THE GROWTH OF SEBI

- FROM HARSHAD MEHTA TO SUBRATA ROY

By Simran Chandok[410]

INTRODUCTION

The Securities Exchange Board of India popularly known as SEBI is in its 27th year of existence. However, the original architects of SEBI would not recognize what it has become today. From a mere regulatory authority to a statutory authority; from a silent spectator to the market watchdogs; SEBI has come a long way since its inception.

SEBI came into existence on 12th April, 1988. It replaced the Controller of Capital Issues Department of the Government. In 1988, SEBI had limited powers with a negligible jurisdiction. In 1992, the SEBI Act bestowed a plethora of responsibilities on the body and gave it a statutory status. Thus after 1992, SEBI was known as a statutory authority and its jurisdiction extended to the whole country except the erstwhile princely states of Jammu & Kashmir.

The SEBI Board is headed by a Chairman (nominated by the Union Government of India). The Board consists of 2 Officers from the Union Finance Ministry serving as whole time members, 1 member from the Reserve Bank of India (RBI) and 5 members nominated by the RBI (at least 3 out of 5 RBI nominated members must be whole time members).

Currently, U.K. Sinha is the Chairman of the SEBI Board.

Since its inception, SEBI has grown steadfastly. Its gradual growth can be analyzed through 3 scams- Harshad Mehta Securities Fraud, Satyam Scandal and Sahara Scam.

DEVELOPMENT OF SEBI THROUGH THE 3 DECADES

Harshad Mehta Securities Fraud (1988-1995)

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In 1988, SEBI had limited powers. Chiefly it regulated the securities market and ensured its constant development. SEBI had no control over the transactions taking place between the brokers and the investors. However, the scenario changed completely after the Harshad Mehta Securities Fraud.

Harshad Mehta was a stockbroker and started his own securities firm in 1990- "Grow More Research & Asset Management Limited". He was reputed and revered in the markets. Being considered the "Sultan of Dalal Street", investors blindly followed Mehta's footsteps. Mehta misused his status to manipulate the stock prices of certain shares on the scrip for his personal financial gain.

Basically what Harshad Mehta did was invest large sums of money in a particular share. Seeing him invest, the other shareholders and investors also invested in the same shares. This resulted in unnatural pumping of money into the stock markets causing a rise in the price of these shares on the scrip. Unnatural inflation of stock prices resulted in the Bull Run[411]. This Bull Run increased the share price of companies like Associated Cement Company (ACC), the first company Mehta invested in in the stock markets, from Rs.200/- to Rs.9000/- a 4400% increase over the course of 1 year (1991-1992).

The above operation though immoral was not illegal but the problem arose because Mehta obtained capital to invest in the stock markets by misappropriating banks' money. When banks gave Mehta cash to purchase government securities owned by other banks, he invested this money into the stock markets, sold the purchased shares at a profit after a period of 7 days or so and then completed the purchase of government securities. The money handed over to Mehta was given for a specific purpose and he wrongfully used the money for personal gain. This falls within the scope of money laundering. Thus, Mehta made approximately Rs. 5000 crores by investing misappropriated money in the securities markets.

Mehta owned 50 lakh shares of more than 130 companies. When his scam was revealed by Sucheta Dalal, a renowned journalist of the time, he offloaded most of his shares to save himself from prosecution. The investors felt that they had been cheated by Mehta and sold of their shareholdings

[411] The Bull Run Phenomenon is defined as the large scale purchase of securities resulting in the increase in price on the scrip.

in order to safeguard themselves. This unabated selling caused the markets to lose Rs. 0.1 million[412] in 1 day.

SEBI, having no authority to regulate the transactions between investors and brokers, was handicapped. The only authority with the jurisdiction to look into the matter was the Central Bureau of Investigation (CBI).

The government was made aware of this major gap in the regulation of securities markets and after introspection they decided to bestow SEBI with greater powers promoting it to the status of "market regulators". In lieu of this, the Legislature speedily approved the SEBI Act, 1992.

The SEBI Act gave SEBI a 3 fold duty-

- Protection function- To protect the stock markets from unscrupulous investors and to protect the investors from unfair market practices.
- Development Function- To develop the stock markets healthily and lawfully.
- Regulation Function-: To regulate the transactions between brokers, investors and the stock market to ensure fair play.

In addition to this, the SEBI Act, 1992 deemed SEBI a statutory authority with a separate legal existence.

The 1992 scam elevated SEBI from a regulatory authority to the level of a statutory authority.

Harshad Mehta Securities Scam (1996-2000)

This development of SEBI between 1988- 1995 was evident when Mehta tried to pull off a 2nd scam in 1997.

In 1997, Mehta tried to re-enter the markets by creating a network of front companies called Damayanti Group. This group operated out of the same office as Mehta's 1990 securities firm. Mehta employed brokers and agents who bought and sold shares at the stock market on his behalf for a commission. Harshad Mehta even managed to find companies (e.g. - BPL, Videocon and

[412]Fall Out of the Harshad Mehta Scam available at- http://www.slideshare.net/prithvighag/indian-stock-market-scams (Last Visited on 29th June, 15)

Sterlite Industries) who gave him start-up capital to set up this second venture in exchange for him inflating the price of their shares in the stock market.

Mehta stuck to his original modus operandi of investing large sums of money into certain shares and tried to bring about a Bull Run. However the investors and SEBI had become too smart to fall for Harshad Mehta's tricks.

In 1998, SEBI having smelled foul play in the sudden increase of certain share prices on the scrip investigated the matter, managed to link the Damayanti Group to Harshad Mehta and his associates through telephone bills, payment to lawyers, investment details, etc. and filed a case against Harshad Mehta and his associates in the courts. SEBI curbed Harshad Mehta before he could harm the investors and manipulate the markets. In 10 years, SEBI had already grown immensely and was well on its way to becoming the market watchdog.

List of Changes by SEBI after the Harshad Mehta Securities Scam

- Strict full disclosure norms were introduced. The full disclosure norms were with respect to material facts, specific risk factors, prudential norms, etc.
- The Listing Agreement[413] was introduced and adherence to it was made mandatory by all listed companies.
- A code of advertisement was introduced to ensure that the companies disclosed all the information in an honest and trusted manner to the investors at the time of making a public offer for purchase of securities.
- The National Stock Exchange (NSE) with online, screen based, nation-wide electronic trading was introduced to increase transparency of operations.
- The Bombay Stock Exchange (BSE) switched over to online, screen based trading.
- A revised "carry forward" system replaced the "badla"[414] system.
- Guidelines regarding requirements of full disclosure to SEBI were introduced.
- Requirements to be fulfilled before making public offers for purchase of securities to the public were also introduced.

[413] The Listing Agreement is a list of rules and regulations to be followed by all companies listed on the stock exchanges of the country.
[414] Badla System was introduced in the Bombay Stock Exchange to combat the shortage of funds in the secondary markets. It was the system of purchasing securities by borrowing money from various brokers.

Satyam Scandal (2001-2008)

The Satyam Scandal came to light on 7th January, 2009 by way of a confession letter written by B. Ramalinga Raju (the Founder and Chairman of Satyam Computers Services Limited) published in the Times of India. In the confession letter Raju confessed to manipulating his books of accounts by overstating assets by Rs. 2161 crores, understating liabilities by Rs. 1020 crores, including non-existent interest worth Rs. 376 crores and inflating cash reserves by Rs. 5040 crores.

In addition to this Ramalinga Raju obtained loans worth Rs. 2000 crores from nonbanking financial companies (NBFC's) by offloading shares worth thousands of crores illegally onto front companies to portray a better financial condition than the reality. There were charges of money laundering levied on Raju because he used the illegally obtained money from NBFC's for the purpose of purchasing land.

The whole scam cost the markets approximately Rs. 14, 000 crores.

The books of accounts are a reflection of the company's financial standing. They are important tools that enable investors and shareholders to determine whether or not they want to invest in a particular company. Ramalinga Raju manipulated the books of accounts to cheat investors and shareholders into believing that the company was doing better than the reality. Raju managed to run the scam past the auditors, Price Waterhouse Coopers (PWC) for 7 years. Raju flouted SEBI Regulations of Fraudulent and Unfair Trade Practices (FUTP), SEBI Regulations for Prevention of Insider Trading (PIT) and SEBI Regulations for Issue of Capital and Full Disclosure Requirements (ICDR). The Satyam Scam was a major setback to SEBI.

However, SEBI managed to hit back strongly. It investigated the matter and readjusted the books of accounts to reflect the real financial position of the company. After a complete study into the scam, SEBI released an order which was the first of its kind.

SEBI held Ramalinga Raju and the 9 major associates including B. Rama Raju (the Managing Director), Vadlamai Srinivas (Chief Financial Officer), G. Ramakrishnan (Vice President) and V.S. Prabhakara Gupta (Head of Internal Audit) guilty of insider trading, indulging in fraudulent

and unfair trade practices and violation of Clause 49 of the listing agreement[415] [416]. In its order SEBI ordered the 10 accused to pay Rs. 1850 crores + 12% simple interest (roughly amounting to Rs.3000 crores) within 45 days and banned any of them from accessing the securities markets in any way for 14 years.[417]

This order, along with the changes introduced by SEBI, was a message to the securities markets and the investor communities that SEBI was becoming stronger. The order spoke volumes of the growth SEBI has seen in 20 years of its existence. Even though SEBI was not successful in detecting the scam on its own, it managed to lash back strongly to ensure such a scam never occurred again.

List of Changes by SEBI after the Satyam Scandal-:

- A record of all transactions with respect to the stock markets to be maintained by the companies for inspection by SEBI.
- Regular monitoring of all transactions by SEBI between investors, shareholders, brokers and the company.
- Special attention to large, unusual transactions by SEBI while inspection of balance sheets.
- Appointment of the Chief Financial Officer (CFO) to be made by the Audit Committee after proper assessment of their background, qualifications, etc.
- Appointment of Independent Directors on the Board to ensure the fair and honest functioning of the company. No stock options to be given to these directors and the salary should also be given in the form of reimbursements.
- Several audit norms were introduced like the mandatory rotation of auditors/ audit firms every 5 years.
- Preventing auditors from undertaking any non–audit related to activities to ensure that the auditors are true to their work and there is no conflict of interest.

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[415] Clause 49 of the Listing Agreement requires the board of directors, audit committee, senior management, and company secretary / compliance officer to comply with the provisions listed in the circular issued by the Securities and Exchange Board of India on 29 October, 2004

[416] Full Text of the SEBI Circular dated 29th October, 2004 available at the following link -: http://www.sebi.gov.in/cms/sebi_data/attachdocs/1293168356651.pdf (Last Visited on 22nd June, 2015)

[417] SEBI's Order 5 Years Too Late available at- http://m.moneycontrol.com/news/management/sebis-satyam-order-5-years-too-late_1131983.html (last Visited on 22nd June, 2015).

- Adoption of the International Financial Reporting Standards (IFRS) by all major companies in the preparation of various financial reports by the companies.
- Interim Disclosure of balance sheet figures (audited balances of major account heads) on a half yearly basis.
- Strict timelines for the submission of various financial reports to SEBI throughout the year.

Sahara Scam (2009- Present)

The Sahara Scam is the biggest victory for SEBI in recent times.

Sahara India floated 2 new companies- Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation (SHIC) in 2005 by registering them under the Companies Act, 1956 with the relevant Registrar of Companies in Kanpur and Maharashtra respectively. In the annual meetings held by both the companies, a resolution was passed to raise funds through *private placement of optionally fully convertible debentures* (OFCD's)[418] from the friends, associates, and family members of the Board of Directors. Funds were also to be raised through the circulation of an information memorandum[419] to a few trusted investors. The date of commencement of issues of the debentures was 25th April, 2008 and 20th November, 2009, respectively. SIRECL collected Rs. 17,656.53 crores (net value) between 25th April, 2008 and 13th April, 2011. SHICL collected Rs. 6373.20 crores (net value) between 20th November, 2009 and 13th April, 2011. Thus both the companies collected Rs. 24,029.73 crores from 30 million investors over a period of 3 years.

In 2009, when a red herring prospectus for Sahara Prime City (a real estate venture of Sahara India) was submitted to SEBI for approval, SEBI noticed unusual fund raising activity in the 2 firms- SHICL and SIRECL. On 4th January, 2010, SEBI received a complaint from a man, Roshan Lal, who alleged that "illegal means were being used by SHICL and SIRECL in issuance of OFCD's."

[418] Private Placement of Shares is defined as an issue of invitation for purchase of shares sent individually to each investor and not an open invitation to the public for purchase of securities. Private Placement of securities generally happens when individual invitation to purchase securities is sent to 50 or less people.
[419] Full Text of the Information Memorandum circulated by SIRECL available at –: http://supremecourtofindia.nic.in/outtoday/CA9813%20Sahara%20combined.pdf pg.5

Following this, SEBI launched an investigation against Sahara India, inquiring into the fund raising activities of SHICL and SIRECL along with investor information.

