised that in certain cases limitations or exceptions should be placed on the exercise or scope of established rights and may be termed as "internal restrictions", i.e. they are actual or potential restrictions resulting from the provisions of the instrument itself.[61] The reasons given for imposing such restrictions may be based on considerations of public interest, prevention of monopoly control, etc. The limitations on copyright are necessary to keep the balance between two conflicting public interests: the public interest in rewarding creators and the public interest in the widest dissemination of their works, which is also the interest of the users of such works.[62] The restrictions may appear in the form of compulsory or statutory licenses (often involving procedural requisites, and payment of remuneration to the right owner), or (more frequently) permitted uses, not subject to formal procedures or payment, but in respect of which conditions may apply (e.g. statement of source).[63] The limitations on the author's exclusive rights may be imposed in order to facilitate the work's contribution to intellectual and cultural enrichment of the community. However, the limitations must not be such as to dampen the will to create and disseminate new works.

V. Copyright Enforcement in Digital Environment

Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility and legitimacy of laws based on geographical boundaries.[64] Digital technology has made copyright enforcement

[61] *See* Sterling J. A. L.: *World Copyright Law* (London, Sweet & Maxwell, 2003) at 434.
[62] Stewart Stephen M.: *International Copyright and Neighbouring Rights,*(London, Butterworths, 1989) at para 4.50.
[63] Permitted uses may, according to standpoint, be recognised as defences provided by law to actions for infringement, or "privileges".
[64] Johnson David R. And Post David: *Law and Borders: The Rise of Law in Cyberspace*, Stanford Law Review, vol. 48 (1996) at 1367.

difficult to achieve.[65] In the online environment, works such as videos, recordings of musical performances, and texts can be posted anywhere in the world, retrieved from databases in foreign countries, or made available by online service providers to subscribers located throughout the globe. Our system of international copyright protection, however, historically has been based on the application of national copyright laws with strict territorial effects and on the application of choice-of-law rules to determine which country's copyright laws would apply.[66] Such a network of national codes may have sufficed in an era when the distribution or performance of works occurred within easily identifiable and discrete geographic boundaries. However, "instant and simultaneous worldwide access to copyrighted works over digital networks fundamentally challenges territorial notions in copyright"[67] and complicates traditional choice-of-law doctrine because it is often difficult to determine where particular acts have occurred in order to determine which copyright law to apply.[68] Thus, as one commentator has asked: "[I]f authors and their works are no longer territorially tethered, can changes in the fundamental legal conceptions of existing regimes for the protection of authors be far behind?"[69] With so many potential locations where unauthorized use of the work may be violative of owner's rights,

[65] Austin Graeme W.: *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM-VLA J. L. & ARTS 1,3, (1999).

[66] Geller Paul Edward: *International Intellectual Property, Conflict of Laws and Internet Remedies*, 22 EUROP. INTELL. PROP. REV. 125 (2000), at 126-127(describing reliance of copyright treaties on national treatment and reliance of classic conflicts rule for intellectual property disputes on the "place of infringing acts").

[67] Reiendl Andreas P.: *Choosing Law in Cyberspace: Copyright Conflicts in Global Networks*, 19 MICH. J. INT'L. L. 799 (1998) at 800-801.

[68] *See* Geller, *Supra* note 86 at 126. ("The points were acts of infringement begin and end become indistinguishable as transactions cross multiple borders simultaneously in global, interactive networks").

[69] Ginsburg Jane C.: *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 SANTA CLARA COMPUTER & HIGH TECH. L. J. 347(1999) at 348-348.

whose law should determine whether the transmission or reproduction of a protected work constitutes infringement? The site where the work was uploaded? The site where the work was downloaded? The author's country of origin? Each location has a viable claim. Without harmonized standards conflicts will be hard fought and bitterly resolved.

VI. Online Dissemination and Liability of Internet Service Providers

The unprecedented power of dissemination created by the web, has posed challenge to the ability of copyright holders to enforce their ownership of intellectual property. The chief threat to copyright holders presented by the Internet's facilitation of information distribution is online piracy.[70] The normal remedy for copyright infringement is litigation against those who infringe. However, the number of computer based infringers is so large that copyright holders cannot find and sue them all. Due to the difficulty of enforcing copyrights against individual users of the Internet, disgruntled copyright owners have found the answer to this problem in placing legal liability for copyright infringement on those who allow and enable Internet pirates to exist, namely the Internet Service Providers (ISPs).[71] The question of the liability of ISPs in these circumstances has been the subject of intense discussion and negotiation, between the interested parties, and of national and regional legislation.[72] On one hand, copyright holders have legitimate interests in preventing infringement and receiving compensation for infringement. On the other hand, third party

[70] Skelton Timothy L.: *Internet Copyright Infringement and Service Providers: The Case for Negotiated Rule Making Alternative*, San Diego Law Review, 35, 1998, at 220.
[71] Some ISPs describe themselves as online service providers (OSPs). In this usage, ISP and OSP are synonyms. In general, the companies sometimes identified as OSPs offer an extensive online array of services of their own apart from the rest of the Internet. ISPs are often also described as information service providers, network service providers, service providers, etc.
[72] Sterling *Supra* note 66 at 538.

defendants understandably wonder why they should pay for another person's misbehavior.[73] A threshold question is therefore whether the ISP should be liable for infringement even where it does not know that an infringing activity is involved. On the one hand, there is the concept of strict liability, under which the ISP will be automatically guilty of infringement, even without knowledge of the facts that constitute infringement. Then, as far as public communication goes, there is the analogy of the postman who carries a sealed letter containing infringing material, without knowledge of the contents of the letter, and delivers it: common sense indicates that he should not be guilty of copyright infringement in these circumstances.[74] Next there is the aspect of authorization, or contributory or vicarious infringement. The ISP may not host the infringing material, but it may provide a link to another site where the infringing material is stored and accessible.[75] The right owners demand the highest possible protection against the unauthorized placing of protected material on the Internet and similar services, in particular because once material is in digital form and placed on a server site, it can be perfectly copied and transmitted throughout the world, *ad infinitum.*[76] Advocates who argue that ISPs should be held liable point to the fact that the latter profit from pirates' use of the Internet and are in good position, through contractual means or the implementation of applicable technologies, to police their subscriber's use of the Internet.[77] ISPs have, however, retaliated by arguing that they are mere passive carriers akin to telecommunication companies, and should accordingly be granted

[73] Yen Alfred C.: *Third Party Copyright Liability After Grokster*, Boston Law College, Legal Studies Research Paper Series, Research Paper 90, (June 2005) at 3.

[74] *See* Sterling, *Supra* note 66 at 538.
[75] *Ibid.*
[76] *Ibid.*
[77] Anil Samtani: *The Limits of Liability of Network Service Providers*, at 1-2, available at http://www.ssrn.com; visited on Sep. 11, 2008.

immunity or limitations from liability for copyright infringement committed by their users. There has been also concern that the imposition of liability on ISPs may stifle the growth of the Internet.[78]

VII. Copyright in Digital Media---Position under Indian Law

The Indian Copyright Law mainly consists of the Copyright Act 1957 [79]. The amendments in 1994 were a response to technological changes in the means of communication like broadcasting and telecasting and the emergence of new technology like computer software[80]. The Amendments introduced by the Copyright Amendment Act, 2012 are significant in terms of range as they address the challenges posed by the Internet and go beyond these challenges in their scope. The latest Amendment harmonizes the Copyright Act, 1957 with WCT and WPPT. With these amendments, the Indian Copyright Law has become a forward-looking piece of legislation and the general opinion is that, barring a few aspects, the amended Act is capable of facing copyright challenges of digital technologies including those of Internet. According to the Indian Act, 'publication' for purposes of copyright means, "making a work available to the public by issue of copies or by communicating the work to the public".[81]

Under the 2012 Amendment the definition of the term "communication to the public" has been amended. The erstwhile definition was applicable only to "works". If the work or performance is made available, whether simultaneously or at places and times chosen individually, this would also be considered as communication to 'public'. Thus, on demand services (video on

[78] *Ibid.*
[79] The latest amendment being, Act 27 of 2012 that came into force on 21 June, 2012.
[80] The 1999 amendments have made the copyright fully compatible with Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.
[81] This definition, by virtue of its non-restrictiveness, can be construed as covering electronic publishing and, thereby, 'publication' on the Internet.[81] *Vide* Section 3.

demand, music on demand); will clearly be considered as "communication to public".

