

SEX OFFENDERS REGISTRATION AND NOTIFICATION: WRONG STEP IN THE RIGHT DIRECTION

Authors – Meher Dev and Devyani Tewari

Meher Dev is an Advocate practicing in the Supreme Court and the Delhi High Court. She is practising at the Chambers of Sr. Advocate, Ms. Indira Jaising and, among others, is engaged in gender and child related issues such as temple entry of women, triple talaq, sexual harassment, sex selection, gender discrimination in service matters, maintenance, crèches at workplaces for women. Simultaneously, she is also remotely working with Avon Global Centre for Women and Justice, Cornell Law School, N.Y., U.S.A as a Research Associate. meherkaurdev@gmail.com

Devyani Tewari is presently a LLM Candidate at London School of Economics and Political Science and a Chevening Scholar (2016-17). She graduated from NALSAR University of Law, Hyderabad in 2013, earning a degree of B.A., L.L.B. (Hons.) and a gold medal in International Law. devyanitewari21@gmail.com

ABSTRACT: The Indian government recently proposed formulation of a sex offender registry and public notification of the same in order to achieve the objective of preventing crime against women and children. The proposed policy indicates that it is modelled on the American model of a sex offender registry wherein registration is followed by public notification of the same.

This paper analyses the American model and assesses its success in the U.S.A. It contrasts the American model with other models used in Europe, especially the U.K. The latter model, particularly the British model combines a rehabilitative approach towards sex offenders with a registration system that has limited notification. The objective of the paper is to prove that the proposed Indian model is inconsonant with the Indian legal framework, and fails to balance the competing interests of promotion of deterrence and protection of the society on one hand, and protection of privacy, dignity and socio-economic rights of sex offenders on the other hand.

The authors argue that registration of sex offenders is imperative; however it must be accessible only to law enforcement agencies, creches, schools, school buses, public carriage buses, radio taxis, web-based taxi aggregators and institutions for the disabled, elderly and children.

Keywords: sex offender registration, public notification, limited accessibility, privacy, dignity, rehabilitation, competing interests, proportionality.

INTRODUCTION

Sexual violence against women is a miasma of melancholia and terror. Despite formulation of various laws, National Crime Records Bureau (NCRB) data states that in 2014 as compared to 2013, there has been an increase of 9.2% in reporting of crimes against women¹. Following the brutal *Nirbhaya rape*, some strategies towards addressing violence against women were initiated, such as, prevention through strengthening infrastructure and human resources, education and awareness-generation; registration and investigation; prosecution and punishment (including victim and witness protection); rehabilitation and reparation and creation of a sex offender registry.

Sex offender registry and notification is a system that allows government authorities and sometimes the public at large to track the movement and activities of convicted sex offenders following their release into the community. The Indian government plans to set up a sex offender registry in the country, on the lines of those maintained in the U.S.A. The government informed the Rajya Sabha on 27th April, 2016 that the database would even comprise information about juvenile sex offenders, which will be put up on the website of National Crime Records Bureau (NCRB). According to the government, the registry entailing photographs, addresses, PAN card details, Aadhaar card number, fingerprints and DNA samples of the sex offenders will be accessible to the public. Minister of State (Home) Haribhai Parthibhai Chaudhury told *The Hindu* that the sex offender registry would comprise “the names and details of only those sexual offenders (including juveniles), who have been convicted and completed their sentence. The registry will not include the details of undertrials and those who are appealing against their conviction.”²

Though the purpose of the creation of a sex offender registry and notification of the offenders is protection of women and children by reducing recidivism³, it is important to note that notification of offenders to the public will only serve in defeating the purpose. We argue that registration of sex offenders is imperative; however, it must be accessible only to law

¹ National Crime Records Bureau Statistics 2014, available at <http://www.ncrb.gov.in/StatPublications/CII/CII2014/chapters/Chapter%205.pdf> (last seen on 18th January, 2017)

² Special Correspondent, *Govt. to set up sex offenders registry*, THE HINDU, April 28, 2016, <http://www.thehindu.com/news/national/govt-to-set-up-sex-offenders-registry/article8529302.ece> (last seen on 18th January, 2017)

³ Id.

enforcement agencies. Creches, schools, school buses, public carriage buses, radio taxis, web-based taxi aggregators and institutions for the disabled, elderly and children should have accessibility to the registry. A thorough inspection of the records of the person seeking employment in the aforementioned institutions should be made mandatory and an employer failing to do that should be penalised. The authors will endeavour to prove that public notification is a major shortcoming of this strategy as such notification fails to fit within the Indian legal framework.

