

ISSN 2394-997X

Lex Revolution

Journal of Social & Legal Studies

Volume I, Issue 3, July-September 2015



Email: editor.lexrevolution@gmail.com

Website: www.lexrevolution.in

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of publisher. The views/opinion expressed by the contributors does not necessarily match the opinion of the Patron-in-Chief, Editor-in-Chief, Editors, Executive Editors, Managing Editors and Advisory Editorial Board. The views of contributors are their own hence the contributors are solely responsible for their contributions. The Journal shall not be responsible in any manner in pursuance of any action including legal on the basis of opinion expressed. In publishing the Journal utmost care and caution has been taken by the Board of Editors, even if any mistake whatsoever occurs the editorial board shall not be responsible or liable for any such mistakes in any manner.

© Lex Revolution 2015, All Rights Reserved

Lex Revolution
Journal of Social & Legal Studies

Quarterly Published International Peer Reviewed Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

The most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. We are looking forward for your contributions. All communications must be made only in electronic form e-mailed to: **EDITOR(DOT)LEXREVOLUTION(AT)GMAIL(DOT)COM** the submission guidelines are available at website.

Contact
Lex Revolution

Shanti Shadan (ITRC Computer Centre), Near BDO Block, Nai Bazar, Buxar-802101 (Bihar)

Email: editor.lexrevolution@gmail.com

Website: <https://www.lexrevolution.in>

Published by
Dr. Vijay Bahadur Pandey,
Smriti Research Association
Durga Bhawan, W.N. 07, Gurudwara Mandir,
Nai Bazar, Buxar-802101 (Bihar)

Facebook: <https://www.facebook.com/LexRevolution>

Patron-in-Chief

Prof. G. K. Chandani, Formerly Professor of Law, University of Lucknow (U.P.)

Editor-in-Chief

Animesh Kumar

Editors

Sumit Agarwal

Mayuri Gupta	Juhi Singh
--------------	------------

Moushmi Chatterjee	Krishna Kumar Pandey
--------------------	----------------------

Associate Editors

Medha Bhatt	Ashish Sharma	Aparajita Kumari
-------------	---------------	------------------

Executive Editors

- Mr. Mayank Dubey, Advocate, New Delhi (LL.M.-University of Leeds, England)
- Mr. Prateek Mishra, Advocate, Supreme Court of India, New Delhi
- Mr. Priyesh Mishra, Advocate, LAMP Fellow, PRS Legislative Research, New Delhi

Advisory Editorial Board

- Prof. Somnath Chaturvedi, Dr. RML Avadh University, Faizabad (U.P.)
- Dr. S. Verma, HoD, Dept. of Law, SLS, BBAU Central University, Lucknow (U.P.)
- Dr. Sangeeta Sharma, Human Rights & Social Activist, Lucknow (U.P.)
- Mr. Ramanuj Pandey, Advocate, Civil Court, Buxar (Bihar)
- Mr. Sanjay Kumar Dwivedi, Advocate, Jharkhand High Court, Ranchi (Jharkhand)
- Dr. Manirani Dasgupta, HoD, Dept. of Law, University of Calcutta, Kolkata (W.B.)
- Dr. Ritu Agarwal, Asst. Professor of Sociology, Amity Law School, Lucknow (U.P.)
- Mr. Pranshu Pathak, Coordinator, Amity Law School, Gurgaon (Haryana)
- Mr. Suresh Mani Tripathi, Asst. Professor of Law, G.N. Law College, Bhatapara (CG)
- Mr. Atif Khan, Asst. Professor of Law, HNLU, Raipur (CG)
- Mr. Bhanu Pratap, Asst. Professor of Law, Amity Law School, Lucknow (U.P.)
- Mr. Ankit Awasthi, Asst. Professor of Law, HNLU, Raipur (CG)
- Mr. Bineet Kedia, Asst. Professor of Law, Amity Law School, Jaipur (Rajasthan)
- Mrs. Honey Dhawan, Asst. Professor of Law, Amity Law School, Lucknow (U.P.)
- Mrs. Annpurna Sinha, Former Lecturer, Amity University U.P., Lucknow Campus (U.P.)
- Mr. Nishith Pandit, Advocate, Gujarat High Court, Ahmedabad (Gujarat)
- Mr. Pratik Mishra, Advocate, Patna High Court, Patna (Bihar)

Web Editor

Mr. Prasoon Dwivedi

MESSAGE

It is with great pleasure we announce the release of Volume I Issue 3 of our Journal ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We owe our sincere gratitude to Prof. Gopal Krishna Chandani for his valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of Lawctopus and AdvocateKhoj who have been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various contributors, teachers and research scholars whose views and opinions have been incorporated in the text.

- Editorial Board

CONTENTS

- 1) **IMPACTS OF INTERNATIONAL TRADE LAWS (UNDER WTO/GATT) AND/OR POLICIES ON THE ENVIRONMENT** Ayalew Abate Bishaw 1-22
- 2) **HIGHER EDUCATION IN INDIA: INTROSPECTION** Dr. Gopal Kumar 23-30
- 3) **COOPERATIVES IN INDIA** Dr. Ritu Agarwal 31-49
- 4) **ELECTORAL REFORM POLICY AND ROLE OF JUDICIARY IN INDIA** Sarvesh Kumar Shahi 50-59
- 5) **EVOLUTION OF INTERNATIONAL CRIMINAL JURISDICTION: INDIVIDUAL RESPONSIBILITY AND THE DEFINITION OF WAR CRIMES - A study** Sundaramurthy Purushothaman 60-69
- 6) **CONSTITUTIONAL OBLIGATION TOWARDS WOMEN AND CHILDREN** Mohit Saini & Nidhi 70-86
- 7) **CORPORATE VEIL AND LIMITED LIABILITY COMPANY: AN ANALYSIS** Sumbul Khare & Nishith Pandit 87-93
- 8) **KILLING OF OSAMA BIN LADEN: A LEGAL ANALYSIS** Syed Zeeshan & Aabid Ali Haider 94-100
- 9) **DECODING THE CONTROVERSIAL LAND ACQUISITION ORDINANCE** Mayuri Gupta 101-106
- 10) **THE 'COLLEGIUM CONUNDRUM': ANALYSING THE DYNAMIC BETWEEN JUDICIAL INDEPENDENCE AND TRANSPARENCY THROUGH NJAC, BILL** Akshara Vaishnavi Baru 107-112
- 11) **A BIRD'S VIEW OF THE BEST PRACTICES ON PROTECTION TO WHISTLE-BLOWERS IN US AND UK** Srishti Vaishnav 113-126
- 12) **DOMAIN NAME DISPUTE RESOLUTION WITH RESPECT TO TRADEMARKS: LEGAL SOLUTIONS TO IT** Lahama Mazumdar & Ritika Mohanty 127-137
- 13) **CYBER FORENSIC: AN INSIGHT TO ITS GENERAL PRINCIPLES AND EXPANSE** Jacob Reji Olaserimannil & Parvathy Manoj 138-47
- 14) **RIGHT TO INFORMATION AND THE PRACTICALITY OF PROGRESSIVE DISCLOSURE** Vegadarshi K 148-152
- 15) **ENABLING THE DISABLED** Ashita Bali & Devanjali Chadha 153-156
- 16) **ANALYSIS OF INDIAN AGRICULTURAL SECTOR AND POSSIBLE MEASURES TO STRENGTHEN IT** Aviral Arora 157-166
- 17) **THE ARMED FORCES SPECIAL POWER ACT AND THE QUESTION OF HUMAN RIGHTS** Madhulika Mishra 167-176

- 18) **ALTERNATE DISPUTE REDRESSAL: ALTERNATIVES TO ALTERNATIVES: CRITICAL REVIEW OF THE CLAIMS OF ADR** Etisha Khaneja 177-187
- 19) **LEGAL ASPECTS OF CHARACTER MERCHANDISING** Anuttama Ghose & Satya Prakash Mishra 188-198
- 20) **WOMEN EMPOWERMENT AND INDIAN POLITICS** Atrayee De 199-212
- 21) **LETTER TO FORMER JUSTICE OF THE SUPREME COURT MARKANDEY KATJU** Pratheek Maddhi Reddy 213-217
- 22) **AFTERMATH OF THE BHOPAL GAS TRAGEDY: DEVELOPMENT OF ENVIRONMENTAL LEGISLATION IN INDIA** Raagya P. Zadu 218-224
- 23) **UNIFORM CIVIL CODE IN INDIA** Diksha Dwivedi & Ashutosh Bajaj 225-228
- 24) **SURROGACY IN INDIA & ITS CORRESPONDENCE WITH HUMAN RIGHTS** Manisha Chava & Sparshi Agarwal 229-238
- 25) **DEVELOPMENT OF FORENSIC SCIENCE AND CRIMINAL PROSECUTION IN INDIA** Sana Sharma 239-247
- 26) **A RESEARCH PROJECT ON SEXISM IN INDIAN LAWS - A JURISPRUDENTIAL ENQUIRY** Gayathree P Thampi 248-257
- 27) **CONCEPT OF INDIVIDUAL RIGHTS IN THE LIGHT OF LAND ACQUISITION BILL 2015: A JURISPRUDENTIAL CRITIQUE** Sujeet Kumar 258-268
- 28) **TRUTH, KNOWLEDGE AND POWER** Kruthika Vasireddy 269-273
- 29) **ENVIRONMENT PROTECTION AND HUMAN RIGHTS: INDIAN PERSPECTIVE** Saira Kausar & Rucha A. Gami 274-283
- 30) **COMMON CAUSE *versus* UNION OF INDIA: CASE COMMENT** Aashna Jain 284-287
- 31) **CONSTITUTIONAL VALIDITY OF THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT 2008 AND NATIONAL INVESTIGATION AGENCY ACT, 2008: A COMMENT** Rudra Dutt & Priyanshu Gupta 288-294

IMPACTS OF INTERNATIONAL TRADE LAWS (UNDER WTO/GATT) AND/OR POLICIES ON THE ENVIRONMENT

Ayalew Abate Bishaw*

Abstract

Trade takes the lion's share of global environmental problems. It affects the environment and environmental protection efforts in a number of ways. Among trade factors affecting the environment are international free trade laws and/or policies. While international trade laws and policies regulate global trade liberalization, they stand out as important challenges in the global environmental protection/governance.

This study focuses on core GATT/WTO trade agreements including the exceptions. It provides an overview of the impacts of core international trade laws and policies on the environment. It further includes some outstanding trade-environment cases and important decisions therein.

* Lecture of Law @ Debre Markos University, School of Law & Consultant and Attorney at Law Debre Markos, Amhara Regional State, Ethiopia; Email: tsion.ayelam@yahoo.com; Contact: +251-918748523

INTRODUCTION

The relationship between international trade and environment is becoming increasingly important and controversial. The steady increase in development between trade and environment stands out as an important challenge in global environmental governance, for trade liberalization in GATT/WTO affects the environment in various ways.

First, the GATT/WTO is exclusively a trade organization that is not necessarily competent to address environmental concerns besides GATT Art XX that simply addresses the general exception on human, animal and plant life and health.

Second, although trade is the major category of human activity as a source of environmental problems, there are wide range of multilateral environmental agreements negotiated and agreed upon outside the purview of trade institutions and which application for environmental reason often conflicts to free trade laws.

And third, while international trade laws regulate free flow of goods and services, they prohibit differential treatment of 'like products' which may result in the worst effect on environmental governance for there are like products and production methods that affect the environment.

Moreover, international trade laws create legal and practical challenges for the enforcement of multilateral environmental agreements because it intersects a number of different WTO rulings.

Besides, these multilateral environmental agreements use trade measures as enforcement tools to meet environmental protection goals while the application of trade measures in GATT/WTO is limited for restricting trade.

Most researches done in this area looks to emphasize on trade effects such as; product, scale, structural, technology and distributional effects and look-over the regulatory effect of international free trade laws on the environment. International trade laws, however, stand out as important challenges to the environment and environmental governance.

This study explores the regulatory impacts of international trade laws on the environment. It aims at addressing the impact of major international trade laws. It deals on GATT/WTO agreements and case laws and find out how it affects the environment.

The first section deals on the impact of multilateral trading system (core international trade principles) on the environment. It gives a detailed overview of how the principle of multilateral trading system affect environment and specifies major areas where these two regimes may conflict. The second section looks into the regulatory effect of the exceptions which include the GATT Article XX and others.

MULTILATERAL TRADING SYSTEM AND ENVIRONMENTAL POLICIES

The foundation of the international trade regime dates back to 1947 when the General Agreement on Tariffs and Trade (GATT) was concluded.¹ The GATT, with its successor WTO, has been the foundation stone for existing trade relation in the world. This agreement, salvaged from an un-ratified larger agreement called the International Trade Organization (ITO), was one piece of the so-called Briton-Woods system which was designed in the post-World War II environment to promote global economic development.²

The main reason behind the establishment of WTO/GATT was to bring about a new world order in which economic ties would be strong enough between all nations so that the economic crises that had been experienced in 1920s and 1930s would not reoccur.³ Therefore, these trade laws are meant to liberalize trade and create peaceful world economic relation among members. It didn't have core objective of protecting the environment. Recent developments have shown that WTO contains environmental objectives following the Uruguay Round for sustainable development. Environment has become a mainstream trade issue in international trade governance, albeit the compatibility of the two objectives is still a question.

The multilateral trading system which founding bloc was the GATT has the principle of *non discrimination*. The core principles of non-discrimination are found in the following articles of GATT which together form the critical "discipline" of GATT. And the point of discussion remains on the regulatory impact of these principles on the environment.

¹ Trade measures-a Legitimate Tool for environmental protection? A comprehensive analysis and the case of India, may 2008, p 4&5 and Alexei vikhlyalev, The use of trade measures for environmental purposes globally and in the EU context may 2001,p.8

² The International Monetary Fund and International Bank for Reconstruction and Development- the World Bank were the other two main pieces

³ This is because the environmental protection efforts of European countries in the 1950s and the following consecutive years could remind especial mention albeit the reason behind these (trade) agreements still was just not environmental protection. But trade/economic growth

1. **GATT Article I (“Most Favored National Treatment”)** which requires each contracting party to grant every other contracting party treatment at least as favorable as it grants any country with respect to imports and exports of ‘like products’. What matters is not whether products keep environmental standards or its method of production harms the environment but whether they are like products, and treatment is accordingly.⁴ Thus, Article I requires equal treatment for like imported products without regard to their condition of manufacture in the exporting nations.
2. **GATT Article contains the “National Treatment Obligations,”** which imposes a rule of non-discrimination between goods that are domestically produced and those that are imported.⁵ National treatment in the environmental context was at issue in the super fund case⁶, which involved a provision of the US Comprehensive Environmental Response, Compensation, and Liability act (Known as “super fund”) that imposed a tax on imported oil greater than the charge for domestically produced petroleum products.⁷ In defending the tax, the United States argued that the resulting discrimination was competitively insignificant and that it was for a benign purpose: to finance pollution control measures, the cleanup of hazardous waste sites. The dispute settlement panel found, however, that the GATT’s national treatment policies are applicable to all taxes regardless of their policy purposes. Therefore, whether the imposition of an internal tax on imported products meets the national treatment requirement of Article III (2) depends on whether like domestic products are taxed, directly or indirectly, at the same or a higher rate. Applying this test to the taxes in dispute, the panel concluded that the petroleum tax did not satisfy Article III (2) because it levied a higher charge upon imported petroleum. As for the tax on critical imported chemicals, the panel concluded that the imported and like domestic substances bore equivalent burdens; therefore, the tax met the requirement of Article III (2).⁸

Thus, in the petroleum case, the domestic environmental measure that U.S. imposed has been considered discriminatory.

⁴ The most celebrated application of this principle is the *Belgian family allowances case*, GATT, BISD, 1st supp. 59 (1953) and it has no environmental decision by itself except that I discussed below in relation to process and production method

⁵ Thomas J. Schoenberg Agora, Trade and environment, free international trade and protection of the environment: irreconcilable conflict, American journal of international law (vol.86:700.) p .707

⁶ United States-Taxes on Petroleum and Certain Imported substances GATT BISD,34th supp.136(1988)

⁷ Supra note 5 p.708

⁸ Supra note 6 at 162 article 11(2.a)of the GATT

3. GATT Article XI (“Elimination of Quantitative Restrictions”) which forbids any restriction other than duties, taxes or other charges on imports from and exports to other WTO members which may impact environmental protection policies of countries.⁹ This article too, has impact on the environment for it forbids any sort of discrimination (including environment measures) except duties, taxes and other charges.

THE PRINCIPLE OF NON-DISCRIMINATION BETWEEN “LIKE PRODUCTS”

As discussed above, the major principles of the multilateral trading system are enshrined in the core GATT principle of non-discrimination. The discussion on the impact of free trade laws on the environment remains the question on the principle of non-discrimination between “like products”.

In normal circumstances, the principle of non-discrimination between “like products” doesn’t seem to have much to do with environment and seems inappropriate to relate to the issue raised above. But there are three possible areas where conflict can arise.¹⁰ These areas include product standards, product and production methods (PPMs), and the enforcement of multilateral environmental agreements.

1. Product Standards

Product standards lay down specifications for product characteristics (such as performance, product safety, dimensions) and requirements for packaging or labeling which have direct relation to environment. They need to be distinguished from PPM standards which stipulate how goods are to be produced. PPM standards, as discussed in detail below, apply to the production stage, i.e. before products are placed on the market for sale. The underlying issue here is whether all like products are to be considered environmentally sound so that the above principles of non-discrimination are made effective.

GATT/WTO agreements in general treat products which have the same physical form as “like products” and prohibits any sort of discrimination either on the bases of its environmental effect or not. Therefore, if a country used to produce a certain product having environmental impact for lack of alternatives and/or skilled man power and is to prohibit

⁹ Supra note 5 p.708

¹⁰ Duncan Brack, Trade and Environment After Seattle, Royal Institute of International Affairs (RIIA) briefing paper new series NO.13 April 2000.p.2

imports of like products from another country for environmental reason, it is against the principle of non-discrimination (national treatment). But this measure may mitigate the impact on the domestic environment of the importing country.¹¹

Though the general principles in GATT frown on trade restrictions and are still problems in protecting the environment, Article XX suggests that countries should be able to ban or restrict the import of products which will harm their own environment, as long as the standards applied are non-discriminatory between countries and between domestic and foreign products. Therefore, environment unfriendly products could be discriminated on the basis of its domestic environmental impacts. But what if there is a situation like the above one-it produces a product that could affect the environment for her necessity but prohibits imports of the same product for at least mitigating the problem.

There are two extensions of GATT in WTO agreements governing the application of potential trade restrictive measures in the field of product standard though its application is limited.¹²

First, under paragraph 2.2 of the TBT Agreement, technical regulations could be used where necessary to fulfill legitimate environmental objectives. However, the phrase ‘*where necessary*’ is not clear and may be understood differently by countries.

Second, the SPS Agreement allows WTO members to take productive measures in the field of a threat from a number of specific causes as long as certain conditions are met and the measure be based on a risk assessment. This still has limited application for scientific uncertainties regarding some environment measures. This was a key point in the 1998 *beef hormone dispute*, in which the US argued that an EU ban on imports of beef from cattle treated with growth hormones was WTO-incompatible. The Appellate Body found that the ban could be justified as long as the EU provided convincing scientific evidence of the danger to human health. When the European commission failed to supply this within the set period, the WTO authorized the US to levy tariffs on specific categories of EU exports.¹³ This proved that the impact of the measures may be scientifically difficult to prove, the principle of non-discrimination still affects the environment.

¹¹ Id.p.32

¹² Supra note 10.p.3

¹³ Ibid

b. Product and Production Methods (PPM)

The fundamental issue raised is whether products produced through environmentally harmful processes and production methods are considered “like” environmental friendly products by trade laws.

A PPM (product and production methods) refers to how a product is made. Many products go through a number of stages, and therefore a number of PPMs, before they are ready for use. For example, making paper requires trees to be grown and harvested, the wood to be processed, the pulp often to be bleached, and so on. The various processes will have different environmental impacts- biodiversity, forest-based streams and wildlife, human health from chemical pollution of waterways, or in terms of air pollution and energy use. Other papers may be made from post-consumer waste, a different process involving a different set of environmental impacts.¹⁴ Therefore, each has to be regulated accordingly for environmental protection.

The way a product is produced is one of the three central questions for an environmental manager: how is it made, how is it used and how is it disposed of. So, from an environmental perspective, it makes sense to also be able to discriminate at the border between otherwise like goods that were produced in clean and dirty ways.¹⁵

GATT/WTO agreements treat products which have the same physical form as “like” products, even if they have been produced in different ways.¹⁶ And it does not allow countries to discriminate among like products, whatever their environmental impact. As a result, “PPM” has become one of the most debated sets of letters in trade law history and for many people, this debate lies at the heart of the trade and environment relationship.¹⁷

The rules of the TBT agreements further do not allow countries to prohibit or restrict imports on the ground that the imported products had not been produced according to the PPM standard imposed on domestic industries. It makes a single exception to this rule: a country may prohibit imports of a product when the PPM used affects its characteristics or quality.¹⁸

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Supra note 10 p.3-4

¹⁸ Alan Oxley, WTO and Environment, September,2001,p. 4-5

Despite WTO laws, pressure from environmental lobbyist are forcing governments to introduce laws which have an impact on trade because imports are then restricted on the ground that they have not been produced according to the methods of production imposed by these laws. Such methods include: management practices for fattening animals or for enhancing the milking capacities of cows and methods for killing animals.¹⁹

In practice allowing discrimination based on PPMs would present some difficulties for the trading system. It would give governments' greater opportunity in their struggle to protect their industries unfairly against foreign competition. Motivated not by environmental but by economic considerations, a government might conduct an inventory of environmentally preferable PPMs used by its domestic industries, and make new regulations penalizing those producers (that is, foreigners) not using them. This might result in environmental improvement, if only in certain industries and only if the inefficiencies thus created did not overwhelm the environmental benefits. But there are two other fears.²⁰

The first is that the standards thus imposed might be environmentally inappropriate for some foreign competitors. For example, a country where water scarcity is a major issue might enact laws discriminating against products produced in ways that waste water is to be used recycled. But this would force exporters in water-rich countries to follow standards that are irrelevant to their local environmental conditions.²¹

The second is a related argument from developing countries that argue their social priorities differ from those of developed countries. They may, for example, be more concerned about clean water than about any other environmental issue. If so, it is unfair for developed countries to discriminate against their exports based on environmental issues that are not high on their agendas, forcing them to either adopt rich country environmental priorities or suffer a loss of wealth-creating exports. Many developing countries worry that if the WTO allows PPM-based discrimination on environmental grounds, it will also be forced to allow it on social grounds, such as human rights, labor standards and so on, increasing the scope of the threat to their exports.²²

¹⁹ These are reflections from the major cases raised before the Appellate Body at different times and is illustrated in the example herein.

²⁰ Supra not 10

²¹ Ibid

²² Ibid

Another part of this argument is that rich countries became wealthy by burning a lot of fossil fuels, cutting down most of their forests, destroying the ozone layer and otherwise cashing in on environmental resources. Now that the wealth they have gained allows them to maintain high environmental standards, it is hypocritical to forbid developing countries to follow the same path. At a minimum such demands should be accompanied by technical and financial assistance to help bring about environmental improvements, and other forms of capacity building.²³

Finally, there is a sovereignty argument. If the environmental damage in question is purely local, then it is really the purview of the exporting country, not the importing government. This argument weakens if the environmental damage in question is not purely local-if it involves polluting shared waters or air streams, depleting populations of species that migrate across borders, or damaging the atmosphere. The need for international co-operation is obvious.²⁴

MEAs²⁵ are one such form of cooperation, and are the most commonly recommended way to prevent PPM-based environment and trade conflicts. That is, countries should collectively agree to either harmonize standards or live with a negotiated menu of different national standards. Many such agreements are in force today. Such agreements, however, take many years to negotiate and even more to take full effect a problem, if the environmental issue in question is urgent. As well, some subject areas may not be ripe for agreement; countries often disagree on the need to regulate or the mechanisms for doing so. These factors may make the international option unattractive for addressing issues of great importance to some countries.