Section 57 of the Act recognizes special rights of the author of the work, also known as "moral rights" viz. (i) Right to claim authorship of the work; and (ii) Right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation ("Right Against Distortion"). The said section also provided that such moral rights (except the right to claim authorship) could be exercised by legal representatives of the author Pursuant to the 2012 Amendment, the exclusion has been removed and the right to claim authorship can now be exercised by legal representatives of the author as well. Therefore, post death of the author, if he is not given credit for his work, then legal representatives, may take necessary action to remedy such breach. As per the Amendment, the right against distortion is available even after the expiry of the term of copyright. Earlier, it was available only against distortion, mutilation etc. one during the term of copyright of the work.

Section 52 of the Copyright Act, 1957 includes in itself the principle of limitation and exception as envisaged under Article 10 of WCT. The acts expressly allowed under Indian law include fair dealing with a literary, dramatic, musical or artistic work (not including a computer program) for the purpose of private and personal use including research, criticism or review[82], the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy in order to(1) utilize the computer programme for the purposes for which it was supplied; or (2) make back-up copies purely as a

[82] Along with an Explanation: "The storing of any work in any electronic medium for the above purposes, including the incidental storage of any computer programme which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.

temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied.

VIII. Copyright Protection: An Emerging Trend

The latest Copyright (Amendment) Act 2012 has introduced the vital changes to prepare ground for copyright protection in the emerging digital environment briefly stated as under:

i. Some of the exceptions (such as fair dealing, use for education purpose) which were earlier applicable only in relation to certain types of work (e.g. literary, dramatic and musical works), have been made applicable to all types of work;

ii. a fair dealing exception has been extended to the reporting of current events, including the reporting of a lecture delivered in public. Earlier, fair dealing exception was limited for (i) private or personal use, including research, and (ii) criticism or review, whether of that work or of any other work. Further, it has been clarified that the storing of any work in any electronic medium for the purposes mentioned in this clause, including the incidental storage of any computer programme which is not an infringing copy, does not constitute infringement.

iii. the transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public;

iv. the transient and incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder, unless the person responsible is aware or has reasonable grounds for believing that such storage is of an

infringing copy: Provided that if the person responsible for the storage of a copy, on a complaint from which any person has been prevented, he may require such person to produce an order within fourteen days from the competent court for the continued prevention of such storage;

v. the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work;

vi. the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device;

vii. the adaptation, reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format;

viii. The importation of copies of any literary or artistic work, such as labels, company logos or promotional or explanatory material, that is purely incidental to other lawfully.

As noted above digital technology has created host of issues which needed an immediate answer. In India a comprehensive process of reformulating copyright law was made recently by way of a major overhaul of copyright law.[83] It provided for punishment for those who in any way circumvent a technological measure applied for the purpose of protecting any of the rights conferred by the Copyright Act. However, few exceptions were carved out to pave

83 The Copyright (Amendment) Act, 2012, w.e.f. 21 June 2012.

for legitimate use of copyright material while encountering technology, which can be summed up as under[84]:

i. Doing of anything not expressly prohibited by this Act,

ii. Doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; or

iii. conducting any lawful investigation; or

iv. doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or

v. doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or

vi. Taking measures necessary in the interest of national security[85].

The scope of the exemption under this section should be restricted to owners or operators who are specially authorized by the owners to perform the task and should not be so wide so as to cover any operator in general[86]. One of the major breakthroughs made by India through these amendments was compliance with WIPO mandate without formally ratifying the WIPO Treaty.

New provisions have been inserted in relation to Right Management Information (RMI)[87]. Under the Amendment many

[84] See section 65A of the Copyright (Amendment) Act 2012.

[85] The act of abetting or aiding the circumvention of technology may also be an offence under this section. This section does not punish persons who circumvent technology for the purpose of doing anything which is necessary for testing the security of a computer system or a computer network with the authorization of its owner or operator.

[86] The time period for which the record should be retained under the proviso to Section 65 A (2) (a) has not been specified. Further, while the owner of copyright may avail of civil remedies in addition to criminal remedies against persons indulging in acts punishable under Section 65B, the civil remedy has not been extended in case of offences under Section 65A, which should have been extended as well.

[87] RMI is defined to mean:

a. the title or other information identifying the work or performance;

acts are considered as offences and are punishable with imprisonment which may extend to two years, as well as, fine[88]. The owner of copyright may also avail of civil remedies provided under Chapter XII against the persons indulging in such acts.

When comparing this section with the US Digital Millennium Copyright Act, we find that there are numerous differences. For instance, there is ambiguity as to how the term 'authority' is construed under the amended section. Furthermore, the DMCA makes exceptions for such activities by law enforcement, intelligence or other authorized government personnel, which is not the case in Section 65B. The exemptions as provided under Section 65A (2), should have also been made applicable in relation to Section 65B.

The 2012 Amendment has introduced a new Section 53 which provides a detailed procedure where the owner of the copyright can make an application to the Commissioner of Customs (or any other authorized officer) for seizing of infringing copies of works that are imported into India[89].After scrutiny of the evidence furnished by the owner of the right and on being satisfied, the Commissioner may treat infringing copies of the work as prohibited goods that have been imported into India, excluding goods in transit.

When any goods treated as prohibited under the above provision have been detained, the Customs Officer detaining them shall

b. the name of the author or performer;
c. the name and address of owners of rights;
d. terms and conditions regarding the use of rights; and
e. any number or code that represents the information referred to in sub-clauses (a) to (d),

but does not include any device or procedure intended to identify the user.

[88] a. Knowingly removing or altering any RMI without authority, or
b. knowingly distributing, importing for distribution, broadcasting or communicating to the public, without authority, copies of any work, or performance knowing that electronic RMI has been removed or altered without authority.

[89] This amendment seems to be in line with the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.

inform the importer as well as the person who gave notice, of the detention of such goods within forty-eight hours of their detention.

The present provision appears to be an aid to the copyright owner to prevent import of infringing copies into India. However, the Customs authorities have limited right to detain the goods till the copyright owner obtains court order.

The right holders will face difficulties to convince the authorities about their ownership of unregistered copyright and therefore, there is a need for guidelines to be issued in respect of unregistered copyright for better implementation of the object of this provision. Further, in the case of the *Gramophone Co. of India Ltd. v. B B Pandey*,[90] the Supreme Court of India concluded that the word 'import' in Sections 51 and 53 of the Act means 'bringing into India from outside India' and is not limited to importation for commerce only but includes importation for transit across the country. The moment goods enter India, even if it is on transit it is prone to violation of copyright. However, the Amendment has carved out "good in transit" from the "prohibited goods" for the purpose of this Section.

Section 30 of the Act has been amended by 2012 Amendment such that the owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by license in writing by him or by his duly authorized agent[91].

[90] 1984 (2) SCC 534. SC

[91] As per Section 30 of the Act, one of the conditions for the grant of a valid license was that the license was required to be made in "*writing"* and *"signed*" by the licensor. However, there was an evolution of various e-commerce online license agreements in relation to copyrightable works which were being undertaken (e.g. Click Wrap Software Licenses), although there was an anomaly to its validity. The reason for the anomaly being that though such licenses were in writing, they did not fulfill the requisite of being signed by the licensor. Further, the nature and uniqueness of these online licenses usually did not provide the licensor to affix his electronic signature, as required under the Information Technology Act, 2000.