On following through with the investigation and finding Sahara guilty, SEBI passed an interim order, ordering the payment of Rs.24, 000 crores + 17% interest to 30 million investors. The SEBI order was passed by the Securities Appellate Tribunal (SAT) and subsequently the Supreme Court on 12th August, 2012.

This was the first time in the history of SEBI that it had caught such a huge scam on its own. SEBI's vigilance and alertness, the expansion of its powers and its strong investigative instinct was revealed in this scam. Detecting the Sahara Scam is a massive achievement for SEBI and is a testament to the growth of SEBI in the last 3 decades since its inception in 1988.

However, the Sahara Scam is also the biggest securities scam in India. It resulted in 30 million investors losing their hard earned money. The fact that it was detected after 3 years and had cost the markets Rs. 25, 000 crores was a matter for concern. Thus the government has taken steps to tighten SEBI's hold on the securities markets still further and has bestowed more powers on the SEBI.

List of Changes made in SEBI after the Sahara Scam-:

- Before the Sahara Scam, the term "private placement" had not been defined in the Companies Act. Only those instances where an offer would not qualify as a "public offer" had been defined. On SEBI's recommendation, S.42 was introduced in the Companies (Amendment) Act, 2013. It defined private placement "as any issue of securities by a listed or an unlisted public company to 49 or less people where individual invitations to buy are sent to the investors." As soon as the number of investors rose to 50 and beyond, the issue of shares would be declared a public offer and would have to be verified and approved by the SEBI.
- The government gave SEBI the power to regulate any money pooling worth Rs.100 crores or more.
- The government has given SEBI the authority to cease the assets of the people who do not comply with the "seize and search" orders issued by the SEBI Chairman.

- The government has instructed SEBI to create a new law to control illicit investment schemes. SEBI is in the process of drafting this law and sending it to the required authorities for approval.
- SEBI now has the right to retrieve and investigate the telephone records, etc. with respect to any securities investigation.
- Chit funds, nidhi schemes and housing schemes (collective investment schemes) that are not regulated by any particular authority and have a corpus greater than Rs.100 crores have to be regulated by SEBI and follow all regulations as deemed fit by SEBI.

NEED FOR SEBI IN INDIA

SEBI has an indispensable role to play in the development of India's economy because it is the only authority with complete control over the capital markets in India.

Apart from banks, securities markets are the 2nd most important channel of converting savings into investments. When people have excess money, they invest it into stock markets to create more money, thereby increasing the country's GDP and putting liquid money into the economy for growth and development. Hence securities markets play a large role in the economic development of India. Since SEBI controls the securities markets, it is naturally very important.

SEBI, however, does not have just one responsibility. It is a comprehensive body performing various functions like regulating mergers, acquisitions and takeovers of companies, auditing the balance sheets of companies listed on the National Stock Exchange and Bombay Stock Exchange, providing licenses to brokers, dealers, etc. and educating investors.

OVER REGULATION – IS THAT THE NEW PROBLEM?

In the above paper we have seen the growth of SEBI in the last 3 decades. Since its inception, SEBI has been constantly subject to change. Every few months there are amendments to the powers and duties of SEBI. The list of key aims and objectives of SEBI are also constantly changed by master circulars, orders, etc.

From practically no powers when it was formed in 1988, SEBI has become the prime market regulator for the stock exchanges in India. SEBI has the power to react to problems, investigate situations, protect the investors, brokers, banks, companies, etc. and develop the securities markets.

SEBI also needs to be proactive and institute policies in anticipation of situations contingent in nature. For instance after the Satyam Scam, SEBI has instituted policies to verify the balance sheets of companies listed on the NSE and BSE on a quarterly basis, to bring about mandatory rotation of auditors/audit firms dealing with a company and enforcing a whistleblower policy in each company[420]. These reforms were necessary and relevant. However, SEBI has been going overboard in its regulation off late.

In recent times, every time there has been a scam or a problem related to the securities markets, the government has dumped SEBI with greater powers and responsibilities. Some of the powers are redundant and restrict fair business practices. Due to certain large scale scams in the recent past, SEBI has become over vigilant and is conducting investigations that are unnecessary and time consuming.

A classic example of this over vigilance is the recent induction of S.42 in the Companies (Amendment) Act, 2013 that defines private placement as *"any offer or invitation to not more than 49 people by way of a personal invitation for purchase of securities."* As soon as the number rises to beyond 50, SEBI will step in and demand for verification prior to the issue of invitation for purchase of securities. This section was added as a reaction to the Sahara Scam where Subrata Roy duped 30 million investors of Rs. 25, 000 crores by private placement of optionally fully convertible debentures (OFCD's).

Since then, SEBI has initiated hundreds of investigations against medium and large companies to enquire into the method of issue of securities to shareholders[421]. Most of these investigations are a waste of time. SEBI is trying to overcompensate for the lack of foresight in the Sahara Case by putting every third company under the scanner. Even if a small company wants to raise money

[420] How Satyam Scam Raised the bar for Corporate Governance, Business Line (Hyderabad) Issue dated 9th April, 2015

[421] SEBI Press Release listing companies against whom an order under S.42 of the Companies (Amendment) Act, 2013 has been passed available at - http://www.sebi.gov.in/cms/sebi_data/pdffiles/30886_t.pdf (Last Visited on 23rd June, 15)

from its family members, SEBI will initiate elaborate verification processes before giving its approval.

Another example of over regulation by SEBI was the DLF Case. In this case, SEBI passed an order banning the company from dealing in the securities markets for 3 years because of the company's failure to mention certain material facts during the SEBI approval process before getting listed on the stock exchange. When this order was appealed in the SAT, it was quashed immediately. SAT accused SEBI of over regulation and justified its decision on the grounds that penalizing every company by banning their entry into the stock markets would cause the markets to collapse.

SEBI is supposed to understand the root cause of the problem and rectify it. Uprooting the company from the securities markets will result in huge losses to the investors and shareholders and prove useless.

In my opinion, SEBI is being over burdened with too many functions. It would be more conducive if SEBI had a varied but relevant bouquet of responsibilities that would ensure efficient functioning of the regulatory authority. The over regulation happening currently must stop. It is tiresome and needs to be done away with so that SEBI does not drown in its pool of duties and maintains its position as the market watchdogs.

TRIAL BY MEDIA – A DISCORD OF RIGHTS

By Swatilekha Chakraborty[422]

INTRODUCTION

One of the pillars of any democratic nation is the freedom to free speech and expression. It is a core freedom without which a democracy cannot survive. The fact that people can voice their opinions without any fear forms one of the very important characteristics of any democracy. In India, this right can be found deeply embedded under Article 19(a) of the Constitution. This right, by judicial interpretation also includes *inter alia* the freedom of press.

The importance of freedom of press has been recognized world-wide, because of the crucial role it plays in the political development and social upliftment. The issue was discussed at lengths at the Dakar Conference on World Press Freedom in 2005 wherein it was stated that *"An independent, free and pluralistic media have a crucial role to play in the good governance of democratic societies, by ensuring transparency and accountability, promoting participation and the rule of law, and contributing to the fight against poverty."*

The importance of this right despite being widely recognized the chances of unlimited right being misused cannot be ignored. To curb such misuse, certain restrictions have been put on the same by Article 19(2) of the Constitution. The need to reasonably restrict the freedom of press has also been reiterated time and again by various Indian courts. [423]

TRIAL BY MEDIA: THE PHENOMENA

The idea that popular media can have a strong influence on the legal processes is well known and goes back as early as the advent of the printing press. . The Supreme Court has described trial by media as *"the impact of television and newspaper coverage on a person's reputation by creating*

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[423] Romesh Thaper v. State of Madras *SC AIR 1950,* CPI (M) v. Bharat Kumar *AIR 1998 SC,*Hamdard Dawakhana v. Union of India *AIR 1960 SC*

a widespread perception of guilt regardless of any verdict in a court of law."[424] While, it is important that media scrutiny of cases be done to make the public aware, but the degree to which media can be let to interfere in a particular case has to be put under careful scrutiny. A biased report can mould the mindset of the people and the public sentiment aroused thereby can seriously affect the trial of the accused. . Television reporters, often start acting as a separate judicial body while conducting debates, demonizing an accused and building a strong public opinion against him. Members of the judicial system have come down heavily on the media houses, criticizing the practice of trial by media time and again, as unethical. Mr. Dhananjay Mahapatra remarks: *"Over the years…a large number of trials have been hijacked…the accused have succeeded in manipulating the witnesses…judges and lawyers have remained handicapped."*[425]

WHAT IS FAIR TRIAL?

"A fair trial is one in which the rules of evidence are honored, the accused has competent counsel, and the judge enforces the proper courtroom procedures - a trial in which every assumption can be challenged."-

Harry Browne

The Right to fair trial of an accused forms the corner stone of a just society. This is a very basic principle of criminal jurisprudence and has been accepted by the judiciaries worldwide. Article 10 of the Universal Declaration of Human Rights explicitly proclaims the Right to fair trial of an accused, while in the United States, the Sixth Amendment to the United States Constitution, and in Europe, Article 6 of the European Convention of Human Rights, as well as numerous other constitutions and declarations throughout the world emphasize on the right to fair trial of an accused. Judicial impartibility was recognized as a vital right along with the right to fair trial in the Bangalore Principles of Judicial Conduct, 2002. These principles were later presented in the UN Commission on Human Rights in 2003 and were approved by the member nations and

[424] Anand v. Registrar, (2009) 8 S.C.C. 106 (Del.)
[425] Dhananjay Mahapatra, Criminal Justice System Has Collapsed: SC, Times Of India, Feb. 6 2009

accepted as Universal Principles[426]. This right has also been recognized under Right to Life guaranteed by Article 21 of the Indian constitution. [427]

There are various aspects of the right to a fair trial : An adversarial trial system, independent judges, presumption of innocence, and knowledge of the accusation, trail and evidence in the presence of the accused, prohibition of arbitrary arrest and detention, right to legal counsel to respond to the charges etc. all form a part of a Fair Trial. The concept cannot be limited to a statute and the Courts in India have gradually expanded its ambit to include various aspects of criminal procedure. The Supreme Court has also in the past transferred cases from one state to another when it is reasonably anticipated that the accused will not be afforded a fair trial or the court process may be interfered with by extraneous considerations. In *Zahira*[428], the apex court observed that:

> **There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause, which is being tried, is eliminated.**

In order to make sure that the trial is conducted in consonance with the principles of Fair Trial, there must be no bias for or against the accused. The convict must be given a fair chance to be heard and this is where the law comes into conflict with the concept of media reporting, giving rise to the term "Media Trial.'

FREEDOM OF SPEECH V. FAIR TRIAL : A DISCORD OF RIGHTS

[426] ECOSOC 2006/23, reference to the principles by the Commission on Human Rights of the United Nations General Assembly *in 2006 A/HRC/4/25, Paragraph 19.*
[427] Citation required
[428] Zahira Habibullah Sheikh & Anr vs State Of Gujarat *((2004) 4 SCC 158)*

Transparency is the key to the successful functioning of a democracy and the media serves as a key facilitator in bringing about transparency in the functioning of a state.. The media is considered to be relatively free from an overall controller, and as such serves an important role in maintaining freedom and different opinions throughout society. It plays a significant role by highlighting several wrongdoings and serving the needs for justice. The courts also usually respect this right of the media and it is only in exceptional circumstances that they go to the extent of imposing control over it. The Supreme Court in the case of *Naresh Shridhar Mirajkar* observed[429]:

> **A Court of justice is a public forum. It is through publicity that the citizens are convinced that the Court renders evenhanded justice, and it is, therefore, necessary that the trial should be open to the public and there should be no restraint on the publication of the report of the Court proceedings. The publicity generates public confidence in the administration of justice. In rare and exceptional cases only, the Court may hold the trial behind closed doors, or may forbid the publication of the report of its proceedings during the pendency of the litigation.**

Broadcasting was a monopoly of the State till 1990, with a government owned and controlled channel as India's only source of news. [430] However since 1990 private players were allowed to enter the market and since then the sector has played an invaluable role in bringing certain issues of public importance to light. Time and again, media has evolved as one of the most powerful machineries to bring issues related to a particular case to public knowledge, initiating discussions and deliberations on the nuances of the cases, often building a public opinion on the matter and thereby influencing judicial decisions on such cases, for or against. A thorough discussion of a few of these cases has been highlighted below:

Jessica Lal Murder Case[431]

[429] Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra *AIR (1967) SC 1*
[430] Khozem Merchant, The Television Revolution: India's New Information Order *(Reuter Foundation Paper 42, University of Oxford).*
[431] State vs Siddarth Vashisth & Manu Sharma, *2001 IIIAD Delhi 829*