1. DISCUSSING DIFFERENT MODELS OF SEX OFFENDER REGISTRATION AND NOTIFICATION

To prove our argument, it is necessary to discuss the prevailing models of sex offender registration and notification including their successes and failures. Their successes and failures will be assessed by reduction of recidivism as well as non-infringement of human rights.

1.1 THE AMERICAN MODEL

As stated above, the Government of India proposes to build its model on the lines of the American model wherein all convicted sex offenders, including juveniles are required to register their details after completion of their term or imprisonment. Registration will be followed by public notification of their details⁴. However, it is important to note that the U.S.A. model has not achieved its desired aims⁵ and if the Indian government holistically assesses the pros and cons of the model before following the same it will be highly useful.

Avrahamian (1998) concluded that sex offender notification statutes "*have been an ineffective weapon to curb sexual offences against children.*" One explanation for their ineffectiveness is that sex offences against children as well as adults are most often committed by someone known to the victim. Therefore, the suggestion, that public notification of sex offenders in one's environs will completely address the typical source of sex offenders, needs to be reconsidered.⁶

⁴ Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 791 (1995-1996).

⁵ Richard Tewksbury, *Validity and Utility of the Kentucky Sex Offender Registry*, 66 FED. PROBATION, 21 (2002).

⁶ Koresh A. Avrahamian, *A Critical Perspective: Do 'Megan's Laws' Really Shield Children from Sex-Predators*, 19 JOURNAL OF JUVENILE LAW, 301-317 (1998).

Petrosino and Petrosino (1999) scrutinised the criminal histories of convicted sexual psychopaths in Massachusetts. Assuming a registration and notification system with “*complete integrity*”, they determined that victims of only 6 offenders (4.4 percent of the entire sample) might have been reached and been able to prevent victimisation. As a result, they held the effect of sex offender registries and notification laws' on stranger-predatory crimes to be very limited.⁷

A 1997 report from the Kentucky Department of Corrections concluded that therapeutic methods are an important means for reducing recidivism, discovering that released sex offenders who had completed a course of treatment had recidivism rates of only one-third than that of a non - treatment group of sex offenders⁸.

It is pertinent to note that the American model not only has the above-mentioned limitations. But, also has a high probability of creating an extremely unwelcome and hostile environment for sex offenders by making it difficult for them to reintegrate into the society.

In **Weems v. United States**⁹, the petitioner, the petitioner appealed to the Supreme Court of United States arguing surveillance for life, violation of the cruel and unusual punishment clause of the Eighth amendment and loss in perpetuity of the right to hold office and vote. This came after he falsified two entries showing that wages had been paid to the employees with an intent to defraud the USA government of the Phillipine Government as a disbursing officer of the Bureau of Coast Guard and Transportation of the U.S.A. government of the Philippines and was sentenced to 15 years of hard and painful labour, with chains worn at all times, civil penalties extending beyond his imprisonment, and to be under surveillance for life and a fine by the Philippine Courts.¹⁰

The Supreme Court held that the Philippine statute was both cruel in its excess for the crime of falsification and unusual. It therefore overturned Weems's conviction. The Supreme Court also held that a sentence of long-term government surveillance was punishment because the offender was:

⁷ Anthony I. and Carolyn Petrosino, *The Public Safety Potential of Megan's Law in Massachusetts: An Assessment from a Sample of Criminal Sexual Psychopaths*, 45(1) CRIME AND DELINQUENCY, 140-158 (1999).

⁸ Jon M. and Katherine Peterson, *The Kentucky Sex Offender Treatment Program*, Frankfort, KY: Kentucky Department of Corrections, (1997); R. Karl Hanson and Monique Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66(2) JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY, 348-363 (1998).

⁹ 217 U. S. 349, 549 (1910)

¹⁰ Amendment VIII: EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENT (Passed by Congress September 25, 1789. Ratified December 15, 1791.)

“*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*”

“forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.”

This resonates well with the life of a sex offender who, subsequent to public notification, will forever be enveloped in the pall of his crime and will be subjected to hostility by the society.

In **Doe v. Poritz**¹¹, as per the Registration and Community Notification Laws in the Supreme Court of New Jersey, convicted sex offenders were required to be registered with the law enforcement officers. It also depended upon the possibility of the commission of another offence by the offender. The aim of the law was to notify the community about the same. A sex offender “John Doe” who was convicted challenged the constitutionality of these laws, referred to as Megan’s Law which became the law in this case. It was held that the Registration and Community Notification Laws do not violate the Eighth Amendment. In his dissenting opinion, J. Stein concluded that public notification amounted to cruel and unusual punishment. His conclusion and reasoning, which took into account various instances of violence against sex offenders that had been reported in newspapers and magazines, are as follows:

“The community's reaction to such notice is impossible to predict, but given the normal range of human emotion one reasonably could anticipate that notice of the presence of a sex offender will trigger fear, suspicion, hostility, anger, evasive behaviour, ostracism, and in some cases derision, epithets and violence. To be sure, the sex offender's quality of life will be adversely affected. Depending on circumstances, the sex offender might lose employment, friends, standing in the community, and might very well be subjected to community hostility so pervasive as to induce the offender to relocate. A likely, although unintended, result of New Jersey's notification statute might be to induce the sex offenders subject to the Community Notification Law to leave the State.”