The introduction of this amendment which provides that *signature* is no more a requisite for the grant of a valid license will resolve the anomaly and provide sanctity to online license agreements, provided the other conditions as specified under this Section 30 are fulfilled. The provisions relating to ISPs are specifically legislated in the Information Technology Act, 2000.[92]

Section 79 of the Act, limits the liability of ISPs under certain circumstances.[93] It reads:

> For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made there under for any third party information or data made available by him if he proves that the offense or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

The title of Section 79 of the IT Act [94] makes apparent the object behind the Section, which is to limit the liability of ISPs. The liability of ISPs could rise in a number of ways under different statutes. The liability could be criminal or civil in nature depending on various factors. The IT Act, 2000 seeks to create a filtering mechanism for determining the liability of ISPs. The idea is that liability of an ISP for his action or omission is first determined in accordance with the statute under which it arises and then, if at all, the ISP is held liable, his liability again be filtered through Section 79 of the IT Act. For example, if an ISP is accused of illegally distributing pirated copies of music, then his liability should be

[92] The internet service provider is now referred as network service provider and shall be deemed as an intermediary.
[93] *Ibid.,* at Section 79.
[94] (Ed.) Verma S. K. and Mittal Raman: *Legal Dimensions of Cyberspace*, (New Delhi, Indian Law Institute, 2004) at 150.

first determined under Section 51 (a)(ii) and Section 63 of the Copyright Act, 1957. If the ISP is found liable then his liability should again be tested on the touchstone of Section 79 of the IT Act, 2000[95]. To qualify for exemption, ISPs may neither initiate the transmission, select the receiver nor have any editorial control by selecting or modifying the material. Section 79 of the IT Act provides two circumstances under which an ISP can qualify for exemption from liability (1) Lack of knowledge (2) Exercise of due diligence.

It is to be noted that matters of a civil nature are always decided on a preponderance of probabilities and the burden of proof in such case is not to be discharged as conclusively as would be expected in a criminal trial. On the other hand, in criminal cases the prosecution must prove the guilt beyond a reasonable doubt and the burden of proof lies on the prosecution;[96] no presumption regarding an offence can be raised[97] and the onus is shifted to the accused only when the prosecution has led evidence which, if believed, would sustain conviction or which makes a *prima facie* case.[98]

So, the slippery wicket of burden of proof differs from statute to statute, depending on numerous factors. The expression used in Section 79 of the IT Act "*if he proves*"[99] imposes the burden of proving his innocence on the ISP in all circumstances and situations. This would be unfair to the ISPs considering that their

[95] In this context, the expression *"under this Act"* which has been used in section 79 has created some confusion. Apparently, this limitation of liability would be applicable only when the liability has arisen under the IT Act alone. This could not be the motive behind drafting Section 79 especially when the Act does not attempt to define the liability of ISP in any of its provisions; it only talks about limiting their liability. For the removal of doubts it is desirable that the expression *"under this Act"* be removed from Section 79.

[96] The Indian Evidence Act, 1872, at Section 105.
[97] 1974 Cr L.J. 509.
[98] AIR 1974 SC 778.
[99] The Information Technology Act, 2000, at Section 79.

liability could arise under various statutes of both civil and criminal nature. So, to be fair and logical this expression *"if he proves"* should be removed from Section 79 and the rules for burden of proof need to be determined in accordance with the specific statute under which an ISP has been charged.

IX. Need for International Harmonization

Given the borderless nature of the Internet and its ability of transmitting works almost at a lightning speed, copyright protection has become increasingly difficult.[100] The problems created by recent technological developments cannot be solved by the decisions of individual countries. With the Internet, copyrighted works remain vulnerable to outside piracy even if protected in the home country. Therefore, it is necessary to balance between easy infringement and expensive enforcement; it is also important to address the uncertainties involved in international litigation. No doubt, to some extent these uncertainties are common to all law suits, but in most other contexts there is, at least, a greater amount of precedent for successful results. The more uncertainty there is about the procedures of enforcement, applicable laws, or the likely results, the more unwilling copyright holders will be to try to enforce their rights abroad. The problem for a copyright holder is not only the potential loss of earnings due to infringement, but also the additional costs spent in unsuccessful litigation. Enforcing judgments would be easy if all the defendants were residents of the country of the court that rendered the judgment. In the case of foreign defendants, it would also be straightforward if they had

[100] WIPO: *Intellectual Property Reading Material*, (Geneva 1998) at 319 (noting that enforcement has become increasingly important in that the formidable expansion of technologies have made possible infringing uses of protected rights to an extent which was unthinkable some decades ago).

assets within that country.[101] However, foreign defendants with no assets in the forum country create a problem. It can be difficult to have national judgments enforced in the foreign country where the defendant resides or has assets, and it is also difficult, costly, and time consuming to need to pursue additional copyright litigation abroad.

The ubiquitous nature of online delivery systems necessitates the consideration of multinational enforcement[102], which will to some degree require the harmonization of domestic laws concerning enforcement measures and facilitate the cross-border protection of copyright in the digital age. Clear rules about the enforcement of preliminary injunctions and monetary judgments will diminish the inconvenience of dealing with the unknowns of how foreign judges apply their own substantive and procedural laws. Even if the cost of international litigation would only be marginally reduced, the increased certainty and probability of success would improve the balance between unfettered infringement and expensive enforcement.

X. Conclusion and Suggestions

The evolution of copyright has been closely linked to technological development. Whereas, most of the technologies made copyright protection more difficult, digital computers managed to alter the fundamental concepts behind copyright. These challenges to copyright industry have emerged at a time when the share of copyright in national economies is reaching unprecedented levels. It becomes critical to adjust the legal system to respond to the new technological developments in an effective and appropriate way, keeping in view the speed and pace of these developments. This will maintain balance between the

[101] *See* Symposium: *Copyright's Long Arm: Enforcing US Copyrights Abroad,* 24 Loy. L. A. ENT. L. REV. 45, 47 (2004).

[102] Ginsburg Jane: *Putting Cars on the 'Information Superhighway':Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. (1995) at 1485.

stakeholders be it uses or creators for the public interest. In order to do so the focus of the anti-circumvention regulation should be to target at the technologically sophisticated persons who have the potential to become circumventors, and the manufacturers and distributors of circumvention-enabling devices. In most circumstances, technologically sophisticated persons, albeit relatively small in number, have the technological know-how to bypass technological measures. On the contrary, ordinary users are by no means equipped with the sufficient technological know-how to make protection-defeating devices in order to circumvent technological measures.

Digital technology has made copyright enforcement difficult to achieve. It is necessary to balance between easy infringement and expensive enforcement, and to address the uncertainties involved in international litigation. As technology allows copyrighted materials to be transmitted easily around the globe without the authorization of the copyright owner, there is an increased need for protection without borders. A procedural mechanism for international litigation would serve to complement already existing substantive provisions. In order to augment enforcement the following measures may be taken:

I. The legal framework of Indian copyright law envisage penal and civil provisions to safeguard the interests of the creators, however, it is not free from hassles and hurdles which need to be eliminated.

II. The enforcement aspect of the provisions is a matter of great concern and there is an urgent need of building better administrative machinery for the enforcement of the provisions of the legislation which requires well-oiled enforcement machinery.

III. There is a need for trained and well-equipped specialized police force for detection and enforcement of provisions

relating to violation of copyright and there is also a need for change of the judicial mindset in dealing with copyright violations.

IV. There are still misconceptions, difficulties of access to courts, slow growth of copyright bar and delay in disposal of whatever cases reach the courts. It is submitted that redress and access to the adjudicatory machinery must be improved and this can be done in a better manner, if copyright or intellectual property tribunals manned by specialists in the areas are set up throughout the country.