However, an importing country may not restrict imports solely because a product has been produced in a plant which does not meet its national standards for water or air pollution, or because the product has not been made according to the methods of production the country prescribes. Any such requirement would be tantamount to obliging an exporting country to adopt the PPM of the importing country, which the exporting country may have good reasons not to use because of its environmental and ecological conditions.

MAJOR CASES INVOLVING THE PPM

²³ Ibid

²⁴ Ibid and the chapeau clause

²⁵ Its main concept is vest discussed in the next paragraph

Major cases relating to PPMs are discussed in one way or another here and other sub sections. The need to raise these cases here is simply for reference.

The first of these cases is the US-Restriction in Imports of Tuna from Mexico (Tuna) which was the measure to save the incidental kills of dolphins while using ‘purse seine’ nets to catch tuna fish.²⁶ The next case is the US restriction on import of Tuna (Which is commonly called Tuna II)²⁷ which fact is identical to the first except that the measure is on a different country and it relates to jurisdiction question. Others include the US shrimp /turtle case and the US Gasoline cases.²⁸

C. Enforcement of Multilateral Environmental Agreement (MEAs)

I. The Role of Multilateral Environmental Agreements

MEAs are agreements among governments that address shared environmental problems. They are voluntary commitments among sovereign nations that seek to address the effects and consequences of global and regional environmental degradation. They address environmental problems with trans-boundary effects, domestic environmental issues that raise jurisdictional concerns, and environmental risks to the global commons.²⁹

In recent years the importance and scope of MEAs has increased dramatically as the international community struggles to address increasing global environmental problems such as the spread of toxic pollutants, biodiversity loss, and global warming. There are now over 200 MEAs to co-ordinate the activities of states on issues related to environmental protection in an effort to achieve sustainable development.

MEAs address a broad range of international environmental issues. Among other things, MEAs identify cooperative solutions, create mechanisms to equitably share benefits and burdens, and limit the use of unilateral measures. Generally, MEAs create a balance between

²⁶ Simeneh Kiros, The Trade Environment Debate: The Normative and Institutional Incongruity, *Mizan Law Review* vo1. 2, No.2, July 2008, p.325

²⁷ Id.,p.326

²⁸ Id .p.327-29

²⁹ See United Nation Environmental Program(UNEP)- Trade Related Measures and Multilateral Environmental Agreements,2004, p.5

the three pillars of sustainable development (environment, social and economic) by applying integrated approaches to achieve their objectives.³⁰

MEAs also serve a number of other functions. They create a forum for measuring the state of the environment and the issues affecting it. They establish frameworks for negotiating new obligations through protocols and decisions for involved parties. They provide guidance and assistance for implementation. And they create mechanisms to enhance compliance and resolve disputes.

II. MEAs and Its Enforcement Tools

Central to many of these MEAs are trade or trade related measures. Trade measures are an essential policy instrument in the toolbox of measures available to environmental negotiators; they are now used in over 20 MEAs.³¹

Trade measures in MEAs serve a number of purposes, including the regulation of trade in environmentally risky products such as hazardous waste, and genetically modified organisms, discouraging unsustainable exploitation of natural resources such as endangered species, and enhancing compliance with MEAs rules. MEAs include or require a variety of other measures too that might affect trade and that may be covered by trade rules. These trade related measures include, among other things, national policies and measures that affect trade or market access, obligations to encourage technology transfer, and measures related to risk assessment or prior informed consent.³²

Trade restrictions required by MEAs have four major objectives:³³

- To restrict markets for environmentally hazardous products or goods produced unsustainable.
- To increase the coverage of the agreements provisions by encouraging governments to join and/or comply with the MEAs.

³⁰ WWT-CIEL Discussion Paper, Legal and Practical Approaches to MEA-WTO linkages towards coherent environmental and economic government, 2001, P.7

³¹ Ibid

³² Supra note 30, p. 7-8

³³ Supra note 10, p. 4-5

- To prevent free riding by encouraging governments to join and/or comply with the MEAs.
- To insure the MEAs effectiveness by preventing leakage - the situation where non-participants increase their emission, or other unsustainable behavior, as a result of the control measures taken by signatories.

And the legal and practical challenges to these objectives are discussed below.

III. Legal and Practical Challenges at the MEAs-WTO Interface

The rules established by MEAs and the WTO intersect in a range of areas.³⁴ For example, WTO rules on trade in goods may cover the trans-boundary movement of genetically modified organisms, endangered species, hazardous waste, or persistent organic pollutants. WTO rule on intellectual property can affect biodiversity. WTO rules to liberalize services, such as transportation, energy and other highly energy consuming services could affect climate change. Thus, the relationship between MEAs and WTO gives rise to a range of legal and practical challenges.

Two issues in particular have been the subjects of longstanding discussion. The first is whether trade measures taken pursuant to MEAs are compatible with the WTO, for they take the upper hand in WTO governance.

The second is the issue of measures regarding non-parties to MEA, which are designed to prevent benefits flowing from MEAs to non-parties that have incurred with no corresponding obligation.³⁵

a. The WTO-Compatibility of Trade Measures in MEAs

Despite the central role of trade measures in many effective MEAs,³⁶ the relationship between trade measures in MEAs and WTO rules remains unclear.³⁷ The potential for conflict between WTO obligation and the use of trade measures in MEAs was explicitly

³⁴ Robyn Eckersley, *the Big Chill: The WTO and Multilateral Environmental Agreements*, <http://muse.jhu.edu>, Massachusetts Institute of Technology, 2004, p.25-29

³⁵ Id, p.27

³⁶ Supra note 30, p.10

³⁷ Ibid and the Decision on Trade and Environment, adopted by ministers at the meeting of the trade negotiations committee in Marrakech on 14 April, 1994

acknowledged by WTO members in 1994.³⁸ At the end of the Uruguay Round the WTO committee on Trade and Environmental (CTE) was established with a mandate to examine “*the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreement.*” The mandate of the committee also includes making “*appropriate recommendations on whether any modifications of the provision of the multilateral trading system are required.*” But over the year’s operation, the CTE has made little progress regarding ways to strengthen and clarify the relationship between MEAs and the WTO.³⁹ Despite proposals by a number of WTO members to amend WTO agreements, the CTE has offered no recommendations to modify the rules of the trading system or other measures to address the tensions between the WTO and the use of trade measures in MEAs.⁴⁰ As a result, a number of WTO agreements continue to raise questions about the use of trade measures in MEAs. Until greater legal certainty is achieved, the use of trade and trade-related measures in MEAs will likely remain underdeveloped.⁴¹ And MEAs that include trade measures will be inadequately implemented. Thus, both the laws and its manner of application therein affect the environment too much.

b. MEA Measures Regarding Non-Parties

Trade measures in multilateral trading system exist to influence the behavior of their parties. However, trade related measures in MEAs are often designed to influence the behavior of non-parties.⁴² They provide a means to compensate against any competitive advantage gained by non-parties at the expense of parties taking on environmental obligation. Trade measures create incentives for non-parties to join MEAs and eliminate leakage by reducing the extent to which non-parties gain a competitive advantage by not joining. Such measures are often essential for maintaining the integrity of the MEA. However, the extent to which these measures are consistent with WTO rules is unclear, even in those cases where membership in an MEA exceeds membership in the WTO.⁴³

³⁸ Supra note 30, p.10

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Supra note 30, p.10

⁴² Ibid

⁴³ Ibid

The potential for a WTO dispute between WTO Members, one of which is a non-party to the MEA, has, arguably, increased. This argument is based on the decisions by some powerful states not to join key conventions such as the convention on Biological Diversity, the Bio safety protocol, the UN convention on the Law of the Sea, or the Kyoto protocol. While the WTO has stated a preference for multilateral solutions to environmental problems, it remains unclear whether trade measures involving non-parties to MEA are consistent with the WTO.⁴⁴

c. Applying the Precautionary Principle Under MEAs

In addition to the above two issues, there are a number of others that may affect the environment. One is the precautionary principle. The precautionary principle is a cornerstone of many MEAs and national environmental policy. Nevertheless, it is not well regarded by the trade community. Indeed, there is a debate in some segments of the trade community about the role of, and limit to, the precautionary principle and how “science-based” WTO rules might be used to ensure that it does not inhibit trade⁴⁵. Thus in as much as there is no scientific certainty, trade measures are not going to be applied for it affects trade. The *beef hormone case* is one of such an example in this area.

EXCEPTIONS TO MULTILATERAL TRADING RULES

INTRODUCTION

In the previous section, an attempt was made to explore core trade principles affecting the environment. It began with identifying fundamental principles of international trade laws and discussed in detail how each may affect the environment and environmental governance.

In this section discussion will be made on basic exceptions to the above multilateral trading rules. They consist of the general exceptions to the principle of GATT (basically Art XX (b, g)), the chapeau, and others. These exceptions are often referred to as environment, health and safety exceptions in WTO free trade governance.

⁴⁴ Ibid

⁴⁵ Ibid and this part of the paper has also been discussed under the exception section

This section briefly addresses historic development of exceptions GATT Art XX (b and g) and most notable cases on the area and the chapeau. It gives an over view of the exceptions and its regulatory impact on the environment.

BRIEF HISTORY

The historical development of GATT/WTO is a trade liberalization effort to the benefit of developed countries. Since GATT establishment, it has included some environment exceptions though the content of these exceptions⁴⁶ were not understood for a long time. While for instance the provisions of GATT Art XX were there since 1948, these exceptions are invoked only in early 1990s.⁴⁷

These provisions are basically general exceptions, deviations from the basic principles of international trade.⁴⁸ For these exceptions to come to existence and serve as regulatory framework within WTO, various ups and downs have been experienced. The first debate as to whether environmental exceptions should be included traces back to 1920s during the preparatory period for the Abolition of Import and Export Prohibitions and Restrictions. That convention contained an exception for trade restrictions imposed for the protection of public health and the protection of animals and plants against disease and extinction.⁴⁹ A generation later, the debate was rekindled in the drafting of the charter of the International Trade Organization and GATT.⁵⁰

The debate on trade and environment was revived in 1970s and then became quiescent again. By the late 1980s, the GATT had developed an inward-looking personality and began to be perceived as being unsympathetic to the challenges of protecting the environment.⁵¹

A new era in the trade environment debate began in 1996-98. This era was fostered by the enlightened Appellate Body jurisprudence and boosted by the attention given to the

⁴⁶ Supra note 26 .p.320 and sup era note 30 p.11

⁴⁷ Ibid

⁴⁸ Supra note 26.p.321

⁴⁹ Steve Char Ovitz, The WTO's Environmental Progress, Journal of international Economics law 10(3),685-706 august 2007,p.1

⁵⁰ Ibid

⁵¹ Ibid

environment by trade negotiations in the waning days of the Uruguay Round.⁵² Recently greening efforts has been made and environment has become mainstream issue.

The slow progress of these provisions is not without effect to the environment.

THE GENERAL EXCEPTIONS TO THE PRINCIPLE OF GATT (ART. XX, B & G)

GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules; a situation where the above core multilateral trading principles could be revoked. As mentioned above, the content of these provisions were not understood for long time and has largely affected the environment. Currently, however, WTO trade-environment jurisprudence has developed well.⁵³

Two exceptions of the GATT are of particular relevance to the protection of the environment: Paragraphs (b) and (g) of Article XX. The legal text of the provisions of GATT Article XX reads as “*subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement (the GATT) shall be construed to prevent the adoption or enforcement by any contracting party of measures:....*

(b) *Necessary to protect human, animal or plant life or health....*

(g) *Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*
.....⁵⁴

As could be referred from the above provisions, GATT Article XX on General Exceptions consists of two cumulative requirements: requirements under Art. XX sub Article (b, or g) and the chapeau.

For a GATT environmental measure to be justified under Article XX a member must perform a two-tier analysis proving: first that its measures fall under at least one of the exceptions (e.g. Paragraphs (b) or (g) and then that the measure satisfies the requirements of the

⁵² Ibid

⁵³ Supra note 26 p.321

⁵⁴ GATT, the legal text, <http://www.wto.org/english/docs-e/gatt47-e-pdf-sujin.com>. np last accessed on 11/08/2009, at 10.07

introductory paragraph (the “chapeau” of Article XX), i.e., that is not applied in a manner which would constitute “*a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*” and is not “*disguised restriction on international trade*”.⁵⁵

The two requirements are cumulative, in the sense that they shall be met for the member’s environmental measure deserve justifiability.

ENVIRONMENTAL POLICIES COVERED BY ARTICLE XX

Although exceptions remained unrecognized for long time, there have been a number of occasions where WTO members’ autonomy to determine their own environmental objective, have been re-affirmed by the Appellate Body decisions.⁵⁶ For example, the US Gasoline and Brazil retreated tires and a number of policies fall within the realm of these two exceptions: policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing health risks posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tires (under Article XX (b)); and policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air (under Article XX (g)). Further, interestingly, the phrase “exhaustible natural resources” under Article xx (g) has been interpreted broadly to include not only “mineral” or “non – living” resources but also living species which may be susceptible to depletion, such as sea turtles.⁵⁷

Besides in the US Shrimp case,⁵⁸ the Appellate Body accepted as policy covered by Article XX (g) one that applied not only to turtles within the United States waters but also those living beyond its national boundaries. The Appellate Body found that there was a sufficient nexus between the migratory and endangered marine populations involved and the United States of Article XX (g).

Although the WTO trade-environment jurisprudence has developed well and helped for the establishment of these environmental policies still its application is very limited and has a bad effect on environmental protection.

⁵⁵ WTO-Trade and Environment, <http://www.wto.org/english/tratop-e/issue3-e.htmhome>> trade topics>trade and environment> the rules, 9/8/2008, last accessed on 29/09/2009 at 2 pm.

⁵⁶ These case are discussed below under the section major cases that involve the exception article XX

⁵⁷ These environmental policies are all derived from each of the corresponding cases that has come to the Appellate Dispute Resolution Body and got a decision

⁵⁸ Report of the panel U.S import prohibition of certain shrimp and shrimp products (15 may 1998) Para 2.3 and <http://www.wto.org/english/tratop-e/envir-e/edis08-e.htm>

INTERFACE BETWEEN MEANS AND ENVIRONMENTAL POLICY OBJECTIVES

Member states of WTO can exceptionally restrict trade for safeguarding their domestic environment, and for trade related environmental measure to be eligible under the exception XX (b and g), a member has to establish a connection between its stated environmental policy goal and the measure at issue. The measure specifically needs to be either:⁵⁹

- Necessary for the protection of human, animal or plant life or health (paragraph (b) or,
- Relating to the conservation of exhaustible natural resources (paragraph (g)).

In determining whether a measure is “*necessary*” for the first requirement; to protect human animal or plant life or health under Article XX (b), the Appellate Body used to weigh and balance series of factors including the contribution made by the environment measure to the policy objective, the importance of the common intersect or values protected by the measure and the impact of the measure on international trade.⁶⁰

If the analysis yield to a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.

But these requirements are of broad and complex and may bring about enforcement hurdles in achieving environmental goals. Member states might be faced with difficulties in defining which measures are “*necessary*” for the protection of human, animal or plant life or health and which measures are “*relating to*” the conservation of exhaustible natural resources for the terms are vague. There are instances in which production methods (rather than products) cause environmental problems and a situation where product standards may not be applicable all the time for environmental purpose, it is tedious to apply these criteria. Finally, the criteria that the measure shall be ‘less trade restrictive’ may take precedence to environmental exceptions.

⁵⁹ Supra note 55

⁶⁰ Ibid

The following are major cases that illustrate these challenges. They will also show how GATT Art. XX (b and g) has been applied in relation to trade-environment jurisprudence.

MAJOR CASES INVOLVING GATT ART. XX (B, G)

Brazil – Retreated Tyres case⁶¹

In this case, the Appellate Body found that the import ban on retreated tires was “apt to produce a material contribution to the achievement of its objectives” i.e. the reduction in waste tyres volumes. The proposed alternatives which were remedial in nature were not found real alternatives to the import ban which could prevent the accumulation of tires. But, more concern has been employed to less trade restrictive measures which can affect the environment.

It further recognized that certain complex environmental problems may be tackled only with a comprehensive policy comprising a multitude of interacting measures and further pointed out the results obtained from certain actions can only be evaluated with the benefit of time.

EC – Asbestos case⁶²

In this case the Appellate Body, after considering a series of factors, found that there was no reasonably available alternative to a trade prohibition and the value pursued by the measure was found to be “*both vital and important in the highest degree*” designed to achieve the level of health protection chosen by France. The Appellate Body noted that the more vital the common interests pursued, the easier it was to accept as necessary measures designed to achieve those ends. Thus, for a certain measure to be considered necessary, the common interest shall be of the highest importance. Nevertheless, a measure which is less trade restrictive may be well deliberate unnecessary for it isn’t important at the higher degree. For the second requirement (paragraph g), a substantial relationship between the measure and conservation of exhaustible natural resources needs to be established. In the words of the Appellate Body, a member has to establish that “*means are reasonably related to the ends.*” The chosen measure shall be reasonably related to the stated policy goal of exhaustible natural resources. For the measure to be justified under Article XX (g) it must be applied in conjunction with restrictions on domestic production or consumption”.

⁶¹ Brazil retreated case <http://www.wto.org/english/tratop-e/dispu-e/ds332-e.htm>, 9/08/2009 at 5.00 pm

⁶² Ibid

The US – Gasoline Case⁶³

In the US – Gasoline case, the US had adopted a measure regulating the composition and emission effects of gasoline to reduce air pollution in the United States- *Gasoline rule*. The quantity baseline established was subject of dispute for its presumed discrimination between domestic and importers' refiners. The Appellate Body found that the chosen measure was “*primarily aimed at*” the policy goal of conservation of clean air in US and thus fell within the scope of paragraph (g) of Article XX.

The US Shrimp case⁶⁴

In this case, the Appellate Body considered that the general structure of the measure in question was “*fairly narrowly focused*” and that it was not a blanket prohibition of the importation of shrimp imposed without regard to the consequences to sea turtles; thus it concluded that the measure was “*relating to*” the conservation of an exhaustible natural resources within the meaning of Article XX(g) and the measure had been made effective in conjunction with the restrictions on domestic harvesting of shrimp as required by Article XX(g).

THE CHAPEAU AND MANNER OF APPLICATION OF TRADE RELATED ENVIRONMENTAL MEASURES

The introductory clause of Article XX is commonly referred as the chapeau and it fundamentally emphasizes on the manner of application of trade related environmental measures. It specifically points out that the application of trade related environmental measures must not constitute a “*means of arbitrary or unjustifiable discrimination*” or a “*disguised restriction on international trade*.” Therefore, the measure should not constitute an abuse or misuse of the provisional justification made available under Article XX exceptions and is required to be applied in good faith.⁶⁵ It is similar to the principle of non – discrimination in prohibiting trade related environmental measures.

The Appellate Body decisions in Brazil Retreated tyres case reminds that the chapeau serves to ensure that members' right to avail themselves to exceptions is exercised in good faith not

⁶³ The U.S gasoline case <http://www.wto.org/english/tratop-e/envir-e/edis/07-e.htm.12/09/2009 at2.00 pm>

⁶⁴ Supra note 58

⁶⁵ The chapeau, <http://www.wto.org/english/docs-e/legal/-e/gatt-47-02-e.htm>, Article XX

as a means to circumvent one members obligations towards other WTO members. It should maintain balance between the right of a member to invoke an exception and the rights of other member under GATT highlighting that the measure is applied in accordance with the chapeau.⁶⁶

Experience in WTO jurisprudence demonstrated that measures have been applied in accordance with the chapeau clause. Some of most important cases showing whether measures have been applied in accordance with the chapeau include: *the US – Gasoline decisions and the US shrimp case*.

Both the US-Gasoline and US-shrimp case decisions show that for the measure to be in line with the chapeau, it has to have the role in international cooperation and coordination,⁶⁷ required to be the flexible enough to take into account different situations in different countries⁶⁸ and may not result in protectionism.⁶⁹

These requirements, however, might make the application of the exceptions very limited for they are broad and complex.

CONCLUDING OBSERVATIONS

International trade laws have great deal of impacts on the environment. They affect environmental laws and processes and cause impediments to many of environmental protection efforts. They produce ambivalences in much of their crossroad areas which in effect affect environmental agreements. They have overriding effect on the environment exceptions in the WTO trade governance. They are most influential on the decision making bodies to the extent that the decisions affect the environment. Major case laws on trade-environment issues reflect that these responsible organs are more concerned to trade than environment in the administration of justice- they have special interest to trade laws and issues.

⁶⁶ Supra note 55

⁶⁷ U.S shrimp Art21.5 and in the US-Gasoline decision, the Appellate Body considered that US hadn't sufficiently explored the possibility of entering in to co-operative arrangements with affected countries to mitigate the administrative problems raised by the US in the justification of the discriminatory treatment

⁶⁸ In the US shrimp case the Appellate Body was of the view that rigidity and inflexibility in the application of measures constitute unjustifiable discrimination.

⁶⁹ US shrimp case Art 21.5, The fact that the revised measures allowed exporting countries to apply programs not based on the mandatory use of Turtle Excluder Device(TED) and offered technical assistance to develop the use of TEDs showed that the measure was not applied so as to constitute a disguised restriction on international trade

And more specifically while regulating international trade relations: First, they affect the environment prohibiting simply differential treatments between ‘like products’ with no regard to their legal and practical challenge on the environment. The big concern given for is whether the products are alike and treatment by member states is accordingly. Second, they stand against trade restrictive measures except on the otherwise expressly specified areas and appear important challenges at the enforcement of multilateral environmental agreements. They often conflict in the area of product standards and product and production methods (PPM). The way GATT/WTO agreements treat products is against discrimination at the border between otherwise like goods that were produced in clean and dirty ways and there is no law on the area that restrict imports on the ground that they haven’t been produced according to the methods of production. Thus, for the set standards are practically trade oriented, truly speaking, their effect on the environment is getting worse.

Third, it may be for the reason that WTO is strong and dominantly a trade organization lobbying other trade-environment sub organs or for the reason that these sub organs are more trade oriented too, important decisions on the area (Case laws) reflect the overriding effect of trade laws on the environment exceptions/ laws. And more important on the environment exceptions is that their application is very limited for the requirements in the chapeau are broad and complex and the terms are vague.

And therefore, it is my suggestion that we can’t avoid these bad impacts of trade laws on the environment unless there shall be both normative as well as institutional amendment/ changes. Environment issues should be treated separate and environmental laws and institutions should take hold of the upper hand position over trade laws.

HIGHER EDUCATION IN INDIA: INTROSPECTION

Dr. Gopal Kumar*

Abstract

The Indian higher education system is facing an unprecedented transformation in the coming decade. This transformation is being driven by economic and demographic change: by 2020, India will be the world's third largest economy, with a correspondingly rapid growth in the size of its middle classes. Currently, over 50% of India's population is under 25 years old; by 2020 India will outpace China as the country with the largest tertiary-age population. With a Gross Enrolment Ratio (GER) of 15 per cent, India is still below the world average. With relatively stagnant growth of public sector, private sector now accounts for 63 per cent of the total higher education institutions and 52 per cent of the total enrolments in Indian higher education. Quality and efficiency policy responses and their endeavors have been insufficient accompanied by poor regulations and its subsequent implementation. Multiple regulations and measures have been envisaged by different commissions and committees to enhance the access, quality and equity to face the challenges globally in years to come.