This is perhaps the best example of how media investigation, if done correctly and in the right spirit can work wonders to serve the interests of justice. Jessia Lal, an upcoming model was working as a celebrity bar tender at a party lauded with high profile socialites and guests when she was shot in the head by one, Siddharth Vashisht aka Manu Sharma for serving him alcohol when he asked for it after closing hours. It is important to note here that Manu Sharma is the son of a prominent Congress leader. The seemingly long trial continued for a good seven years and ended with the acquittal of the accused in 2006. This was mostly owing to the fact that almost all the witnesses had turned hostile and claimed, in some way or the other, to not know anything about the accused. The acquittal led to a huge public outcry against the injustice being done to Jessica and her family. It was believed that his acquittal was a result of his father's powerful position and was highly condemned. Pressure mounted on the judiciary and the Delhi High Court admitted an appeal against the previous order. A magazine called "Tehelka" played its part in solving the mystery behind the hostile witnesses and embarked on a mission to unravel the truth. It conducted a sting operation on many of the hostile turned witnesses and caught them on camera accepting that Manu Sharma's father had bribed them. Based on all the evidence collected, Manu Sharma was finally brought to justice and was given life sentence.[432]

Priyadarshini Mattoo case[433]

Santosh Kumar, son of a soon to be Additional Commissioner of Police, Delhi, harassed a law student. However even after regular police complaints, he was let off after warnings owing to the influential position his father held. Santosh Kumar then raped and murdered the girl at her residence. The CBI, after taking sufficient evidence arrested Santosh, who later was acquitted by the Additional Session Judge due to lack of evidence and benefit of doubt. Public emotion and unrest against such cases was already at its peak due to recently concluded Jessica Lal case and the media decided to intervene again and got into investigation mode again. It was found that vital evidence had been overlooked and on appeal by the CBI the earlier judgment was reversed within

[432] Alvarez, Lisette, "Justice for Jessica: A Human Rights Case Study on Media Influence, Rule of Law, and Civic Action in India" *(2011). Honors Theses. Paper 49.http://diginole.lib.fsu.edu/uhm/49*

[433] *S.K. Singh v. State through CBI*, Criminal Appeal No. 87 OF 2007, SC

a span of a meager 42 days and Santosh Kumar was convicted under Section 302 and 376 of the Indian Penal Code.

Nitish Katara Murder Case[434]

Nitish Katara, an IIT'ian and son of an IAS officer and a businessman himself, had been in a four year relation with one of his classmates, Bharti Yadav, whose father was an influential criminal turned politician. The family being against their relationship, her brother brutally hammered Nitish to death and later burnt his body and disposed it off at a highway. Initially the Bharti conceded to her relationship with Nitish, but two weeks later, due to pressure from her father and family, she refused to have ever shared any relation with Nitish other than that of a usual classmate. The media pressure however was surmounting and she conceded. The media also brought the fact into light that the accused had already confessed to his crime, which was not brought before the court by the investigating officer, as he was a business associate of Bharati's father.

There have been several other such cases such as the Nirbhaya rape case, commonly referred to as the Delhi gang rape case, Bijal Joshi rape case etc. wherein the media brought the true facts in the public arena which amounted to a strong public pressure on the police as well as courts to bring fast justice to these cases. Not only in India, but all over the world the media has been like a god's hand even for families and friends of either the victim or the accused who has been wrongfully convicted. Such was the celebrated case of Stephen Downing[435] of Derbyshire where a campaign by a local newspaper editor resulted in a successful appeal and his release after twenty-seven years in prison.

Relentless reporting by the media in such cases have time and again brought about speedier justice for the victims ,and the immense role it has played in ensuring the same cannot be overlooked.

However, unbound freedom can more often than not has negative consequences. . There have indeed been several occasions where the media has tried to unduly interfere with the judicial process, and at the same time interfering with the of fair trial of an accused.

An observation made in *Shaji* v. *State Of Kerala reads thus:*

[434] State v. Vikas Yadav & Vishal Yadav, *SC No. 78/2002*
[435] R. v. Stephen Downing *[2002] EWCA Crim 263*

> **the media has always unfairly conducted a trial against accused and has tarnished them black. This Court may steer clear of any such impressions, which may be left behind by such unfair media trial… These are days of fierce competitive journalism and in the search for attractive headlines, no holds appear to be barred. There is long queue of obliging jurists, lawmen, opinion makers, cultural leaders etc., (not to speak of busy bodies) of the genuine and pseudo varieties making a beeline for the head lines in the media.[436]**

In 2005, there were accusations all around by the media of a religious leader, Holiness Shri Jayendra Saraswathi Swamigal, of being guilty of a murder. However, the Madras High Court and the Supreme Court both found no credible material against him at all. They in fact came down upon the media for such blatant misuse of their power.

Another example can be seen in almost a century old case of Roscoe Arbuckle an American silent film actor, comedian and director. He was accused on grounds of manslaughter and arrested. After successive trials he was absolved of all charges and set free, his career however had taken a toll of all the coverage the media had given to his case and maligned his image in the film fraternity and in the eyes of his viewers. So much so that he was cited as an example of the poor morals in Hollywood by Will H. Hays, head of Hollywood censor board.[437] He was also banned him from working in American movies again. His career was torn into pieces even though he was found 'not guilty'; such was the effect of media in this case.

During the aftermath of the celebrated case of *O.J. Simpson*[438] it was observed by Laura Alber, a commentator that: "if O. J. Simpson was guilty, the media was responsible for his acquittal".[439]

She was referring to the public opinion built by the media in favor of a 'not guilty' verdict. More often than not, the press is said to reflect to views of the common man. More credibility is generally

[436] Shaji v. State Of Kerala, *2005 (4) KLT 995*
[437] *http://www.crimelibrary.com/notorious_murders/classics/fatty_arbuckle/8.html*
[438] People of the State of California v. Orenthal James Simpson *Case No. BA097211*

[439] *http://www.unilawbooks.com/jan/lawyersupdate-01.htm*

accorded to printed material rather than flying word of mouth gossip and rumors. This must be understood by the media and must be used with care.

Further,in the case of *Saibal Kumar v. B.K. Sen*[440], the Supreme Court tried to discourage the tendency of media trial and observed ,

> **No doubt, it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on the part of a newspaper tends to interfere with the course of justice, whether the investigation tends to prejudice the accused or the prosecution**.

Though role of the media cannot be ignored, the right of an accused to a fair trial, a cornerstone of the justice delivery system, should be ensured with resolution. . The Delhi High Court while ruling in support of the right to fair trial of the accused commented upon the role of media as herein stated:

> **It is said and to great extent correctly that through media publicity those who know about the incident may come forward with information, reduces crime through public expression of disapproval of the crime and last but not the least it promotes the public discussion of important issues. All this is done in the interest of freedom of communication and right of information little realizing that right to a fair trial is equally valuable. The European Court of Human Rights has emphatically recognized such a right.**

Trial by media can cause irreparable and irreversible harm to the reputation of a person and he might be ostracized, humiliated and convicted without a fair hearing. All this puts a grave risk on administration of justice.

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[440] *1961 AIR 633*

This misuse of power by the media has revealed the negative sides of media trial, making it necessary to strike a balance preventing to act as a deterrent to fair trial of cases.

CONTEMPT OF COURTS ACT, 1971

Perhaps the most important of the judicial safeguards to keep a check on the media is the Criminal Contempt of Media under Contempt of Courts Act, 1971. The act splits the offence of contempt of court into civil and criminal. Civil contempt refers to non-compliance of court orders, criminal on the other hand deals with publication of any matter that prejudices the judicial process and obstructs with the delivery of justice.[441] It constitutes scandalizing court or judge, undermining people's confidence in administration of justice and tending to bring the court into disrespect by a scurrilous attack on a Judge questioning his authority.[442] It is well settled that it is inappropriate for comments to be made publicly (in the Media or otherwise) on cases, which are sub-judice.[443] However, keeping in view the fact that the public has a right to be kept informed about court proceedings, a few exceptions to the general rule has been provided for.

- Sec 3- Innocent publication and distribution of matter not contempt
- Sec 4- Fair and accurate report of judicial proceeding not contempt.
- Sec 5- Fair criticism of judicial act no contempt
- Section 7 mentions when publication of information relating to proceeding in chambers or in camera is not contempt.

The media has an important role to gather what is happening in courts and to disseminate the information to the public, which in turn enhances the public confidence in the transparency of court proceedings. Fair and accurate reporting of a case would still give rise to substantial risk of prejudice for cases .The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The rationale behind Section 4 is to grant a privilege in favor of the

[441] *Section 2(b) and 2(c), The Contempt of Courts Act 1971.*
[442] Dr. D.C. Saxena v. Hon'ble The C.J.I., *J.T. 1996(6) S.C. 529*
[443] Sahara India Real Estate Corp. Ltd. & Ors. v. Securities & Exchange Board of India & anr, *C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011*

person who makes the publication provided it is fair and accurate. This is based on the presumption of "open justice" in courts.

At present, under sec. 3(2) of the Contempt of Courts Act, 1971 read with the explanation given therein it, full immunity is granted to publications even if they prejudicially interfere with the course of justice in a criminal case. However this was done only if, by the date of publication, a charge sheet or challan is not filed or if summon or warrant is not issued. Therefore, all publications made after arrest but before filing of a charge sheet or challan, are immune. This once became a hot topic of debate and it was before the law commission to recommend whether this should be allowed to stay or publications must be regulated from the time of arrest.

The commission observed that before 1971, the common law principles were applied to treat prejudicial publications made even before the 'arrest' of a person as contempt. Some courts even treated prejudicial publications made after filing of an FIR as "criminal contempt". A Bill was prepared by the Sanyal Committee in 1963 for this very purpose, which put forth a proposal that for criminal matters, the date of "arrest" is crucial, and just be held to be the starting point of pendency of a trial. This however was dropped by the Joint Committee of the Parliament (Bhargava Committee). The Joint Committee decision however turned out to be flawed as the Supreme Court[444] in 1969 held that a prejudicial publication made after "arrest" could be contempt and agreed with the Sanyal Committee. In that case, the editor of the newspaper, responsible for a prejudicial publication after arrest was held liable for contempt; however a prejudicial statement made by Mr. A.K. Gopalan after lodging of FIR but before arrest was not held to be contempt.

Hence, citing contempt laws in several other countries which held prejudicial publications made before "arrest" as contempt, the Law Commission, in its 200th report[445] suggested that this has to be rectified by adding a clause 'arrest' in the Explanation below sec. 3 as being the starting point to reckon 'pendency' of a criminal proceeding.[446]

The Contempt of Courts (Amendment) Act, 2006 made an important addition to the Contempt of Courts Act, 1971, to provide for "truth…in public interest" as a valid defense in contempt

[444] *A.K. Gopalan* v. *Noordeen 1969 (2) SCC 734*
[445] *http://lawcommissionofindia.nic.in/reports/rep200*
[446] *Sec 4(d)(iii), Contempt of Court (Amendment) Bill, 2006.*

proceedings. This amendment was recommended by the National Commission to Review the Working of the Constitution (NCRWC)[447], recognizing the common law "Doctrine of Truth" as a defense in criminal matters.

IMPACT OF TRIAL BY MEDIA ON COURT PROCEEDINGS

When substantial publicity has been received by a case, which ultimately leads to building of an adverse public opinion about the accused, do the court proceedings become invalid? Does the accused have a right to ask for shifting of trial location? This question was posed and was given serious consideration in the case of *R. Balakrishna Pillai vs State Of Kerala*[448]. The petitioner in this case had contended a transfer of his case from the Kerala High Court to the Karnataka High Court on the ground that adverse publicity had been given to his case, involving corruption charges with regards to a Hydro Electric Project, by the media in Kerala and hence he would not be allowed his Right to Fair trial in such circumstances. He also contended that Mr. Justice P.K. Balasubramanian, a member of the bench hearing his case, had already worked against him as part of an enquiry commission set to inquire into the mal-practices of the rectification work in the Hydro Electric Project, which would lead to prejudice against him. His transfer petition was however rejected.

> **It would be difficult to presume or to draw an inference that the learned Judge, because of assisting the Commission of Inquiry as an Advocate in different matter, would have bias or prejudice against the petitioner and would not render justice in accordance with law. Acceptance of such contention would seriously undermine the independence and stern stuff of the Judges**.