V. The ubiquitous nature of Internet necessitates the consideration of multinational enforcement, which will to some degree require the harmonization of domestic laws concerning enforcement measures and facilitate the cross-border protection of copyright in the digital age. Diversities in basic theories and in the practice of national systems protecting copyright and related rights create obstacles to effective international and national implementation of protection of authors and other right owners.

VI. The experience and achievements of the harmonization programme of the European Community demonstrate the possibilities of bringing together important provisions of diverse national systems. The unity of legislative approach will, it is submitted, be the only effective way of dealing with the problems posed for the exercise of copyright and related rights in the borderless environment created by the Internet and other international communication systems.

VII. The provisions of the Berne Convention taken in conjunction with those of other relevant international instruments and the relevant regional instruments can, it is suggested, provide the basis for a unified global system of copyright, and, to be effective, future planning should be

based on moves towards a world copyright regulation which will incorporate harmonized rules on all fundamental issues.

VIII. Last but not the least, since, the pirate is using new technologies in the digital environment to infringe on the copyright and related rights, so in the same vein, the holders of these rights should use the very means to counter such actions of infringer. As renowned novelist Chinua Achebe once said the Engel bird says 'since man has learnt to shoot without missing, I have also learnt to fly without perching'.

IX. The recent Amendments to the Indian copyright law have certainly given room for using creative lawyering skills to develop and structure innovative business models to help the industries effectively deal with the changes.

A Perspective on Evolving Jurisprudence on Advance Medical Directives in India

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ABSTRACT

Article 21 accords sanctity to the right to life and personal liberty. Over the years the Constitutional Courts in India have given an expansive interpretation to the right to life by drawing inspiration from the dignity jurisprudence. Building upon the dignity jurisprudence the Apex Court has carved out a bundle of rights under Article 21 of the Constitution. Lately, the Supreme Court's judgment in Common Cause, a registered society v Union of India set out a legal regime for allowing the use of Advance Medical Directives in India. This judgment was founded upon the principle that the right to life within Article 21 of the Constitution recognizes the right of an individual to execute an Advance Medical Directive. This linkage between the right to life and advance medical directives is premised on the fundamental constitutional principle that the right to execute an advance medical directive is an affirmation of an individual's right of bodily integrity and self-determination which are duly protected. This paper is an attempt at unraveling the approach of the Constitutional Courts in setting out a legal regime for Advance Medical Directives within India by drawing linkages between the right to life and the right to die with dignity.

I. Introduction

The right to life is one of the basic human rights and the most cherished one among the list of rights recognized the world over. The right has been recognized across all jurisdictions. At the international plane, there are various international instruments that accord sanctity to human life. The Universal Declaration on Human Rights under Article 3 declares 'Everyone has the right to life, liberty, and security of person'. Similarly, International Covenant on Civil and Political Rights states in Article 6.1 "Every

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human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

Within the Constitution, the right to life has been recognized in Article 21 of the Constitution which provides that "No person shall be deprived of his right to life and personal liberty except in accordance with the procedure established by law." The term 'life' in this Article has been given an expansive interpretation by the Supreme Court by drawing inspiration from Justice Stephen Field's observation in Munn V Illinois. Justice Field in his dissenting opinion while expounding the meaning of the term 'life' in the Fifth and the Fourteenth Amendment of the US Constitution observed that

> By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question if its efficacy be not frittered away by judicial decision[3].

In Francis Coralie v Union Territory of Delhi, Justice Bhagwati applied this opinion of Justice Field with some modifications by observing that

> We think that the right to life includes the right to live with human dignity and all that goes along with

[3] Munn v Illinois 94 U.S. 113 (1876).

> it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self[4].

Over the years the Apex Court has carved out a bundle of rights under Article 21 of the Constitution and in the process enriching the extant rights jurisprudence in India. Some of the important rights that have been recognized within the paraphernalia of the 'right to life' include 'the right to livelihood'[5], right to shelter[6], 'the right to education'[7] etc. Right to life though sanctified by various national and internal legal instruments is a fragile right and vulnerable to interest-based interpretations[8]. One of the important illustrations of the vulnerability of right to life is in the context of debate revolving around sanctity of life and euthanasia. This issue has hogged the limelight in the contemporary discourse on the path that constitutional jurisprudence traversing world over. Ronald Dworkin aptly highlights the importance of this debate on the right to die in his inimitable style. According to Dworkin,

> We must therefore, begin by asking how does it matter to the critical success of our whole life how

[4] Francis Coralie Mullin v U.T.Delhi AIR 1981 SC 746.
[5] Ollga Tellis v Bombay Muncipal Corporation AIR 1986 SC 180
[6] Chameli Singh v State of UP AIR 1996 SC 1051
[7] Mohini Jain v State of Karnataka AIR 1992 SC 1858.
[8] Hans Georg Ziebertz, Francesco Zaccaria, *Euthanasia, Abortion, Death Penalty and Religion- The Right to Life and its Limitations* 3 (Springer, New York, 2019)..

> we die? We should distinguish between two different ways that it might matter because death is the far boundary of life, and every part of our life including the last is important; and because death is special and peculiarly significant event in the narratives of our lives like the final scene of a play with everything about it in the spotlight[9].

With the advancement of medical technology, it has been possible to prolong the life of terminally ill patients. Today, we are faced with a prospect where a clamour is raised by terminally ill patients or relatives of patients in permanent vegetative state pleading for accelerating the process of their death. This state of affairs has been brought to fore owing to the hapless conditions of patients whose lives are prolonged by artificial means but without regaining back the quality of life that they used to enjoy in the past. Such patients are in a pitiable condition because they have lost their basic cognitive faculties, which are vital to live a meaningful life. As such there is a school of thought which opines that those terminally ill, and who are having no chance of recovery should be allowed the right to die as prolonging their lives merely adds to their pain and suffering[10].

II. Sanctity of Life and Euthanasia -Indian Perspective

In the year 1994, the Supreme Court's verdict in P. Rathinam v Union of India stirred a debate within the socio-legal circles in India when it laid that right to life within Article 21 includes the right to die. The Apex Court while declaring section 309 of the penal code as unconstitutional observed that

[9] Ronald Dworkin, *Life's Dominion- An argument about abortion and individual freedom*209 (Random House Inc. New York, 1994).
[10] See, 196th Report of the Law Commission on 'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners).

> we state that Section 309 of the Penal Code deserves to be effaced from the statute book to humanise our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality, or public policy, and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for[11].

Later on, in Gian Kaur v Union of India, the Supreme Court overruled its judgment in Rathinam's case by observing that

> To give meaning and content to the word 'life' in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The right to die', if any, is inherently inconsistent with the right to life' as is death' with life'[12].

An important milestone in this issue was marked by the Supreme Court's decision in Aruna Ramachander Shanbaug v Union of India wherein the Court stated that the right to life in Article 21 would provide for passive euthanasia. However, in the instant case, the Supreme Court laid down a comprehensive procedure for

[11] P.Rathinam v Union of India AIR 1994 SC 1844 at P. 1868.
[12] Gian Kaur v Union of India AIR 1996 SC 946 at P. 952.

dealing with applications praying for permission to withdraw life support to an incompetent person.[13]

III. Advance Medical Directives- Indian Perspective

The advance medical directives have emerged in various western countries as a medium for allowing an incompetent person to exercise his right to autonomy in respect of his medical treatment. Living Will is thus essentially an instrument by which a competent adult person communicates a desire that in eventuality where there is no hope of recovery on account of an illness, whether physical or mental; he should be allowed to die rather than kept alive by artificial means[14]. The basis for the moral and legal validity of an advance directive is the patient's autonomy or right to self-determination[15].