* Head-Department of Mathematics, K. B. Jha College (A constituent unit of B.N. Mandal University, Madhepura), Katihar (Bihar)

INTRODUCTION

India's higher education system is the third largest in the world, next to the United States and China.¹ The higher education system in India grew rapidly after independence. Today, Indian higher education is comprised of 33,657 institutions, made up of 634 universities and 33,023 colleges; it is the largest higher education system in the world in terms of the number of institutions.² India's demographic trend indicates that it will soon overtake China as the world's largest population, and with an average GDP annual growth of 8% over the last decade, its middle classes that demand higher education will swell to over 500 million people in the next ten years.

There is, indeed, a multitude of interconnected problems that higher education system in India faces; "*Higher education in India suffers from several systemic deficiencies. As a result, it continues to provide graduates that are unemployable despite emerging shortages of skilled manpower in an increasing number of sectors. The standards of academic research are low and declining.*"³

With the changing demographics, political, philanthropic and economic environment, the objective of higher education has now a more focused attention on access and equity. In 1994, the World Bank produced a report entitled, *Higher Education: The Lessons of Experience*, and followed-up with another report *Priorities and Strategies for Education: A World Bank Review in 1995*. The 1994 report emanates confusion, and uncertainty about its subject matter and ultimately stresses that higher education should not have much priority in development strategies. To quote:

Indeed, it is arguable that higher education should not have highest priority claim on incremental public resources available for education in many developing countries, especially those that have not yet achieved adequate access, equity and quality at the primary and secondary levels. This is because of the priority these countries attach to achieving universal literacy; because the social rates of return in investments in primary and secondary education usually exceed the rates of return on higher education and because investment in

¹ World Bank, *India Country Summary of Higher Education*, Available at: http://siteresources.worldbank.org/EDUCATION/Resources/2782001121703274255/14392641193249163062/India_CountrySummary.pdf

² Agarwal, P. (2006). *Higher Education in India: The Need for Change*, ICRIER Working Paper, Indian Council for Research on International Economic Relations: No. 180

³ *Ibid*

basic education can improve equity because it tends to reduce inequalities. (World Bank, 1994, p.3)

Surprisingly, the executive summary of the same document reads:

Higher education is of paramount importance for social and economic development. Institutions of higher education have the main responsibility for equipping individuals with advanced knowledge and skills required for positions of responsibility....estimated social rates of return of ten percent or more in many developing countries also indicates that investments in higher education contributed to increase in labor productivity and to higher long term economic growth essential for poverty alleviation. (World Bank, 1994, p.1)

The manner in which this debate was carried out in India The allegedly low social rates of return on higher education were frequently deployed during 1990s to reallocate public expenditure away from higher education. This resulted in a number of problems. At the same time, the gains to be derived from overcoming these problems

Are shown by a recent World Bank study to be tremendous:

The time is very opportune for India to make its transition to the knowledge economy – an economy that creates, disseminates, and uses knowledge to enhance its growth and development...⁴ India currently produces a solid core of knowledge workers in tertiary, scientific and technical education, although the country needs to do more to create a larger cadre of educated and agile workers who can adapt and use knowledge.

This paper is meant to be a modest contribution to assessing, against the background of the current situation of higher education in India. Despite impressive progress over the years, the higher education in India is faced with these challenges:

1. GOVERNANCE AND REGULATION

The Department of Higher Education), under the Ministry of Human Resource Development (MHRD is the Apex body of governance, acting as an umbrella organization, consists of fifteen regulatory bodies performing overlapping roles in addition to influences from few other ministries too. It is overregulated, limiting the initiatives for change and misdirecting individual or private efforts. In its assessment of the existing regulatory arrangements, the

⁴ Dahlman and Utz 2005

National Knowledge Commission concludes: “*In sum, the existing regulatory framework constrains the supply of good institutions, excessively regulates existing institutions in the wrong places, and is not conducive to innovation or creativity in higher education.*”⁵

The judicial interventions also have at several times complemented or contradicted the objectives associated with higher education (Agarwal, 2006). It thus results into ambiguity related to policy understanding, policy implementations, accountability, and answerability.

Thus, the extent and the nature of the regulatory arrangements appear to inhibit both the reform of Indian higher education and the mobilization of additional resources for its further development.

QUALITY AND EFFICIENCY

The quality in many of its institutions is at stake due to chronic shortage of faculty, poor quality teaching, outdated and rigid curricula, lack of accountability and quality assurance and separation of research and teaching. The appointments are almost stagnated in most of the sections of the public sector, left alone expanding the faculty intake in accordance to the ever-growing higher education sector.

External Quality assurance was conceived in India in 1990s as a solution to the deteriorating higher education quality in India. There are three main agencies to evaluate quality of institutions: The National Assessment and Accreditation Council (NAAC), National Board of Accreditation (NBA) for technical education and the Accreditation Board (AB) for agriculture institutions. It shows that majority of accreditation process is carried out by NAAC but as accreditation is voluntary. The accreditation grading is not associated with either rewards or punishment. Now initiative has been taken to link it with UGC funding.

As efficiency is the product of quality education. Higher education is seen as one of the sources to increase private and social rates of returns thereby justifying the efficiency resulting from pursuing higher education. Conditions of employment may also be looked at as a parameter of efficiency. The Times of India paper in its article, “Unemployment rate at graduation level is 9.4 per cent and that at post-graduation level is 10 per cent. For Urban India it was 8.2 per cent and 7.7 percent respectively. Among SCs, graduate unemployment is

⁵ NKC 2007, 54; see also Khemani and Narayan 2006, 4; Kapur and Mehta 2004, Agarwal 2006, 76-102; Kaul 2006

11.3 per cent and post-graduate unemployment 12.7 per cent, while for ‘others’, the corresponding figures are 9 per cent and 9.7 per cent. Unemployment among graduate and post-graduate STs and OBCs is also higher than for *others*. Across social groups, graduate unemployment among women is above 25 per cent.⁶

FINANCING

The Indian higher education has seen three phases of funding, philanthropic to public, and then to private financing. Even in public sector it’s a joint responsibility of Central government as well as State government. India being a developing economy, amongst competing governmental priorities higher education is not treated as priority sector. About 80 per cent of the public higher education funding has been sourced from State governments and about 20 per cent from the Centre. Of the 80 per cent State government funding about 82 per cent goes in non-plan expenditure, i.e. routine administration and maintenance and hardly in any capacity is building. The Central government spending lopsided towards central universities and centers of excellence serving hardly 3per cent of the total students. While the trend has always been upwards, the total public expenditure on higher education at about 1.25 per cent of the GDP, is by any standards certainly insufficient (UGC, 2012).

Even the global patterns of funding also show that higher education remains very much a state dominated sector. In OECD countries such as Denmark and Holland, public funding provides 98 percent of the resources in this sector; the figure is almost 90 percent for Canada. Even in the United States, the figure is as high as 78 percent. There is absolutely no doubt that the public sector has a preeminent role to play in higher education which will be dealt separately.⁷

NATURE OF PRIVATIZATION

The private sector has outpaced the state sector in higher education and is rapidly expanding. Trends show that of the various forms of institutes of higher education that exists, the number supported by public funding have very limited growth (like the central and state universities, aided colleges, etc.) and rather the numbers with private funding have witnessed a speedily rising growth (like the private universities, deemed universities, unaided colleges, etc.) (Agarwal 2006). Within a small duration of five years from 2001–2006 the unaided private

⁶ *Higher your education, harder it is getting a job*, Times of India, Delhi18-7-12.

⁷ Devesh Kapur,, Ajay.S. Mehta, R Moon Dutt, *Indian Diasporic Philanthropy*

higher education accounted for 63 per cent (from 43 per cent in 2001) of the total higher education institutes and 52 per cent (from 33% in 2001) of the total higher education enrolments (FICCI, 2011). Since 2005–2011, the State Private Universities have witnessed a fifteen-fold rise in the number of institutes from 6 to 94. Of the 130 Deemed Universities, 73 are in the private sector. About 1 per cent of colleges have been granted an autonomous status (FICCI, 2011). Quiet obviously most of this growth of private higher education has happened in the more marketable professional courses like engineering, medicine, management, computer applications. Currently, private higher education universities are growing at 40% per annum and worth \$6.5 billion.⁸ Many potential private investors are waiting in the wings. The private sector will continue to be crucial in the growth of higher education in India.

ACCESS

Socially, India remains highly divided; access to higher education is uneven with multidimensional inequalities in enrolment across population groups and geographies.

In Indian higher education, about 86 per cent of students are enrolled at undergraduate level and only about 12 per cent are enrolled at post graduate level. Surprisingly, diploma and certificate education has a meagre 1 per cent enrolment as it is considered as an available provision for those who are not able to make it in the mainstream higher education. Unfortunately, for a nation aspiring to become a knowledge economy, a trivial one per cent enrolment in research would not be praiseworthy (UGC, 2012).⁹

The Gross Enrolment Ratio (GER) has seen steep growth in recent past decade, which is appreciable considering the ever increasing population and thereby the relevant age cohort in absolute terms. During the last five years the GER has increased more than 5 per cent and for some of the disadvantaged sections of the population it has been much more. With a GER of 15 per cent, India still lags behind world average, the averages of other countries including its growth sharing BRICS nations, and even the average of developing nations. But the GER attainment of 15 per cent is a result of increase in social demand and deliberate policy efforts to improve access (MHRD, 2012).¹⁰

⁸ *Private universities in India: an investment in national development*, The Parthenon Group (2012)

⁹ Higher Education in India at a glance, UGC, February (2012)

¹⁰ MHRD (2012), Annual Report 2011-12, Department of School Education and Literacy and Department of Higher Education, Ministry of Human Resource Development, Government of India.

POLICY INITIATIVE

In general, there is widespread dissatisfaction with the central and state governments' performance in giving clear direction and momentum to systemic reform, while at the same time, broad support for the government's future plans. There was broad endorsement of the 12th Five Year Plan (2013-17).¹¹ These three overarching challenges: excellence, equity and expansion, interrelated areas are not new: all have been addressed in various forms in previous five-year plans dating back to 1980. The main difference in the 12th plan is its holistic nature, with a clear focus on quality, or 'excellence', as an overarching guiding principle for expansion and equity. The excellence principle incorporates the diversification of higher education courses in response to changing economic and industry needs, the provision of greater choice and career paths for students and brings teaching quality to the fore, alongside research capability.

** Excellence:*

Priority issues include improvements in teaching and learning, and a focus on learning outcomes; faculty development to improve teaching; increased integration between research and teaching; more international partnerships in teaching as well as research; better links between industry and research to stimulate innovation; and connecting institutions through networks, alliances and consortia.

** Equity:*

Further initiatives targeted at underprivileged and underserved populations in society and geography, addressing urban/rural, gender, people with disabilities and community divisions and inequities.

** Expansion:*

Scaling up capacity in existing institutions, rather than creating many new government-funded institutions; enabling discipline diversity, counteracting the skewed growth towards engineering and other technical subjects; enabling flexible and skills-based learning; ensuring a more even spread across the country; alignment to the needs of the economy; and encouraging private investment.

¹¹ Twelfth five-year plan, Chapter on Higher Education, Government of India Planning Commission (2012), Available at: <http://planningcommission.gov.in/plans/planrel/12thplan/welcome.html>

CONCLUSION

Considering both the multitude and the magnitude of the difficulties that Indian higher education faces, it would be easy to be overwhelmed by the problems and to despair of finding solutions but at the same time, the tremendous potential of India's booming industry and technology, the considerable progress made in higher education and the scientific research in recent decades will certainly push India to surmount these difficulties. What is at stake is aptly captured Dr. Ragunath A. Mashelkar. As I see it from my perch in India's science and technology leadership, if India plays its cards right, it can become by 2020 the world's number-one knowledge production center, creating not only valuable private goods but also much needed public goods that will help the growing global population suffer less and live better.¹² The entire present problem is addressed and incorporated in the 12th Five Year Plan. The Indian government is planning huge expansion at all levels of education. While there is no doubt that this will be the decade of change at a transformational scale and pace, India's rise faces daunting challenges. The education system as a whole is beset with issues of quality, access and equity, and change is happening in much faster pace.

Nevertheless, India continues to walk its way forward carrying a chaotically huge but more-or-less harmonized higher education system. Higher education does hold many promises for a bright future for India in the years to come.

¹² Ragunath A. Mashelkar, *India's R&D: Reaching for the Top*. Science Vol. 307, No. 5714 (4 March 2005), pp. 1415-1417

COOPERATIVES IN INDIA

Dr. Ritu Agarwal*

MEANING OF COOPERATION AND COOPERATIVE SOCIETIES

The dictionary meaning of cooperation is ‘*to work together*’. However, the meaning of cooperative societies is quite technical and has the context of village cooperatives in India. In one form or the other some kind of cooperative societies are found all over the world. A few of the meanings of cooperative societies given by the experts are explained as under:

M.T. Herrick is a renowned author on the theme of rural credit. He has extensively examined the situation of credit in rural society. It is in the context of peasantry that he describes the cooperative societies¹. He writes:

“Cooperation is the act of poor persons voluntarily uniting for utilizing reciprocally their own forces, resources or both under their mutual management, to their common profit or loss.”

Thus, Herrick brings out a few elements, which are essential to any cooperative society: (1) it is an organization of poor, (2) it is voluntary and (3) it is sharing common resources. The author stresses that the poor peasantry has meager resources and, therefore, they unite together to pull their resources for common good. The basic idea of cooperative society excludes the role of big peasants. It is supposed to be a union of small and marginal peasants.

The Cooperative Planning Committee, constituted in 1946 has defined the cooperatives in the context of Indian peasantry. It observes:

“Cooperation is a form of organization in which persons voluntarily associate together on the basis of equality for the promotion of their common interest.”

The committee has elaborated further the meaning of cooperatives. It says that the objective of a cooperative society is to promote the economics interests of the common peasants. The association of members is based on equality. The functions of the cooperative society cannot

* Assistant Professor of Sociology, Amity Law School, AUUP, Lucknow Campus, Email: rituagarwal162@gmail.com

¹ Doshi, S.C. and Jain P.C., *Rural Sociology*, Rawat Publications, Jaipur and New Delhi, 2001, p. 295

be fulfilled by individuals. The idea is that what individual cannot do because of his limitations, it can be done by economic enterprise.

P. R. Dubhashi brings out the meaning of cooperative society in an evolutionary way. He says that cooperative societies have undergone a historical change in their structure and their meaning. His argument is that we can understand cooperative society not as an institution but as a movement. This movement is not static and is always changing with the changing needs of the peasantry. Dubhashi's definition of cooperative movement runs as below:

*"The cooperative movement in the beginning was confined to the credit structure. It was only during the First World War that the cooperative movement was extended to the consumer business. In the case of the scarcity during the war period, the cooperative movement was given the role of making commodities, in short supply, available to the people. The cooperatives were managed easily by part time workers. There was an element of social service in the cooperative activities undertaken in the colonial times. This must be considered to be a very precious element in the India's cooperative movement in the pre-independence phase, despite the rapid development in that period."*²

The above definition brings out four important objectives of cooperative societies. In the initial stage cooperatives in India as elsewhere in the world were meant only to advance credit to the peasants. Credit was essential owing to several reasons, such as investment in farm production, failure of crop or making provision for irrigation. Yet another meaning of cooperatives was to serve the consumers in case of scarcity that could be caused by war, flood, draught etc. Then, in the 1940s, the idea of social service emerged. It means help given to the peasants. Recently the meaning of cooperatives has undergone a revolutionary change. The cooperatives today are formed for the attainment of development. In other words, cooperatives are constituted to provide loans for agriculture inputs, like purchase of implements, manure, digging of wells, etc.

COOPERATIVE MOVEMENT

The practice of mutual help in the business of getting a living is very ancient. Modern cooperative movement is generally dated from the foundation of the 'Rochdale Equitable Pioneers' at the end of 1844 .The structure and rules of the Rochdale Cooperative Society of

² Dubhashi, P.R., *Cooperative Movement, Present Status and Further Challenges*, Cooperative Perspective, Vol.26, No.2, July – September, 1991, p. 6

weavers formed the model for countless successors, not only in England but also in other countries and continents. The objects of the society were varied and far-reaching; they ranged from the establishment of a store for the sale of provisions and clothing to the building of houses for members the opening of workshops, the purchase of farms for their employment and the establishment of a self-supporting home colony. There was political and religious neutrality; member education in cooperative principles was the core of cooperative philosophy.

Cooperatives: Global Presence

Cooperatives have been adopted in the developed and developing countries alike to solve their socio-economic problems. Cooperatives control 100 percent of Uganda's cotton ginning capacity, 99 percent of Sweden's dairy production, 95 percent Of Japan's rice harvest, 75 percent of Western Canada's grain seed output, 65 percent of India's sugar production and 60 percent of Italy's wine production. A cooperative in Shanghai is considered a world leader in waste management and a cooperative in Argentina is one of the South America's major book publishers. Eight of the largest commercial banks outside the United States are cooperatively organized or owned by cooperatives, including such giants as France's credit agriculture Holland's Rebo bank and Germany s D.G. Bank.³

Co-operatives in India

Traditional Forms of Cooperation in India

A brief discussion on cooperatives in India is presented below:

In the socio -economic activities of the people of ancient India, coop-eration took four principal forms viz. Kula, grama, sreni and jati. Kula meant a meeting of kinsmen relatives and friends. Cooperation at gram level assembly [Gram Sabha] striving for the socio-economic progress of the villagers especially of the artisans and cultivators: *Sreni* was a guild of merchants, artisans, bankers and Brahmins. Though cooperation at the level of *jati* was mostly for social purposes [education. charity, relief work etc] caste-based cooperatives emerged among occupational/craft groups.

³ Kumar, C. Rajendra and Dr. Kaptan, Sanjay S., *Cooperative Marketing: A Rural Perspective*, Kurukshetra, Vol. 52, No. 12, October 2004, pp. 46-49.

During the latter part of the 19th century, the problem of rural indebtedness became acute and the passing of agricultural lands from the hands of the peasants to the moneylenders became a common phenomenon. The system of state loans [tagavi] followed by the British fell almost into disuse. Committees and commissions like the Deccan Agriculturists Relief Act 1879, Land Improvements Loans Act 1883, and Agriculturists Loans Act 1884 are some of the notable attempts to address rural indebtedness. With the failure of the Acts, the dire economic conditions of the peasants called for an alternative agency of credit to the agriculturists.

In 1892 the Government of Madras appointed Sir Frederic Nicholson to study the problem of rural indebtedness and report on the advisability of starting the system of agricultural and land banks in the Presidency. In the classic suggestion ‘Find Raiffeisen’ Nicholson wanted European mode of cooperatives to be established in Madras. The Famine Commission 1901 also endorsed the suggestion for the establishment of credit cooperatives. But neither the Societies Registration Act No. XXI of 1860 nor the Indian Companies Act No. VI of 1882 provided for the organization and registration of societies for the purpose of promoting the economic interests of its members in accordance with cooperative principles. A bill for the cooperative credit societies was drafted by Sir Edward Law in 1901 with the objective of assisting farmers, artisans and low-paid employees with credit. With the Cooperative Credit Societies Act, passed on 25th March 1904, the cooperative movement was formally launched in India.⁴

Cooperative Movement (1904-1950)

Though there was provision for organizing urban societies, mostly rural credit societies were organized during the first stage of the movement. In order to diversify the movement into non-credit societies, the Cooperative Societies Act of 1912 was passed. The Committee on Cooperation (1915), chaired by Sir E.D. Maclagan emphasized the need for cooperative education, audit and supervision. Following the Reforms Act of 1919, cooperation became a provincial transferred subject under a Minister. Land Mortgage Banks came to be established in 1929 at Dharwar, Broach and Pachora. Another development was the formation of industrial cooperatives and cooperative housing. The Royal Commission on Agriculture made a strong plea for government assistance for the development of the movement. The decline in

⁴ Sankaran, P.N., *Indian Cooperative Movement: Retrospect and Prospect*, Kurukshetra, Vol. 52, No.12, October 2004, pp. 3-7.

agricultural prices during the Great Depression of the 1930's dealt a severe blow to the cooperative movement in terms of mounting over dues and collapse of societies.

In the annals of the cooperative movement, the establishment of the Reserve Bank of India (and the Agricultural Credit Department) in 1935 was an important event. As a result, the movement gained great momentum during the period of World War II. The period also witnessed a gradual shift to non-credit societies. Independence and the approach of Cooperative Commonwealth incorporated in the Directive Principles of State Policy gave further fillip to the cooperative movement of India.

Cooperative Movement in Modern India

Community Development Projects, National Extension Service and Five Year Plans opened up a new vista for the movement in modern India. The foundation of the new policy of cooperative development- promotion of cooperatives as part of state policy- was laid down with the implementation of the recommendations of the Rural Credit Survey Committee Report in 1954. The policy of state partnership in the share capital of cooperatives which was also endorsed by the Committee on Cooperative Laws (1956-57), NDC Resolution 1958, Committee on Cooperation [1964], Cooperative Laws vis-a-vis Cooperative Principles (1973) and the National Cooperative Policy Resolution (1977) further strengthened government control on cooperatives. The government had also passed the Multi-State Cooperative Societies Act (1984) for regulation of cooperatives spread over several states. In 1987, the Committee on Cooperative Law for Democratisation and Professionalisation of Management in Cooperatives came up with a number of suggestions to strengthen the system. An expert committee under the chairmanship of Chowdhary Brahm Perkash was appointed by the Planning Commission to draft a model cooperative law. The approach of the model law was to give a genuine character to cooperatives to facilitate building of an integrated cooperative structure so as to evolve a cooperative system, make the federal organizations at various levels more responsive and responsible towards their members, to minimize government control and interference, to enable cooperators and cooperatives to develop self-reliance and self-confidence with power of decision making and to eliminate politicization.

The role of cooperatives acquired a new dimension with the changing scenario of globalization and liberalization of the national economy. In the absence of a national cooperative policy and a level playing ground, the cooperative sector could not take full

advantage of the first (1991) and second generation economic reforms packages. Recognizing that a number of cooperatives are emerging as significant business enterprises, that a number of them are not registered under the Multi- State Cooperative Societies Act and that they be given a level playing field to compete with the growing number of private players in the market place, the government provided an alternative legislation -The Producer Company under the Companies Act -following the recommendations of the High Powered Committee on Conversion of Cooperative Business into Companies [2000] chaired by Prof. Y.K. Alag. The producer company legislation enables cooperatives to come under a central legislation like all other business enterprises, provided 2/3 majority in a general body resolve to become a producer company.

National Policy on Cooperatives

Internal and structural weaknesses of cooperatives, wide regional imbalances combined with lack of proper policy support had neutralized their positive impact. This had necessitated the need for a clear-cut national policy on cooperatives. The objectives and salient features of the comprehensive National Policy on Cooperative April 2002, announced by Government of India are the following. Under this policy, cooperatives would be provided necessary support, encouragement and assistance so as to ensure that they work as autonomous, self-reliant and democratically managed institutions accountable to their members and make a significant contribution to the national economy. The policy aims at ensuring the functions of cooperatives based on the Manchester Declaration of International Cooperative Alliance 1995 (voluntary and open membership, democratic member control, members' economic participation, autonomy and independence, education, training and information, cooperation among cooperatives and concern for community). Emphasis of the policy is on

- Revitalization of the cooperative structure.
- Reduction of regional imbalance.
- Strengthening of education, training and HRD.
- Greater members participation und
- Removal of the restrictive regulatory regime.

The policy considers cooperatives as essentially community initiatives for harnessing

peoples' creative power, autonomous, democratically managed, decentralized, need-based and sustainable economic enterprises. Cooperatives will, however, remain the preferred instrument of execution of the public policy, especially in the rural area.

A bill to amend the Multi State Cooperative Societies Act 1984 has been passed to remove the restrictive provisions and to professionalise the management of cooperatives. Another landmark in cooperative reform is the amendment of National Cooperative Development Corporation Act to broad base its activities to rural industrial services and development of infrastructure.