¹¹ 662 A.2d 367, 439 (N.J. 1995)

1.2 ALTERNATIVE MODELS

In light of the limitations of the American model¹², alternative models shall be identified and adapted to the suitability of India. In France, the database operates under the supervision of judges and can be accessed by police officials¹³. In South Africa, those who have been convicted of committing sex offences against children and mentally disabled people are registered. Employers in the public or private sectors such as schools, crèches and hospitals have the right to check an applicant's details in order to determine whether the person is suitable to work in the said organisation.¹⁴ In order to prevent recidivism and promote rehabilitation of sex offenders, U.K. conducts Sex Offender Treatment Programmes (SOTPs) which focus on showing offenders that all behaviour have consequences, and lay importance on the need to repeat positive behaviours¹⁵.

According to Ward, the notion of good lives or well-being that forms the basis of rehabilitation programmes results in an effective linkage between recognition of risk factors or psychological problems with the desired result of reduced recidivism. The clinicians undertake formulation of capabilities and skills necessary for each offender's basic needs and thereby enhance the opportunities of him or her living a good life. The rehabilitation process relies on recognising the internal and external shortcomings that have been hindering an individual's ability to meet his or her basic needs.¹⁶

Research has been conducted to study the efficacy of the rehabilitative approach towards sex offenders. In Lösel and Schumucker's 2005 meta-analysis of sixty-nine studies of efficacy of SOTPs reported in England, France, Netherlands, Sweden and Germany up to 2003, they concluded that treated offenders reoffended at a rate of 11.1 per cent compared with 17.5 per cent for the untreated group¹⁷.

1.3 THE RECOMMENDED INDIAN MODEL

On an analysis of the different models of sex offender registration and notification, it is submitted that public notification in India will have similar repercussions as observed in

¹² Richard Tewksbury and Matthew B. Lees, *Perceptions of Punishment: How Registered Sex Offenders View Registries*, 53(3) CRIME & DELINQUENCY, 383-4, (2007).

¹³ Global Overview of Sex Offender Registration and Notification Systems (2014) available at <http://www.smart.gov/pdfs/GlobalOverview.pdf>. See also Gardel v. France, December 17, 2009, ECtHR.

¹⁴<http://www.justice.gov.za/vg/nrso.html>

¹⁵Aisha Gill and Karen Harrison, *Sentencing Sex Offenders in India: Retributive Justice versus Sex-Offender Treatment Programmes and Restorative Justice Approaches*, 8(2) INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCES (IJCJS) – OFFICIAL JOURNAL OF THE SOUTH ASIAN SOCIETY OF CRIMINOLOGY AND VICTIMOLOGY 174 (2013).

¹⁶Tony Ward, *Good lives and the rehabilitation of offenders- Promises and problems*, 7 AGGRESSION AND VIOLENT BEHAVIOR 514, (2002)

¹⁷ F Losel and M Schumucker, *The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis*, 1 J. EXP CRIMINOL, 117-146 (2005)

U.S.A., thus impairing the effective participation and inclusion of the sex offender in socio-economic-cultural spheres of life. Since rehabilitation has a significant positive effect on recidivism, a better way to prevent sex offences would be to not only register sex offenders but, also to utilise therapeutic methods (like SOTPs) to rehabilitate the offenders so, as to prevent recidivism.

A primary cause of recidivism is the flawed investigation process. In a study conducted by Hindustan Times from 2014-2015, it was concluded that several of the rape cases result in acquittal due to the lacunae in investigation, poor handling of forensic evidence and ineffective witness protection programs¹⁸. The latter also results in the complainant turning hostile. Therefore, the investigation process, witness protection programs and handling of forensic evidence need to be reformed.

Another key reason behind recidivism is lack of regulation of schools, crèches, institutions for the disabled and elderly, public carriage buses, radio taxis and web based taxi aggregators. In the Uber rape case, it was found that no proper background verification had been done of the driver¹⁹ (the accused, now convicted of rape) and the character certificate issued to him by the DCP, South East Delhi Police, in August 2014, was unreliable and false since, it failed to check and disclose the fact that he was a sex offender and had even been convicted earlier²⁰.