Advance medical directives allow an incompetent person to beforehand communicate their choices which are made while they are competent. Within the United States of America, most of the states provide in the form of 'living will' and 'medical power of attorney'. Both these instruments are being used by individuals in America to communicate their treatment choices in the eventuality wherein they may become incompetent to make a decision concerning their treatment. One of the significant legislations on the advance medical directives is the Patient Self- Determination Act (PSDA) enacted by the US Congress which allowed the patient to either refuse or to accept it. Moreover, the National Right to Life Committee (NRLC) in the United States came up with a version of a living will which was called 'Will to Live" which is a safeguard of the lives of patients who wish to continue treatment and not

[13] (2011) 4 SCC 454 at P. 512 (Paras 134-146 lay down the procedure to be adopted by the High Court when such an application is filed).
[14] See, James C Turner, "Living Wills- Need for legal recognition" 78 West Virginia Law Review 370 (1976).
[15] Nancy MP. King, *Making Sense of advance medial directives- Clinical Medical Ethics* 3(George Town University Press, Washington 1996).

refuse life-sustaining treatment[16]. "Ulysses Clause" accords protection in situations when the patient goes into relapse in his/her condition, that is, schizophrenia and refuses treatment which they would not refuse if not for the said relapse. (Virginia). "Do Not Resuscitate Order" (DNRO): a form of patient identification device to identify people who do not wish to be resuscitated in the event of respiratory or cardiac arrest.[17] Similarly, in England, advance medical directives have been legalized under the Mental Capacity Act, 2005. Under this enactment, advance decisions are legally binding as long as they fulfill the statutory conditions[18]. Within, India, the Mental Health Care Act, 2017 provides a stipulation related to advance medical directives[19].

The concept of Advance Medical Directives was perhaps deliberated upon by the Supreme Court in Aruna Shanbaug's case for the first time since there is no reference to advance Medical directives in the Court's earlier rulings in Rathinam and Gian Kaur cases. The Supreme Court dealt with the issue of Advance Medical Directives in Aruna Shanbaugh's wherein Justice Katju referred to advance medical directive and its linkages with a patient's 'right to autonomy'. The learned judge went on to state that "Autonomy means the right to self-determination, where the informed patient

[16] Common Cause, a registered society v Union of India AIR 2018 SC 1733.
[17] *Ibid*., (Excerpted from Justice Misra's judgement) at PP. 1732, 1733.
[18] *Ibid.*
[19] Section 5 of the Act provides that Every person, who is not a minor, shall have a right to make an advance directive in writing, specifying any or all of the following, namely:— (a) the way the person wishes to be cared for and treated for a mental illness; (b) the way the person wishes not to be cared for and treated for a mental illness; (c) the individual or individuals, in order of precedence, he wants to appoint as his nominated representative as provided under section 14. (2) An advance directive under sub-section (1) may be made by a person irrespective of his past mental illness or treatment for the same. (3) An advance directive made under sub-section (1), shall be invoked only when such person ceases to have capacity to make mental healthcare or treatment decisions and shall remain effective until such person regains capacity to make mental healthcare or treatment decisions. (4) Any decision made by a person while he has the capacity to make mental healthcare and treatment decisions shall over-ride any previously written advance directive by such person. (5) Any advance directive made contrary to any law for the time being in force shall be ab initio void.

has a right to choose the manner of his treatment. To be autonomous the patient should be competent to make decisions and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a Living Will, or the wishes of surrogates acting on his behalf ('substituted judgment') are to be respected."[20] Interestingly, Mr. T.R. Andhyarujina, the amicus curiae appointed by the Court also made references to Advance Medical Directives while deliberating upon situations wherein a patient can exercise his right to self-determination.[21]

Subsequently, in the Common Cause judgement, the Supreme Court dealt in detail with advance medical directives. Throughout the judgement there are 64 references to 'advance medical directive and 26 references to 'medical power of attorney'. As such it would be frugal to dwell in length with this judgment. In this case four judgments were delivered by a five member constitution bench consisting of Justices Dipak Misra, Justice A.K. Sikri, Justice Chandrachud, Justice Ashok Bushan and Justice Khannwilkar. All the four judgements deal with the concept of advance medical directives in detail. Justice Dipak Misra (on behalf of himself and Khanwilkar) dwelt in length with the concept of patient's right to autonomy and right to life. The learned judged in the course of his judgement elucidated the various ways through which a patient can exercise his right to autonomy be it, through the medium of living will or medical power of attorney. The learned judge made it emphatically clear that failure to recognize advance medial directives would amount to non-facilitation of the right to have a smoothened dying process.[22]

The Court did acknowledge that the extant legislative framework within India does not provide for Advance Medical Directives.

[20] (2011) 4 SCC 454 at P. 482.
[21] *Supra* note at P. 488.
[22] *Ibid*., at P. 1739

However, the Court referring to the constitutional obligation couched in Article 21 proceeded to lay down the guidelines in this regard. According to Justice Deepak Misra, advance medical directive would serve as a fruitful means to facilitate the fructification of the sacrosanct right to life with dignity[23]. The directive, according to the learned judge, "would dispel many a doubt at the relevant time of need during the course of treatment of the patient. That apart, it will strengthen the mind of the treating doctors as they will be in a position to ensure, after being satisfied, that they are acting in a lawful manner"[24]. Commenting, further, the learned judge observed that the right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. While referring to its earlier judgment, Justice Misra expressed the view that the right to live with dignity includes the smoothening of the process of dying in case of a terminally ill patient or a person in PVS with no hope of recovery.[25] A failure to legally recognize advance medical directives may amount to non-facilitation of the right to smoothen the dying process and the right to live with dignity[26]. Justice Bhushan commenting upon the Advance Medical Directives stated in the context of a person's right to execute an Advance Medical Directive. Justice Bhushan states "Such right by an individual does not depend on any recognition or legislation by a State and we are of the considered opinion that such rights can be exercised by an individual in recognition and in affirmation of his right of bodily integrity and self‐determination which are duly protected under Article 21 of the Constitution."[27]

[23] *Ibid.*
[24] *Ibid*
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid*., at P.1886.

Justice Chandrachud's judgement is the most detailed on the topic of advance medical directives. At the outset, Chandrachud introduces the notion of human dignity and its linkages with Article 21 of the Constitution. In the context of advance medical directives, Chandrachud, proffers the view that the reason for recognizing an advance directive is based on individual autonomy. According to the learned judge "as an autonomous person, every individual has a constitutionally recognized right to refuse medical treatment.[28] He further elaborates the point by stating that "It is the consensual nature of the act underlying the advance directive which imparts sanctity to it in future in the same manner as a decision in the present on whether or not to accept medical treatment"[29]. Justice Chandrachud then refers to the concept of 'substituted judgment standard' and its usefulness to the legitimacy of the advance medical directive instrument. He states that an advance medical directive is construed as a facilitative mechanism in the application of the substituted judgment standard if it provides to the physician a communication by the patient of the desire for or restraint on being provided medical treatment in future. Justice Chandrachud succinctly sums up the ratio of the judgement by observing that

> The view which this judgment puts forth is that the recognition of advance directives as part of a regime of constitutional jurisprudence is an essential attribute of the right to life and personal liberty under Article 21. That right comprehends dignity as its essential foundation. Quality of life is integral to dignity. As an essential aspect of dignity and the preservation of autonomy of choice and decision-making, each individual must have the right on

[28] *Ibid*., at P. 1833.
[29] *Ibid*., at P.1834.

> whether or not to accept medical intervention. Such a choice expressed at a point in time when the individual is in a sound and competent state of mind should have sanctity in the future if the individual were to cease to have the mental capability to take decisions and make choices. Yet, a balance between the application of the substituted judgment standard and the best interest standard is necessary as a matter of public interest. This can be achieved by allowing a supervisory role to an expert body with whom shall rest oversight in regard to whether a patient in the terminal stage of an illness or in a permanent vegetative state should be withheld or withdrawn from artificial life support.[30]

The Supreme Court's approach is setting out legal regime facilitative of advance medical directive premised on the understanding that as an autonomous person, every individual has a constitutionally recognized right to refuse medical treatment which inexorably flows from an individual's right to self-determination[31].