OBJECTIVES OF THE NATIONAL POLICY ON COOPERATIVES

The objective of the National Policy⁵ is to facilitate all round development of cooperatives in the country. Under this Policy, cooperatives would be provided necessary support, encouragement and assistance, so as to ensure that they work as autonomous, self-reliant and democratically managed institutions accountable to their members and make a significant contribution to the national economy, particularly in areas which require people's participation and community efforts. This is all the more important in view of the fact that still a sizeable segment of the population in the country is below the poverty line and the cooperatives are the only appropriate mechanism to lend support to this section of the people.

The National Policy on Cooperatives to this end would seek to achieve:

- Ensuring functioning of the cooperatives based on basic cooperative values and principles as enshrined in the declaration of the International Cooperative Alliance Congress, 1995;
- Revitalization of the cooperative structure particularly in the sector of agricultural credit;
- Reduction of regional imbalances through provision of support measures by the Central Government/State Government, particularly in the under-developed and cooperatively undeveloped States/regions;
- Strengthening of the Cooperative Education and Training and Human Resource Development for professionalisation of the management of the Cooperatives;

⁵ Dr. Singh, Katar, *The National Policy on Cooperatives: A Critical Appraisal*, Kurukshetra, Vol. 51, No.6, April 2003, pp. 6-7

- Greater participation of members in the management of cooperatives and promoting the concept of user members;
- Amendment/removal of provisions in cooperative laws providing for the restrictive regulatory regime;
- Evolving a system of integrated cooperative structure by entrusting the federations predominantly the role of promotion, guidance, information system, etc. towards their affiliate members and potential members;
- Evolving a system of inbuilt mechanism in Cooperative legislation to ensure timely conduct of general body meetings, elections and audit of cooperative societies;
- Ensuring that the benefits of the cooperatives endeavour reach the poorer sections of the society and encouraging the participation of such sections and women in management of cooperatives.

PLAN OF ACTION

A plan of action for implementation of the policy shall be formulated and pursued with adequate budgetary support by the Government of India, State Government and other concerned agencies including federal / national level cooperative organizations in a time bound manner.⁶

The Government of India trusts that the enunciation of this statement of Policy on Cooperatives aimed at professionalisation and democratization of their operations will facilitate the development of cooperatives as self-reliant and economically viable organization, providing their members improved access to the economy of scale, offsetting various risk elements, safeguarding them against market imperfections and bestowing the advantages of collective action. And further trusts that the above statement of policy would ensure enduring autonomy and lasting viability to them as democratically owned, self-reliant enterprises, responsible and accountable to their members and to a large public interest.

State of Cooperation

With an enormous number of 545 thousand cooperatives of various types at various levels with member ship of nearly 230 million, it is one of the largest in the world. It has covered

⁶ Sankaran, P. N., *Indian Cooperative Movement: Retrospect and Prospect*, Kurukshetra, Vol. 52, No.12, October 2004, p. 7

100 per cent villages and 75 per cent of rural households. Cooperatives have made impressive progress in various segments of the economy as observed from the table below.⁷

Share of Cooperatives in National Economy

◆ Agricultural Credit Disbursed by Coops.	: 46.15%
◆ Fertilizer Disbursed (6.049 Million Tonnes)	: 36.22%
◆ Fertilizer Production (3.293 MT – N & P) : Nutrient	27.65%
◆ Sugar Production (10.400 Million Tonnes)	: 59.00%
◆ Wheat Procurement (4.501 Million Tonnes)	: 31.8%
◆ Animal Feed Production/ Supply	: 50%
◆ Retail Fair Price Shops (Rural + Urban)	: 22%
◆ Milk Procurement to Total Production	: 7.44%
◆ Milk Procurement to Marketable Surplus	: 10.5%
◆ Ice- Cream Manufacture	: 45%
◆ Oil Marketed (branded)	: 50.0%
◆ Spindleage in Coops (3.518 Million)	: 9.5%
◆ Cotton Yarn/ Fabrics Production	: 23.0%
◆ Handlooms in Cooperatives	: 55.0%
◆ Fishermen in Cooperatives (active)	: 21.0%
◆ Strong Facility (Village Level PACS)	: 65.0%

⁷ Rao, U.M., *Entrepreneurship Through Cooperatives, An Experience of Women's Dairy Projects in India*, Kurukshetra, Vol.52, No.12, October 2004, p. 51

◆ Direct Employment Generated	: 1.07 Million
◆ Self – Employment Generated for Persons	: 14.39 Million
◆ Self Manufactured (18266 Metric Tonnes)	: 76%

The National Cooperative Union of India has identified the following areas of activity for successful cooperatives.

- Agricultural credit, marketing, agro-based industries and food processing.
- Animal husbandry and dairy.
- Rural Development, poverty alleviation, and women empowerment.
- Irrigation, environment protection.
- Village and small-scale industries, rural electrification.
- Development of Tribals etc.

In the light of the changes that have taken place in the economy, the theme of the Indian Cooperative Centenary Celebration 2004, has been identified as '*Reforms Initiative-Vision for Autonomous and Competitive Cooperatives.*' The programmes envisaged for the celebration consist of a volume on Cooperative Development (1904-2004), a document on Cooperative Vision 2015, research studies/ case studies, success stories, souvenir, seminars, lectures, exhibition, publicity etc.

There are 545 lakhs cooperative societies with over 236 million memberships. The share capital of the movement is around Rs. 198542 million. Their network is vast; it covers all the villages, over 70% of rural households, and occupies a key position in agricultural development. Cooperatives are distributing 46% of agricultural credit, 36% of fertilizers distribution, 59% of sugar production, 32% of wheat procurement, 23% of cotton yarn/fabric

production, 95% of rubber processed and marketed 15% of total marketed surplus of milk etc.⁸

As of rural credit structure, there are 98843 primary agriculture societies, 371 district central cooperative banks, and 30 state cooperative banks. Further, there are 19 state cooperative land/ agricultural and rural development banks with 1421 branches. This credit structure helped stabilizing growth rate of economy by way of its agriculture credit, which contributed in boosting the economy.

Indian Farmers Fertilizers Cooperative Limited, and Krishak Bharati Cooperative Limited (KRIBCO) are the two giant fertilizer manufacturing organisations contributing 28% of the fertilizer production and are managed professionally on principles of sound financial management. Similar organisations of this category are Karnataka Milk Producers' Cooperative Federation Limited, and Gujarat Cooperative Milk Marketing Federation Limited. So is the case with Maharashtra State Sahakari Sakhar Karkhana Limited, and Gujarat State Cooperative Sugar Federation Limited.⁹

Besides this the National Cooperative Union of India (NCUI), which is the front-runner national level cooperative society, is working towards strengthening and development the cooperatives. The membership of NCUI is 225, out of which there are 175 state level societies, 17 national level societies and 32 multi state societies. Its work is to impart education and training to the cooperatives, develop information technology services, publication and distribution, preparation of cooperative plans and maintenance of international cooperative relations. The National Cooperative Development Corporation (NCDC) established in 1963 has been engaged in planning and promoting programmes through cooperative societies for the production, processing, marketing, storage, export and import of agricultural commodities and a variety of food staffs such as: coconuts, areca nuts, eggs, egg products, honey, fruits, milk and milk products, vegetables and the like. Of late the NCDC has extended its activities to the development of cooperative dairy, fisheries and minor forest products which are basically intended to benefit the weaker sections of the community. National Agricultural Cooperative Marketing Federation Limited (NAFEI) established on 2nd October 1958 is a national level apex agency in the field of cooperative

⁸ Arunachalam, J., *Role of Women in Cooperatives: Perspective for 2000 A.D.* in VMNICM (ed.), Positioning Cooperatives in 21st Century, VMNICM, Pune, 1999.

⁹ Upadhyaya, Devendra, *Bharat Me Sahkari Andolan Ke Sau Varsh*, Yojana, Vol. 47, No.12, March 2004, pp. 39-42

marketing. It deals with procurement, distribution, export and import of selected agricultural commodities and helps in fixing supporting price of agricultural products. The National Consumer Cooperative Federation (NCCF) was established in 1965. It's main work is to purchase and market agricultural products. It is also working in the field of production and distribution of some important essential items under the name 'Sarvapriya' under the National Plan. Tribal Cooperative Marketing Development Federation (TRIFED) was established in 1987 by the government of India to attend to the problems of the marketing and distribution of Agricultural products exclusively of tribal areas. The success story of India's dairy cooperatives is universally acclaimed today owing largely to the contributions made by the dairy cooperative to the accelerated growth of the cooperative sector and of entire rural economy. These have been termed as the 'Golden Area of the Indian Cooperative Movement'. Operation Flood, the ambitious programme of cooperative dairying is the biggest dairy development programme of the world in terms of its coverage and longevity. It covers roughly 10 million rural milk-producing households all over India, and initially launched on July 1, 1970, it is still under way. Thanks to Operation Flood, in 1999 with an annual milk output at 74 million mt., India overtook USA to be number one in milk production. As on March 31, 1996, over 72,500 Village Milk Producer's Cooperatives (VMPCs) has been organized in 170 milk sheds covering 267 districts in 23 states/ union territories in the country. National Cooperative Dairy Federation (NCDF) has 21 state level cooperative milk federations. National Dairy Development Board is also its member. The milk coopeatives have made their own name and standing in the country. The easy availability of milk, curd, ghee, butter under different brand names in different states like 'Mother Dairy' in Delhi is made possible only because of dairy cooperatives. Anand Milk Union Limited (Amul) and Campcoo are successful in breaking the monopoly of multinational companies in the field of chocoholate production. The KERADEF of Kerela produces oil from coconut and sells it in the whole country. Besides this, coir and rubber is produced on large scale in the cooperative field. Amul is a well-known name in the whole country, which produces dairy products besides producing edible oils under the brand name Dhara. Milk products have been successful in making their position among consumers by the name of VEERA in Haryana, VIRCA in Punjab, PARAG in Uttar Pradesh, AANCHAL in Uttaranchal, SARAS in Rajasthan, VIJAYA in Andhra Pradesh and SNEHA in Madhya Pradesh. The CO-OPTEX of Tamilnadu has made it's own significant name and recognition in the production of saris, bed sheets and other items of daily needs. Girijen Cooperative Corporation limited of Vishakhapatnam has made 45 products famous among consumers

under the brand name GIRIJAN. These products are collected, produced and developed by tribals. The small forest produces, medicinal herbs, edibles etc are some of the important products under this brand name.¹⁰ In India, the cooperative Banking System comprises of Rural Cooperative Credit Institutions, Central Cooperative Banks (CCB's), Primary Agricultural Cooperative Societies (PACS), Urban Cooperative Banks (UCBs), State Apex Level Federations for short-terms credit and medium – terms credit (loans) and State Level Federations for long-term (credit) loans known as State Cooperative Agriculture and Rural Development Bank.¹⁸ The short term structure is organized in three- tier and two - tier structures in 16 and 12 states respectively, while Andhra Pradesh has a mixed structure. There are around 92,000 Primary Agriculture Credit Societies (PACS), 367 District Central Cooperative Banks (DCCBs) and 29 State Cooperative Banks (including Sikkim SCB) supplying short terms and medium/long term agricultural credit whose coverage extends to the remotest parts of the country. The long terms credit structure consists of 19 State Cooperative Agricultural And Rural Development Banks (SCARDBs) with 745 Primary Cooperative Agricultural And Rural Development Banks (PCARDBs) in respect of federal structure and around 1500 branches in unitary structure. The long-term structure is also organised as unitary and federal structures in eight states each. Three SCARDBs have, however, a structure incorporating both the unitary and federal system (Assam, Himachal Pradesh and West Bengal).¹¹

PARTICIPATION OF WOMEN

Founding fathers of the nation as also architects of modern India visualized cooperatives as ideal vehicles for bringing about a social transformation in the society through greater participation of women in community-based organisations. Cooperatives can be an approach to integrated development, enhancing status of disadvantaged and marginalized women, and utilizing women to play a significant role in the process of collective action. Experience shows that there are number of cooperatives owned, controlled and managed by women successfully. Some of them are presented in the table below.¹² The list is indicator exhaustive. Women have proved themselves as good managers/ entrepreneurs by balancing

¹⁰ Dr. Lopoyetum, Samwel, K., *Problems and Prospects of Cooperative Banking*, Kurukshetra, Vol. 52, No.12, p. 25

¹¹ Dr. Patel, Amrit, *Cooperative Banking: Achievements and Challenges*, Kurukshetra, p. 19

¹² Rao, U.M., *Entrepreneurship Through Cooperatives, An Experience of Women's Dairy Projects in India*”, Kurukshetra, Vol.52, No.12, opcit., October 2004, p. 51

responsibilities between home and business organisations like cooperatives. Some successful examples of cooperatives managed by women are presented in the table below.

Some Successful Examples of Cooperatives Managed by Women

1.	Shri Mahila Sewa Sahakari Bank Limited, Ahmedabad	Gujarat
2.	ShriMahila Griha Udyog Lijjat Papad, Mumbai	Maharashtra
3.	Uttanchal Mahila Dairy Vikas Nigam, Almora	Uttaranchal
4.	The Ichamati Cooperative Milk Producers' Union Limited, Barasat	West Bengal
5.	Gujarat State Sewa Women's Cooperative Federation, Ahmedabad	Gujarat
6.	Bhagini Nivedita Cooperative Bank, Pune	Maharashtra
7.	Jijamata Mahila Sahakari Bank Limited, Pune	Maharashtra
8.	Indira Mahila Cooperative Spinning Mill, Inchalkaranji	Maharashtra
9.	Savitribai Kore Mahila Industrial Cooperative Society, Warananagar	Maharashtra
10.	Jawarhar Mahila Cooperative Spinning Mill Limited, Dhule	Maharashtra
11.	Shetkari Mahila Cooperative Spinning Mill Limited, Sangole	Maharashtra
12.	Keonjhar District Cooperative Producers Union Limited, Keonjhar	Orissa

13. Mulkanoor Women Dairy Cooperative Society, Andhra Pradesh
Karimnagar

India, a World Leader in Cooperative Movement

In the initial phase the Cooperative Societies were concerned with mainly credit disbursal. Gradually their activities have multiplied. Today in the rural areas the cooperatives are all pervasive. They have started functioning in almost every area of the people's economic activity. Be it fisheries, poultry, dairying, agro-processing, sugar mills, spinning mills, supply of inputs or the marketing. Special emphasis is laid on the people from the weaker sections and also on the women to encourage them to start the cooperative society.

There are more than 3.95 lakh cooperative societies in India with a membership of 18.96 crore people. This fact has put India on the top in the world in the cooperative arena. Credit disbursed through the cooperative network has crossed a phenomenal sum of Rs. 13,000 crores.¹³

Tool of Poverty Alleviation

Cooperation is the very foundation of society. No society can survive without the spirit of cooperation. At the policy level it started as a movement of social reforms particularly in the human economy domain. The aim was clear that of promoting self-reliance, self-help and self-government among members. It is said that it helps in the equitable sharing of gains and losses. The ideology is also clear about the upliftment of the economically weaker sections of the society. It aims to empower the weak in the society to effectively contribute their meager resources in a cooperative venture to combat exploitation at the hands of the haves. This becomes possible owing to the member's participation in decision-making. The cooperatives also help them in stepping up bargaining power in trade and financial markets. It facilitates access to goods and services including the credit. It widens the scope of income generating activities by pooling resources. It also helps in enhancing local control over the means of production.

¹³ Mital, Anant, *Cooperatives: Viable Tool for Socio-Economic Empowerment*, Kurukshetra, Vol. 52, No.12, pp. 66-67

Boon for The Rural Poor

The cooperatives have helped to alleviate rural poverty in a big way. It works two fold i.e. as sources of credit at a reasonable cost and as providers of both inputs and market access for produce at reasonable rates / remunerative prices.

Availability of the credit at cheaper, rates has freed the rural folk from the clutches of moneylenders Credit is being given for crops and investment. It has increased agricultural production. 60% of production credit and 30% of investment credit from institutional sources is contributed by the cooperatives. With 89,000 Primary Agricultural Credit Societies and 2,500 primary units of land development Banks, cooperative have reached the remotest corners of the country, thus substantially improving the access to credit for small and marginal farmers.

The cooperatives have ensured remunerative prices for a large number of farmers through collective bargaining, but the small and marginal farmers are still largely deprived of these benefits earlier, farmers used to end up selling their produce at a very low rate to commission agents and did not get remunerative prices. Cooperative societies have to a large extent helped farmers in selling their produce at competitive prices.

Cooperatives have also helped to create facilities like godowns for proper storage of the produce. That has helped in avoiding wastage and loss of agricultural produce. Cold storage facilities have helped in storing horticulture and other perishable products for a longer period thus ensuring their availability during all the seasons.

Cooperatives: A Friend in Need

The cooperative network is playing a pivotal role in the government's efforts to provide remunerative prices to farmers and helping them to avoid distress sale. The Government fixes minimum support price of certain commodities thus ensuring Minimum Support Price for non-perishable agricultural commodities. In case the price falls below that level, the Government steps in through National and State Cooperative agencies to procure the commodities and sell the same whenever market turns favourable. This ensures proper return on the produce to the farmer and avoids suffering undue losses. The Central and State governments intervene to procure the perishable goods even at a heavy loss. The Central and the State government through their cooperative network share the loss equally. Another key

activity of the cooperative societies is the training and education of farmers by providing technical guidance to the members thus ensuring increased productivity and production.

Major Source of Employment

Cooperatives have provided employment in large number to deprived rural population in almost every sphere of rural economy i.e. primary secondary and tertiary sectors.

Primary Sector: Besides helping in agricultural growth by providing the credit and inputs, cooperatives have helped improve the income-generation capacity of villages through special sector cooperatives in fisheries, poultry dairying etc. They have also enabled cotton and sugarcane growers to improve their income by increasing output and supply their produce through sugar and spinning cooperatives.

Secondary Sector: 60% of sugar production and 30% of spinning mills' production is in the cooperative sector. Although these cooperatives have large turnover and are managed by affluent sections, they help the poor by giving them employment and buying their raw material like cotton and sugarcane thus ensuring them a market as well.

Tertiary Sector: Cooperatives have given employment in the tertiary sector both directly and indirectly. They have provided direct employment in the PACs, District and State Cooperative banks, marketing outlets, employment of managers by the primary societies etc and indirect employment in the form of transport requirements, construction of godowns, market sheds etc.

On the basis of vast experience of the cooperative sector it can be said that an institutional approach to poverty alleviation should start with an examination of the mechanism that govern the poor's access to assets, services and markets, since improved access to assets and services is fundamental for the wealth creation. Assets include productive resources such as land, water, finances, farm equipment and inputs, off-farm employment opportunities, whereas access to services includes: education and health, extension and markets. Without access to such assets and services, participation and empowerment of the poor is meaningless. The ultimate aim of such an assessment is to identify a subset of these interaction mechanisms which, when taken together, can help improve the poor's access to assets and services, increase their negotiation capacity and lead to their economic and political empowerment.

Despite their overwhelming presence in the rural sector, co-operatives suffer from a variety of organisational, managerial, administrative and financial problems. Consequently, they are not able to reach out to all segments of rural society, especially the poor, and meet in full their demands and aspirations. For example, most of the cooperatives suffer from the problems of loss of financial viability, alienation of members, interference by petty politicians and bureaucrats and mismanagement. The loss of financial viability is due mainly to the low rate of recovery of outstanding loans, partly to the low spread (margin) between the cost of funds (borrowing) and the income from lending money, and partly to mismanagement. The problem of low recovery has been further exacerbated by populist measures such as loan waivers, disbursement of loans in loan me/as and stay orders on legal processes of recovery. In view of this, there is need for an all-party political consensus at the national level for doing away with all such populist measures to ensure that politicians and other vested interests for their self-aggrandizement do not misuse co-operatives.

In view of all this, there is need for a holistic and multi-faceted strategy to revamp the co-operatives in the country. According to James J. Wadsworth¹⁴, RBS Agricultural Economist, the basic elements of such a strategy are as follows:

- Unification through mergers, consolidation, and acquisition;
- Contraction through selling assets, and closing loss-making facilities and discontinuing products or services;
- Setting up joint-business ventures with other cooperatives, or other legal business entities;
- Entering into agreements or working relationship, pact, or strategic alliance with other successful cooperatives;
- Expansion through purchasing of assets, or business units, building new facilities, expanding existing facilities, and acquiring outside businesses; and
- Revamping through upgrading or modifying operations, services, functions, or organisational structure.

¹⁴ Wadsworth, James j., *Cooperative Restructuring, 1989-1998*, Background Material Prepared by the Institute of Rural Management, Anand and distributed at a Seminar on “Desigining Cooperative Companies/ Joint Ventures in the Emerging Environment, January 16-17, 2003

It is high time that necessary measures should be taken to help cooperatives consolidate and cooperate with each other and/or to restructure themselves to cope with the challenges in their external environment.

Thus it can be said that cooperatives in India have traversed a long and arduous path over the last one hundred years or so and now are at the crossroads. Notwithstanding their achievements and their phenomenal growth, cooperatives are beset with several financial, organisational, and management constraints and problems. In view of this, there is urgent need for restructuring them. The challenge therefore, is to restore the cooperative movement to good health through revamping and to guide them into the right direction. The Government, of course, is committed to strengthen the cooperative movement in India. The announcement of the National Policy on Cooperatives and the acceptance of the new approach to cooperative legislation have both taken a long time to come into being, but they augur well for the millions of rural poor producers and consumers in the country. However, to impart credibility to them, the commitments of GOI need to be institutionalised through the passage of an appropriate (model) Central Cooperative Law. It is hoped that the government will implement the new Policy faithfully and honour its commitments to action. Then only will the good intentions of the government will fructify.

ELECTORAL REFORM POLICY AND ROLE OF JUDICIARY IN INDIA

Sarvesh Kumar Shahi*

Abstract

“An election is a moral horror, as bad as a battle except for the blood; a mud bath for every soul concerned in it.”

- George Bernard Shaw

Electoral reform means introducing fair electoral systems for conducting fair elections. It also includes recuperation of the existing systems to enhance and increase the efficiency of the same. One of the most important features of our democratic structure is elections which are held at regular intervals. Free and fair elections are indispensable for a healthy democracy. India has an indirect form of democracy which implies that the government draws its authority from the “will of the people”. It is the citizens who have the sovereign power to elect the government and this government is responsible to the people who have elected them. But there are some shortcomings connected with this form of democracy which we have been carrying since long. The citizens who elect the representatives have no right to “recall or reject the representative” on the ground that they are unsatisfactory for their post unlike Switzerland, pursuing a direct form of democracy.

This paper discusses, what is electoral reform, origin of electoral reform policy in India, electoral policy and Constitutional Laws, current situation, electoral laws in India, role of Judiciary and scope and also effects of electoral reform.

Keywords: Electoral Reform, Electoral Reform Policy, Constitutional Law, Indian Judiciary

* Assistant Professor, Amity Law School, AUUP, Lucknow Campus; Former Research Assistant, IIM Lucknow, Email: shahi.nalsar@gmail.com, Contact: +91-8418012778

INTRODUCTION

“Elections belong to the people. It's their decision. If they decide to turn their back on the fire and burn their behinds, then they will just have to sit on their blisters.”

-Abraham Lincoln

India has the difference of being the biggest democratic system of the world. Elections are the most significant and essential part of politics in a democratic setup of governance. While politics is the art and practice of dealing with political power, election is a process of legitimization of such power. Democracy can indeed function only upon this faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and in form and are not mere rituals calculated to generate illusion of difference to mass opinion, it cannot survive without free and fair elections.