In order to achieve its aim of protection of women and minors, the registry should be devoid of any falsity and lacunae and the aforementioned employers should thoroughly verify the applicants' details before employing them. If the employers fail in their obligation, they should be penalised. A duly revised model addressing the aforementioned shortcomings will promote rehabilitation of sex offenders and result in effective prevention of recidivism, promotion of deterrence and protection of the society.

It is also suggested that the proposed India Model will amount to violation of inherent human rights of the offenders, such as, right to privacy and dignity. As opposed to that, the recommended model by the authors will not only achieve the intended objectives of securing

¹⁸ Avantika Mehta, *Exclusive: In Delhi, a rape accused has 83% chance of acquittal*, Hindustan Times, April 29, 2016, <http://www.hindustantimes.com/delhi/in-delhi-a-rape-accused-has-83-chance-of-acquittal/story-2iknxGEDiqRVi196HTQnLJ.html> (last seen on 18th January, 2017)

¹⁹ Debashish Panigrahi, *Driver molests foreigner: 'Uber did not do a background check before hiring'*, Hindustan Times, Sep 10, 2016, <http://www.hindustantimes.com/mumbai-news/uber-driver-molests-foreigner/story-p1krszmKbYdCCGyJyg8ihO.html> (last seen on 18th January, 2017)

²⁰ PTI, *Uber cab driver Shiv Kumar Yadav's 'character certificate' issued by Delhi police fake: Commissioner B S Bassi*, Dec 08, 2014, <http://economictimes.indiatimes.com/news/politics-and-nation/uber-cab-driver-shiv-kumar-yadavs-character-certificate-issued-by-delhi-police-fake-commissioner-b-s-bassi/articleshow/45418832.cms> (last seen on 18th January, 2017)

a safer environment for women and children, and reducing recidivism, but will also fit well within the Indian legal framework.

2. LEGAL FRAMEWORK SUPPORTING THE RECOMMENDED INDIAN MODEL AND NOT THE PROPOSED INDIAN MODEL

2.1. INTERNATIONAL OBLIGATIONS

2.1.1. UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

India adopted the UDHR on 10 December, 1948.

Article 12 of the UDHR mandates that no person shall be subjected to arbitrary intrusion of his privacy nor attacks on his reputation and all persons shall be protected against such intrusion.

2.1.2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

India acceded to the ICCPR on 10 April, 1979.

Article 17 of the ICCPR mandates that no person shall be subjected to unlawful interference with his privacy or attacks on his honour and all persons shall be protected from such unlawful interference.

2.1.3. CONVENTION ON RIGHTS OF THE CHILD (CRC)

India acceded to the CRC on 11 December, 1992.

Article 3 of the CRC mandates that all state and non-state actions concerning children shall be taken in the best interests of children. Article 16 of the CRC mandates that no child shall be subjected to unlawful interference with his privacy or attacks on his honour and all children shall be protected from such unlawful interference. Article 40 of the CRC mandates that all state parties which includes India shall recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The U.S.A. is not a signatory to the CRC so laws like Megan's Law and Sex Offender Registration and Notification Act, 2006 can be upheld in the U.S.A.

Any policy such as the proposed Indian model that provides for community notification of juvenile sex offenders is not only violative of India's international obligations under the UDHR and ICCPR but, also under the CRC as such model will lead to violation of the rights of, both juveniles and adults, to privacy and dignity and will prevent their reintegration in the society. The community notification is a means of attacking the reputation of the convicted children and adults and disclosure of their personal details is intrusion of their privacy. Such intrusion of their privacy and attack on their reputation would be unlawful and arbitrary as such intrusion and attack is not a proportionate punishment but double punishment as explained below.

2.2 DOMESTIC OBLIGATIONS

The Indian Constitution by virtue of Article 21 guarantees all persons the fundamental rights to privacy and dignity. Article 21 reads as: "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"

The right to live with dignity is intimately related to the right to privacy and privacy-dignity claims deserve to be examined with care and denied only when there is a countervailing interest. However, for the sake of clarity, these rights though inherently linked are being separately elaborated upon.

2.2.1 RIGHT TO PRIVACY

It is being argued that the proposed Indian model will violate the right to privacy of sex offenders by disclosing their personal details to the public at large. The right to privacy exists as an unenumerated fundamental right under Article 21 of the Indian Constitution as has been held in various Indian Supreme Court judgments as will be discussed below.