Similar contentions were placed before the courts in the Jessica Lal and the Parliament Attack case.[449] Ram Jethmalani, counsel for the accused, raised a "trial by media" defense. He cited Cardozo; one of the great Judges of American Supreme Court in his "Nature of the Judicial Process" observed that the judges are subconsciously influenced by several forces. A similar view

[447] Report of The National Commission to Review The Working of The Constitution, para. 7.4.1(2002)
[448] *(2000) 7 S.C.C. 129*
[449] *State (NCT of Delhi)* v. *Navjot Sandhu* alias Afsan Guru, *(2005) 11 SCC 600*

had also been expressed in the cases of *P.C. Sen In Re:*[450] *and Reliance Petrochemicals Ltd. v. Proprietors of Indian Express*[451]. The court, though did not let this argument affect their decision, they were vigilant enough to make the following observation:

> *"Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. "*

In the Parliament Attack case, some argued that the primes accused, Afzal Guru was denied his right to fair trial due to excessive coverage given to his case by the media. This was also one of the contentions raised by his legal representative, Colin Gonsalves, on the basis of which he sought a re-trial before the Delhi High Court. He argued that because of the frizzy media reports and accusations, "serious prejudice was caused to the accused persons" in the mind of the trial court judge. Mr. Gonzalves relied upon the European Court of Human Rights judgments in the cases of *Allenet De Ribemont v. France*[452]*, Wayne Carl Coleman v. Ralph KEMP*[453]*, Samual H. Sheppard v. E.L. Maxwell*[454] *and Wilbert Rideau V. State of Louisiana*[455] and argued that

> **Pre-trial publicity prejudicially pervades and saturates the community and renders virtually impossible a fair trial. It was argued that so insidious is bias that a person believing that he was actually acting impartially, in his unconscious mind, is affected by the bias and the decision is therefore, the result of a biased mind.**

In all the above cases there were unfair and prejudicial news comments. There was a repeated telecast of the confessions. In *Rideau*, a video showing the accused confessing to the police about his alleged crimes was broadcast on local channels. An appeal to change trial venue was denied and accordingly the trial court, and on appeal, the Supreme Court of Louisiana sentenced him to

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[450] *AIR 1970 SC 1821*
[451] *1988 (4) SCC 592. 147*
[452] *3/1994/450/529*
[453] *778 F.2d 1487 (54 US LW 2367)*
[454] *384 U.S. 333*
[455] *373 U.S. 723*

death. However on appeal, the Supreme Court of the United States reversed the decision observing that there was a prejudice against the accused. In Coleman also it was observed by the Court that public had been "overwhelmed…with prejudicial and inflammatory publicity.

The Delhi High Court however was did not consider these arguments to be good enough to vitiate the trial and order a re-trial. It was observed that trials in India are conducted by judges and by juries. Further, the time lag between the publicity and the conduct of the trial is also a factor to be borne in mind. The court also *cited R. Balakrishna Pillai v. State Of Kerala*[456], wherein the Hon'ble Supreme Court observed, "Judges do not get influenced by propaganda or adverse publicity" and further *Zee News v. Navjot Sandhu*[457], wherein it was held that media interviews do not and cannot prejudice judges. They ended by holding that judges are trained and experienced enough to shut their minds to such hearsay evidence by the media. The Court was however quick to comment on this condemn and shun this practice wherein, after remand by a magistrate, the media is allowed to parade the accused in a sub-judice matter with interviews and questions, which then are given bizarre interpretations and telecasted worldwide.

The above examples and excerpts have thus succeeded in establishing that media trial cannot be allowed to vitiate a trial. However, there also have been a few comments from within the legal fraternity, which might lead to establishment of a contradictory viewpoint. The Chief Justice of India, Yogesh Kumar Sabharwal, in November 2006, made a public speech said that "Judges are confused because the media has already given a verdict"[458], extra emphasis to be given to the choice of words. Similar comments were made by the Delhi High Court[459] which said that media trial tends not only to influence the general public, but also increases pressure upon judges and that they are human beings too. For now however, it must be assumed that judges are not vulnerable to such acts and situations created by outside world actions.

EPILOGUE:

The discussion above clearly leads to the conclusion that Media trial has negative as well as positive outcomes. If on one hand it has led to harassment of the innocent, it has also led to

[456] *Supra, 11*
[457] Appeal (Crl.) 373-375 of 2004
[458] The Hindu, Sunday, Nov. 12, 2006
[459] Indian Council of Legal Aid v. State (Govt. Of NCT Of Delhi), WP © No. 17595/2006

conviction of the accused, which would not have been possible without its intervention. The question however is whether such harassment of the innocent is a cost worthy of getting a few guilty to justice? The answer probably lies in a famous statement made by a legendary English jurist way back in the 1760's:- "*It is better that ten guilty persons escape than that one innocent suffer*"[460]

This common law maxim has also been accepted in India, on the basis of which the Supreme Court of India observed that there must be a fact of prejudice being caused. A mere possibility of prejudice being caused is not enough to occasion a failure of justice.[461] However, a balancing approach is the need of the hour. If on one hand there is a need to respect the freedom of speech and expression, a right guaranteed under Article 19, which is also available to the media, it also has to be ensured that on the other hand that it does not converge and violate the right to a fair trial recognized under Article 21.

Much ink has been spilled world-wide about the values served by an unrestrained exercise of freedom of the press. As has been pointed out by several critics, reporting has become a part of an ever growing industry which is commonly driven by commercialization and other business concerns.[462] It must hence be regulated and kept under check. A journalist cannot and must not be given, at any cost, the right to openly declare a person as guilty or innocent. The 200th report of the Law Commission on "Trial by Media" has been a welcome step in this regard. Media should acknowledge the fact that whatever they publish has a great impact over the spectator and hence, a right balance should be struck by courts while interpretation of cases, between the right to free press and principles of natural justice guiding fair trial of cases.

[460] Sir William Blackstone, *Commentaries on the Laws of England*
[461] *State* v. *Mathew, AIR (1956) SC 536*
[462] Vincenzo Zeno-Zencovich, *Media Liability in the Information Society*, in The Protection of Personality Rights Against Invasions by Mass Media

WE THE PEOPLE OF INDIA

By Dixit Parakh[463]

INTRODUCTION

The Preamble of the Constitution of India starts from WE THE PEOPLE OF INDIA[464], emphasis exclusively on the citizen of India. The Preamble is considered as the core of the Constitution of India and gives us the glimpse of the guiding purpose and principles of the same. The phrase "we the people" laid down by J.J. Rousseau, emphasizes the concept of popular sovereignty, meaning that "all the powers emanates from the people of India and the political system will be accountable and responsible to the people of India"[465]. It formulates that the Constitution and its powers are mainly conferred to the people of India and does, by the virtue of the same; the powers enumerated in the Constitution are for the people of India. Though some of the articles in the Constitution do provide the powers to aliens, though they govern the concept of humanity and harmony. We see, the Constitution of India is constituted in keeping all the aspects of the human society and works for the betterment of the same. The Preamble says that we, i.e. The People of India, enact, adopt and give ourselves this Constitution, which conferred the powers to the people of India.

Part II of the Constitution of India talks about the Citizenship. This part deals with several categories of the Citizenship at the commencement of the Constitution. The legislation related to this matter is The Citizenship Act, 1955, which was enacted in the year 1955, i.e. The sixth year of the Republic of India (published in the Gazette of India on Dec, 30, 1955). By the virtue of Citizenship, a person enjoys full membership of the political community.

Part II consists of six (6) articles, governing the concept of citizenship in details. With Citizenship Act, 1955 and the case laws, the concept of Citizenship has elaborated discussed in the Indian judiciary and any confusion arises due to material facts and circumstances have been scrutinize and Justice is laid down. Citizenship Act, 1955 contains a total of nineteen (19) sections. These sections discussed the concept of citizenship with a point of view of legislation. Part II of the

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[464] Gopal Sankaranarayan, The Constitution of India, (15th Edn, 2012)
[465] < http://www.iasaspirants.com/2013/09/preamble-to-the-constitution-of-india/ >

Constitution of India when read with the said act provides flamboyant and promulgated guidelines for the Citizenship of India. The other acts, such as Foreigners Act, 1946 and the Passport Act, 1967 also provides the necessary material for indulgence in the concept of Citizenship. The Concept of Citizenship is like a pillar, where the Constitution of India and the Citizenship Act are the mechanism for the base and the case laws is a top architect laid down firmly on the said base.

There can be no Democracy without Citizenship.

- Ralph Nader

PART II OF THE CONSTITUTION OF INDIA

Part II of the Constitution of India consists of seven (7) Articles, constitutes elaborately the concept of Citizenship. Article 5 to article 10 have become of historical interest, whereas Article 11 have relevance for the future. Article 11 provides exclusive and absolute powers to Parliament to deal with matters concerning the Citizenship in India. Further down these Articles will be dealt in details.

- **Article 5** – Citizenship at the commencement of the Constitution.

This article states that at the commencement of the Constitution, every person who has his domicile in the territory in India and

a) Who has born in the territory of India; or
b) Either of whose parents was born in the territory of India; or
c) Ordinarily resident in the territory of India for not less than five (5) years immediately preceding such commencement.

is the citizen of India.

This Article has a broad concept of Domicile[466], which is an essential feature for the Citizenship or for acquiring the Citizenship. It is important to note that between the time of commencement of Constitution and the Citizenship Act, 1955, the decisions regarding the Citizenship is dealt under Article 5 of the Constitution of India[467].

[466] D.P. Joshi v. State of M.B., AIR 1955 SC 334
[467] State of Andhra Pradesh v. Abdul Khader, AIR 1961 SC 1467

Article 5 distinguished domicile into two broad categories, namely Domicile of Origin and Domicile of Choice. Though domicile is not defined in the Constitution, it is an essential ingredient for acquiring Citizenship. The main contention of this article is that any person who has the domicile in the territory of India can acquire Citizenship, and fulfil any one of the pre-requisite condition mentioned above.

THE CONCEPT OF DOMICILE

The Constitution of India does not provide any definition of Domicile, though it is clearly laid down by the legislation, where in different facts and circumstances, the definition of Domicile is being provided. The constitution recognizes only one Domicile namely, the Domicile of India.[468] Ordinarily it means a permanent house where an individual resides with an intention to reside there for an indefinite period.[469] The domicile of a person means big permanent house and is sometimes used in the sense of residence. A Domicile is acquired in that part of the state where the individual resides.[470] The term Domicile does not admit of an absolute term. The simplest definition of Domicile is "that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing thereof."[471]

The concept of Domicile is categorized into two parts, namely Domicile of Origin and Domicile of Choice. These two categories discussed the issue of Domicile in more elaborated manner and provide the guideline for implementation of Concept of Domicile.

Domicile of Origin – Every person born in the territory of India has the domicile of Origin and received at the time of his birth. The Domicile of Origin was determined by the Domicile at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in wedlock to a loving father receives the Domicile of the father at the time of his birth. [472] In case of a posthumous child, the Domicile will be that of the country in which his father was domiciled at the time of his Father's death.[473]. In case of marriages, a woman acquires the Domicile of her

State of Uttar Pradesh v. Rehmatullah, AIR 1971 SC 1382
Wahid Mian Hiddan Mian v. State, AIR 1961 All 111
[468] Dr. Pradeep Jain v. Union of India & Ors., AIR 1984 SC 1420
[469] Mohd. Reza Debstani v. State of Bombay, AIR 1966 SC 1436
[470] *Supra* Note 3
[471] Central Bank of India v. Ram Narin, AIR 1955 SC 36
[472] Kedar Pandey v. Narain Bikram Shah, AIR 1966 SC 160
[473]Shukla, V.N, Constitution of India (12th Edn., 2013)

husband if she did not have the same domicile before, but the same is not applicable if they are separated by the award of the competent court.[474] It is firmly established in the landmark judgement[475] that domicile indicates the civil rights of an individual and that a persons' domicile of origin is the domicile of his birth and not of his place of birth. Thus, it can be concluded that the Domicile of Origin cannot be acquired, but is attested to an individual till the time he deserts it, but can be revived back once the person lost his Domicile of Choice.[476]

Domicile of Choice – For acquiring the Domicile of Choice, the person has to fulfil two necessary conditions, i.e. (1) Actual residence in the first place, and (2) intention to remain there permanently or for an indefinite period. The essential ingredient required for that is *animus manendi*, meaning the state of mind having formed the fixed intention to make his place of residence or settlement for an indefinite period.[477] Therefore, to constitute for the Domicile of Choice, a person has to bear an intention to reside there for an indefinite period. Residence alone is insufficient evidence to establish an acquisition of domicile; there also has to be proof that residence in a country was with the intention of making it the person's home[478], and the intention should be of permanent residence.[479] It is important to note that the intention to reside in any country and the time for that may vary with the nature of the inquiry; it may be past or present. The criterion to prove the intention is indeed very difficult, in order to prove the requisite intention in the court of law, many elements have to be taken into consideration, such as the taste, habit, conduct, actions, ambitions, health, hopes, project, aspirations, whims, prejudices, and financial expatiations all must be taken into account, because they all are considered to be a key to his intention.[480] A person acquiring the domicile of choice must show a fixed and settled purpose of residing permanently or for an indefinite time in the country where he seeks to acquire the new domicile and the onus to prove the same resides on the individual himself.[481]

DOMICILE AND CITIZENSHIP

[474] Satya v. Teja, AIR 1975 SC 105
[475] *Supra* Note 3
[476] A.H. Magermans v. S.K. Ghosh, AIR 1966 Cal 552
[477] *Supra* Note 10
[478] *Supra* Note 6
[479] Louis De Raedt v. Union of India., AIR 1991 SC 1886
[480] Sankaran Govindan v. Lakshmi Bharati & ors., AIR 1974 SC 1764
[481] S.P. Ghose v. Deputy Controller, R.B.I., AIR 1964 Cal 442

The Constitution of India guarantees the citizenship of India, if an individual possesses the domicile in the territory of India, or by acquisition under the manner prescribed by the governing authority. Domicile is one of the silent features for acquiring citizenship; they both are different from each other and mere acquiring the domicile does not guarantees or constitutes citizenship. The individual may possess the domicile, but it does not guarantee citizenship and vice versa. Domicile implies connection with territory, not membership of community which is at the root of the notion of citizenship or nationality.[482] Citizenship has reference to the political status of a person and domicile to his civil rights.[483]

The seventh schedule of the Constitution of India governs about the concept of the list. The schedule enumerates three (3) lists consists of matters, where the central or the state authority has powers upon. The lists, namely, the Union List, consisting of matters where the central government has authority to decide, the State List has matters on which the state government has the authority and lastly the Concurrent List, where both the central and the state government has authority to decide. Admission on the basis of Domicile, comes under the state list, as the matters relating to education is governed by the State government and thus the use of the word "Domicile" for admission in educational institutes signifies only "the idea of intention to reside permanently or indefinitely" and "not in the technical sense in which it is used in private international law".[484]

Article 6 – Rights of citizenship of certain persons who have migrated to India from Pakistan.