The election at present are not being hold in ideal conditions because of the enormous amount of money required to be spent and large muscle power needed for winning the elections. While the first three general elections (1952-62) in our country were by and large free and fair, a discernible decline in standards began with the fourth general election in 1967.¹

No such events were reported till the fourth general election. Over the years, Indian electoral system suffers from serious infirmities. The election process in our country is the progenitor of political corruption. The distortion in its working appeared for the first time in the fifth general elections, 1971 and multiplied in the successive elections especially those held in eighties and thereafter.² Some of the candidate and parties participate in the process of elections to win them at all costs, irrespective of moral values. The ideal conditions require that an honest, and upright person who is public spirited and wants to serve the people, should be able to contest and get elected as people's representatives. But in actual fact, such a person as aforesaid has no chance of either contesting or in any case winning the election.

The election at present are not being hold in ideal conditions because of the enormous amount of money required to be spent and large muscle power needed for winning the

¹ Shukla, Subhash, *Issues In Indian Politics*, New Delhi: Anamika Publishers 219 (2008)

² Kaur, Amancleep, *Electoral Reforms In India: Problems and Needs* (1989-2009), Chandigarh: Unistar Publication 35 (2009)

elections. The major defects which come in the path of electoral system in India are: money power, muscle power, criminalisation of politics, poll violence, booth capturing, communalism, castism, non-serious and independent candidates etc.³

In democracy the public is most powerful entity. If the public do not vote in favour of criminals, dishonest and corrupt politicians who wish to purchase their votes by money or muscle powers, everything shall function nicely and the democracy will shine in the dark spectrum of hitherto corrupt and criminalised political system. So, though the EC is working hard in this direction, but it cannot succeed unless all political parties and voters realize their responsibility. There should proper mechanism, fully functional and fully equipped to fight with any triviality.

The Judiciary of India has taken upon them the task of cleansing the electoral system of India. The role of the judiciary has changed since colonial rule; it is no longer to be perceived as a primarily oppressive system. Rather, it has to a certain extent become a centre of activism to clean up the State apparatus. Judiciary has, thus, played a crucial role in electoral reform in India from time to time and ensuring good governance by those holding reins of power in particular.

ORIGIN & EVOLUTION OF ELECTION IN INDIA

The term “democracy” is a Greek term made up of the words demos and kratos, meaning people power.⁴

One of the most important features of a democratic polity is elections at regular intervals. Elections constitute the signpost of democracy. These are the medium through which the attitudes, values and beliefs of the people towards their political environment are reflected. Elections grant people a government and the government has constitutional right to govern those who elect it. Elections are the central democratic procedure for selecting and controlling leaders. Elections provide an opportunity to the people to express their faith in the government from time to time and change it when the need arises. Elections symbolize the

³ Dr. Bimal Prasad Singh, *Electoral Reforms in India – Issues and Challenges*, Vol. 2 Issue 3, International Journal of Humanities and Social Science Invention 01-05 (2013)

⁴ Josiah Ober, *The original meaning of democracy: Capacity to do things not majority rule*, Version 1.0, Stanford University, September (2007)

sovereignty of the people and provide legitimacy to the authority of the government. Thus, free and fair elections are indispensable for the success of democracy.⁵

In persistence of the British inheritance, India has opted for parliamentary democracy. Since 1952, the nation has witnessed elections to the lawmaking bodies at both the national as well as State levels, as per the Constitutional principles and Electoral Laws, elections are held at regular intervals.⁶ The permanent Constitutional body is the Election Commission of India, which was established on 25 January, 1950.

The elections are held in accordance with the laws made by the legislative body. Election Commissioner and Chief Election Commissioner are appointed by the President of India. They get pay and position alike to the Judge of Supreme Court of India. A separate secretariat is provided for the Commission that consists of 300 officials. The Commission is assisted by two senior most Deputy Election Commissioners. As per law, the political parties are also required to be registered with the Election Commission.⁷

India got its first Lok Sabha in April 1952, after the first General Elections were successfully concluded and the Indian National Congress (INC) came into power with 245 seats in its kitty.⁸

MEANING OF ELECTORAL REFORM

‘Electoral reform’ means “*reforming the myth of democracy*”. ‘Electoral reform’ is a broad term that covers, among other things, improving the responsiveness of electoral processes to public desires and expectations. However, not all electoral change is electoral reform. Electoral change can only be referred to as reform if its primary goal is to improve electoral processes, for example through fostering enhanced impartiality, inclusiveness, transparency, integrity, or accuracy.⁹

Electoral reform often only catches the public eye when it involves changes to representational arrangements, such as electoral systems.

CONSTITUTION OF INDIA AND ELECTION

India is a Socialist, Secular, Democratic Republic and the largest democracy in the World. The modern Indian nation state came into existence on 15th of August 1947. Since then free and fair elections have been held at regular intervals as per the principles enshrined in the

⁵ Sumandeep Kaur, *Electoral Reforms in India: Proactive Role of Election Commission*, Vol. XLVI, No. 49, Mainstream Weekly, Nov 22nd (2008)

⁶ Ibid.

⁷ Election Policy of India, Guide to India (2009), http://www.iaslic1955.org/election_policy_of_india.html.

⁸ History of Lok Sabha elections, India General Elections 2009, http://www.smetimes.in/smetimes/general_elections-2009/miscellaneous/2009/Mar/23/history-of-lok-sabha-elections5584.html

⁹ Electoral Assessment and Reform (2010), <http://www.idea.int/elections/reform.cfm>

Constitution, Electoral Laws and System. The Constitution of India has vested in the Election Commission of India the superintendence, direction and control of the entire process for conduct of elections to Parliament and Legislature of every State and to the offices of President and Vice-President of India.¹⁰

Election Commission of India is a permanent Constitutional Body. The Election Commission was established in accordance with the Constitution on 25th January 1950. In other words the Indian Constitution provides for its creation.

Part XV of the Constitution of India deals with elections. Article 324 (1) of India Constitution provides the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in the Election Commission.¹¹ Article 324 (2) states that the Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.¹² Article 324 (3) says that when any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.¹³

Article 325 states that no person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex. Article 326 deals with elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.¹⁴ Article 327 deals with power of Parliament to make provision with respect to elections to Legislatures. Article 328 states the power of Legislature of a State to make provision with respect to elections to such Legislature. Article 329 deals with bar to interference by courts in electoral matters. Article 243K deals with elections to the panchayats, Article 243 ZA elections to the municipalities.¹⁵ Article 58 deals with qualifications for election as President.¹⁶

Right to Vote

¹⁰ Election Commission of India (2001), http://eci.nic.in/eci_main1/the_setup.aspx

¹¹ Bakshi, P.M., *The Constitution of India*, Universal Law Publishing, (12th Ed. 2013).

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Constitution of India, <http://www.mahasec.com/PDF/243/243%20Act%20English.pdf>

¹⁶ Article 58: Qualifications for election as President, Constitution of India, Lawyers Update, May 2010: <http://lawyersupdate.co.in/LU/4/51.asp>

Any citizen over 18 years can vote. Voting right denied to certain class of people: criminal convicts of certain class, person convicted of electoral offence, and person of unsound mind. There is no compulsion to vote.

ELECTORAL REFORM POLICY & COMMITTEES

Several Indian Committees formed in India to give their suggestions and recommendations to government of India to form a better policy related to elections. There is need to discuss and form a best electoral policy for conducting free and fair election in this largest democratic country where crores of people vote to decide their own faith as well as the faith of their nation. Some of the important committee's recommendations to look upon for electoral reform are as follows:

a. Justice J.S. Verma Committee on electoral reform -

The Committee recommended the amendment of the Representation of People Act, 1951. Currently, the Act provides for disqualification of candidates for crimes related to terrorism, untouchability, secularism, fairness of elections, sati and dowry. The Committee was of the opinion that filing of charge sheet and cognizance by the Court was sufficient for disqualification of a candidate under the Act. It further recommended that candidates should be disqualified for committing sexual offences.

The three-member committee headed by Justice J S Verma has said that electoral reforms are important for gender justice. The electoral reforms in India are integral to the achievement of gender justice and the prevention of sexual offences against women," the panel said in its report and suggested that the Representation of the People Act, 1951, be amended.

b. V. M. Tarakunde Committee (1974-75)

The Tarakunde Committee on Electoral Reforms was appointed by Jayaprakash Narayan on behalf of the Citizens of Democracy, an independent organization. An important recommendation of this committee was that there should be a law requiring all recognized political parties to keep audited accounts and sources of all income and details of expenditure, with false accounts being a punishable offence.

c. Goswami Committee on Electoral Reforms (1990)

It stated that irregularities in electoral rolls are exacerbated by purposeful tampering done by election officials who are bought by vested interests or have partisan attitudes.¹⁷ The provision of independent Secretariat to the Election Commission has been accepted in principle by the Goswami Committee on Electoral Reforms. The Committee on Electoral Reforms did not favor Negative or Neutral voting and was of the view that it does not serve any purpose.¹⁸

d. Vohra Committee Report (1993) & Indrajit Gupta Committee (1998)

The major contribution of the report, in the context of electoral reforms, is the coining of, or at least popularizing, the phrase “criminalization of politics and politicization of crime.” It was the first time that the effect of crime, organized and unorganized, on the electoral process was officially recognized, though not made public. It goes without saying that money power and muscle power go together to vitiate the electoral process and it is their combined effect which is sullying the purity of electoral contests and effecting free and fair elections.¹⁹

e. Law Commission Report on Reform of the Electoral Laws (1999)

The law commission reports on reform of electoral laws are as follows:

- a. Recommendations of introducing the List System;
- b. To address the defections, the Commission has proposed that a pre-election front/coalition of political parties should be treated as a ‘political party’;
- c. Any political party which receives less than 5% of the total valid votes cast in the general election to the Lok Sabha or to a State Legislative Assembly, as the case may be, shall not be entitled to any seat in the Lok Sabha/Legislative Assembly, even if it wins any seat(s);
- d. enactment of provisions requiring the political parties to maintain accounts, have them audited and file them before the election Commission;
- e. The Commission has also recommended that in case of electoral offences and certain other serious offences, framing of a charge by the Court should itself be a ground of disqualification in addition to conviction; and

¹⁷ Background Paper On Electoral Reforms (Prepared By The Core-Committee On Electoral Reforms) Legislative Department Ministry Of Law And Justice Government Of India Co-Sponsored By The Election Commission Of India December, 2010, Available at: <http://www.lawmin.nic.in/legislative/ereforms/bgp.doc>

¹⁸ Proposed Electoral Reforms Published By Publication Division, Election Commission Of India, (2004).

¹⁹ George T. Haokip, CRIMINALIZATION OF POLITICS AND ELECTORAL REFORM IN INDIA, The International Journal of Social Sciences Research IJSSR (Vol 1, No4), 2004.

f. in case of electoral offences and certain other serious offences, framing of a charge by the Court should itself be a ground of disqualification in addition to conviction;

g. Election Commission of India – Proposed Electoral Reforms (2004)²⁰

The election commission of India proposed electoral reform policy which contains the following objectives:

- Candidates must file an affidavit on criminal antecedents, assets, etc. It will reduce instances of candidates wilfully concealing information;
- The security deposit is needed to increase;
- Court must restrict criminalisation of politics in greater public interests;
- The Commission reiterates its view that there should be some restriction on publishing the results of Opinion Polls and Exit Polls;
- The Commission recommends that the law should be amended to specifically provide for negative / neutral voting;
- The Government may consider amending the relevant provisions of the Cable Television Network (Regulation) Rules, 1994 to provide for suitable advertisement code and monitoring mechanism.

ROLE OF JUDICIARY ON CONFLICTING ISSUES

In a Constitutional system of government, the role of the judiciary is essential for maintaining the balance of power, protecting individual rights, upholding the rule of law, interpreting the Constitution and ensuring equal justice for all.

Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and thus insulates all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness, etc. but also nullify the abuse of election provision by political parties, use of unfair means, etc. by introducing electoral reform time to time.

In the recent judgment, the Indian Supreme Court, in **PUCL v. Union of India²¹**, upheld the constitutional right of citizens to cast a negative vote in elections. This judgment crystallizes an emerging theme in Indian constitutional jurisprudence: the connection between the

²⁰ ci.nic.in/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf.

²¹ (People's Union For Civil Liberties) PUCL v. Union of India, WRIT PETITION (CIVIL) NO. 161 OF (2004).

constitutional right to freedom of speech and expression [Article 19(1) (a)] and parliamentary elections.

In the case of ***Jyoti Basu and Others v. Debi Ghosal and Others***²², Supreme Court upheld Shri Jyoti Basu contention and allowed his appeal, holding that under Section 82 of the Representation of the People Act, 1951 only the candidates at the impugned election could be joined as respondents to an election petition, and no one else.

In the case of ***Km. Shradha Devi v. Krishna Chandra Pant and Others***²³, The Supreme Court laid down that any remark or writing on a ballot paper to invalidate it must be such as to unerringly point in the direction of identity of the voter and that in the absence of such suggested remark or writing the ballot paper could not be rejected merely because these were some remarks or writings by which the voter may possibly be identified.

In the case of ***N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakkal, Salem District and four Others***²⁴, The Supreme Court held that the word ‘election’ in Article 329 (b) connotes the entire electoral process commencing with the issue of the notification calling the election and culminating in the declaration of result, and that the electoral process once started could not be interfered with at any intermediary stage by Courts.

In the case of ***The Election Commission, India v. Saka Venkata Rao***²⁵ Madras High Court held that Article 192 applied only to cases of supervening disqualification and the Election Commission had, therefore, no jurisdiction to opine on the Petitioner’s disqualification which arose long before the election took place.

EFFORTS OF INDIAN GOVERNMENT

Thus, well-recognizing the urgent need for electoral reforms starting with the year 2011, the Ministry of Law and Justice, Government of India, had constituted a core committee to look into a range of aspects on Electoral Reforms in India. The resolution was taken to hold seven regional consultations across various locations in India to elicit views from various stakeholders in order to consensually overlay the path for electoral reforms. The Election Commission had co-sponsored this exercise. The consultations attempts to address a number

²² Civil Appeal No. 1553 of 1980

²³ Civil Appeal No. 277 of 1980

²⁴ Civil Appeal No. 351 of 1951

²⁵ Civil Appeal No. 205 of 1952

of well-established grey areas in the electoral processes like de-criminalization of politics, de-communalization of elections, financing of elections, auditing of finances of political parties, conduct, regulation, better management of elections, adjudications of election disputes and media and elections. These seven regional consultations culminated in the National consultation in New Delhi, and attended amongst others by the Prime Minister of India. As a follow-up action to the nation-wide consultation the Law Ministry seems to have already finalized its list of proposed changes to be made to the Representation of People Act, a finalized draft of the same seems to have been forwarded for the consideration of the Cabinet at the Prime Minister's Office²⁶.

CONCLUSION

Although several committees formed and several efforts of the government has been well appreciated but still in the Some of the areas calling for urgent redressal within the election system are de-criminalization of politics, political parties reforms, state-funding of elections, adoption of certain ingenious methods like ‘no-vote’ option and the ‘right to recall’ in order to make the political functionaries more accountable to the very general public that they claim to represent.

For the purpose of protecting democratic structure of the country, and to ensure free and fair elections, it is much needed that Supreme Court as a guardian of the Constitution should give directions from time to time to the government in order to remove the obstacles faced in achieving the above mentioned goal.

²⁶ Nripendra Misra , *Salient Recommendations of Various Committees on Electoral Reforms*, (June 5, 2012), Available at: <http://publicinterestfoundation.com/2012/06/05/salient-recommendations-of-various-committees-on-electoral-reforms/>

EVOLUTION OF INTERNATIONAL CRIMINAL JURISDICTION: INDIVIDUAL RESPONSIBILITY AND THE DEFINITION OF WAR CRIMES - A study

Sundaramurthy Purushothaman*

INTRODUCTION

The modern history of war crimes began with the Nuremberg Trial following World War II that pierced the veil of national sovereignty and command responsibility and held major German leaders responsible for their actions during World War II. The Charter of the International Military Tribunal sought to prosecute crimes against peace, war crimes, and crimes against humanity. The Statute of the Tribunal for the Former Yugoslavia expanded the definition of crimes against humanity to include rape, persecution, and other inhumane acts. The International Tribunal for Rwanda clarified the various guises that genocide takes. The Rwandan situation also allowed Belgium to successfully test its then-existing law claiming universal jurisdiction to prosecute persons committing crimes against humanity. The Special Court for Sierra Leone included in its Statute that involving or conscripting children in the conflict was a violation of international humanitarian law. The International Criminal Court provides a potentially permanent institution to address future war crimes, although the lack of participation by the United States raises concerns.

All in all, although international humanitarian law underwent substantial development from the middle of the nineteenth century until after World War I, its enforcement was lagging behind. The failures in establishing an international tribunal or international military tribunals after the Versailles Treaty and the serious short comings of holding those accountable during the Leibzing trials indicate that “while the contours of war crimes law had been increasingly well established by World War II, persons violating that law faced only a hypothetical possibility of criminal sanction. In a sense, war crimes law had not yet truly become a form of criminal law.”¹

* Research Scholar @ Department of Legal Studies and Research, Acharya Nagarjuna University; Email: purushoth@hotmail.co.in; Contact: +91-8144898989

¹ See <http://www.historians.org/projects/GIRoundable/Criminals/Criminals3.htm> (last visited on 20 April 2012).

The Charter of the Nuremberg Tribunal manifests individual criminal responsibility² moreover, it states official capacity of defendants does not free them from responsibility, and the defence of superior order cannot be applied as negating responsibility, only, at most, as a mitigating circumstances³. It was therefore the Nuremberg and Tokyo procedures that initiated the evolution of individual criminal responsibility in international law and produced important jurisprudence in this regard.

As a consequence, the International Law Commission (ILC) manifested individual criminal responsibility in its 1950 report, even in case the crime in question was not criminalized in national law⁴. The ILC understood international crimes as those coming under the jurisdiction of the Nuremberg Tribunal and this is how eventually crimes defined in international law became “crimes under international law”.

During about this time, the “search for and prosecute” obligation appeared in the 1949 Geneva Conventions⁵. This was one of the novelties in the 1949 Conventions, as the 1929 Conventions entailed only a very weak reference to responsibility⁶. The 1949 Geneva Conventions expressly oblige states to punish perpetrators of grave violations in national law: “ensure respect” and the repression obligations, moreover, the exercise of universal jurisdiction has now become binding on states⁷.

In addition, the Geneva Conventions list the grave breaches, and the list is more comprehensive than the war crimes in the Nuremberg Charter. The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts and its 1999 Protocol, as well as the 1977 Additional Protocol I all contain similar rules, extending the list of international crimes.

² Dieter Fleck. **The Hand Book of International Humanitarian Law**, Second Edn.(Oxford University Press, Oxford, 2008).

³ Charter of the International Military Tribunal, Article 6.

⁴ Charter of the International Military Tribunal, Article 8.

⁵ Principles du Droit International Consacres par le Statut du Tribunal de Nuremberg et dans le Judgment de ce Tribunal, adopted by the UN International Law Commission on July 1950, Principle II. In : Dietrich Schindler Jiri Toman: Droit des Conflicts Armes, CICR, Institute Henry – Dunant, Geneva (1996), p. 1312

⁶ Geneva Convention of 1949, articles 49/50/129/146 respectively.

⁷ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929, Article 30:,, On the request of a belligerent, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention when such violation has been established the belligerents shall put an end to and repress it as promptly as possible.”

Based partially on the Geneva Conventions, the Statutes of the two ad hoc tribunals established to try violations committed in the ex-Yugoslavia and Rwanda⁸ respectively do not only refer to the grave breaches of the Geneva Conventions, but also to other serious violations – including the serious violation of common Article 3 and Additional Protocol II and the laws and customs of war, already referred to in the Nuremberg Charter.

The high peak of these developments was the further expansion of the list of international crimes in the Rome Statute of the International Criminal Court, probably the main merits of which is the enlarging of the list of crimes committed in non – international armed conflicts.

Summing up, international law today undoubtedly accepts individual criminal responsibility. The main enforcement body today, with the gradual closing down of the two ad hoc tribunals is the International Criminal Court, in case it has jurisdiction. The primary responsibility, however, still lies with states.

MEANING OF WAR CRIME

Generally a war crime may be defined as a serious violation of the laws and customs applicable in armed Conflict also known as international humanitarian law, which gives rise to individual criminal responsibility under international law⁹. Unlike crimes against humanity, war crimes have no requirement of widespread or systematic commission. A single isolated act can constitute a war crime. For war crimes law, it is the situation of armed conflict that justifies international concern¹⁰.

According to the Encyclopedia Britannica, the term ‘war crime’ means “in international law, serious violation of the laws or customs of war as defined by international customary law and international treaties.” The definition pretty much covers the notion, and it can probably be agreed that it is due to the fast development of customary law that makes identification of the list of war crimes today rather difficult.

DEVELOPMENT OF WAR CRIMES IN INTERNATIONAL LAW (OBJECT OF THE STUDY)

⁸ The obligation to exercise universal jurisdiction is not expressisverbis entailed in the text, however, the aut dedere aut judicare obligation practically means the same. See Jean S. Pictet (Ed) : Commentary to Geneva Convention, I, ICRC, Geneva, First Reprint (1995), pp. 365-366.

⁹ Leslie Green, **The Contemporary Law of Armed Conflict** (Manchester 2000) p.20

¹⁰ Ibid at p.25

Laws and customs regulating warfare may be traced back to ancient times. While such norms have varied between civilizations and centuries, and were often shockingly lax by modern standards, it is significant that diverse cultures around the globe have recorded agreements, religious edicts and military instructions laying out grounds rules for military conflict. In recent centuries, military codes such as the Lieber Code promulgated during the American Civil War have refined and developed these customs¹¹. Codification and progressive development at the international level was spurred in part by the efforts of one individual. In 1859, Henri Dunant, a businessman from Geneva, witnessed the aftermath of the Battle of Solferino, and was shocked by the horrors of wounded soldiers left to die on the Red Cross in 1863 and the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864. Since then, there have been many treaties developing international humanitarian law (IHL). These are sometimes divided into ‘Geneva law’, which primarily focuses on protecting civilians and others who are not active combatants (such as the wounded, sick, ship-wrecked and prisoners of war), and ‘Hague law’, which regulates specific means and methods of warfare, with a view reducing unnecessary destruction and suffering. Among the most significant in the latter category are the 1907 Hague Regulations, which recognized that ‘the right of belligerents to adopt means of injuring the enemy is not unlimited’, and laid down many provisions on the means and methods of warfare that are now recognized as customary law¹².

Other significant treaty developments have strengthened the protection of cultural property, the prohibition or regulation of certain weapons such as biological and chemical weapons¹³ and Anti-personnel mines, and whether parties to the conflicts have ratified those conventions. Some, but not all, provisions of the Additional Protocols have obtained recognition as customary law.

¹¹ Christopher Greenwood, **Historical Development and Legal Basis Handbook of International Humanitarian Law**, (Oxford University Press, Oxford, 2008) pp.1-44.

¹² Henri Dunant, UN Souvenir de Solferino, Geneva, 1862.

¹³ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980; four protocols thereto including Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines 1993; Convention, 18 September 1997

The Versailles and Sevres Treaties did not list war crimes. The Leipzig Trials, conducted as a consequence of the Versailles Treaty, were based on the 1907 Hague Regulations, which, however, did not list war crimes either, instead, the Regulations concentrated on the payment of compensation by the state as the chief form of punishment – however, this obviously did not mean individual responsibility. At the same time, violations of the Hague Regulations had long been seen as violations for which members of the armed forces or civilians could be held individually responsible¹⁴, and thus the rules of the Hague Regulations served the basis for the determination of war crimes during the Leipzig Trials.

The 1919 Commission, in its report, drew up a list of war crimes¹⁵, including murder and massacre, torture of civilians, rape, and internment of civilians under inhuman conditions¹⁶. The list, however, and the justifications for including certain elements in the list indicate that it included both war crimes and what later became crimes against humanity. This last element was the main criticism of the United States against the findings of the Commission, indicating that violations of the “laws of humanity” were vague and not well established; therefore it would violate the principle of legality¹⁷. Obviously, the American opinion on this changed substantially by the time of the Nuremberg Tribunals.