IV. Advance Medical Directives and Some Concerns

Within the United States, certain practical problems have cropped up with reference to living wills. The treating physicians are constrained to put a patient on an aggressive medical treatment if the patient has not left a living will. Thus, a patient's failure to execute a 'living will' would seemingly lead to a consequence wherein a patient has to undergo an aggressive medical treatment which the patient may not have desired. Secondly, in situations where a patient has executed a living will; problems related to the contents of the will and its interpretation may crop up, thereby,

[30] *Ibid*., at P. 1839.
[31] *Ibid* at P.1834.

making its execution problematic[32]. There are some jurists who have been somewhat skeptical of the approach of draw linkage with the right to self-determination and an individual right to die. At the heart of this debate are the conflicting interests of the protection of human life as a matter of public interest and individuals' right to autonomy[33]. Justice Scalia, one of the most conservative judges of the US Supreme Court has proffered the view that a state has a constitutional power to prohibit suicide in any circumstance even for someone in terrible pain who would plainly be dead. According to the learned judge, the state has the power to protect human life for its own sake. A state need not honour the living will if it has decided that allowing people to die is an insult to life's sanctity[34]. Dworkin, however, counters the assertion of Scalia on the ground that Scalia had mistaken the effect of the court's decision in Cruzan's case. According to Dworkin, "contrary to Scalia's belief the majority of the justices in the Cruzan's case had upheld the constitutional right to die albeit with severe state restrictions"[35]. Genuine concerns are raised by many about the drawbacks of Advance Medical Directives. Some of the apprehensions raised relate to the fact that medical professionals may become careless or less zealous about saving lives. Similarly, concerns are raised in reference to the impact of legally sanctioned killings in the community and the sanctity attached to life within the community.[36] According to Nancy King, this stark opposition could be assigned of healthy diversity of values in a pluralistic culture. According to King it could represent

[32] Ibid., at P.177.
[33] Elizabeth Wicks, *Right to Life and Conflicting Interests* 176 (Oxford university Press, New York, 2010).
[34] See, Nancy Beth Cruzan, by her parents and Co-Guardians Lester Cruzan v Director, Missouri Department of Health 497 US 261(1990)
[35] Supra note 9 at P.198.
[36] Ibid at P. 182.

adversary viewpoints necessary, as in the court of law for distilling the proper perspective.[37]

One of the concerns with reference to Advance Medical Directives stem from the fact that a person may execute a living will not in the exercise of his autonomy but succumbing to a variety of extrinsic factors. A patient may be constrained to execute a living will because of a guilt that about the expenses defrayed by his relatives in keeping him alive. An interesting debate around the Advance Medical Directives revolves around the considerations of patient autonomy and the best interests of patient doctrine. At times it may so happen that these two may be in contradiction to each other. That is in situations where giving effect to a living will may not be in the patient's best interest. In such a scenario there arises a dilemma whether to respect a patient's living will and allow him to die or to ignore the will and prolong his life. At this junction, a whole gamut of ethical, moral and legal concerns arises in reference to advance medical directives which need to be resolved before a comprehensive regime facilitative of advance medical directives can find acceptance within the populace.

V. Conclusion

With the Supreme Court's ruling in Common Cause, a legal regime has been set out for permitting individuals to execute Advance Medical Directives either through existing the living wills or writing a medical power of attorney. These instruments are considered as facilitative tools for an individual to exercise his right to self-determination. The Supreme Court has tried to introduce comprehensive directions so that the chances of abuse related to Advance Medical Directives are minimized.

The comprehensiveness of the guidelines formulated by the Court highlight the realization that instruments like a living will and

[37] Ibid at P. 215.

medical power of attorney are vulnerable to misuse. At the same time, the comprehensiveness of the guidelines makes the whole process of executing an advance medical directive complex and cumbersome, thus raising doubts whether this mechanism is practically viable. On the other side of the paradigm, the issues of morality and ethics associated with advance medical directives continue to engage the attention of the jurists. On the one side of the aisle, there are those who agree with the rationale of Advance Medical Directive and its intrinsic linkages with the right to die with dignity. In this context, it is submitted that the proper course of action should be for the Parliament to enact a law on advance medical directives. However, any such legislative exercise should be preceded by a holistic appraisal of the ethical and moral concerns related to advance medical directives. More importantly, the proposed legislation should set out a legal regime which facilitate, an individual's right to self-determination rather than making it nugatory. This suggestive course of action is premised on the belief that a paradigm shift in the constitutional jurisprudence of a country must be introduced by a democratically accountable institution like Parliament. This step would be highly frugal since it would invest the regime on advance medical directives with popular legitimacy keeping in view it's bearing on our ethical, moral and cultural ethos.

Conflict and Mental Health in Kashmir

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Abstract

Health is a physical, mental and social wellbeing. Mental health is "the most essential and inseparable component of health (Shah, 1982). Mental, physical and social health, are vital strands of life that are closely intertwined and severely interdependent. Over the past three decades Kashmir became associated with violence & the conflict has brought insecurity, breakdown of social relations and families. This has led the youth of Kashmir to switch over to drugs or undertake anti-social activities. In health care and the field of public health, a lot of stress and resources have been devoted to the screening, diagnosis, and cure of mental illness than focusing on mental health. Little has been done to guard the mental health of those free of mental illness. Depression is the major psychological morbidity in Kashmir, given the clinicians trend towards prescribing more antidepressant medications now than in the past. The burden of depression is rising, affecting both the working and social lives of individuals. The prevalence of depression is 55.72%. There is a significant difference in the prevalence of depression among males and females as well as in rural and urban areas. The present paper throws light on the impact of conflict on mental health with special reference to Kashmir.

Keywords: Kashmir, Conflict, Violence, Mental Health, Depression, Health care services

I. Introduction

The prolonged conflict has taken a heavy toll on the people of Kashmir, destabilising their economic, social and political lives. The emotional and psychological impact of the resulting violence

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is deeply felt by all, irrespective of gender, age, occupation and location. The uncertainty of life is usually summed up in a common utterance that once people leave home, they are not certain if they would return again.[1] Mental, physical and social health, are vital strands of life that are closely interwoven and deeply interdependent. Mental disorders affect people of all countries and societies, individuals at all ages, women and men, the rich and the poor, from urban and rural environments. Depression is more likely following particular classes of experience those involving conflict, disruption, losses and experiences of humiliation or entrapment. Many people living amidst the rages of conflict suffer from post traumatic stress disorder. The inadequacy of preventive and curative system is adversely affecting health equity as well quality. The healthcare system, emergency preparedness and trauma prevention in geographic oddities of J&K are proving detrimental to health and welfare of people. This is further aggravated by inverse doctor-patient ratio of 1:1880 as against the World Health Organisation ratio of 1:1000.[2]

II. Impact of Conflict on Mental Health

The worst part of the conflict is that it equally affected the psyche of children which are considered to be the future of a given society. Most common traumatic event experienced by children was witnessing the killing of a close relative (49%), followed by witnessing the arrest and torture of a close relative (15%).[3] Parental loss, frequent displacement and exposure to violence have led to an

[1] Nuzhat Firdous, "Kashmir Conflict: Alarming Mental Health Consequences", Volume 3, Issue 1, available at http://www.ijip.in.
[2] M.Z.M Nomani, Lone Ajaz, "Medico-Legal Profiling of Sher-i-Kashmir Institute of Medical Sciences Srinagar under Consumer Protection Laws of Union Territories of Jammu and Kashmir",
[3] Khan, A. Y, Margoob, M. A, "Pediatric PTSD-Clinical Presentation, Traumatic Events and Socio-demographic Variables-Experience from a Chronic Conflict Situation", 13, S40-4.