Notwithstanding anything in Article 5, a person who has migrated in the territory of India now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if-

(a) He or either of his parents or grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) *(i)* In the case where such person has so migrated before the 19th day of July 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) In case where such person has so migrated on or after the 19th day of July 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the

[482] *Supra* Note 10
[483] *Supra* Note 3
[484] *Supra* Note 3

Government of Dominion of India on an application made by him therefor to such officer before the commencement of his Constitution in the form and manner prescribed by that Government:

Provided that no person shall be registered unless he has been resident in the territory of India for at least 6 months immediately preceding the date of his application.

This Article deals with the migration of people from Pakistan to India and lays down special criteria for deciding who shall be deemed to be a citizen of India. The Article starts with a non-obstante clause defines that in the matter concerning the citizenship of an individual migrated from Pakistan, Article 5 is not applicable. The Article enumerated the word Migration, which has significant importance and thus need to be scrutinized. The word Migration[485] is capable of two (2) meanings; namely-

1) Narrower Connotation, and (2) Wider Connotation

Narrower Connotation means going from one place to another with the intention of residing permanently in the latter place, while, Wider Connotation means going from one place to another whether or not with the intention of permanent residence in the latter phase.

It is vital to notice that in both the Articles i.e. Article 6 and Article 7, which thoroughly elaborated the concept of citizenship, where migration to the territory of India and to the Pakistan respectively, took place. In both the Articles, the interpretation of the word Migration has taken Wider Connotation[486]. This is because, in both the meanings, the only difference lies is about intention, and Wider Connotation is considered because at the time of partition people moved without forming any definite intention.

The question of why the Narrower Connotation does not adopt and why the Wider Connotation was, is given by the Constitution makers, who aptly stated that, the partition cause men's minds in a state of flux. They were completely unhinged and unbalanced and there was hardly any occasion to form the requisite intention for acquiring domicile in one place or another. That is why; Domicile is not a part of both Article 6 and Article 7.[487] The honourable court of law also stated

[485] Kulathil Mammu v. State of Kerala, AIR 1966 SC 1614
[486] Ibid
[487] Supra Note 22

in the same landmark judgement that, if such person is major or minor, would be covered by Article 6 and Article 7, respectively.

Article 7 – Rights of Citizenship of certain migrants to Pakistan.

Notwithstanding anything under Article 5 and 6, a person who has after the first day of March 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Providing that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return, issued by the authority of any law and every such person shall for the purpose of clause (b) of Article 6 be deemed to have migrated to the territory of India after the 19th day of July 1948.

Article 7 also starts with a non-obstante clause, stating that Article 5 and Article 6 do not stand for those individuals who migrated to Pakistan after 01st March, 1947. This Article deals specially with the migration of population from the territory of India to Pakistan and lays down the criteria for deciding who shall not be deemed to be such citizen. The concept of migration in this Article follows as same as in Article 6 and is discussed above.

Article 6, Article 7 and the Concept of Citizenship.

Both these articles play a significant role in the concept of Citizenship. The articles starting from the non-obstante clause provides the guideline that Article 5 does not have any significance as far as migration is concerned. It is very critical to maintain and follow the guidelines when partition took place and where the country suffers great loss because of the flamboyant chaotic situation and was on verge of war. Before the legislative powers enacted in 1955, i.e. The Citizenship Act, 1955, it was very dark to provide light for who shall be considered the citizen of the nation and who shall not. In between the time, Article 6 and Article 7, with the help of decisions of the honourable court of justice, provides the guideline.

As mentioned earlier that the concept of Domicile does not apply to these articles, so the issue of Residence does not appear. The use of the word "migrated" in Article 6 and Article 7 do not require an intention to reside permanently, but merely ought to be voluntary and for a special purpose.[488]

Under Article 6, a person who has migrated from Pakistan to India before the commencement of the Constitution, are classified into two categories, namely (1) those who came to India before 19th July 1948, and (2) those who came on or after 19th July 1948.

For the person falling in first category has to fulfil two necessary conditions: -

- He or either his parents or grandparents was born in India as defined in the Government of India Act, 1935; and
- He has been ordinarily residing in India since the date of his migration.[489]

For the person falling in second category has to fulfil the requisite conditions: -

- He or either his parents or any of his grandparents was born in India as defined in the Government of India Act, 1935;
- He must make an application for citizenship;
- He must prove that he resided in India for six months; and
- He must be registered[490] as a citizen by an officer appointed either by the Government of India under the Act of 1935 or the Union Government under the present Constitution.[491]

If the above said conditions are fulfilled, the person shall be deemed to be a citizen of India.

Starting with the non-obstante clause, the constitution makers clearly guide that individual falling under the category of Article 6, does not have any impression of Article 5 what so ever. It is clearly talking about migration at the time of partition, and thus follows the concept of migration, as mentioned earlier.

Under Article 6, an exception is made in favour of a person who has returned to India on the basis of a permit for resettlement in India. Such a person is entitled to become a citizen of India, if he

[488] *Supra* Note 1
[489] *Supra* Note 10 (page no. 18)
[490] Certificate of Registration cannot be cancelled unless fraud, false representation or suppression of material fact exists.
[491] *Supra* Note 10 (page no.)

fulfils all other conditions necessary for immigrants from Pakistan after 19th July1948.[492] As far as granting citizenship is concerned, after fulfilling the above criteria, Parliament has sole power to do so. No court of law has the jurisdiction of ascertaining who is a citizen and who is not, the authority lies to only Parliament[493]. Also in October, 1948, the permit system came into existence, so no one from Pakistan was allowed to come back to India without a permit.[494][495]

Article 7 overrides both Article 5 and 6, as it talks about migration after 01st March 1947. Individual falling under the category of Article 7, cannot claim citizenship under Article 5 and 6, and the only exception provides to those who had apply of resettlement and permanent residence shall be deemed to be migrated after 19th July 1948, under Article 6 (*b)*. The honourable court of justice said that, no such intention was necessary and that migration under Article 7 means the physical act of going from India to Pakistan and if any person did so whether he was a major or minor he would be covered by Article 7.[496]

Article 7 also has a stand in the ambit of Article 9, which states about the person acquiring the citizenship of another country voluntarily. The question of a certain person, who has voluntarily accepted the passport of Pakistan and now wishes to return back, in those cases Article 7, goes hand in hand with Article 9. Article 7 deciphered migration one before 26th Jan 1950, i.e. between the time of 01st March 1947 and 26th Jan 1950 and Article 9 as migration after 26th Jan 1950.[497] Also, acquiring a foreign passport is not a conclusive proof that the individual has voluntarily acquired citizenship of a foreign national (where the dispute involves only Pakistani citizenship).[498] For matters related to other countries, acquiring passport is conclusive proof of adoption of foreign citizenship.

It is necessary to mention that those people who were convicted for overstaying in India on a Pakistani Passport and Indian visa in 1955 was valid, because at that time Citizenship Act, 1955 does not exist; status had to be determined with reference to Art. 5. The Honourable Court of

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[492] *Supra* Note 10 (page no. 19)
[493] *Supra* Note 4
[494] Fazal Dad Alias Sardar Khan Fateh v. State of M.P., AIR 1964 M.P. 272
[495] Ebrahim Vazir Mavat v. State of Bombay., AIR 1954 SC 229
[496] *Supra* Note 22
[497] *Supra* Note 4
Supra Note22
[498] State of U.P. v. Rehmatullah, AIR 1971 SC 1382
Govt. of Andhra Pradesh v. Syed Mohd. Khan, AIR 1962 SC 1778

Justice stated that the individual continued to be a citizen, till the Central Govt. decided that he had lost his Indian citizenship.[499]

Article 8 – Rights of Citizenship of certain persons of Indian Origin residing outside India

Notwithstanding anything under Article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Govt. of India Act, 1935 (originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representatives of India in the country where he is for a time being residing on an application made by him therefore to such diplomatic or consular representation, whether before or after the commencement of the Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Starting with a non-obstante clause referring that, Article 5 does not have any ambit in virtue of Article 8. This Article is applicable to whose individuals who have no Indian Domicile, but are citizens, if certain conditions are fulfilled. Thus, as Article 6 and 7, Article 8 also excludes the Concept of Domicile.[500] Under this Article, citizenship can only be achieved by him if he is registered as the citizen of India by the diplomatic or consular representatives of India. Section 7A to Section 7D of the Citizenship Act, 1955 elaborately discussed the concept of overseas citizenship. Section 7A talks about registration of overseas citizens of India, with mentioning the criteria for application, Section 7B states the conferment of the rights of the same, Section 7C and 7D provide guideline for Renunciation and Cancellation of registration of overseas citizens, respectively.

This Legislative Act has also the governing of the Central Government, as under Section 7A, it is clearly mentioned that no such individual shall be granted overseas citizenship, which is or had been the citizen of Pakistan, Bangladesh or any such other country as under the authority of Central Government. Also under Section 9(2), it is stated that any question regarded when or how any individual had acquired the citizenship of a foreign country, shall be determined by such authority.[501]

[499] State of Andhra Pradesh v. Abdul Khader., AIR 1961 SC 1467
[500] *Supra* Note 22
[501] The Citizenship Act, 1955

- **Article 9** – Person voluntarily acquired Citizenship of a foreign State not to be citizens.

No person shall be a citizen of India by virtue of Article 5, or deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign state.

Both Article 9 and section 8 and section 9 deal with termination of citizenship of India, voluntarily. Section 8 and section 9 deals with Renunciation of Citizenship and termination of citizenship, respectively and Section 10 about the deprivation of the citizenship. The Central Govt. has the authority to decide the question of voluntarily acquisition of citizenship of a foreign country arising under Sec. 9(2). No other court or authority has the power to decide the question[502], but an individual remains the citizen of India, until the Central Govt. makes the decision regarding acquiring of foreign citizenship.[503] Section 9 is considered as the comprehensive code in regards to termination of citizenship and acquiring of the foreign national.[504] Though Section 9 debars the court from trying the issue whether an Indian citizen has acquired the citizenship of another country, but the section does not bar the court from considering whether the individual concerned ever became the citizen.[505] Also, by the virtue of Section 9, acquiring the passport of a foreign national does not amount to cessed of citizenship of India.[506]

As far as residence is concerned, an individual once give up his citizenship, cannot claim the right of residence on the basis of his domicile.[507] As per Honourable Justice P Gajendragakar, "Section 9 does not lead to unguided power to the Parliament, because it gives the govt. the power to provide an authority to decide the question whether a person has acquired foreign citizenship, it really gives no power but only empower the govt. to constitute an authority for deciding a question which the section itself requires."[508]

Not only Section 9, but also Section 3, Foreigner Act, 1946, authorises the Central Govt. to make provision with the respect to foreigner for among other matter, their continued presence in India, and their departure from India, and Section 3, The Indian Passport Act, 1967, empowers the Central Govt., to make rules requiring that person entering India shall be in a possession in

[502] Rule 90, Citizenship Rules, 1956
[503] Bhagwati Prasad Dixit v. Rajeev Gandhi, AIR 1986 SC 1534
[504] Abdul Satter Haji Ibrahim Patel v. State of Gujarat, AIR 1965 SC 810
[505] Ali Ahmed v. Electoral Registration Officer, AIR 1965 Cal 1
[506] *Supra* Note 31
[507] *Supra* Note 13
[508] Izhar Ahmad Khan v. Union of India, AIR 1962 SC 1052

passport, and for all ancillary and incidental matters, and confers power to arrest any person who contravenes any provision of it or of a rule made thereunder and to remove him from India.[509]

Certain criteria have been laid down for the individual, who has been deprived (Section 10, Citizenship Act, 1955) of citizenship, such as certificate of naturalization obtained by fraud, false representation, or concealment of any fact, or unlawfully traded or communicated with an enemy, being disloyal towards the Constitution of India. Thus, it can be said that the Central Govt. has the soul authority in regards with the decisions of Citizenship.