Particularly, it was in the landmark case of **Kharak Singh v. State of U.P.**²¹ (**Kharak Singh case**), where two dissenting judges of the Supreme Court, Justice Subba Rao and Justice Shah, for the first time recognized the right to privacy to be a part of right to life under Article 21 of the Constitution of India. A petition was filed by Kharak Singh under Article 32 of the Constitution challenging the constitutional validity of Chapter 22 of the U.P. Police Regulations that empowered the police officials to open history sheets of past suspected

²¹ (1964) 1 SCR 332

criminals and monitor their movements. The same was challenged on the ground that such regulation is violative of the right to movement protected under Article 19(1)(d) and right to privacy protected under Article 21 of the Constitution. The court analysed Regulation 236 that vested power in the police to undertake surveillance measures such as secret picketing of the house or approaches to the houses of suspects; domiciliary visits at night; periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation; reporting by constables of movements and absences from home; verification of movements and absences by means of inquiry slips; and collection and record on a history-sheet of all information bearing on conduct.

The two dissenting judges held the entire regulation to be unconstitutional on the grounds that it violated the right to free expression under Article 19(1)(a), the right to movement under Article 19(1)(d), and the right to personal liberty under Article 21 of the Constitution. Justice Subba Rao while evaluating the scope of Article stated that the right to privacy falls within the scope of personal liberty.²² He defined the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.

Although, the majority opinion in **Kharak Singh case** did not recognize the right to privacy as a fundamental right under Article 21 of the Indian Constitution, the dissenting opinion of the **Kharak Singh case** was relied upon by the court in **Gobind v. State of Madhya Pradesh**²³ (**Gobind case**) to hold that the right to privacy is a fundamental right guaranteed under the expansive scope of Article 21 of the Indian Constitution as it inherently relates and overlaps with a person's liberty. Further, it was held that the right to privacy encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing and cannot be exhaustively defined.²⁴ The Supreme Court held in the **Gobind case** that the right to privacy is expansive in nature and will be developed case by case. In the context of the recommended Indian model, we herein argue that the right to privacy includes the right to have one's criminal records kept confidential with the law enforcement agencies accompanied with accessibility to certain institutions instead of public disclosure of the records.

²² Id, Para. 28.

²³ (1975) 2 SCC 148, Para.23.

²⁴ (1975) 2 SCC 148, Para.24.

Further, following the approach of the Supreme Court in **Gobind case**, the court in **Francis Coralie Mullin v. Administrator, Union Territory of Delhi & Ors.**²⁵ (**Francis Coralie case**), has held Article 21 to be ever expanding to incorporate within it all that is necessary to live with dignity.

While recognizing the existence of a right to privacy being guaranteed under Article 21 of the Indian Constitution, the court in the **Gobind case** applied the principle of presumption of constitutional validity to partially uphold the validity of Regulations 855 and 856 of the Madhya Pradesh Police. These regulations empowered police officials to open history sheets and undertake surveillance on suspected criminals. The court narrowly interpreted the application of these regulations by stating that the surveillance shall be confined to the limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they will lead such a life, based on material evidence on record. It stated that if the regulations are widely applied and against the directions of the court then they can be challenged as being void. The regulations being analysed in the **Gobind case** vested the police to undertake surveillance measures on persons, whether or not previously convicted, but, whose conduct shows a determination to lead a life of crime. Further, surveillance measures included: periodical enquiries by the station-house officer as to repute, habits, association, income, expenses and occupation; domiciliary visits both by day and night at frequent but, irregular intervals; secret picketing of the house and approaches on any occasion when the surveillance (surveillant) is found absent; reporting of movements and absences from home; verification of such movements and absences by means of bad character rolls; and collection in a history-sheet of all information bearing on conduct. Further, the regulations cautioned the user of such regulations that it must be remembered that the surest way of driving a man to a life of crime is to prevent him from earning an honest living. It is pertinent to note that these regulations provided safeguards so, as to ensure that the suspect can seek steady employment and live in the society with dignity and peace and is not isolated in the society. The proposed Indian model lacks any such safeguards.

Further, it is pertinent to note that both in the **Kharak Singh case** and the **Gobind case**, the surveillance and record of information of suspected criminals was held to be not violative of Article 21 (right to privacy and dignity) in a factual context wherein the information of suspected criminals was kept and recorded with the police and was not in the public domain.

²⁵ (1981) 1 SCC 608

It is argued that if the information had been shared with the public at large similar to the proposed Indian model, then the case would have resulted in holding of a violation of Article 21 which includes the right to live with personal freedom, privacy, and dignity.