The next instrument where war crimes appeared was the Statute of the Nuremberg Tribunal is lacking in listing the war crimes in the 1929 Geneva Conventions. The antecedent event was the inauguration of the United Nations War Crimes Commission (UNWCC) on October 20, 1943 to investigate war crimes; many findings of which were adopted in the Nuremberg Charter. The Commission relied on the war crimes listed by the 1919 Commission, mainly to avoid criticism that it had invented new war crimes after they had been perpetrated, and also because Italy and Japan had also been part of the 1919 Commission, and Germany had not objected to its findings.

¹⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993., Articles 2-3 and Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994, Articles 1 and 4.

¹⁵ See Meron (2006), p.554 cf. *Supra Note:2*

¹⁶ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (March 29, 1919), reprinted in 14 **American Journal of International Law** (1920) pp92-95.

¹⁷ See Meron (2006), p.555 Cf. *Supra Note:2*

The text of the Statute of the Nuremberg Tribunal referred to laws and customs of war, laws meaning mainly the 1899 and 1907 Hague Treaties and the 1929 Geneva Conventions, none of which mentioned war crimes. Therefore it was the Nuremberg Statute that first operated with the term “War Crime” and provided a definition to it. The Nuremberg Statute also relied heavily on customary law to overcome the problem of a lack of proper international regulation of prohibition of attacks against civilians in the international treaties in force at the time of the Second World War. Hence, the Nuremberg Statute did not only apply the term war crimes, but also filled it with precise meaning, basically codifying existing customary law.

The 1949 Geneva Conventions and their provisions on penal repression and grave breaches were obvious followers of the Nuremberg Statute. However, the Geneva Conventions used the term ‘grave breaches’ instead of ‘war crimes’ and for a reason. According to the ICRC Commentary, the actual expression “grave breaches” was discussed at considerable length. The USSR Delegation would have preferred the expression “grave crimes” or “war crimes”. The reason why the Conference preferred the words “grave breaches” was that it felt that, though such acts were described as crimes in the penal laws of almost all countries, it was nevertheless true that the word “crimes” had different legal meanings in different countries.”¹⁸ More specifically, the idea was to emphasize the difference between these very serious crimes and ordinary crimes or infractions under national law¹⁹. The Geneva Conventions therefore concentrated on grave breaches of the Conventions, whether they were called crimes or not in specific domestic laws.

The lists of grave breaches in the Geneva Conventions are substantially longer than in the Nuremberg Statute. In addition, the 1949 Geneva Conventions made the obligation of the 1929 Convention I regarding national legislation more imperative. While the 1929 Convention I merely said that “[t]he Governments of the High Contracting Parties shall also propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention.”²⁰ The obligation of the 1949 Conventions has been made considerably more imperative. The Contracting Parties are more strictly bound to enact necessary legislation

¹⁸ See Meron (2006), p. 556, Cf. *Supra Note*:2

¹⁹ Commentary to GCI, p.371

²⁰ Gabrielle Kirk McDonald – Olivia Swaak – Goldman (eds.) *Substantive and Procedural Aspects of International Criminal Law, The Experience of International and National Courts*, Volume I, Commentary, Kluwer Law International, (The Hague 2000), p. 70.

than in the past”²¹. The difference basically lies in the imperativeness: while the 1929 Convention I should more like a recommendation ‘shall propose’ the 1949 text is clearly an obligation of ‘Parties undertake to enact’.

The 1977 Additional Protocol I made further developments. Article 11 lists prohibited acts, while Article 85 lists further grave breaches, making the list longer²². In addition, it makes grave breaches of the Geneva Conventions applicable to grave breaches of Additional Protocol I, if these are committed against persons or objects newly protected by Additional Protocol I²³. Therefore Additional Protocol I extended the number situations in which acts would become grave breaches, and added one more grave breach, notably the perfidious use of protective signs and signals.

Finally, Additional Protocol I adopted a text that was initially highly controversial, notably stating that grave breaches constitute war crime²⁴. As outlined below in Chapter II.2.(i), the difference between the notions of grave breaches and war crimes lies in where they are regulated. ‘Grave breaches’ are terms used by the Geneva Conventions or Geneva law, whereas the term ‘war crimes’ was used in the Nuremberg Charter, originated from Hague

²¹ 1929 Geneva Convention, Article 29

²² Commentary to GCI, p. 363.

²³ Additional Protocol I substantially widens the area of protection and extends it to, among others, civilian medical personnel, transport and material and certain protected objects. It also includes specific fuels on means and methods of warfare with providing more detailed provisions on the notion of combatants. According to Articles 11 and 85 of Additional Protocol I, acts considered as grave breaches in addition to those described in the Geneva Conventions include the following : physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation not justified by the state of health of the person; any willful act or omission which seriously endangers the physical or mental health or integrity of any person; [when committed willfully, in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health]: making the civilian population or individual civilians the object of attack; launching an indiscriminate attack violating the principle of proportionality; launching an attack against works or installations containing dangerous forces; making non defended localities and demilitarized zones the object of attack; the perfidious dangerous forces; making non – defended localities and demilitarized zones the object of attack; the perfidious use of the protected emblems; [when committed willfully and in violation of the Conventions or the Protocol]: the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Geneva Convention IV; unjustifiable delay in the repatriation of prisoners of war or civilians; practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, historic monuments, works of art or places of worship the object of attack, causing as a result extensive destruction; depriving a person protected by the Conventions or Protocol I of the rights of fair and regular trial.

²⁴ Claude Pillod, Yves Sandoz, Bruno Zimmermann, **Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949**, International Committee of the Red Cross, (MartinusNijhoff Publishers, 1987), p. 991, para 3460.

law. Therefore many regarded grave breaches as referring to violations of Geneva law, and war crimes as violations of Hague law.

This differentiation or grouping was made obsolete by the mentioned provision of Additional Protocol I⁶²⁵, and also by the fact that Additional Protocol I includes both Geneva law and Hague law. What was clear however at the time was that grave breaches and war crimes therefore international criminal responsibility were not applicable to violations committed in non-international conflicts. This text in Additional Protocol I, finally adopted by consensus, merely confirms that there is only one concept, assuring however that “the affirmation contained in this paragraph will not affect the application of the Conventions and the Protocol”²⁶.

However, this grouping is not entirely reflected in the ICC Rome Statute. Article 8 specifies only grave breaches in the understanding of the Geneva Conventions, but not in Additional Protocol I. This can be explained by the fact that Additional Protocol I was not ratified by many of the states negotiating the Rome Statute, including the United States which knowingly played an important role in the Preparatory phase. Therefore these states were reluctant to incorporate grave breaches of AP I into the Rome Statute. The Rome Statute only works with the notion ‘war crimes’ and not grave breaches, however, one set of war crimes are grave breaches of the Geneva Conventions. Therefore with respect to the war crimes and grave breaches relation, it shall state that all grave breaches of the Geneva Conventions are war crimes, but not all war crimes are grave breaches of the Geneva Conventions.

METHODOLOGY

In this work, mainly doctrinal research has been adopted. Going by the words of S.N.Jain²⁷ doctrinal research is analyzing the existing statutory provisions, legal documents, decided case laws of various courts etc. The historical method has also been employed in this research

²⁵ Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.” Article 85para 5, Additional Protocol I.

²⁶ See Schabas (2005), p. 53 cf. *Supra Note: 24*

²⁷ S.N.Jain, “*Doctrinal and Nona-Doctrinal Legal Research in Legal Research and Methodology*”, edited by S.K. Varma, M.Afsal Wani (Second Edition, Indian Law Institute, New Delhi,2001) p.68. According to S.N. Jain, Doctrinal Research, of course, involves analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions but it does more- it creates law and its major tools (but not only tool) to do so us through legal reasoning or rational deduction.

work for tracing out the history and development of the concept of war crimes. Analytical method too is used wherever necessary.

Sources

For realizing this research study materials from both primary and secondary sources have been utilized. The Four Geneva Conventions and its Additional Protocols, Rome Statute, United Nations Charter, Relationship Agreement between the United Nations and The International Criminal Court, Ottawa Convention, International Convention for the Suppression of the Financing of Terrorism etc. are relied upon as primary sources. The secondary sources referred herein are treatises, commentaries, text books, case comments, law journals, and case reports both national and international.

As a primary source the study goes with the following:

Four Geneva Conventions and its Additional Protocols,

Rome Statute,

United Nations Charter,

Ottawa Convention,

International Convention for the Suppression of the Financing of Terrorism,

As a secondary source the study goes with the following books:

Abrams, Jasons, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford, 2001.

Ackerman, Peter, *A Force More Powerful: A Century of Nonviolent Conflicts*, Palgrave, 2000.

Acuna, T.F., *The United Nations Mission in El Salvador-A Humanitarian Law Perspective*, Kluwer Law International, The Hague, 1995.

Alston, P., *The United Nations and Human Rights- A Critical Appraisal* Clarendon, Press, Oxford, 1992.

Alvarez, Alex, *Governments, Citizen, and Genocide: A Comparative and Interdisciplinary Approach*, Indiana University Press, Bloomington, 2001.

CONCLUSION

Therefore, it may be safely concluded that serious flaws in current single nation and *ad hoc* attempts to avenge human rights violations and war crimes. The U.N. and the vast majority of nations now clearly recognize the need for a permanent international criminal court. U.S. opposition to this Court is obviously contrary to our history as the world's leader in defense of human rights. Moreover, the public objections expressed by U.S. officials and congressmen to the Court appear, for the most part, to be based on the understandings and unlikely hypothetical. To the extent they have merit, fairly minor adjustments in ICC procedures could correct the problem. More importantly, it is vital to understand that our opposition to the ICC is against our best interests. This international institution and international criminal law have arrived, and it is far better that the U.S. controls the process in the future and use it to its advantage than stand alone as its own rogue state against ninety-nine civilized nations. When we decide to join the ICC, we will not see the international community and the Court as the enemy, nor will others perceive us in this manner. We will instead recognize the great potential of the Court to provide stability to the world and to serve as a channel of unified action against terrorists, aggressors, and tyrants. Those who consider themselves nationalists, moderates, or members of the right wing of American politics need to consider these arguments in the years to come. If they do, the author is confident that not only will the U.S. join the ICC, but it will emerge as its leader and greatest advocate.

CONSTITUTIONAL OBLIGATION TOWARDS WOMEN AND CHILDREN

Mohit Saini* & Nidhi**

INTRODUCTION

Civilized humanity considers the norms of equality and liberty as the basis of a just society free from arbitrariness. Despite odds, a great deal of transformation has taken place in the position of women international as well as nationally global jurisprudence, epitomized through various instruments, had made its contribution in this equalization process. In India after independence, a new vision was incorporated in the Supreme lex which is reflected, *inter alia*; in Preamble, Fundamental Rights, and Directive Principles of State Policy. Now we are in the 21st century and the present position of the Indian women and children is the ultimate result of the efforts already made till now towards the amelioration of women and children. The Constitution of India, 1950 has certain provisions relating to women and children. The legislatures enacted a number of laws to give meaning to the ideals enshrined in the constitution. Also, various women's rights have been the priority areas of recommendation of the Law Commission. This legislative intent are backed by resounding judgments of the Supreme Court and High Courts, trying to remove the orthodoxies conflicting with the concepts of equality, liberty, dignity and humanity. The courts in various judgments reiterated the laws where they were unambiguous, enhancing the concepts of gender equality and justice; but they were conflicting and against the dignity of women, the omission was readily applied. Therefore, for women's emancipation and socio-economic development, progressive legislation and positive judicial pronouncement are an integral part.

WOMEN AND CHILDREN UNDER INDIAN CONSTITUTION

According to a report of the United Nations published in 1980- "Women Constitute half of the world population, perform nearly two-thirds of works hours, receive one tenth of the world income and own less than one hundred per cent of world's property." The Constitution of India, 1950 has certain provisions relating to women. It makes special provisions for the

* Assistant Professor of Law, Guru Nanak Dev University, Amritsar, Punjab

** Research Scholar @ Panjab University, Chandigarh

treatment and development of women in every sphere of life¹. The Indian Constitution is the most comprehensive and complete document containing the provisions of equality and justice which aims at protecting the dignity of each individual irrespective of class, caste, religion etc. This fundamental laws of the land through various provisions particularly as laid down in the Preamble, in Part III dealing with the Fundamental Rights and in Part IV which deals with Directive , thrive for securing gender justice thereby putting women at par with men². In *Madhu Kishawar v. State of Bihar*³, the dissenting judgment of K. Ramaswamy said “legislative and executive actions must be conformable to and for effectuation of the fundamental rights guaranteed in PART III, directive principles enshrined in the part IV, and the preamble of the constitution which constitutes the conscience of the constitution. Covenants of the United Nations add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of the women in socio-economic restructure for establishing egalitarian socio order.

Our Constitution makers wise and sagacious as they were, had known that the India of their vision would not be a reality if the children of the country are not nurtured and educated. For this, their exploitation by different profit-makers for their personal gain had to be first made punishable⁴. Considering the fact that India is a welfare state, the founding father of the Constitution recognised the importance of the rights of the child in a nation’s development. Dr Ambedkar was far ahead of his time and in his wisdom projected these rights in the directive principles, including children as beneficiaries. Thus the Constitution mandates that every child shall have the right to health, well-being, education and social protection without any discrimination on the ground of caste, birth, colour, sex, language, religion, social origin, property or birth alone⁵. The principle of gender equality is enshrined in the Constitution in its Preamble, Fundamental Rights, Directive Principles of State Policy and Fundamental Duties. Let us start with the Preamble itself.

Preamble

¹ S.C.Tripathi and Vibha Arora, *Law relating to women and Children*, Central Law Publications, Allahabad,2010.

² Sukanta K. Nanda, *Law Relating to Women & Children*, The Law House, Rajabagicha, Cuttack-9,2011.

³ AIR 1996 5 SCC 125

⁴ Mamta Rao, *Law relating to Women and Children*, Eastern Book Company, Lucknow,2012.

⁵ Ibid.

The preamble is the key to the Constitution. It does not discriminate men and women but it treats them alike. Undoubtedly, the preamble appended to the Constitution of India, 1950 contains various objectives including “the equality of status and opportunity” to all the citizens⁶. The Preamble starts by saying that we, the people of India, gives to ourselves the Constitution. The source of the Constitution is thus traced to the people, i.e. Men and women of India, irrespective of Caste, community, religion or sex. The Preamble contains the goal of equality of status and opportunity to all citizens. This particular goal has been incorporated to give equal rights to women and men in terms of status as well as opportunity. The aspect of social justice is further emphasised and dealt with in the directive principles of state policy⁷.

Fundamental Rights

Part III of the Constitution consisting of Articles 12-35 is the heart of the Constitution. Human Rights which are the entitlement of every man, woman and child because they are human beings have been made enforceable as constitutional or fundamental rights in India. *Justice Bhagwati in Maneka Gandhi v. Union of India*⁸ says, “These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.”

Article 14 guarantees that the State shall not deny equality before the law and equal protection of the laws⁹. In its landmark judgment the Apex Court has held that a woman shall not be denied employment merely on the ground that she is woman as it amounts to violation of Article 14 of the Constitution¹⁰.

Article 15 prohibits discrimination against any citizen on the ground of sex and Article 15 (3) empowers the state to make positive discrimination in favour of women and child. *Cal HC in Mahadev v. B.B.Sen j Mukherjee*¹¹ observed the “words women and children used in Article 15 (3) means making special provision in favour of women and children and not against

⁶ S.C. Tripathi and Vibha Arora, *Law relating to women and Children*, Central Law Publications, Allahabad, 2010.

⁷ S. Alladi Kuppuswami, *The Constitution: What it Means to the People*, Gogia & Company, Hyderabad, 2000.

⁸ AIR 1978 SC 597

⁹ Article: 14 Equality before Law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

¹⁰ Air India v. Nargesh Meerza (AIR 1981 SC 1829)

¹¹ AIR 1951 Cal. 563.

them.” Its object is to strengthen and improve the status of women¹²”. The State in the field of Criminal Law, Service Law, Labour Law, etc. has resorted to Article 15(3) and the Courts, too, have upheld the validity of these protective discriminatory provisions on the basis of constitutional mandate¹³. In *Government of Andhra Pradesh v. PB Vijay Kumar*¹⁴, the court upheld the government’s notification reserving 30% seats for women in public services and also the treatment in posts better suited for women. Giving wide meaning to the term ‘special provision’ under Article 15(3) to include both reservation and affirmative action, the Court observed that: “*Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16*”.

Article 16 provides for equality of opportunity in matter of public employment. The Constitution, therefore, provides equal opportunities for women implicitly as they are applicable to all persons irrespective of sex. However, the Courts realize that these Articles reflect only de jure equality to women. They have not been able to accelerate defacto equality to the extent the Constitution intended¹⁵. Reflecting this in *Dimple Singla v. Union of India*¹⁶, the Delhi High Court expressed its apprehension that unless attitudes changes, elimination of discrimination against women cannot be achieved. Article 16 guarantees equal opportunity in matters of public employment as Article 16(1) declares that “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state”. In this case a reference may be made to the case of *C.B. Muthamma v. Union of India*¹⁷, where the rules requiring female employees to get permission before marriage and denial of right to employment to married women were held discriminatory and violative of Article 16 of the Constitution. Justice V.R.Krishna Iyer declaring this rule to be in defiance of Article 16 went on to observe: “*If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle*

¹² Govt. Of Andhra Pradesh v. P.B.Vijay Kumar (AIR 1995 SC1648)

¹³ Article: 15 Prohibition of discrimination on grounds of religion, race, cast, sex, or place of birth (1) The state shall not discriminate against any citizen on grounds only of religion, race, cast, sex, or place of birth or any of them.(3) Nothing in this article shall prevent the State from making any special provision for women and children.

¹⁴ (1995) 4 SCC 520

¹⁵ “No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”

¹⁶ (2002)2SLJ161

¹⁷ AIR 1979 SC1868

for national freedom was also a battle against woman's thrall dom. Freedom is indivisible, so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis half of India's humanity, viz. our women, is a sad reflection on the distance between Constitution in the book and Law in action¹⁸". In *Air India Cabin Crew Association v. Yeshaswinee Merchant and Ors*¹⁹, the Supreme Court has held that the twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. Article 16 covers discrimination only in public employment not by private employers and it applies to all the facets of employment, such as promotion, pay, transfer and retirement.

Article 21 Protection of life and personal liberty,²⁰ Gender equality becomes elusive in the absence of right to live with dignity. Article 21 contains provisions for protection of life and personal liberty of persons. The right to life enshrined in Article 21 of the Constitution also includes the right to live with human dignity and rape violates this right of women was held in *Shri Bodhisattwa Gautam v. Subhra Chakraborty*²¹, & *Chairman, Railway Board v. Mrs. Chandrima Das*²². In *Vishaka v. State of Rajasthan*²³, the Supreme Court, in the absence of legislation in the field of sexual harassment of working women at their place of work, formulated guidelines for their protection. The Court said: "Gender equality includes protection from sexual harassment and right to work with dignity which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose²⁴". A very important case concerning bar girls came before the high court and the decision was given In the *Indian Hotel Restaurants Assn (AHAR) v. state of Maharashtra*²⁵ in the instant case the

¹⁸ Ibid.

¹⁹ (2003) 6 SCC 277

²⁰ "No person shall be deprive of his life or personal liberty except according to procedure established by law.".

²¹ (1996) 1 SCC 490

²² (2000) 2 SCC 465

²³ AIR 1997 SC 3011

²⁴ Ibid.

²⁵ 2006 (3) BomCR 705

petitioner establishments carried on 3 distinct activities, namely, i) service of food, ii) performance of music and dance iii) service of liquor in an independent and demarcated room approved by the collector/licensing authority. “The right to education flows directly from the right to life”. It is declared by the Apex Court²⁶. Articles 21-A and 51-A(K) of the Constitution is also relevant with this.

Article 21-A²⁷ of the Constitution- the fundamental right to a free and compulsory education for children.

Article 23 prohibits trafficking in human beings and forced labour. Trafficking in human beings has been prevalent in India for a long time in the form of prostitution and selling and purchasing of human beings²⁸. *In Gaurav Jain v. Union of India*²⁹, the condition of prostitutes in general and the plight of their children in particular was highlighted. The Court issued directions for a multi-pronged approach and mixing the children of prostitutes with other children instead of making separate provisions for them. The Supreme Court issued directions for the prevention of induction of women in various forms of prostitution. It said that women should be viewed more as victims of adverse socio-economic circumstances than offenders in our society³⁰.

Article 24³¹ of the Constitution prohibits employment of children in factories etc. The Supreme Court held that “hazardous employment” includes construction work, match box, and fireworks. Therefore, no child below the age of 14 years can be employed. Positive steps should be taken for the welfare of such children as well as for improving the quality of their life³².

DIRECTIVE PRINCIPLES OF STATE POLICY

²⁶ Unni Krishnan v. State of A.P(1993) 1 SCC 645

²⁷ Article 21A, Constitution of India, amended by The Constitution (Eighty-Sixth Amendment) Act,2002 (brought into force on April 1, 2010), “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

²⁸ Prohibition of traffic in human beings and forced labour.— (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

²⁹ 1997 (8) SCC 114

³⁰ Ibid

³¹ No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

³² M. C. Mehta v. Union of India (1991) 1 SCC 283

The Constitution in part IV under Directive Principles of State Policy also directs the state to take certain remedial measures for the welfare of the women. This policy envisaged equal rights to work, equal pay for equal work, adequate means of decent and dignified livelihood both men and women, these are guaranteed under the directive principles of state policy.

Article 39³³ which directs the State to secure a social order for the promotion of welfare of the people has specific provisions for women also.

Article 39(a)³⁴ directs the State to direct its policy towards securing that citizens, men and women, equally have the right to an adequate means of livelihood. This Article provides equal right for all citizens, irrespective of sex, to adequate means of livelihood.

Article 39(c)³⁵ of the Constitution the children of tender age should not be subject to abuse and they should be given opportunities and facilities to develop in a healthy manner. Freedom and dignity of children should be protected.

Article 39(d)³⁶ directs the State to secure equal pay for equal work for both men and women. The State in furtherance of this directive passed the Equal Remuneration Act, 1976 to give effect to the provision.

Article 39(e)³⁷ specifically direct the State not to abuse the health and strength of workers, men and women.

Article 39(f)³⁸ says that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

³³ Article: 39 certain principles of policy to be followed by the state. The State shall, in particular, direct its policy towards securing -

(a) That the citizen, men and women equally, have the right to an adequate means of livelihood;

(d) That there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

³⁴ Article 39(a) says, “The citizens, men and women equally, have the right to an adequate means of livelihood”.

³⁵ Article 39(c) provides, “that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength”.

³⁶ Article 39(d) provides, “that there is equal pay for equal work for both men and women”.

³⁷ The health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

Article 32³⁹ of the Constitution, i.e. Right to Constitutional Remedies, the Supreme Court has the power to lay down guidelines for effective enforcement of fundamental rights of the children of prostitutes and the law declared by the Supreme Court under Article 141 of the Constitution, to be treated as the law relating to that particular field. In a historic Judgment in *Gaurav Jain v. Union of India*⁴⁰, it was held by the Apex Court that under Article 32 of the Constitution, the Court has power to adopt such procedure as is expedient in a given fact and situation and deal with the matter appropriately and to evolve procedure for enforcement of fundamental rights.

Article 42⁴¹ Provision for just and humane conditions of work and maternity relief. The Hon'ble Supreme Court in its landmark judgment has given direction to the Central Government to extend the benefits of the Maternity Benefits Act, 1961, also to the women employees working on daily wages and on their muster roll⁴².