- **Article 10** – Continuance of the rights of Citizenship.

Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

It is very clear that under Article 10, Parliament can only destroy the rights of citizenship by an express enactment, which ought to be made for the purpose, and cannot be taken away indirectly. Article 10 guarantees the continuance of the rights of citizenship and provides that every person who is or is deemed to be a citizen of India under any of the foregoing provisions; but this guarantee is subject to the important conditions that it would be governed by the provisions of any law made by Parliament only.[510] Proviso introduced by Article 10, clearly states that Parliament has the power to affect the continuance of the rights of citizenship subject to its terms, concluding that Parliament has the supreme authority, as mentioned under Article 11.[511]

- **Article 11** – Parliament to regulate the rights of citizenship by law

Nothing in the foregoing provisions of this part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matter relating to citizenship.

The main objective of this Article is to consider the fact that, notwithstanding anything, Parliament has the absolute powers in matters regarding citizenship. Parliament has the ultimate powers to make any provision in matters related to citizenship, naturalization or termination. Under Article

[509] *Supra* Note 4
[510] *Supra* Note 42
[511] Ibid

11, it is also cleared by the constitution makers that status of the citizenship is not a fundamental right.[512]

FUNDAMENTAL RIGHTS AND THE CITIZENSHIP

Fundamental Rights, as conferred in Part III of the Constitution of India, comprising of a total of 30 Articles. Out of those 30 articles, 4 articles, i.e. Article 14, 20, 21 and 25 applies to any individual on the Indian soil; whereas Article 15, 16, 19 and 30 are expressly applied to the citizens of India only.

The Fundamental Right, if infringed, can be brought in the court of law, in the form of writ, as per Article 32 (Supreme Court) and Article 226 (High Court). Fundamental Rights includes a significant amount of rights and privileges (Constitutional), this includes the right of equality (Article 16), right of speech (Article 19), which includes certain aspects, such as freedom of speech and expression, peaceful assembly, to form associations and unions, to move freely throughout the country and to reside or settle anywhere in the country, and lastly to practise any profession or trade and business throughout the country.

CONCLUDING REMARKS

The test of Good Citizenship is loyalty to country.

- Brainbridge Cloby

For the betterment of the country, such as India, the world's largest democracy, its citizens due makes an effective contribution in the development of the country. The Right to Vote, as conferred in Article 326, which states that every citizen of India, and who is above 18 years of age, has the Constitutional Right to vote. Thus the Right to Vote, provided by the Constitution of India, understands the true implication of the value of Vote in India.

To be a part of this world's largest democracy, it's been a pleasure and more over to contribute to the development and enhancement of the Country. Being a citizen of India, the Constitution provides a flamboyant set of rights and privileges, for its own people, to help them overcome the

[512] Ibid

corruption and contravention of law. A country, which is governed by the people, and for the people.

WOMEN OF FORCED GLUTTONY- THE ETHICAL DILEMMA AS TO WHETHER THE ACT OF COMMITTING A CRIME QUALIFIES AS PROVIDING EQUAL RIGHTS TO WOMEN

By Sumedha Sen[513]

Feminism has become one of the most abated topics of the century. The world and the intellectuals in it have been seen debating vociferously upon the same pushing forward their own colored version of the word. As per our most trusted Oxford Dictionary the most abated topic is described in a single line saying "the advocacy of women's rights on the ground of the equality of the sexes." The issue of rights for women first became prominent during the French and American revolutions in the late 18th century. In Britain it was not until the emergence of the suffragette movement in the late 19th century that there was significant political change. A 'second wave' of feminism arose in the 1960s, with an emphasis on unity and sisterhood; seminal figures included Betty Friedan and Germaine Greer; the word tracing its origin in the late 19th century from the French *word feminism.* But with growing exposure comes greater complications.

While the world suffers from the dilemma in all aspects as to legalize marijuana or not and other medical and ethical dilemmas here is a council of the Colorado Cannabis Chambers of Commerce was founded to provide businesswomen with the tools, community, and resources necessary to overcome the unique hurdles presented by the emerging cannabis industry. As marijuana evolves into a larger and (in Colorado and quite a few other locations) legal cash crop, businesswomen have used this as an opportunity to collaborate and advise each other on how to sustain success in a unique business. The Council's focus is to provide an inclusive, enriching, educational and supportive environment for women in cannabis (and the men who work with them). As we work together to overcome the stigmatization of cannabis, we're also forging new ground as female business owners, executive directors, marketing gurus, bud-tenders, accountants, event planners, scientists, investors, politicians, and more. From tackling large-scale cannabis issues to providing

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workshops, mentoring opportunities, job fairs, and seminars with powerful guest speakers, the council hopes to be a source of strength and empowerment for both the present and the future female leaders of the cannabis industry.

Women who are involved in Colorado's cannabis industry; from novel business owners to bud-tenders and contractors, anyone dynamically engaged in a cannabis business is welcome to join. Legal marijuana trade is much more open to welcoming women into the fold than her previous line of work. The cannabis industry is a group that is already discriminated against, so discriminating isn't very comfortable for them. Mutual respect exists throughout licensed business owners in Colorado's budding economy regardless of gender. With all the risks that come with operating a business centered on a federally illegal substance, one can see a much more results-driven approach. Women involved in Colorado's cannabis industry. From new business owners to bud tenders and contractors, anyone actively engaged in a cannabis business is welcome to join. While most parts of the world consider it ethically and morally wrong to legalize marijuana or any other narcotic for that matter the question lies is practicing the trade by helpless women be made legal?

In India The Narcotic Drugs and Psychotropic Substances Act 1985, an Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. Section 8(c) of the said Act provides that "*No person shall produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter- State, export inter-State, import into India, export from India or transship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of license, permit or authorization also in accordance with the terms and conditions of such license, permit or authorization; Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja*

or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter- State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf'.

Punishment for dealing with narcotic and psychotropic substances is enshrined in Section 21 of the said act which excerpts "*Punishment for contravention in relation to manufactured drugs and preparations- Whoever, in contravention of any provision of this Act or any rule or order made or condition of license granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,*

(a) Where the contravention involves small quantity, with rigorous imprisonment for a term, which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both;

(b) Where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to two years and with fine which may extend to one lakh rupees;

(c) Where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

The problem that lies here entails those women who are engaged in trades such as these in India as they have no alternative source of living and aren't very well educated to work in some other field; as a result they resort to illegal trades including prostitution and drug trafficking to name a few. The question lies as to what is the alternative solution to providing a source of living to such women who the only bread-earners of their families. India is one country, which has yet to legalize prostitution, and same is the case with narcotic substances. While both of these have proved vicious yet is their continuance a symbol of empowerment to such women or is banning them injurious to

the scaffold of feminism? These are some of the questions the answer to which is an enigma in the Indian society.

Another problem lies that the proximity to the largest producers of heroin and hashish-the Golden Triangle and Golden Crescent (Afghanistan-Pakistan-Iran) has made India vulnerable to drug trafficking. Indigenous production of low grade heroin as well as various psychotropic and prescription drugs and their growing demand in the neighboring countries and international market have added a new dimension to the problem of drug trafficking. Trends and patterns of drug trafficking in the country demonstrate that there is a gradual shift from traditional/natural drugs towards synthetic drugs that are being trafficked. Trafficking of drugs takes place overwhelmingly through land borders followed by sea and air routes. Given the vulnerability of the borders to drug trafficking, India has tried to tackle the problem through the strategy of drug supply and demand reduction, which involves enacting laws, co-operating with voluntary organizations, securing its borders and coasts by increasing surveillance, as well as seeking the active cooperation of its neighbors and the international community. And most of the times it is girls who are used to traffic such noxious substances, compelled by personal circumstances.

Drawing strength from the Constitution of India where trafficking of persons is prohibited under Article 23 (1), the directive for prevention of trafficking of persons, has received significant attention from the Government. In lieu of the multi-faceted issues associated with trafficking, the task and responsibility to fight the problem cut across different Ministries/Departments and also State Governments as the subject of trafficking falls within the purview of both the Centre and State mandates.

The Government of India has built quite strong linkages and partnerships with varied stakeholders including civil society, NGOs, corporate sector, international organizations to name a few; in all its endeavors to build an integrated response to prevent and combat trafficking in persons, especially of women**.**

India has reiterated its commitment to prevent and combat trafficking by being a signatory to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

It has also ratified, other related Conventions such as Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and its optional protocols, and the SAARC Convention on Preventing and Combating Trafficking among Women and Children. "Strengthening the law enforcement response in India against trafficking in persons, through training and capacity building" was launched as a joint initiative between the Ministry of Home Affairs, Government of India and UNODC in April 2006. The major achievement in the design of the Project has been the harmonious coordination of Government and Non-government agencies as partners in the implementation of the Project.

The National Commission for Women- It is a national level, to safeguard the interests of women. It has a wide mandate covering almost all aspects of women's development, such as to investigate and examine the legal safeguards provided for women under the Constitution and other laws; review the existing provisions of the Constitution and other laws affecting women and recommend amendments to meet any lacunae, inadequacies or shortcomings in such laws; look into complaints and take suo moto notice of matters relating to deprivation of women's rights and take up the issues with appropriate authorities; take up studies/research on issues of relevance to women; and participate and advise in the planning process for socio-economic development of women.

National Policy for Empowerment of Women, 2001 of the MWCD – The goal of this Policy is to bring about the advancement, development and empowerment of women. Some of the objectives include creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential; the de-jure and de-facto enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres – political, economic, social, cultural and civil; equal access to participation and decision making of women in social, political and economic life of the nation; equal access to women to health care, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office; strengthening legal systems aimed at elimination of all forms of discrimination against women; elimination of discrimination and all forms of violence against women and the girl child; and building and strengthening partnerships with civil society, particularly women's organizations. The Ministry of Women and Child Development till November, 2007 had decided to implement three pilot projects, to combat trafficking of women and children for commercial sexual exploitation under

the sanction of tradition in source areas and in destination areas. It was decided to convert these three projects into comprehensive scheme in the Eleventh Five Year Plan (2007-12) of the Government. Thus, 'Ujjawala', a new "Comprehensive Scheme for Prevention. The MWCD also runs shelter based homes, such as short stay homes and 'Swadhar' homes for women in difficult circumstances. These schemes also cater to trafficked women/girls rescued or runaway from brothels or other places. The schemes provide for shelter, food, clothing, counseling, clinical, medical, and legal and other support, training and economic rehabilitation and helpline facilities. Many of these homes are equipped with women helplines for emergency response. At present, there are 380 short stay homes and 240 'Swadhar' homes functioning in the country. State Governments also separately run shelter homes for women and children in distress. Many of these homes are equipped with women helplines for emergency response. The Government of India is implementing a number of poverty alleviation programs, which would also reduce vulnerabilities of women and children to trafficking. These programs include Swarnajayanti Gram Swarozgar Yojana (SGSY), Sampurna Gramin Rozgar Yojana (SGRY), National Rural Employment Guarantee Act (NREGA), mobilization of Self Help Groups (SHGs) and providing skill building training and linkage with micro-credit institutions, vocational training organizations, etc. The SHG is a silent but powerful movement that is revolutionizing and revitalizing remote corners of the country, bringing together poor and women without assets, giving them a face and a voice.

The ultimate empowerment of women and their children will happen when all programs and policies are engendered, leading to gender responsive budgeting. Fifty-six central level Ministries/Departments have set up Gender Budgeting Cells and are reporting allocations of funds flowing to women and girl children in the Union Budgets. The MWCD has embarked on regional workshops for State Governments as well as one to one training of individual Ministries/ Departments/State Governments to ensure effective gender budgeting. The Government has also introduced Child budgeting in the Union Budget of 2008-09, with a view to improve the allocations of funds flowing to children under the various Ministries/Departments.

While one is overwhelmed with the number of government organizations and the innumerable initiatives that are launched by them one is compelled to think that the condition of women in the country has enriched but it hasn't. The reason being that the enforcement agencies lie rusted in ruins. Everyday we read something or the other in the newspapers as to how a government official

assaulted (both tangibly and intangibly) a girl who sought help to which she was entitled to. There are many women who are engaged in the drug trade and want to escape by approaching the Government for help. Its because of such incidence, induced by such vermin that ruin the face of the Government. Hence the last resort being further acceptance of what is deemed illegal by the law.