increase in paediatric psychopathology. Since children lack the cognitive capacities than the adults and find it difficult to talk upon their traumatic experiences. Behavioural changes amongst children and youth is seen in the form of isolation, aggression including stone-pelting, drug abuse, lack of respect for elders, loss of morality/values and hopelessness. Owing to parental loss, most of the children are often reared in orphanages and PTSD and depression is seen common diagnoses in children living in orphanages.[4] A greater vulnerability of psychiatric morbidity in female children of 5-12 years of age range,[5] in learning difficulties sleep related problems, bedwetting, loss of recently acquired skills, feelings of guilt, and variety of somatic complaints[6]. It has been noticed that older children are more vulnerable than younger children to the psychological effects of war.[7]

Owing to deaths and disappearances of male members, many women have no choice but to head their families and bear the responsibility. The most precarious position of "half widows" or women, unsure of the fate of their husbands, is even more distressing. These women can neither inherit property nor claim widow benefits & can't remarry as according to Islamic law they must wait for at least seven years.[8] This sense of insecurity has given rise to several psycho-physiological pathologies. The constant stress experienced by the women folk has adversely affected their reproductive health as well, resulting in frequent miscarriages, polycystic ovarian disease, premature ovarian failure

[4] Margoob, M.A, Firdosi M.M, Banal, R, Khan, A.Y, Malik, Y.A, Sheikh, A.A., et al. "Community Prevalence of Trauma in South Asia-Experience from Kashmir", 13, 14-17.
[5] M.A, Firdosi M.M, Banal, R., Khan, A.Y., Malik, Y.A., Sheikh, A.A., Margoob, et al. "Community Prevalence of Trauma in South Asia-Experience from Kashmir" 13, 14-17.
[6] Mousa, Y, "The Psychological effects of War on Gaza's children", Pande A. "Mental health related stigma reduces access to existing services", Healing Kashmir? Psychiatry in Practice. Kashmir Times.
[7] Bloch, D.A, Silber. E, & Perry, S. E, "Some factors in the environmental reactions of children of disaster", *The American Journal of Psychiatry*: 150, 235-239.
[8] Manecksha, F, Traumatised by Violence. 'Violence and Health'Available From: http://indiatogether.org/kashmir-health

which is alarmingly high (20-50%) when compared to India's national POF rate of 1-5 percent.[9] Suspicion and fear continue to permeate the Kashmir valley. A knock on the door late at night send spasms of anxiety through households, afraid that a family member will be asked by the security forces or militants to step outside for "a minute" and then never return. Psychological trauma related to the violence has been enormous, as life itself is constantly under threat.[10] 1.8 million of adults in the Valley show symptoms of significant mental distress.[11] A non-governmental organisation[12], has found an alarming increase in the suicide rates by 400 times because of the ongoing violence.[13] & that 15% of people attributed their drug use to the prevailing trauma and turmoil. People cope with the trauma and negative emotional states by using anything, many substances which induce a temporary state of sleep and rest.[14]

III. Mental Illness and Coping

To cope with the prevailing situation in Kashmir and its effects on the mental health of the average person, a network of trained counsellors is the need of the hour. Counselling centres & counsellors can be helpful to the victims of torture and those suffering from trauma related mental problems. Violence is a phenomenon intrinsic to class based societies which are inherently

[9] Yousuf, S, "Depression casts cloak of infertility over Kashmir valley" Inter press service. Available at:http://www.ipsnews.net/2014/11/depression-casts-cloak-of-infertility-over- kashmir-valley/

[10] Human Rights Watch (2006) everyone lives in Fear: Patterns of impunity in Jammu and Kashmir, 18(11). available at http://www.hrw.org/sites/ default/ files/ reports/ india 0906web.pdf

[11] Survey was the result of collaboration between the Kashmir University's Department of Psychology, and the valley-based Institute of Mental Health Neuroscience. It was conducted between October and December 2015

[12] Study conducted by MSF (*doctors without borders*),

[13] Bukhari, P, "Why the valley blooms", *Tehelka Magazine*, available at http://www.tehelka.com

[14] Khan, A.Y, Margoob, M.A. "Pediatric PTSD-Clinical Presentation, Traumatic Events and Socio-demographic Variables-Experience from a Chronic Conflict Situation", 13, S40-4.

unequal and oppressive. Violence here may either take implicit forms in the manner of institutionalized oppression and inequality or a more explicit form of state oppression through the use of state sanctioned institutions, such as the police, the military and courts. It could even assume a more direct form, whereby civilians manage the task of a weakened state through militia groupings. Large-scale violence may also take the form of mass uprisings against the oppression of dominant classes. Civilians are increasingly being targeted in these episodes of contemporary violence. To reduce military casualties, civilians are used as protective shields, torture, rape and executions are carried out to undermine morale and to eradicate the cultural links and self-esteem of the population. Most civilians witness war related traumatic events such as shooting, killing, rape and loss of family members. The extent of psychosocial problems that results from this mass exposure to traumatic events can ultimately threaten the prospects for long-term stability in society.

IV. Health Infrastructure and Health services

The health care facilities to the people of the erstwhile state of Jammu and Kashmir is marred by constraints of financial resources, difficult topography and terrain, poor road connectivity, low presence of private sector, low accessibility and affordability by under- privileged segments of the population. There has been a gradual decay in the health services of J&K over the last three decades. The state is under shadows of infectious diseases like tuberculosis, RTI, UTI diarrhoea disease.[1] there is growing shadow of chronic diseases like hypertension, coronary artery disease, cancers, and diabetes.[15]

The health care services in the J&K are important not only for human resource development but also for restoring the faith of the

[15] M.Z.M Nomani, Lone Ajaz, "Health Care Services under Consumer Protection Laws of Union Territories of Jammu and Kashmir: A Socio-Legal Mapping",

people in the institutions of governance. At present there are 5,534 health institutions (4,433 governments and 1,101 private) functional in the J&K. Among these there are two notable medical colleges, namely Government Medical College, Bakshinagar, SKIMS whereas four new medical colleges have been set up in Anantnag, Baramulla, Kathua and Rajouri districts of the state.[16] The inadequate health care infrastructure further added to the miseries making the people vulnerable to health problems and other forms of deprivation. This exodus coupled with poor governance led to malfunctioning of health sector including the rural health facilities. Women's health has not received proper attention from policy makers as there is a single maternity hospital catering to whole population of Kashmir. Mental health has been neglected far too long. In spite of psychiatric diseases due to ongoing conflict, tremendous stressful conditions, overwhelming fear and uncertainty during three decades, much attention has not been paid to expand and modernize the present infrastructure. Women are an integral to all aspects of society. The multiple roles that they fulfil in society render them at greater risk of experiencing mental problems than others in the community. Women bear the burden of responsibility associated with being wives, mothers, Sisters and carers of others. Women are becoming an essential part of the labour force and in one-quarter to one-third of households they are the prime source of income. Women are more likely than men to be adversely affected by specific mental disorders, the most common being anxiety related disorders and depression. The conflict situation since 1989 in J&K has brought unprecedented suffering to the people. It has affected every aspect of a common Kashmiri's life. Thousands of families have lost their sole bread earners. Children and women of the Kashmir valley have gone through trauma over the period of seventy years. The

[16] M.Z.M Nomani, Lone Ajaz, "Therapeutic Perception of Access to Medicines and Health Care in Government Hospital of Union Territories of Jammu and Kashmir",

conflict situation has left behind a track of sadness, and depression. The minds of Kashmir's are permanently scarred. One of the biggest consequences of this conflict is the impact on the mental health of people in Kashmir. In any conflict situation, the impact stage occurs when disaster strikes like bombs explode, brining death, injury and destruction. This type of event includes loss, life threat Displacement torture and indirect effects like unemployment and poverty and so on. Home/communities have an important containing function as it provides a certain framework, boundary & secure base for all its members. During conflict when homes & communities are shattered, people experience a lack of this containing function in a most acute way. This creates a sense of disruption of the secure base to all those affected. Once the conflict leads to violence, the fallout can be unforeseen in its extent and magnitude.