The dissent in the **Kharak Singh case** and the majority in the **Gobind case** have been relied on time and again by the Supreme Court while holding that the right to privacy is guaranteed under Article 21 of the Constitution. Amongst others, these cases include **Rajagopal v. State of Tamil Nadu**²⁶ and **District Registrar and Collector, Hyderabad v. Canara Bank**²⁷ (Rajagopal case), **People's Union for Civil Liberties v. Union of India**²⁸, **'X' v. Hospital 'Z'**²⁹ (X case), **People's Union for Civil Liberties v. Union of India**³⁰, **Sharda v. Dharmpal**³¹, **Anuj Garg v. Hotel Association**³² (Anuj Garg case) and **Suresh Kumar Koushal v. Naz Foundation**³³ (Naz case).

Particularly, the Supreme Court in the **Rajagopal case** while holding that Section 73 of the Indian Stamp Act, 1899 as incorporated by Andhra Pradesh Act 17 of 1986 that provided for inspection of documents of customers in the custody of banks is unconstitutional, relied on **Gobind case** to hold that the right to privacy deals with persons and not places, it is not limited to spatial privacy but, encompasses the sphere of private intimacy and autonomy that allows persons to establish and nurture human relationships without State interference.³⁴

Further, the Supreme Court in the **'X' case** elaborated on the meaning and scope of the right to privacy. It held that right of privacy is a part of right to life under Article 21 of the Indian constitution.³⁵ It may, arise out of particular relationships which may be commercial, matrimonial, or even political, for example a doctor-patient relationship.³⁶ Public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of person's 'right to be let alone' with another person's right to be informed.³⁷

In light of the jurisprudence on the right to privacy laid out in the above cases, it is being argued that the proposed Indian model will be violative of the personal liberty of the

²⁶ (1994) 6 SCC 632

²⁷ (2005) 1 SCC 496

²⁸ (1997) 1 SCC 301

²⁹ (1998) 8 SCC 296

³⁰ (2003) 4 SCC 399

³¹ (2003) 4 SCC 493

³² (2008) 3 SCC 1

³³ (2014) 1 SCC 1

³⁴ Supra at 29, Para. 53.

³⁵ Supra at 32, Para. 28.

³⁶ Supra at 32, Para. 7.

³⁷ Supra at 32, Para. 27.

convicted sex offenders which *inter alia* includes the right to privacy, right of person, family, and autonomy as to education and employment as guaranteed under Article 21 of the Constitution. Further, it is argued that the relationship between a convict whose information has been retained by the police or other law enforcement agencies is such that no information shall be released on a widely available and accessible public platform as that would lead to violation of his/her right to privacy. The documents containing the personal information and details there in of the convict shall remain undisclosed and in police custody unless the same is required to be produced before court and any such authority or for further investigation. But using personal information of the sex offender to shame him will be an invasion of the right to privacy and thus violative of Article 21 of the Constitution of India.

2.2.2 RIGHT TO DIGNITY

It is being argued that persons listed in the sex offender registry and thereby in the public notification will always carry the shame and stigma of their past, thereby will be demeaned and devalued in the eyes of others. As a result, they will be serving a life long punishment even after their release and it will become difficult for them to re-integrate into the society. Such a measure will be violative of their fundamental right to live with dignity, guaranteed under Article 21 of the Indian Constitution.

Following the **Francis case**, the Supreme Court in **National Legal Services Authority of India (NALSA) & Others v. Union of India**³⁸ (NALSA case) held human dignity to be a fundamental postulate of the expansive right to life and liberty.³⁹ It stated that Article 21 takes all those aspects of life which go to make a person's life meaningful and includes the right of expressing oneself in diverse forms, freely moving about and comingling with fellow human beings.⁴⁰

In his concurring opinion in the **NALSA case**, Justice A.K Sikri, further, elaborated on the link between dignity and human development in a free democratic society, governed by the constitution and the rule of law by stating that the basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Which requires us to respect and develop the free spirit of human being which is

³⁸ (2014) 5 SCC 438

³⁹ Id, Para. 73.

⁴⁰ Id, Para. 73.

responsible for all progress in human history.⁴¹ The court also stated that there is growing recognition that the true measure of development of a nation is not economic growth but, human dignity.⁴²

It is argued that the proposed Indian model will serve as a life-long punishment that impairs the dignity and humanity of a person and thus will violate Article 21 of the Indian Constitution. In **Sunil Batra v. Delhi Administration**⁴³(**Sunil Batra case**), the Supreme Court held that punishments, in civilised societies, must not degrade human dignity as the cardinal sentencing goal is correctional, that is changing the consciousness of the criminal to ensure social defence.⁴⁴ It further stated that dehumanising techniques, are counter-productive to such reformation goal as torture tactics try to achieve national goals of preventing crime.⁴⁵

The Supreme Court in the **Sunil Batra case** understood the need to humanise prison conditions with a view to protect the rights and dignity of prisoners including prisoners under sentence of death.⁴⁶ It held transformation of consciousness to be the surest ‘security’ measure to overcome social entropy.⁴⁷ The same principles shall be applicable to convicts of sexual offences who have undergone the punishment.