Even though there are comprehensive plans and directives, which have been formulated by the Indian Government, yet the enforcement and its practical application are what form the fractures.

In conclusion what anyone analyzing this problem may draw that this problem is the end to a tunnel with an infinite seeming culmination. The problem has a vice like grip on the economy making it seem like a maze hence the only question that remains is the question of legality that ensures the Fundamental Rights promised by articles of the coveted Indian Constitution but yet are in line with the sentiment of the Justice System in India.

The dilemma is not only ethical but is also legal and constitutional in nature and needs a well-planned system.

HOW CRIMINAL DEFENCES WORK

By Sourish Ray[514] & Divyank Sindhu[515]

INTRODUCTION

The liaison organized by criminal law is very much different from that existing between clubs, societies, and members of a family or the other social communities of concerns. In its archetype pattern of core offences, it manifests various obligations which are dependant for their jurisdiction not upon the presence of the rule itself and their indiscriminate internalization, as in games and sports or the demand to encourage and cultivate the purity of a really close relationship which can be seen within families, but upon a categorical acknowledgment of the real truth of the rules and standards which are concerned. Sometimes this can be observed when ones own parents give them up to the regulatory authorities, the police upon the finding of an act of grave wrongdoing. People should not think that due to this act of the parents, they don't care or have lost their love for their own off springs, but the subtle reason behind this is to show that they themselves are not the owners of such a wrongdoing and they want the concerned authorities to take whatever action is needed on behalf of the particular community or individual which has been harmed, so as to prevent or deter their children from committing such crimes in the longer run. Individuals who hunt, steal, kill or commit an offence are always made the main aim of public censure. No other mechanism, other than punishment can willfully explicit this censure and none other than the State has the jurisdiction to punish on behalf the community which has been affected. For all these various reasons, *mens rea* is very much required. It is just inappropriate to punish and castigate someone who has committed a wrong until and unless they are really at fault in committing the wrongdoing.[516] The benchmark here is that the criminal law has a role to play over and above confirming wrongdoings particularly to restrict its brunt to those who disregard the values which

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[516] See generally HLA Hart *Punishment and Responsibility* (1968)

have been embodied in the norms of criminal law and therefore are deserving to have their actions adjudicate as a public wrongdoing.[517]

Modern communities these days really lack the developmental and intellectual homogeneity which is vital to showcase a common impression of what is right and what is wrong. People who go to the same pubs for drinking, who have the same pattern of lifestyle may nevertheless not agree on what the law of murder should consist of. Is Euthanasia or Abortion an element of an individual's personal choice, or is it a sacrosanct moral pressure.[518]

THE ROLE OF THE STATE

The states elementary role, in this aspect is to clearly specify the regulations by which cases are governed where the equivalence of reasons for and against the operations might be misconceived. Where as in grave offences, like rape and murder and various other offences of high culpability, the behavior aspect encompasses a moral constraint, contributing an individual's reasons for creating violence a detailed role in the crime would be self annihilation. By entrusting situations and emotions to the domain of pursuing defences, the lucidity of the moralistic precept that harming people is a wrongdoing in itself can be maintained. It is a doctrine which formulates its own reasons to ascertain. To an individual it may seem on the squeal of a puzzle that to mercifully kill is the best choice, and this is because the criminal defences and offences are patterned in such a way.[519] Criminal proscriptions require conformity even in the time of coercive reasons for non abidance. They have a lucidity of reason, which allows people to be aware of what is the correct thing for the people to do, without the intervention of a principled enquiry. If the special intent of the individual is heroic enough to provide a balanced reason, then not conforming to that particular reason has to be evaluated in the beginning from the scope of the ostracized society rather than that of the individual himself.

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[517] G Lamond 'What is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609;

[518] R Dworkin, *Life's Dominion* (Penguin, London, 1993); W Wilson *Central Issues in Criminal Theory* (2002), chapter 2.

[519] See J Raz, *The Authority of Law*, ch 1 and generally, (OUP, Oxford, 1979). A Norrie, *Punishment Responsibility and Justice* (Clarendon Press, Oxford, 2000),

This rejection to grant motive and context a bigger say in the building of criminal liability marks up, a general standardized dilemma which no volume of judicial trifling can hope to correct, namely how to mitigate the demands of the society and fairness, equity and justice to the individuals where the private interests, perceptions collide with the public interests.[520] This dilemma can be recapitulated as asking whether or not it is probable to formulate a basic prototype for the purpose of criminal defences by which defences meet up for realization can be accordingly judged. These burdens have had the most serious impact for the offence of murder. The necessary and statutory sentence makes it philosophically crucial, rather than simply enticing, for criminal defences to patrol effectively in the borders between the most dangerous killings and those which might be excused or partly can be excused.[521]

ROLE OF CRIMINAL DEFENCES IN THE FORMULATION OF LIABILITY

Rather than getting involved in general righteous interpretation of the defendant's behavior for the determination of estimating the defendant's vigor for punishment and denunciation, the criminal justice system makes its valued decisions through a rational spectrum, which displaces the false act and the wrong components in criminal liability into more fundamental elements. This spectrum based approach targets to react a division of the unbiased facts out of which a criminal proscription and its accompanying mental status is constructed, from the circumstantial elements which might provide to excuse the breach or justify for the breach.[522] The scope of compartmentalizing the fault and conduct variable in such a way, is as has been discussed to study the control over the contingent elements which does or does not affect the criminal liability and to mitigate the scope and nature for uncertainty and denial of what is censurable conduct and what is not censurable conduct. What is historical is this detailed separation was showcased in a criminal procedure in which the defense and the prosecution ferried separate onuses.[523] The prosecution had to bear the burden of justifying

[520] Lacey, Space, time and function : intersecting principles of responsibility across the terrain of criminal Justice, Criminal Law and Philosophy (2007) 1 :233-250, p.235

[521] See B Mitchell & J Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart Publishing 2012)

[522] R A Duff (2007) Answering for Crime: Responsibility and Liability in the Criminal Law (Hart Publishing).

[523] G Fletcher (1978), chapter 7. J Langbe in (2003) *The origins of adversary criminal trial* (Oxford, OUP)59.

the very fundamental elements of the crime and for the defense, matters like self defense, regulated to acquit the liability from the defendant for the offence committed. There was a time, whether a defense was benchmarked as a justification or an alibi was a proud moment. A murderer who was excused of manslaughter nonetheless had to give away his valuable possessions to the Crown. A justified killer did not have to do this. Ceremonial aftermaths no longer affix to segmenting defences in such a way. Maybe they should. Diminishing this difference serves to abolish vital penological and principled functions of the doctrine of defense.[524] Let's take an example like, if an individual murders another person, in the mistaken notion that he was about to commit a grave offence will be granted an acquittal of unqualified nature. It may take some more sense than to catalogue excused wrongs with an exclusive verdict. It might also advocate various different procedural or evidential convocations like an annulment of the burden of persuasion connected maybe with a lower level of proof.[525]

Not only would such conclusions tinkle better with the balanced principled reaction which pardoned wrongdoing contributes to evoke it is quite possible that there will be a bigger eagerness to actually accept peripheral excuses, for example murdering for reasons of humanity, if the result was not an absolute acquittal. It could also distribute as a ground for implanting onto the not guilty decree enforceable situations constructed to mitigate the possibility that such an act which is wrong in nature will be again repeated.[526] The shield of automation is a very evident case in this point. In the courts of England, mainly for various reasons of social defences, have often constrained to embed the special decree of not being guilty for reasons like insanity or various other corrective mechanisms.[527]

Going by the concept, criminal defences work about in tandem along with the requirement of *mens rea*, clarifying the terminologies of the definition of offences to insure that the principled reason of a criminal proscription is accomplished.[528] This is specifically for justifying; whose

[524] G Fletcher op cit

[525] See A Stein 'Criminal Defences and the Burden of Proof' *Coexistence 26*: 70, 82-86 (1990)

[526] The offence of handling stolen property provides something of a prototype in this respect.

[527] See for example *Lipman* [1969] 3 All ER 410; *R v Sullivan* [1984] AC 156; *Burgess* [1991] 2 All ER 386.

[528] P. Robinson 'Criminal Law Defences: A Systematic Analysis' (1982) 82 Col L Rev 199, at 209.

standardizing pattern supports and complements that of the crimes themselves. An abridged synopsis of offences of violence signifies why a structure of restrictions grounded in principled rules or norms assumes also a methodical mean to justify violations. Violence is prohibited, at a large scale but not entirely, as it involves an attack upon the personal autonomy of individuals which is generally unjustified. The requirement for individual freedom, justifies the reasoning of not using force against an individual and even this is defeated when the other party consents to it, or is not capable of giving consent where the usage of force is in his interest. It also explains why the reason is not vanquished if it goes against the patients wishes.[529] Criminal offences and defences are two distinct facet of the same coin.[530] This has punctuated the view that the circumstances of liability are better evaluated without resorting to the somewhat unreal classes of *mens rea, actus Reus* and defences. All of the principles which have been envisioned by the term *actus reus* do not attribute to the main state of affairs which are prohibited by a criminal prohibition. The rationale mental component sometimes aids to determine the wrongdoing rather than making the individual culpable for it. All the questions of responsibility, fault are not resolved by the principles of *mens rea*, but they require the regulations which govern causation and defences. This restoration of the ternary division into the more elemental division of the circumstances of liability into those of faults and acknowledgement underpins the categorizing of defences into excuses and justifications. The antecedent is relevant to the wrongdoing that is whether their committed action of violence and the violation of the laws is indeed an occurrence of wrongdoing for which they must be held accountable for. The latter is much more relevant to acknowledgement that is whether the defendant is culpable for their acts of wrongdoings. The benefits of this analogy has consequently been put to question[531] there is no other substantial way

[529] *St George's Healthcare NHS Trust* v. *S* [1998] 3 All ER 673; *Re C* [1994] 1 All ER 819.;*Malette* v. *Shulman* (1988) 63 OR (2d) 243; *Re W (a minor)(medical treatment)* [1992] 4 All ER 627.

[530] R A Duff (2007) *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing). CF A Loughnan 'Diminished Responsibility as Hybrid Legal Form' (Mental Disorder and Criminal Justice Conference, Northumbria University, October 2013).

[531] See P. Greenawalt, 'The Perplexing Boundaries of Justification and Excuse' (1984) Columbia Law Review 1847; P. Robinson, 'Criminal Law Defences: A Systematic Analysis' (1982) 82Col LR 199; J.C Smith, Justification and Excuse in the Criminal Law (1989), London: Sweet &Maxwell; Fletcher (1978), Chapter 10. D. Husak, 'On the Supposed Priority of Justification to Excuse', Law and Philosophy 24 (2005), 557; J. Gardner, 'In Defence of Defences' in Offences and Defences, Selected Essays in the Philosophy of Criminal Law, Oxford: OUP (2007); A

to comprehensibly render this fact that those who help an individual who is behaving in a justified manner, like for self defense, but not in an excused manner, under force, also escapes from the grunts of criminal liability. Justified coercion cannot legally be prevented, but on the other hand excused coercion can legally be prevented.[532]

ROLE OF CRIMINAL DEFENCES IN THE CIRCUMVENTION OF LIABILITY

Following this division of defences into justifications and excuses, what if one should really go forward in terms of their essential components[533]? The paramount structure of the formulation of criminal excuses is the happening of some forms of crisis of nature to stop the normal inference that those who pierce a fundamental norm of conduct manifests the type of evil character which suits them for denouncement and punishment for their acts. This is not to take any favorable sides in the choice versus character dispute on criminal responsibility.[534] It rather encompasses the uncontroversial belief that for most of the excuses the applications which evoke the conclusion that an individual lacks the fair chance to react as per the requirements of law. However, there is a meta- theoretical base for promoting one to the next which is always ignored or overlooked. This is that choice theory affirms, in such a way which the character theory does not, the whole scenario that state punishment is very problematic.[535] In facilitating criminal defences in the absenteeism

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Simester, 'On Justifications and Excuses ' In L Zedner and J Roberts (eds) Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth (OUP 2012) 95

[532] see W Wilson Central Issues (2002), chapter 10

[533] See generally R A Duff (2007) Answering for Crime: Responsibility and Liability in the Criminal

Law

[534] see P. Arenella, 'Character, Choice and Moral Agency' in E.F. Paul, F.A. Miller and J. Paul (eds) *Crime, Culpability and Remedy* (1990), Oxford: Clarendon Press; N Lacey 'Character,

capacity, outcome: towards a framework for assessing the shifting pattern of criminal responsibility in modern English law' in M D Dubber and L Farmer (eds.) *Modern histories of crime and punishment: Critical perspectives on crime and law* (Palo Alto; Stanford University Press) 14-41; N Lacey (2011) 'The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation' in R A Duff and S Green (eds) *Philosophical Foundations of Criminal Law* (Oxford, OUP), 151-178.