Article 44⁴³, Uniform Civil Code for the citizens. Uniform civil code in India is the debate to replace the personal laws based on the scriptures and customs of each major religious community in the country with a common set governing every citizen. These laws are distinguished from public law and cover marriage, divorce, inheritance, adoption and maintenance. Article 44 of the Directive Principles in India sets its implementation as duty of the State. In *Sarala Mudgal case*⁴⁴, the Hon'ble Supreme Court has given a historical judgment, where it directed the government to take fresh look at Article 44 of the Constitution, which enjoins the state to secure a uniform civil code which accordingly to the

³⁸ This Article was amended by the Constitution (42nd)Amended Act,1976 with a view to ascertain the constructive role of the State in relation to children.

³⁹ Remedies for enforcement of rights conferred by this Part:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

⁴⁰ AIR1997 SC3021

⁴¹ The State shall make provision for securing just and humane conditions of work and for maternity relief .

⁴² Municipal Corporation of Delhi,v. Female Workers (Muster Roll) (2000) 3 SCC 224

⁴³ The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

⁴⁴ Sarala v. Union of India, (1995)3 SCC 635.

court is imperative for bot protection of the oppressed, and promotion of national unity and integrity. The Court directed the Central Government through the Secretary to Ministry of Law and Justice, to file an affidavit by Aug.,1995 indicating the steps taken and efforts made, by the government towards securing a uniform civil code for the citizens of India.

Article 45⁴⁵ Right to free and compulsory education for children. An important extract from the Supreme Court Judgment in the landmark case *Unni Krishnan, J. P. v. State of Andhra Pradesh*⁴⁶, "The citizens of this country have a fundamental right to education. The said right flows from Article 21. This right is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41. In other words, every child/citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limit of economic capacity and development of the State".

Article 47⁴⁷ stipulates that it is the duty of the state to raise the level of nutrition and health of the children.

FUNDAMENTAL DUTIES

Parts IV-A which consists of only one Article 51-A⁴⁸.This Article for the first time specifies a code of eleven fundamental duties for citizens.

Article 51-A (e) is related to women. It states that; "It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religion, linguistic, regional or sectional diversities; to renounce practices derogatory to the dignity of women".

Women's Representation in Local Bodies

Women in Panchayats

⁴⁵ The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

⁴⁶ AIR 1993, S.C. 2179-2254

⁴⁷ The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

⁴⁸ Which was added to the constitution by the 42nd Amendment, 1976

Article: 243 D⁴⁹ Reservation of seats.(1) Seats shall be reserved for—(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

In every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide: Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the

Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State: Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women: Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

⁴⁹ 73rd Amendment 1992 - w.e.f. 1-6-1993

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

Women in Municipalities

Article: 243 T⁵⁰ Reservation of seats.(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

(5) The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334.

⁵⁰ 74th Amendment 1992 - w.e.f. 1-6-1993

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Municipality or offices of Chairpersons in the Municipalities in favour of backward class of citizens.

NATIONAL COMMISSION'S FOR WOMEN AND CHILDREN

The Committee on the status of the Women in India recommended nearly two decades ago, the setting up of a National Commission for women to fulfill the surveillance functions to facilitate redresses of grievances and to accelerate the socio-economic development of women⁵¹. Keeping in view the desirability of a commission for women at the National Commission for Women Bill, 1990 was introduced in the Lok Sabha on 22nd May, 1990. Later on this Bill became an Act to be known as the National Commission for Women Act, 1990 w.e.f 30-8-1990⁵². Women as a class neither belong to a minority group nor are they regarded as a backward class. India has traditionally been a patriarchal society and therefore women have always suffered from social handicaps and disabilities. It thus became necessary to take certain ameliorative steps in order to improve the condition of women in the traditionally male dominated society. The Constitution does not contain any provision specifically made to favor women as such. Though Art. 15 (3), Art. 21 and Art. 14 are in favor of women; they are more general in nature and provide for making any special provisions for women, while they are not in themselves such provisions. The Supreme Court through interpretive processes has tried to extend some safeguards to women. Through judgments in cases such as *Bodhisattwa Gautam v. Subra Chakraborty*⁵³ and the *Chairman Rly Board v. Chandrima Das*⁵⁴ case, where rape was declared a heinous crime, as well as the landmark judgment in *Vishaka v. State of Rajasthan*⁵⁵, the courts have tried to improve the social conditions of Indian women. But these have hardly sufficed to improve the position of women in India. Thus, in light of these conditions, the Committee on the Status of Woman (India) as well as a number of NGOs, social workers and experts, who were consulted by the Government in 1990, recommended the establishment of a apex body for woman.

The lack of constitutional machinery, judicial ability and social interest formed the impetus and need for the formation of the National Commission for Women. It is apparent from the

⁵¹ Malik and Raval, *Law and Social Transformation in India*, Allahabad Law Agency, Haryana, 2011

⁵² S.C Tripathi and Vibha Arora, *Law Relating to Women and Children*, Central Law Agency, Allahabad, 2010.

⁵³ AIR 1996 SC 922

⁵⁴ AIR 2000 SC 988

⁵⁵ AIR 1997 SC 3011

prior mentioned conditions and problems that women in India, though in a better position than their ancestors, were handicapped to a great extent in the early 1990s and these handicaps and injustices against Indian women prompted the Indian Government to constitute the first National Commission for Women in 1992⁵⁶.

In order to ensure protection of rights of children one of the recent initiatives that the Central Government have taken for children is the adoption of National Charter for Children,2003 and then after that the Commission for the Protection of Child Rights Act,2005 was passed by Parliament⁵⁷.

LEGISLATIONS WITH RESPECT TO WOMEN AND CHILDREN

Indian parliament has passed the Acts since independence. Hence, enactments relating to women are of two kinds, one equally applicable to men and women and other specially intended to women only.

A) *Women's protection rights and remedies under criminal laws of India, these are:*

- 1) Indian penal code, 1860 (sec's 509, 359,362,363,366-373, 375,376,376A-D, 493, 494,496,497,498.
- 2) The Indecent representation of women (prohibitions) Act 1986.
- 3) The commission of sati (prevention) Act, 1987.
- 4) The pre-natal Diagnostic Techniques (regulation and prevention of misuse) Act, 1994.
- 5) The medical termination of the pregnancy Act, 1971.

B) *Women's protection rights and remedies under Industrial law of India.*

- 1) Equal remuneration Act, 1976.
- 2) Maternity benefit Act, 1925.
- 3) Factories Act, 1948.

⁵⁶ <http://ncw.nic.in/> (Aug. 4, 2007).

⁵⁷ Ibid.

- 4) Mines Act, 1952.
- 5) Employee's state insurance Act, 1948.

C) *Women's matrimonial rights and remedies.*

- 1) Marital rights and remedies under the Hindu marriage Act, 1956.
- 2) Marital rights and the remedies under the special marriage Act, 1954.
- 3) Marital rights and the remedies under the Dowry prohibition Act, 1961.
- 4) Marital rights and the remedies under the Hindu widow's remarriage Act, 1956.
- 5) Protection of Muslim women's rights on divorce under the Muslim women (protection of rights on Divorce) Act, 1986.
- 6) Forum for matrimonial and family Remedies under the family courts Act, 1984.

While all children have equal rights, their situations are not uniform. At the same time, childhood and the range of Children's needs and rights are one whole, and must be addressed holistically. A life-cycle approach must be maintained. Keeping this in mind, there are several national laws and policies that address the different age-groups and categories of children.

2012: The Child Labour (Prohibition and Regulation) Amendment Bill, 2012

2012: Protection of Children from Sexual Offences Notified Rules - 2012

2012: Protection of Children from Sexual Offences Act-2012

2009: The Right of Children to Free and Compulsory Education Act, 2009

2006: Juvenile Justice (Care and Protection of Children) Act (Amendment, 2006)

2006: Prohibition of Child Marriage Act

2002: The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act

2000: The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act

2000: Juvenile Justice (Care and Protection of Children) Act (2000)

2000: Information Technology Act

1996: Persons with Disabilities (Equal Protection of Rights and Full participation) Act

1994: Transplantation of Human Organ Act

1992: Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act

1989: Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act

1987: Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act

1986: Child Labour (Prohibition and Regulation) Act

1976: Bonded Labour System (Abolition) Act

1974: National Policy for Children

1960: Orphanages and Other Charitable Homes (Supervision and Control) Act

1956: Probation of Offenders Act

1956: Immoral Traffic (Prevention) Act (amended in 1986)

1956: Hindu Adoption and Maintenance Act

1948: Factories Act (Amended in 1949, 1950 and 1954)

1890: Guardians and Wards Act

DEBATE-ABLE ISSUE

The Judiciary is to be an arm of the social revolution upholding the equality that Indians had longed for. It is established fact that Judiciary is the third organ of the Government in any democracy. The Judiciary is the guardian of the fundamental rights of the people. Truly, the

Supreme Court has been called upon to safeguard the rights of the people and play the role of guardian of social revolution⁵⁸.

In the last 65 years of independence, if there is one concern, which has been the subject of much debate and has constantly encompassed the judicial mind are the rights of women and children in India. Counted together, they form more than the majority population and yet their voices and choices continue to be in minority. Their social and economic disadvantages further disable them to seek legal remedies. It is in this background that judiciary has exhibited extra precaution in deciding civil and criminal cases involving women and children. Courts have given a purposive interpretation to the legislations to undo age old inequalities and extend the benefits favorably. In spite of timely interference by legislature and judiciary, the equal status of women and children has not translated into actual reality. The vulnerable status of women and child is the only element, which has not witnessed radical change in this globalized and liberalized world. However, the eternal truth remains that no country can see the full swing of development both economic and social until their women and children prosper. Recent statistics of rape, child abuse, sexual harassment, child marriages and female foeticide depict the grim reality, which prevails today. Violence and its various manifestations point to the fact that discrimination against women and children is not mere local issue. In this light, the judicial wing of the State has to play a vital role in elimination of such discrimination in particular and for the upholding of women and children rights in general. India is a diverse country with its multicultural, multi-ethnic and multi-religious population where the protection of human rights becomes sine qua non for peaceful existence. It is indeed impossible to give an inclusive definition of Human Rights owing to its vast nature, however, the legislators have defined Human Rights as "*the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India*" under the Human Rights Act, 1993. The women and children are entitled to the same human rights as individuals. This was envisaged by our Constitution makers and the same has to be enforced by the judiciary.⁵⁹

CONCLUSION

⁵⁸ J. N. Pandey, *The Indian Constitution Cornerstone of Nation*, Central Law Publishing Agency 2002

⁵⁹ Hon'ble Mr. Justice P.Sathasivam, Judge, Supreme Court of India on 23.03.2013 at Tamil Nadu State Judicial Academy during the Special Programme for District Judges and Chief Judicial Magistrates on "Women and Children".

In spite of timely interference by legislature and judiciary, the equal status of women and children has not translated into actual reality. The vulnerable status of women and child is the only element, which has not witnessed radical change in this globalized and liberalized world. However, the eternal truth remains that no country can see the full swing of development both economic and social until their women and children prosper.

Recent statistics of rape, child abuse, sexual harassment, child marriages and female foeticide depict the grim reality, which prevails today. Violence and its various manifestations point to the fact that discrimination against women and children is not mere local issue. In this light, the judicial wing of the State has to play a vital role in elimination of such discrimination in particular and for the upholding of women and children rights in general. India is a diverse country with its multicultural, multi-ethnic and multi-religious population where the protection of human rights becomes sine qua non for peaceful existence. It is indeed impossible to give an inclusive definition of Human Rights owing to its vast nature, however, the legislators have defined Human Rights as "*the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India*" under the Human Rights Act, 1993. The women and children are entitled to the same human rights as individuals.

CORPORATE VEIL AND LIMITED LIABILITY COMPANY: AN ANALYSIS

Sumbul Khare* & Nishith Pandit**

Abstract

Nowadays, company is considered as separate legal entity. The concept was initiated to fund big projects as they require more finance, but in present time the term is used in it's widest sense. One such type of company which protects shareholders risks is Limited Liability Company, or company limited by shares. In limited liability Company, the creditors can only look to company's assets for their claim and personal assets of members of the company cannot be claimed against credit. If the company has committed any fraud or other illegal acts, the same cannot be then seen as corporate personality, and members are examined personally in order to identify the person liable. This act is called lifting of corporate veil. There are many provisions in the Companies Act, 2013.

The paper will examine different theories of corporate veil, position in United States and United Kingdom, and will also reply on some case laws. The paper will also discuss convergence in concept of companies and laws dealing with such concepts which have been seen since the emergence of the concept of companies.

Keywords: convergence, corporate veil, limited liability company, corporation

* Student @ Symbiosis University, Noida

** Advocate, Gujrat High Court; Member-Advisory Editorial Board, Lex Revolution Journal of Social & Legal Studies ISSN 2394-997X

INTRODUCTION

A company having the liability of its members limited by the memorandum or article of association, to the amount if any, unpaid on the shares respectively held by them is termed ‘a company limited by shares’. Such a company is called Limited Liability Company. The liability of members can be enforced at any time during the existence and also during the winding up of the company. The rule of limited liability is generally understood to concern the scope of shareholder’s liability. If shareholders can be found personally liable as a general rule, the principal can be extended to contract creditors or employees.

A company is a separate legal entity, the most important ingredient that flows from the separate legal personality clause is that of limited liability. The concept was invented in the 17th century. As the capital needed to finance the largest projects grew, and along with it the necessity of raising money, investors were reluctant to invest because of the risk involved in essentially guaranteeing the entire debt of the business entity. The main importance of the limited liability concept is that it protects the company and its members, as well as to facilitate commercial ventures in which the company may be interested. Thus, creditors who have claims against the company may look only to the corporate assets for the satisfaction of their claims as creditors and generally cannot proceed against the personal or separate assets of the members. This has the potential effect of capping the investors' risk whilst, consequently, their potential for gain is unlimited¹.

Nevertheless, there is a major exception to the general concept of limited liability. There are certain circumstances in which courts will have to look through the corporation, that is, lift the veil of incorporation, otherwise known as piercing the veil, and hold the shareholders of the company directly and personally liable for the obligations of the corporation.

LIFTING THE CORPORATE VEIL

In the event of fraud, illegal or improper acts committed by the company the facade of corporate personality have to be removed to identify the person guilty and such is known as lifting of corporate veil. The court may lift the corporate veil only under Statutory Provisions or Judicial Interpretations.

¹ Gower and Davies Principles of Modern Company Law (7Ed) London Sweet and Maxwell (2003) at 176.

The veil may be lifted as per express provision of the Act. The Companies Act, 2013 provides for the following cases under which the director or the member of the company may be held personally liable:

- Section 34 & 35 – Mis statement in the prospectus.
- Section 39 – Failure to return application money.
- Section 12 – Misrepresentation of name
- Section 219 – For facilitating the task of an inspector appointed under Section 210 or 212 or 213 to investigate the affairs of the company.
- Section 216 – For investigation of ownership of the company.
- Section 339 – Fraudulent Conduct.

Legal Doctrines Which Constrain Limited Liability

A. PRODUCTS LIABILITY

Products liability extends beyond the corporate group to reach all the enterprises involved in manufacturing, distributing and selling products that harm consumers. The doctrine seeks to ensure compensation for victims and to allocate losses to the economic activity that caused them². It was developed by the courts for this reason, in response to the needs of modern consumer society, with little thought given to any broader consideration of enterprise principles. Within the corporate group, the cases are clear in holding that a parent who distributes a defective product manufactured by its subsidiary will be liable in products liability. The doctrinal basis for these cases is products liability, without any inquiry into limited shareholder liability and traditional veil piercing analysis.

B. DIRECT PARENT COMPANY LIABILITY

Direct parent company liability in tort for claims that are also brought against the subsidiary. On the surface these are not derivative liability cases at all, for in these the parent is held directly liable for its own torts which pertained to the subsidiary's affairs. However, the tort doctrines developed such as "assumption of duty" or "non-delegable duty" have been widely expanded to provide relief in cases involving corporate groups.

² Restatement (Third) of Torts: Products Liability §1 et seq (1995).

C. ‘SINGLE BUSINESS’ THEORIES

Several cases have based liability on the operation of a single business by a multi-corporate enterprise operates as a single business, as the modern large business typically does. By looking to the whole business, rather than its constituent separate corporate entities, “single business enterprise” avoids completely a direct discussion of the policies of limited liability. Jurisprudentially, the doctrine could serve as a vehicle to supplant all veil piercing law for corporate groups

D. AGENCY AND ‘QUASI AGENCY’

A number of cases using the language of agency to find parent company liability for subsidiary conduct in these agency cases the courts purport to use traditional theories of agency to attribute liability of one corporate entity to another. However, this is a misapplication of traditional common law agency which, at its core, turns on consensual agreement for one party to act in the interest of another and, in the right circumstances, to have the legal capacity to take legal actions and incur liability for the other. When courts speak of “agency” in attributing subsidiary liability to a parent corporation, they are usually not applying common law agency doctrine, but rather a variant of veil piercing that is perhaps better called “quasi-agency”.

CURRENT POSITION IN OTHER COUNTRIES

UNITED KINGDOM

The doctrine of piercing the corporate veil is apparently in a transitory state in many common law jurisdictions. Current practice by Her Majesty's courts demonstrates that the courts are increasingly becoming as interested with legal and equitable principles as they are with the traditional fraud requirement. In other words, what the Common law courts typically consider is injustice and impropriety. Where this is the case, the only motive of the courts in lifting the veil is the restoration of equity.

UNITED STATES OF AMERICA

The U.S. courts lift the company’s immunity in a variety of situations. The piercing concept does not come from the laws of the states or federal government but it is a judicial creation which varies from state to state. The scope of abuses relating to groups of companies is the

most popular reason for which the courts disregard the separate entity principle. If a controlled company is organized as a mere tool in the hands of a parent enterprise and the separateness of the two corporations has ceased, one can assume that holding only the subsidiary corporation liable for any damages resulting from fraud or dishonesty of the parent company would result in injustice.

CASE LAWS

*DELHI DEVELOPMENT AUTHORITY V. SKIPPER CONSTRUCTION COMPANY(P.) LTD.*³

The court held that the corporate bodies were mere cloaks and that the devise of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.

*WORKMEN OF ASSOCIATION RUBBER INDUSTRY LTD. V. ASSOCIATION RUBBER INDUSTRY LTD.*⁴

Where it was found that the sole purpose for the formation of the company was to use it as a device to reduce the amount to be paid by way of bonus to workmen, the SC upheld the piercing of the veil to look at the real transaction.

*SANTANU RAY V. UNION OF INDIA*⁵

In case of economic offences a court is entitled to lift the veil of corporate entity and pay regards to the economic realities behind the legal facade.

*CIT V. SRI MEENAKSHI MILLS LTD.*⁶

Where the veil had been used for evasion of taxes and duties, the court upheld the piercing of the veil to look at the real transaction.

*JOHNSON V. ABBE ENGINEERING CO*⁷

³(1996) 4 SCALE 202(SC)

⁴ (1986) 59 Comp. Cas.134 (SC)

⁵ (1985) 65 Comp. Cas. 196 (Delhi)

⁶ AIR 1967 SC 819

⁷ 749 F. 2d 1131 (5th cir, 1984)

The parent inspected the subsidiary's plant for conformity to the parent's recommended safety requirements and this was enough involvement to support a finding that the parent was directly liable to the employee injured by a violation of those requirements.

*SOLAR INTERNATIONAL SHIPPING AGENCY V. EASTERN PROTEINS EXPORT, INC*⁸

It was held that a corporation was liable for its commonly owned sibling's shipping contracts because it had acted as the sibling's undisclosed principal. Yet the facts show clearly that this was not really an agency case, but one concerned with piercing the veil to prevent an abuse of limited liability. Both corporations were owned by the same family, and both had identical boards of directors. They operated out of the same address, used the same telex and telephone numbers, the same stationary and sales forms, and the same sales agents. The corporation which had entered the contract had never issued its own checks or had its own employees. In this situation, the court concluded that this was "not just a shell corporation but a shell game". Yet these fairly typical veil piercing facts were here held to justify a finding of agency, with liability based on it, and the case offered no discussion of veil piercing. Such a "quasi agency" doctrine is, of course, not true common law agency at all, but rather another doctrinal tool to fashion specific results when an exception to limited liability is appropriate.

CONCLUSION

The act of piercing the corporate veil until now remains one of the most controversial subjects in corporate law, and it would continue to remain so, even for the years to come. By and large, as discussed in the paper, the doctrine of piercing the corporate veil remains only an exceptional act orchestrated by courts of law. Courts are most prepared to respect the rule of corporate personality, that a company is a separate legal entity from its shareholders, having its own rights and duties, and can sue and be sued in its own name.

As we move from jurisdiction to jurisdiction across the globe, its application narrows down to how that system of the law appreciates the subject. Common law jurisdictions are examples par excellence where the piercing of the corporate veil has gained notoriety, and as the various cases indicate, courts under this system of the law generally appreciates every case by its merits.

⁸778 F. 2d 922 (2d Cir 1985)

The above notwithstanding, there are general categories such as fraud, agency, sham or façade, unfairness and group enterprises; which are believed to be the most peculiar basis under which the common law courts would pierce the corporate veil. But these categories are just a guideline and by no means far from being exhaustive.

Also, from the results and discussion on the law limited liability in a company limited by shares it has been clear that there has been a convergence in the application of these laws. Earlier when because of the law of limited liability the managerial personnel escaped liability from the company gradually with the evolution of law there has been a shift and the law as read in books is different from its applicability.

Secondly, because of the incorporation of the company, the company has been considered as an artificial person having a separate legal entity, though the company never had brain or thoughts it was made liable for the acts done by its members, here rosed the concept of lifting of the corporate veil which was again a convergence and with it came into picture the vicarious liability of the company.

Therefore the convergence made is essential for today's corporate affairs as the big organizations could have easily fooled the innocent shareholders and escaped their liabilities.

KILLING OF OSAMA BIN LADEN: A LEGAL ANALYSIS

Syed Zeeshan* & Aabid Ali Haider**

Abstract

In the early hours of May 2, 2011, about two-dozen Navy SEALS left by helicopter from a base in Jalalabad, Afghanistan, and entered Pakistani sovereign territory, into the garrison town of Abbottabad and approached a compound that had been under surveillance for months. The helicopter landed, and the SEALS moved toward the buildings in the compound after blasting through several internal walls with C-4 explosives and eventually killed the world's most feared person Osama Bin Laden.

The US pentagon, supporting its act quoted,

'Should we not bother respecting the rules when confronted to terrorist groups who, evidently, do not respect any'?

However, one simply forgets that by applying the above principle, an individual or a state simply just erases the line of distinction between the acts of the so-declared terrorists and a state acting in bona fide self-defense. The same line that makes them the victim and the other party a terrorist. The same line that declares the other party's actions a terrorist strike while there's to be 'serving of justice'. The paper tries to analyze the justifiability of this act of killing by the USA under the scope of international law and its provisions and to find on which side of the line the United States stands.

Keywords: Osama Bin Laden, Operation Neptune Spear, Sovereignty, Al-Qaeda, Killing

* Student-B.A.LL.B.(H) {IV Year} @ Hidayatullah National Law University, New Raipur, Chhattisgarh

** Student-B.A.LL.B.(H) {III Year} @ Hidayatullah National Law University, New Raipur, Chhattisgarh

INTRODUCTION

Osama bin Mohammed bin Awad bin Laden was born in Riyadh, Saudi Arabia, a son of Mohammed bin Awad bin Laden, a billionaire construction magnate with close ties to the Saudi royal family, and Mohammed bin Laden's tenth wife, Hamida-al-Attas (then called Alia Ghanem).¹ In a 1998 interview, bin Laden gave his birth date as March 10, 1957.² Bin Laden was raised as a devout Wahhabi Muslim. From 1968 to 1976, he attended the elite Al-Thager Model School. He also studied economics and business administration at King Abdulaziz University.