The goal of preventing crime will be more effectively achieved if the state uses reformation techniques and ensures that dignity of the convicts is not jeopardized, as an attack on their dignity will further make the state’s task of reformation more difficult. The above discussed decisions of the Supreme Court make it clear that it is constitutionally impermissible to subject persons who have already undergone a sentence of imprisonment for their offence, to measures that impair their dignity and respect, hamper their societal interactions and re-integration into the society.

2.2.3 TEST OF BALANCING COMPETING INTERESTS

Undoubtedly, the objective and intention of the proposed Indian model of providing a safer environment for women and children is laudable. Also, it is accepted that the right to privacy and the right to dignity are not absolute rights. However, at the same time, if such objectives are restricting or interfering with the fundamental rights of privacy and dignity of

⁴¹ Id, Para. 106.

⁴² Id, Para. 106.

⁴³ (1978) 4 SCC 494

⁴⁴ Id, Para. 197.

⁴⁵ Id, Para. 197.

⁴⁶ Id, Para. 200.

⁴⁷ Id, Para. 200.

other persons (here, convicted sex offenders), then these competing interests need to be balanced. It is argued that, the right to privacy and the right to dignity being tenets of the right to life under Article 21 of the Indian Constitution, these rights can be curtailed only by substantive due process. The Supreme Court has innumerable times been faced with two competing interests: one being fundamental rights under Article 21 of the Indian Constitution and other being state objects such as security, health of citizens etc. It has balanced such interests using the due process test that entails assessing: the compelling nature of the state interest, and the proportionality of the state action curtailing the fundamental right.

Particularly, the Supreme Court in the celebrated case of **Maneka Gandhi v. Union of India**⁴⁸ (**Maneka Gandhi case**), while adjudicating upon the unlawful impounding of passport, laid down the due process requirement for curtailing rights under Article 21 of the Indian Constitution. It stated that the procedure prescribed by law has to be fair, just and reasonable and the question whether the procedure prescribed by a law is reasonable or not has to be considered substantively and not in the abstract.⁴⁹ It further stated that a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution: Articles 14 (equality) and 19 (reasonable restrictions).

This principle of lawfully restricting rights by due process has been followed in cases thereafter, including the **Sunil Batra case** where the Supreme Court stated that though our constitution has no 'due process' clause but after the **Maneka Gandhi case**, the concept of due process has been incorporated in our constitutional framework.⁵⁰ This is so as anything that is unarguably unreasonable and arbitrary is inflicted with procedural unfairness and violates Article 21.⁵¹

The Supreme Court in **Anuj Garg case** was adjudicating a challenge to Section 30 of the Punjab Excise Act, which prohibited the employment of any woman, in any part of an establishment in which liquor or another intoxicating drug was being consumed. It examined two competing interests of privacy and security and held that in an attempt to achieve

⁴⁸ (1978) 1 SCC 248

⁴⁹ Id. Para 48.

⁵⁰ Supra at 46, Para. 52.

⁵¹ Supra at 46, Para. 52.

security for women, the State cannot take measures that result in a complete taking away of a right (there, right to choice of profession) ⁵².

The Supreme Court in **Anuj Garg case** expounded on the doctrine of proportionality in the context of competing values of right to employment and security and held that an act will be considered to be proportional if the same is reasonable in a modern democratic society.⁵³ It stated that it is the duty of the court to reach to a finding as to whether the legislative interference is justified as a legitimate aim and proportionate to the aim pursued.⁵⁴

The court's task is to determine whether the measures furthered by the State to achieve the legitimate aim are proportionate to the other constitutional rights such as autonomy, equality of opportunity, right to privacy.⁵⁵ We argue that if the Indian model was challenged in court, it would not be able to stand this test of proportionality.⁵⁶

The Supreme Court in '**X**' case, held that disclosure of the HIV+ status of a patient to the person whom he was going to marry was justified in the interest of protecting the person from being infected with HIV. It observed that right to privacy, though not absolute, and despite being amenable to curtailment, such curtailment has to be by lawful means for preventing crime and protection of health. It stated that the right to privacy has to be balanced with other rights and compelling state interests.⁵⁷

The Supreme Court in **Naz case** placed reliance on the **Maneka Gandhi case** and held that laws restricting rights protected under Article 21 of the Indian Constitution have to pass the substantive due process test which entails passing the tests of proportionality and of compelling state interest. ⁵⁸

The Supreme Court in **Om Kumar v. Union of India**⁵⁹ (**Om Kumar case**) while holding that no reopening of the quantum of punishments imposed in departmental enquiries on certain officers of the Delhi Development Authority and no upward revision is required, expounded on the principle of proportionality that is to be applied while assessing laws or executive actions curtailing fundamental rights. It stated that applying the principle of proportionality means assessing whether the appropriate or least-restrictive choice of

⁵² Supra at 35, Para 33.