V. Discussion

Following the partition of India in 1947, the Kashmir Valley has been subject to continual political insecurity and ongoing conflict, the region remains highly militarised. Traumatic events can have a profound and lasting impact on the emotional, cognitive, behavioural and physiological functioning of an individual. No age group is immune from exposure to trauma, and its consequences. The effects of trauma in terms of psychopathology are well understood in the case of adults and women, and particularly children's. In a turmoil situation, civilian casualties have been found to outnumber military casualties. The most common traumatic event experienced is witnessing the killing of a close relative, followed by witnessing the arrest and torture of a close relative. To live in a community of total 6 million people, having more than a million depressed patients is a matter of great concern and a big challenge for any medical professional, working in Kashmir. The situation has become grim due to a very high

percentage of chronic post traumatic stress disorder alongwith Co-Morbid Depressive Illness.

VI. Results

Globally mental health disorders are among the leading causes of illness and disability. Mental illness leads to decreased productivity and has a negative impact on the quality of life of affected individuals and their families. Annually, over 450 million people worldwide experience mental health disorders, but few seek access to services. Barriers to seeking care and treatment are accentuated by social stigma, discrimination, lack of understanding and neglect. In 1989, the psychiatric hospital at Srinagar saw 1700 patients, which rose to 35, 000 in 1998 and then to about 50,000 in 2002. In 2005, the patient's number had risen to 60,000. Presently 1.8 million (45%) adults in the Kashmir Valley have significant symptoms of mental distress. Approximately 1.6 million adults (41%) in the valley are living with significant symptoms of depression, with 415,000 (10%) meeting all the diagnostic criteria for severe depression. Estimates for districts range from 28% in Srinagar to 54% in Badgam. That prevalence rates for depression were highest in the districts of Badgam and Baramulla.[17] An estimated 1 million adults (26%) in the valley are living with significant symptoms of an anxiety related disorder. Nearly 1 in 5 adults (19%) or 771,000 individuals in the Valley are living with significant PTSD symptoms, with 248,000 (6%) meeting the diagnostic criteria for PTSD. High rates of co-morbidity of symptoms of depression, anxiety and PTSD were found in adults living in the valley. The districts of Baramulla and Badgam reported the highest prevalence rates of symptoms for all three mental disorders. In 2011, a Kashmir-based report by Mercy Corps reported risks associated with high youth unemployment, which

[17] Government of India. 2011 Indian National Census Online: Census Organisation of India, available at www.census2011.co.in.

included feelings of failure, isolation, lack of social status, delayed marriages and an increase in tensions among disenfranchised young people, all of which have been compounded by the impact of future uncertainty related to ongoing political conflict. Expressions of disappointment, anger and hopelessness in addition to conflict related stress, mental illness, suicide and drug addiction have been reported as prevalent in Kashmir's youth.[18] A high proportion of Kashmiri adults report regularly experiencing headaches (62%), heart palpitations (47%), excessive worrying (61%), feeling low in energy (64%), feeling irritable and having outbursts of anger (65%), and having difficulty concentrating (52%). Suicidal ideation was reported by 12% of Kashmiri adults, 94% of whom were classified as a probable case for at least one of the three disorders. Physical health has also affected miserably.[19] Tobacco use was very high, with 29% of Kashmiri adults using some form of tobacco, and nearly half of all Kashmiri households with at least one person in their family using tobacco. Twice as many men as women use tobacco; as reported earlier, tobacco use was identified as one of the main coping strategies for Kashmiri men.

VII. Present Scenario and Mental Health Crisis

India has one of the highest rates of psychiatric disorders in the world, with around 15 per cent of the population estimated to be suffering from a mental health or substance misuse disorder. But in Kashmir, that figure is much higher, estimating that as many as 45 per cent of the population is suffering from some kind of mental distress.[20] "Shocking" levels of mental ill health, particularly

[18] Mercy Corps, "Youth entrepreneurship in Kashmir: challenges and opportunities. Kashmir", Mercy Corp, 2011.
[19] Margoob AM, Firdosi MM, Banal R, Khan AY, Malik YA, Ahmad SA, et al. "Community prevalence of post traumatic stress disorder in South Asia - Experience from Kashmir",
[20] A 2016 report published by charity Action Aid and the Institute of Mental Health and Neurosciences

among vulnerable groups. Between April 2018 and March 2019, 366,906 people received treatment in a government psychiatric hospital in the city of Srinagar alone just under three per cent of the entire population of the state. And children are bearing the brunt of the crisis.

> It's a crisis, says Kashmiri psychiatrist Mushtaq Margoob. "Before 1989, there were no PTSD cases, but now we have an epidemic of disorders in Kashmir. Generation after generation has been at the receiving end, anybody could get killed or humiliated, it's a condition of helplessness. So, it is a trans generational transmission of trauma."

Meds Sans Frontiers (MSF),[21] the non-government organization asserts that one out of five grown-ups in Kashmir is living with posttraumatic stress disorder (PTSD). Besides, they additionally stated that the prevalence of psychological distress is higher among women. MSF stated, "50 for every woman and 37 for each of man have likely to be diagnosed depressed, 36 for each and every woman and 21 for each man have an anxiety disorder, and 22 for every woman and 18 for every man have PTSD." The investigation was directed by MSF, in a joint effort with the University of Kashmir and the Institute of Mental Health and Neurosciences, from October to December 2015 out of 399 villages in the valley.[22] Doctors predicted a rise in the number of cases presenting with stress and anxiety, as a consequence of the removal of Article 370 and the accompanying communications blockade that has prevented many from talking to their families, or stepping out of home for fear of they being unable to contact their families when out. Currently, people are unable to resume work and there is

[21] Médecins Sans Frontières (MSF), the University of Kashmir, Institute of Mental Health and Neurosciences, Kashmir Mental *Health Survey Report,* 2015

[22] Rafiqi B. "How Violence in the Valley is Taking a Huge Toll on the Mental Health of its Women", *Youth Ki Awaaz,* 2016.

distraction and anxiousness about the uncertainty of what lies next. The communication blockade and political decision has a miserable effect on the mental health and lives of Kashmiris. The adults use prayer as a coping strategy, as well as talking to a family member or friend or keeping themselves busy. Already considered an epidemic before India's revocation of regional autonomy, Kashmir's have been plunged into another crisis affecting their psychiatric health. The mental strain of the anti-Kashmiri sentiment and lack of empathy for natives of the region have overloaded.

VIII. Conclusion

Due to continuing conflict in Kashmir during the last three decades there has been a phenomenal increase in psychiatric morbidity. The prevalence of depression is 55.72%. Mental health is an integral part of overall health and quality of life. Effective evidence-based programs and policies are available to promote mental health, enhance resilience, reduce risk factors, increase protective factors, and prevent mental and behavioural disorders. Innovative community-based health programmes which are culturally and gender appropriate and reaches out to all segments of the population need to be developed. Substantial and sustainable improvements can be achieved only when a comprehensive strategy for mental health which incorporates both prevention and care elements is adopted. Health services should be able to provide the much-needed treatment and support to a larger proportion of the people suffering from mental disorders than they receive at present. Services that are more effective and more humane, treatments that help them avoid chronic disability and premature death, and support that gives them a life that is healthier and richer, a life lived with dignity should be adopted. Investing in mental health today can generate enormous returns in terms of reducing disability and preventing premature death.

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