[535] See generally A Brudner, *Punishment & Freedom: A Liberal Theory of Penal Justice* (OUP 2012 and a special issue of the New Criminal Law Review devoted to its analysis' (2011) 14(3) New Criminal LR 427, See also R A Duff 'Blame, moral standing and the legitimacy of the criminal trial' *Ratio*, 23(2), 123-140; A Norrie, *Punishment Responsibility and Justice* (Clarendon Press, Oxford, 2000), ch 1; N Lacey, ''Punishment, (Neo)Liberalism & Social Democracy', in J Simon & R Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage Publishing 2012) 260-280.

of the chance to affirm to a criminal restriction, the chance theory averts making any connection between responsibility in a criminal activity and desert in punishment. It involves itself only to the purview that without intentional acts of wrongdoings, punishment is not deserved and hence includes a farther prerequisite for the intervention of the state mechanism, as long as the state is unbiased and not acting unfairly.[536]

Neither of the challenging doctrines of defences moves forward keeping this premise in mind. If the individual's wrongdoings are in character or if the individuals wrong acts is equitably not reasonable, then no further protocols for state punishment and denouncement is required. As it may be, each and every theory moves forward from an acceptance of the elemental building blocks of dilemma, and the feedback, thereto which constructs the vital criminal defences. The excuses are founded in the admission either that the reception of the defendant was quite reasonable or the most equitable amongst many of the people can, in dire situations like anger, terror, trauma loses touch with that elemental core of justifications which invites upon affirmation with legal regulations.[537] The fundamental excuse template bringing together these defences assures, in a way which is comparable to defences of justified reaction, that it is only such one sided reactions to dilemmas which are experienced in blocking the ascription of morally disgraceful conduct.[538] All the vital criminal defences of loss of self control, duress, self defense, automatism and necessity reflects this aptitude to separate those things which occur to us by merit of who the people think they are and the things which happen to them, where they are set out by an impulsive fate to be the individual to face a dilemma.[539]

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[536] See generally R A Duff (2007) Answering for Crime: Responsibility and Liability in the Criminal Law (Hart Publishing; For recent discussion see V Tadros, The Ends of Harm: The Moral Foundations of Criminal Law (OUP 2011)

[537] For criticism of the view that all excuses reduce to the claim that the defendant's action was reasonable see J Horder, *Excusing Crime* (2007); V. Tadros, *Criminal Responsibility* (2005), 286, W Wilson 'The filtering role of crisis in the constitution of criminal excuses' (2004) Canadian Journal of Law and Jurisprudence XVII, See also D Klimchuk (2012) 'Excuses and Excusing Conditions' in F Tanguay- Renaud and J Stribopoulos (eds.) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Law* (Hart) 118

[538] W. Wilson, The Filtering Role of Crisis in the Constitution of Criminal Excuses' Canadian Journal of Law and Jurisprudence XVII, 2 (July 2004); W. Wilson, 'The Structure of Criminal Defences' [2005] Crim LR; P. Westen, 'An Attitudinal Theory of Excuse' (2006) Law and Philosophy 289

[539] This is not to say, of course, that this is an invariable rule. Certain excuses or defense groupings, for example, are clearly grounded in individual moral or practical bases which necessarily exclude the operation of the template. For example, the defense of voluntary withdrawal for accessorial liability requires a very different ingredient of organizing

THE FUNDAMENTAL TEMPLATE

The Trigger

The preponderance of vital defences which include automatism, involuntary conduct, necessity, duress, loss of self control are functional only upon the application of proof of an external trigger. This functions whether the ground of the defense is a valid justification or merely an excuse and or the righteous claim is whether the defendant reacted reasonably as in protecting himself or herself or it was necessary, as justifiably during loss of self control or duress, or the most philosophical demand that the trigger dispossessed the state of any ground upon which to assess the conduct of the individual as in involuntary conduct. In each of the cases, the trigger executes two vital functions. At first it constructs the defense in terms susceptible to proof, and secondly it provides criminal justifications with their political and moral authorization.

The fundamental components of the trigger for each of the confirmative defenses are therefore very similar. The menace of harm has to be taken care of and avoided or provocations by words or actions. For each and every defense, the criminal behavior which it is desired to excuse or justify has to be directly affirmative to the threats, which is dependant upon. The defences are not available if the act which was taken was for ambiguous reasons. An individual cannot depend on either loss of self control or self defense if galvanized by revenge rather than the trigger.[540] An individual cannot depend on coercion if, although the subject matter of a threat which is mortal in nature, the correct trigger for activity was blackmail.[541] An individual cannot resort to coercion or necessity if they are not able to pin point a particular threat, and the source which punctuated such

rationale from other excuses and justifications—one based essentially in societal needs rather than fairness to the individual beset by crisis.

[540] R v *Ibrams* and Gregory (1981) 74 Cr App R 154; R; R v *Hussain & Hussain [2010]* EWCA Crim 94

[541] *Singh* [1972] 1 WLR 1600; *Valderrama-Vega* [1985] Crim LR220.

a reaction.[542] Furthermore, an individual cannot depend on loss of self control if the defense is not able to pin point any particular provocative words or actions which punctuated the reaction.[543]

The trigger executes a proportionate part in the defense of loss of self discipline. In the case of *Dawes, Hatter Bowyer,* There was a distinction made between the general determinants and the specific triggers by giving reference to the events arising from a marriage breakdown. Despite the fact, that the fall out from the breakdown of a relationship may formulate an enabling trigger, where the deceased advocates quite a few hurting actions or assertions.[544] The break down of a relationship cannot give rise to circumstances of a dangerous character to provide for a justifiable trigger.

The Reaction

Central to the concept of the trigger is an occurrence which is of an essence to agitate a reaction. Accordingly, the entire affirmative defences demand, admitting to differing degrees, the reaction to be an instinctive one. Again the alterations are managed and controlled by the hypothesis of the defense. The relationship between the hypothesis and the essence of the reaction has been analyzed thoroughly in connection to the loss of self discipline and its primogenitor and provocation.[545] The hypothesis of each differentiates those whose conduct is triggered by a morally plausible emotion of fear or reasonable moral anger rather than a desirable desire to vindicate or to safeguard oneself from farther occurrences of violence. The former attitude would offer no alibi of any kind. The following would need to affirm to the criticisms of self defense for it to be rational with respect for the rules and regulations of the legal system. Although the attitude must be determinable to a triggering occurrence it is quite clear that it shouldn't or need not to be followed immediately.[546] This is because loss of self discipline is, by rationale, an exemplified reply to stress. As such, it can be triggered in various manners banking upon the particular individual, the situation, and the nature of the triggering act. A classic example of a postponed loss of self discipline is that which

[542] R v *Shayler* [2001] EWCA Crim 1977

[543] *Acott* ([1997] 1 All ER 706, House of Lords); *R v* Bowyer [2013] EWCA Crim 322

[544] Clinton, R. v [2012] EWCA Crim 2 (17 January 2012)

[545] Law Com 290 2004, Partial Defences to Murder; Law Com No 304 (2006) Murder, Manslaughter and Infanticide

[546] *Ahluwalia* [1992] 4 All ER 889

is generally experienced by individuals who have fallen prey to domestic violence. In the landmark case of R v. Dawes it was noted that provided there is a loss of discipline, it really does not matter whether the loss was immediate or it wasn't. An answer to situations of acute intensity may be postponed. Different personnel in various circumstances do not react analogously, nor reply immediately. Therefore for the determination of the new defense, the loss of discipline may pursue from the accumulative brunt of earlier events.

Adjacency or amazement is however of fundamental concern to coercion, although again one must certify this by allusion to the kind of coercion, that whether it was of moralistic involuntariness or of equitable reciprocation to confrontation. Taking into account the formers case, which generally involves coercion in the form of threats, this demands for prompt action on the footing of the excuse that is, it would not be fair to hope that the defendant would overcome his or her anxiety, is abolished. If the intimidation was not an immediate one, then there would be no valid reason to acclaim the allegations that the defendants regularizing reserves were subdued. Contradicting this with compulsion of circumstances and obligations where the defendants principled claim will normally be of good sense, that is it was practical for a human being to select a pathway of action which did not cede his own life or that of another thing for which he is liable, or in cases of urgency, was a justifiable mean to avoid a bigger wrongdoing.

In the case of Pommell[547], the defense team was held responsible to defend the defendant for carrying a firearm without a valid license, but according to him the defendant possessed the firearm to avert its original owner from using it for a vengeance killing.[548] Although it can be argued that it was a case of urgency or necessity than of coercion. It was quite clear that accession rather than promptness of threat was satisfactory to grant the explained excuse.[549]

The Reaction Must Not Embed a Dangerous Personality

The reaction and trigger components in the templates of the criminal defense are imminent elements of the conventional humanistic approach of liability which is deeply rooted in an

[547] [1995] 2 CrAppRep607.

[548] Cf. *Cole,* in which no great enthusiasm for such a prospect was voiced.

[549] J. Horder, 'Self-defence, necessity and duress' [1998] Can J Law and Juris 143.

individual's wrongful act. An individual is sought to have committed the offence of murder only when there is intent to kill until and unless this *reaction* is provoked by an occurrence which prevents his societies inclination to hold him responsible. By this embodiment it thoroughly becomes crystal clear that though the reaction and the trigger are prerequisites of justly holding an individual to give account for his or her wrongful doings, is not the whole story. The main subject matter of criminal approbation is not a confined person. This same individual is one who lives in a society whose belief's define and establish him or her as a person and as a subject matter. Necessarily, both crimes and defences therefore manifest those beliefs in the tenacity of wrongdoings and in the assurance for criticism.[550]

There are proportionate constraints on the opinions outlining the other affirmatory defenses, each of which is linked to the respective hypothesis of the defense. For coercion the trigger does not operate if it is observed that the defendant does not have the fortitude of an ordinary citizen of the society. People might feel that this is not fair. If principled involuntariness along with justifications of reaction lies at the crux of the defense, the question is why should it then matter whether or not the horror was justifiably honored or not. Principled involuntariness does not necessarily lie at the crux of the defense or maybe there lies another reasoning why justifications require reactions to amplify up to the equitable canonicals of bravery and courage. The general reason which is normally provided is duress, like all the other excuses which operate by rejecting principled accusation. Principled accusation is not annihilated by declaring that an individual is liable to be scared of, on supposedly an accusation of theft.[551]

Criminals laws only permit is to construct into the various features of the subject matter which is to be judged, unlike lack of principled endurance are not genuine forms of who they are but are features which could be revisited upon any practical individual like a lessened scope or capacity

[550] see RA Duff; Sandel, Liberalism and the Limits of Justice, (1982); Walzer, 'The Communitarian Critique of Liberalism' [1990] Political Theory 6-23; Etzioni, *The Responsive Community : A Communitarian perspective*¸ American Sociological Review.

[551] being 'unnaturally cowardly ... is the very ground for blaming him. It could hardly serve as an excuse. Such defences are not accorded in moral any more than in legal judgment.' S. Kadish, 'Excusing Crime' (1987) 75 Calif LR 257 at 276.

to intimidations available to accumulative violence's at the very hands of the oppressor.[552] Once again the intimidations or threats of the oppressor do not qualify to a workable trigger if placed as he or she was or he or she might have avoided being in the company of deadly offenders.[553]

PROPORTIONALITY

Proportionality is elemental to the concept of urgency, with its requirement that the measures taken are proportionate to the wrongdoing which is to be prevented. In the actual scenario, while proportionality on a lesser of two harms ground is required it is not in itself suitable to establish the reason. This is so because of the principled preference which is given to personal rights over unified interests.

In the future, it will never be legal to coerce a person to shed blood even though many lives might be protected and saved. As an elemental need, a guarantee to equity must assure that the measure which has been taken do not affect a calculated baloney of an innocent person.

CONCLUSION

All the vital defenses propound an identical build up. This has instilled the certainty that defenses share an universal philosophy whether that hypothesis be in the matter of core justifications, that the defendants wrongful act was out of caliber, was as justified as it could be familiar in the situations or was not the subject of a reasoned, justified choice. These diversified explanations tend to obstruct peoples considerations and understandings of how the various defenses tend to work. In cases of self defense, coercion and urgency problems helps pin point the guidelines for the requirement for and equitability of a subject matters reaction or action. For the reason of intellectual or physical involuntariness contingencies might also bereave individuals of their sensitivity to affirm their conduct to the rules and regulations. The accepted construction manages to afford means of dodging the free will enigma by conforming that the triggers rather than elementary explanations compromise principled authority, and insuring an efficient and equitable

[552] *Emery*. (1993) 14 Cr App R (S) 394

[553] *R v Hasa*n [2005] UKHL 25; *Mullally* [2012] EWCA Crim 687.

balance between the rules of the legal system and righteousness to the individuals in matters where private and public concerns meet head on.