⁵³ Supra at 35, Para 36.

⁵⁴ Supra at 35, Para 49.

⁵⁵ Supra at 35, Para 49, 51.

⁵⁶ Supra at 35, Para 51.

⁵⁷ Supra at 32, Para. 26, 28.

⁵⁸ Supra at 36, Para. 69.

⁵⁹ (2001) 2 SCC 386

measures has been made by the legislature or the administrator so as to achieve the object of the legislation and whether the legislature and the administrative authority have maintained proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve.⁶⁰

The Supreme Court in **Teri Oat Estates (P) Ltd. v. UT, Chandigarh**⁶¹ applied the doctrine of proportionality to hold that the respondents shall not have exercised the power of resumption of the land and building leased to the appellant after the appellant had discharged their pending dues under the Capital of Punjab (Development and Regulation) Act, 1952 read with the Chandigarh Leasehold of Sites and Buildings Rules, 1973 and the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. It also applied the test of proportionality as elaborated in the **Om Kumar case**.⁶²

On analysis of the jurisprudence on the tests to balance competing interests and application of such tests to the competing interests of security of women and children, on one hand and the right to life of convicted sex offenders including the rights to privacy and dignity, on the other hand, it is argued that the proposed Indian model fails to reflect the required balance. The proposed Indian model wherein a sex offender registry will be available in the public domain is not a proportional means to achieving the aim of prevention of crime and promotion of security of women and children as it amounts to a lifelong punishment and stigmatisation and prevents the convict from reintegrating into the society. The least restrictive means, as accepted and understood in a modern democratic society, should be employed. It is argued that maintaining a sex offender registry with limited accessibility that is to enforcement agencies and vulnerable groups such as institutions for women and children is an alternative means which is less restrictive than the proposed Indian model.

3. CONCLUSION

The obnoxious rise of sex offences began from the *Mathura* rape case in 1979 and unfortunately, there is no cessation or reduction of sex offences. Well intentioned laws and policies targeted towards protection of women and minors have not yet achieved their goal.

⁶⁰ Id, Para. 28-33.

⁶¹ (2004) 2 SCC 130

⁶² Id, Para. 46.

Sex offender registration and accessibility of institutions for the disabled, elderly and children, schools, public carriage buses, radio taxis, web-based taxi aggregators to the registry would have prevented the Nirbhaya rape case, Uber rape and sex offences in the aforementioned institutions and vehicles. As argued before, employers of the aforementioned institutions should be mandated to thoroughly scrutinise a person's background before employing them.

It is opined that the Indian government's proposal of granting public accessibility to the registry though supported by many for its laudable objects of providing a safer environment for women and children will have a detrimental impact on the rehabilitative foundation of the justice system. As per the studies discussed in this paper, efficacy of rehabilitative approaches is higher than the public notification system which has cast a stigma upon the sex offenders and prevented their reintegration. The proposed Indian model of community notification system will amount to violation of Article 21 of the Indian Constitution and India's international obligations under CRC, UDHR and ICCPR.

It is also submitted that the Government's proposal will be violative of their personal liberty, autonomy as to personhood, education, employment, the right to privacy and the right to live with dignity guaranteed to all persons including convicted sex-offenders. Assuming but, not admitting that such violation is just in light of the compelling state interest of security of women and children, the means adopted to meet such aim is not proportional to the aim sought to be achieved and there exists alternative least restrictive means to achieve the same, i.e., creating a sex-offenders registry for the sole use and purpose of the public enforcement agencies such as the police, without the disclosure of the same in the public domain and to the public at large.

In light of the above, it can be concluded that no one should remain imprisoned and shadowed by their past. Sex offenders also have a right to creating a future for themselves wherein their socio-economic rights are guaranteed and they can effectively participate in the society. As Nelson Mandela said, "*To deny people their human rights is to challenge their very humanity*". Denying sex offenders their inherent rights through exclusion, malice will only make them antagonistic towards the society and aid the failure of this strategy, thus causing recidivism. Sex offender registration and public notification is proposed to be initiated as a strategy directed towards protection of women and minors. However, its shortcomings only make it a wrong step in the right direction.