In addition to the general Islamic commitment he started forming an Islamic responsibility at an early age. His father used to host hundreds of pilgrims from all over the world during the Hajj season. Some of those were senior Islamic scholars or leaders of Muslim movements. This custom prevailed even after his father's death through his elder brothers. He used to make good contacts and relations through those gatherings.³

He was the founder of al-Qaeda, the Sunni militant Islamist organization that claimed responsibility for the September 11 attacks on the United States, along with numerous mass-casualty attacks against civilian and military targets.

OPERATION NEPTUNE SPEAR: THE ACTION

For over a decade, the United States Armed Forces and intelligence agencies have searched exhaustively for him. For many years, bin Laden was thought to be hiding, possibly in a cave, in the remote tribal region between Pakistan and Afghanistan. Instead, he was living in a massive walled compound about an hour's drive north of Islamabad. He was hiding in Abbottabad, a city known as the home to the Pakistani Military Academy, the country's version of West Point, as well as another military base.

Reports state that, in the early hours of May 2, 2011, about two-dozen Navy SEALs left by helicopter from a base in Jalalabad, Afghanistan, and entered Pakistani sovereign territory. The SEALs were part of the Naval Special Warfare Development Group ("DEVGRU") under the Joint Special Operations Command (JSOC), a sub-unified component of the U.S. Special

¹ Steve Coll, "Letter From Jeddah: Young Osama- How he learned radicalism, and may have seen America", The New Yorker, December 12, 2005.

² Lisa Beyer, "The Most Wanted Man in the World", Time, May 26, 2010.

³ Carl Cameron, "Osama bin Laden: A Chronology of His Political Life", The New York Times, June 18, 2001.

Operations Command (USSOCOM) dedicated to conducting antiterrorism operations. In two helicopters (MH-60 Black Hawks), the team entered the garrison town of Abbottabad and approached a compound that had been under surveillance for months. The helicopter landed, and the SEALs moved toward the buildings in the compound after blasting through several internal walls with C-4 explosives.

Upon entering the structure where Bin Laden was thought to be residing, the SEAL team proceeded to the upper floors, killing Bin Laden's son on the way up. Bin Laden was visually identified on an upper floor. One of the SEALs shot Bin Laden in the chest and then the head. According to their report, four other people were killed in the raid: the courier, Bin Laden's son Khalid, the courier's brother (who was armed), and the latter's wife. One of Bin Laden's wives was later treated for a bullet wound in her leg.

JUSTIFIABILITY OF THE ACT: AN ANALYSIS

The first question subject to debate concerns the mission in itself and whether or not it was permissible for the United States forces to enter the Pakistani territory in order to conduct their raid against Bin Laden? The Article 2(4) of the United Nations Charter states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". According to this Article, the United States could have only legally entered Pakistan if a Security Council Resolution had given them the authorization to do so or if the Pakistani government had agreed upon it. Considering that neither the SC nor the Pakistani government gave such authorizations, the conduct of the raid was therefore unlawful,⁴ which constitutes breach of an obligation *erga omnes*, the obligation to respect other state's sovereignty.

Article 2(4) is not implicated only where the territorial state consents to foreign intervention.⁵ However, there is little or no indication that Pakistan was aware of the bin Laden operation, let alone consenting to the same. Also, there is a considerable difference between the drone intervention as sanctioned by Pakistan in Federally Administered Tribal Areas (FATA) and

⁴ Laura Kugel, "The Killing of Osama bin Laden: Legal or Illegal?", JSE Journal of International Relations, (2011).

⁵ Article 20, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

the attack on Osama Bin laden. So, consent to action in FATA would not necessarily extend to the Bin Laden raid.⁶

All that said, we may never know for sure whether Pakistan had at some time offered its open-ended consent to an operation of this kind notwithstanding the domestic palatability of such an authorization. In addition, it could be argued that Pakistan consented to the operation *ex post*, thus forgoing any claims based on the territorial breach.⁷ In any case, the ensuing analysis shows a lack of Pakistani consent at the time of the operation. Absent Pakistan's consent, the bin Laden raid resulted in a *prima facie* breach of that country's sovereignty within the meaning of Article 2(4) of the UN Charter.

The primary argument advanced to justify this use of force is that the U.S. was exercising its inherent right—and sovereign duty—of self-defense, a codified exception to the general prohibition on the use of force in the U.N. Charter.⁸

The theory of self-defense as based upon the UN charter is that since September 11, 2001, the U.S. has been a subject to continuous armed attacks from Al Qaeda, with Osama Bin Laden as its head. This risk of future attacks is cited to justify the incursion into Pakistani territory. However, a number of legal and factual hurdles exist in the way of smooth application of the established self-defense doctrine in these circumstances.

For one, only the commission of an “armed attack” triggers Article 51 by its own terms.⁹ But, the precise definition of “armed attack” remains a subject of dispute. As for international armed conflict, a commonly accepted definition is that provided in the Tadić jurisdictional decision¹⁰, which is based on common Article 2 of the Geneva Conventions (GC) I–IV. Accordingly, ‘an armed conflict exists whenever there is a resort to armed force between States’. What is clear from the definition is that the conflict between Al Qaeda and the US can certainly not be an international one since Al Qaeda does not qualify as a state.

Also, the right of self-defense applies only in response to an armed attack by another sovereign entity, even though no such limitation appears in Article 51 itself. The International

⁶ *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Rep. 168, paras.52-53.

⁷ O'Connell, "Operation Neptune Spear: The Pivotal Role of Pakistan", 2011.

⁸ UN Charter, Article 51 - “Nothing in this Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”

⁹ *Id.*

¹⁰ *Prosecutor v. Dusko Tadic* (Judgement in Sentencing Appeals), IT-94-1-A.

Court of Justice has adopted this position, even following the attacks of September 11th.¹¹ By this rationale, measures in self-defense may only be exercised against the state legally responsible for the initial attack. Because Pakistan did not engage in an armed attack against the U.S., and no one has argued that Bin Laden's actions may be attributed to that country, Article 51 would thus be inapplicable to justify the United States' use of force on Pakistani territory.¹² Nonetheless, because there was no clear predicate-armed attack and no imminent threat in the scenarios under consideration, the operation doesn't comply with standard self-defense doctrine.¹³

Another argument that is invoked to preclude any wrongfulness of the United States' conduct is the existence of a general state of necessity. The freeform principle of necessity finds expression in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The Articles state that necessity may not be invoked unless the otherwise unlawful act:

- (a) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.¹⁴

This defense cannot, however, be invoked to justify or excuse the impairment of an essential interest of another state or to breach a peremptory rule of international law,¹⁵ such as Article 2(4) of the Charter. The ICJ has also made clear, however, that although such a defense may exist in customary international law, it is circumscribed such that it may only be invoked on an "exceptional basis" and under "strictly confined conditions".¹⁶

The second issue concerns the actual killing of bin Laden. There has been a lack of transparency concerning what actually happened in the compound. In effect, the official story has changed and there seems a lacuna in the clear explanation of the series of events that lead

¹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ Rep. 136, para.139.

¹² Alston P, "The CIA and Targeted Killings Beyond Borders", New York University Public Press (2011).

¹³ Barnidge Jr., 'The Due Diligence Principle Under International Law', 9 International Criminal Law Journal (2006). Rev. 81.

¹⁴ Article 25, ILC Draft Articles.

¹⁵ Article 26, ILC Draft Articles.

¹⁶ Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), (1997) I.C. J. Rep. 92 at para.51.

the US Navy SEALs to kill bin Laden rather than arrest him.¹⁷ Even though it is lawfully permitted to kill combatants, bin Laden was not armed and therefore did not seem to represent an immediate threat. Perhaps the Americans considered that they could use the right to pre-emptive self-defense in this case: even if bin Laden was not armed at the moment when the shooting occurred, keeping him alive might have turned out to be a dangerous decision.

Human Rights advocates have argued that the operation was also a breach of the fundamental right to life. Even though Bin Laden was a murderer, if not directly at least clearly indirectly considering his position as leader of Al Qaeda, but he still had a claim to his human rights, like any other person. From this perspective, shooting him while he was unarmed instead of simply capturing him was an unlawful move.¹⁸ There is no doubt that Osama bin Laden committed atrocities that ought to be punished. However, the circumstances of his death seem to deviate from justice, since they are so far from the basis of international law that defends states' sovereignty and forbids torture as well as assassinations.¹⁹

If, it is argued, that the US is not at war with Al Qaeda, the applicable legal regime is exclusively that of peacetime. Thus, lethal force against any person, be it an ordinary citizen or a terrorist suspect, is, as a rule, prohibited by both criminal law and international human rights law, including customary international law. International human rights law does not distinguish between a targeted or untargeted killing, or between a killing executed by an unmanned drone or otherwise.

CONCLUSION

Killing of Osama Bin Laden in the year 2011 is a much-debated topic till date. Addressing the nation from the East Room of the White House at 11:30 pm on 1 May 2011, President Barak Obama reported to the American people, and to the world, that the United States had conducted a successful operation resulting in the death of Osama bin Laden, the infamous leader of Al Qaeda, the militant jihadist organization responsible for the September 11 attacks on the United States and multiple other lethal attacks against civilian and military targets. President Obama told the families who had lost loved ones to Al Qaeda's terror that '*justice*

¹⁷ Robertson G, "Why It's Absurd To Claim That Justice Has Been Done", *The Independent*, 3 (2011).

¹⁸ Rona G 'Interesting Times for International Humanitarian Law: Challenges in the "War on Terror,"' 27 Fletcher Forum of World Affairs 55 (2003).

¹⁹ UN Charter, Art. 2(4); UDHR, Art. 5; ICCPR, Art. 7.

has been done'.

However, the mode of imparting justice adopted by the United States was not just in itself. Due to absence of Pakistani consent, it is clear that the Operation Neptune Spear violated Pakistan's territorial integrity, even though an attempt was made to justify it on expanded self-defense grounds. Complaints about Article 2(4) are for Pakistan to raise against the U.S. Although Pakistan has grumbled about the violation of its sovereignty, no formal claims have been pursued to date. Nor it seems that it is likely to be forthcoming given the lack of actual damage to Pakistani property or interests, and the embarrassment factor stemming from the fact that Bin Laden was living in relative comfort in the military city of Abbottabad for such a long time.

That being said, the employment of deadly force by one state even in the absence of breach of another state's territorial sovereignty still requires justification. For this, a more expanded form of self-defense is required that hinges on a showing of the risk posed by the individual being targeted. However, relying on self-defense to justify the operation requires a number of controversial doctrinal leaps. These include:

- a) That a terrorist act can constitute an "armed attack".
- b) That self-defense applies on a continuous basis and not only in the immediate aftermath.
- c) That self-defense can be exercised in the territory of a state that is nowhere under an apprehension of being a treat or a party to the menace already caused.
- d) That the law supports a form of anticipatory self-defense that can be exercised in the absence of a concrete threat of future attack.

On an analysis, there seems to be a special arbitrary treatment for terrorists. The US pentagon, affirming to this treatment quoted, '*Should we not bother respecting the rules when confronted to terrorist groups who, evidently, do not respect any?*'

However, one simply forgets that by applying the above principle, an individual or a state simply just erases the line of distinction between the acts of the so-declared terrorists and a state acting in *bona fide* self-defense. The same line that makes them the victim and the other party a terrorist. The same line that declares the other party's actions a terrorist strike while there's to be 'serving of justice'.

DECODING THE CONTROVERSIAL LAND ACQUISITION ORDINANCE

Mayuri Gupta*

Land acquisition remains at the centre of many controversies and public policy paralysis in India. Land is the basic infrastructure required for any project. It is the platform without acquiring which we cannot set up manufacturing units. Historically, the authority to acquire the land is a sovereign power. The concept of Land Acquisition has been derived from the concept of the *Eminent Domain*¹ which authorizes the State to take away the private property owned by the public for development, industrialization and urbanization of the State.

Until 2013, the Land Acquisition in India was governed by the Land Acquisition Act, 1894.² Over the 120 years the Land Acquisition Act, 1894 had become obsolete and needed amendment. The compensation provisions were inadequate and there was call for a legislation that would provide higher compensation coupled with a rehabilitation and resettlement package. The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act, 2013 repealed the Land Acquisition Act, 1894. The Act of 2013 was passed by the UPA government with the objective to promote transparency and participative governance in the acquisition of land for industrialisation and urbanisation and ensure overall socio-economic development. The new legislation was an attempt by the UPA government to fine-tune the need of development of India and protecting the interest of the most fragile socio-economic segment of Indian population – farmers and tenants. In the pursuit of this objective, the law introduced mechanisms as Social Impact Assessment, Consent, and Rehabilitation, *etc.*

On December 31, 2014, the President of India promulgated an ordinance with an official mandate to ‘meet the twin objectives of farmer welfare along with expeditiously meeting the

* Student- B.A. LL.B (H) Amity Law School, Amity University Uttar Pradesh, Lucknow Campus, Lucknow-226028 (U.P.); Editor-Lex Revolution Journal of Social & Legal Studies ISSN 2394-997X; Email: mayurigupta55@gmail.com

¹ The doctrine empowers the sovereign to acquire private land for public use, provided the public nature of the usage can be demonstrated beyond doubt. The doctrine is based on the following two Latin maxims: (1) *Salus populi suprema lex* (Welfare of the People Is the Paramount Law) and (2) *Necessitas publica major est quam* (Public Necessity Is Greater Than Private Necessity). See: M.R. Biju, ‘Land Acquisition Amendment Bill, 2014: U-Turn by the BJP’, Mainstream, VOL LIII No 33 New Delhi August 8, 2015.

² Vinod Madhavan, ‘Controversy Over Land Acquisition Bill: All You Need to Know’, The New Indian Express, 07th March 2015

strategic and developmental needs of the country'.³ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (the LARR, Act) has been amended by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014. What was the need to amend the Land Acquisition Bill that the Bharatiya Janata Party (BJP) had helped vote into law only 15 months ago? The need for the Amendment arose because the LARR Act, 2013 established an extremely complex and impractical land acquisition process which resulted in infrastructure bottleneck, high inflation and fall in GDP.⁴ A highly complicated process of acquisition can upset India's development to a large extent. Notable in this direction is an excerpt from an article⁵ by *Sanjoy Chakravorty*⁶ where he argued that the LARR Act, 2013 is a law '*that carries within it the seeds of its own destruction*'.

³ Article 123 of the Constitution enables the President of India to promulgate an ordinance if both the Houses of Parliament are not in session and circumstances exist, which render it *necessary* for him to take *immediate action*. Every ordinance had to be laid before Parliament, and ceased to exist six weeks from the end of the next sitting of Parliament. Since the Constitution mandated that Parliament to be called into session at least once every six months, an ordinance has a *de facto* expiration period of approximately seven and a half months. See: G. Raghuram and Simi Sunny, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance 2014: A Process Perspective, IIM Ahmedabad W.P. No. 2015-07-03, July 2015

⁴ Thirteen Acts of Parliament, which provided for land acquisition, were put in the Fourth Schedule of the Act. Section 105 of the 2013 Act made the provisions of the Act inapplicable to these exempted Acts. The said Section provided that the Government could issue a notification and direct 'any' provision of the Act relating to compensation or R&R would be made applicable to the exempted acts. The "Proposed" notification had to be placed before Parliament for a period of 30 days and Parliament was expected to approve, disapprove or modify the said proposed notification. The need for an ordinance arose because such a notification would have to be put before Parliament in the Budget session itself in July-August, 2014 and the approval or disapproval taken accordingly. 31st December, 2014 being the last day for such a notification, the Government decided to amend the Section 105 and apply all the compensation and R&R provisions of the 2013 Act to the thirteen exempted laws. Through this provision the present ordinance provides that the farmers' would get higher compensation if land is acquired under any of the exempted laws. It goes a step further than the 2013 Act itself. This also explains the urgency of issuing the ordinance on the last day of the year since otherwise the Government would have been in default of the complicated approval provisions outlined in the 2013 Act.

See: Shri Arun Jaitley, *Amendments To The Land Acquisition Law – The Real Picture*, Available at: <http://www.bjp.org/en/mediaresources/pressreleases/articleshriarunjaitleyonamendmentstothelandacquisitionlawtheralpicture>

⁵ Sanjoy Chakravorty, How to Design the Next Land Acquisition Law, the Center for the Advanced Study of India (CASI) of the University of Pennsylvania, Available at: <https://casi.sas.upenn.edu/iit/sanjoychakravorty>
EXCERPT: How should a new acquisition law be designed in light of this history and present reality? Some of the clearest thinking on the subject is by Maitreesh Ghatak and Parikshit Ghosh. They argue that there are three possible broad approaches. "One is to let money speak-hiking minimum compensation amounts significantly to win farmers' support. The second is to let farmer's speak-making project clearance contingent on a referendum among affected households. The third approach is to let the bureaucrats and experts speak—getting it vetted by an empowered committee doing its own social cost benefit assessment." The problem, Ghatak and Ghosh argue, is that rather than being alternative methods, the Congress law uses the "kitchen sink" approach and makes these

LARR was political and fundamentally bureaucratic approach based on little or no recognition of some simple economic principles — on land markets and on transaction and opportunity costs. The basic presumption was that the price of land matters to the land loser but not to the land acquirer. Consequently, LARR raised the price of land acquisition to unsustainable levels. The new Bill is based on the principle that price matters to both.⁷ The key changes made by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Bill, 2015 are:

The Bill allows the government to exempt five categories of projects from (i) Social Impact Assessment, (ii) limits on acquisition of irrigated multi-cropped land, through a notification, and (iii) consent provisions. However, the compensation provisions remain untouched.

These five categories are:

- (i) defence
- (ii) rural infrastructure
- (iii) affordable housing
- (iv) industrial corridors and
- (v) Infrastructure and social infrastructure.

The amendments make the following changes to this provision:

1. The LARR Act, 2013 requires that the prior consent (the consent clause) of at least 80% of land owners for private projects and the consent of 70% of land owners be obtained for PPP projects. The Bill exempts the five categories mentioned above from this provision of the Act. Acquisition, being different from purchase, implies that land owners were unwilling to part with the land. In such a situation, requiring consent from them may be impractical. It is not comprehensible why the consent requirement varies on who owns the project.

complementary methods. All are now in the law. The result is what I had argued when the bill was being debated—a law “that carries within it the seeds of its own destruction.”

⁶ Sanjoy Chakravorty is a Professor in the Department of Geography and Urban Studies, Temple University, and the author of *The Price of Land: Acquisition, Conflict, Consequence*. He is a CASI (Center for the Advanced Study of India) Non-Resident Visiting Scholar.

⁷ See: Sanjoy Chakravorty, ‘Improving an unworkable law’, The Hindu, January 07 2015, Available at: <http://www.thehindu.com/todayspaper/ttopinion/improvinganunworkablelaw/article6761692.ece>

2. The LARR Act, 2013 exempted 13 laws⁸ from its purview. The Bill brings the compensation, and rehabilitation and resettlement (R&R) provisions of these 13 laws which govern land acquisition in specific sectors in line with the provisions of the Act. The Act had required that this be done within a year of its enactment (January 1, 2015), through a notification.
3. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 says the land unutilised for five years should be returned to the owner, but the amendment proposed by the NDA Government intends to change it to five years or any period specified at the time of setting up the project.
4. Under the 2013 Act, land can be acquired for the government, a public private partnership, or a private company, if the acquisition serves a public purpose. The Bill changes the term ‘private company’ to ‘private entity’. This means that land may now be acquired for a proprietorship, partnership, corporation, non-profit organisation, or other entity, in addition to a private company, if the project serves a public purpose.
5. The 2013 Act entailed that if an offence is committed by a government department, the head of the department will be held guilty unless he can show that he had exercised due diligence to prevent the commission of the offence. The Bill removes this section and adds a provision that if an offence is committed by a government employee, he can be prosecuted only with the prior sanction of the government. It may be pertinent to note that the changes made by the Bill raise the threshold to hold government employees accountable for offences committed under the Act.
6. The 2013 Act provides that the provisions of the Bill would apply to any acquisition initiated under the Land Acquisition Act, 1894 under two conditions: (a) an award had been made under Section 11 of the 1894 Act, five years or more prior to the commencement of the 2013 Act, and (b) the physical possession has not been taken or compensation not been paid. The Bill adds a proviso to state that the computation of the five year period should exclude any period during which a court has granted a stay

⁸ The Ancient Monuments and Archaeological Sites and Remains Act, 1958; The Atomic Energy Act, 1962; The Damodar Valley Corporation Act, 1948; The Indian Tramways Act, 1886; The Land Acquisition (Mines) Act, 1885; The Metro Railways (Construction of Works) Act, 1978; The National Highways Act, 1956; The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962; The Requisitioning and Acquisition of Immovable Property Act, 1952; The Resettlement of Displaced Persons (Land Acquisition) Act, 1948; The Coal Bearing Areas Acquisition and Development Act, 1957; The Electricity Act, 2003; The Railways Act, 1989.

or possession has been taken but compensation has been deposited in a court or a designated account.

7. The 2013 Act excluded acquisition of land for private hospitals and private educational institutions from its purview. The Bill sought to include these two within its scope. However, the Lok Sabha removed this provision of the Bill. Thus, in its present form, the Bill does not include the acquisition of land for private hospitals and private educational institutions.⁹

In addition to removing social infrastructure from one of the five exempted categories of projects, clarifying the definition of industrial corridors, and removing the provision related to acquisition for private hospitals and private educational institutions, the Lok Sabha made a few other changes to the Bill, prior to passing it. These include:

- (i) Employment must be provided to ‘one member of an affected family of farm labour’ as a part of the R&R award, in addition to the current provision which specifies that one member of an affected family must be provided employment as a part of R&R;
- (ii) Hearings of the Land Acquisition, Rehabilitation and Resettlement Authority to address grievances related to compensation to be held in the district where land is being acquired; and
- (iii) A survey of wasteland must be conducted and records of these lands must be maintained.¹⁰

Unlike the upper house, the lower house, where the NDA holds a majority, passes the bill. Opposition parties continue to fight against it. In May 2015 the Lok Sabha referred the bill to a joint parliamentary committee under the Chairmanship of Shri S.S.Ahluwalia, M.P. for examination and presenting a Report to the Parliament, consisting of 30 members. The committee comprises members from both the Lok Sabha and the Rajya Sabha.¹¹ Eleven members in the Joint Committee of Parliament on the Land Bill on August 3, 2015 moved amendments seeking to bring back the social impact assessment and consent clauses. With the NDA government’s Land Acquisition (Amendment) Ordinance set to lapse on August 31, the government is likely to issue a fresh ordinance in order to accommodate the 13

⁹ Joyita, ‘Land Acquisition: An overview of proposed amendments to the law’, The PRS Blog, March 16th, 2015, Available at: <http://www.prssindia.org/theprsblog/?p=3515>

¹⁰ Ibid.

¹¹ Available at:

<http://www.prssindia.org/parliamenttrack/parliamentarycommittees/jointparliamentarycommittee3882/>

legislations excluded under the 2013 law, while dropping a majority of key amendments brought in through its earlier ordinances. The government had earlier re-promulgated its ordinance three times, bringing extensive changes to the 2013 law. However, in a major climb-down earlier this month, the government agreed to drop most of its controversial amendments to the Act in order to bring back the crucial clauses on consent and Social Impact Assessment. This change in government's stand was made clear by the amendments moved by the BJP members of the Joint Committee of Parliament examining the issue.¹²

Land Acquisition stands at the political fault line of a changing India, undergoing significant transitions: political, economic, social, environmental. There is keen contestation along a variety of fronts, actors, structures and visions, and with deepening democracy and a savvy 24/7 media, the salience and political articulation of such contestation has become more visible. These debates are part of a greater emerging story that engages with processes and governance deficits in the country.¹³

The future of the land acquisition is still in jeopardy. The author believes that the government is honest in emphasising on public infrastructure in rural and urban areas. Undoubtedly, India suffers from an infrastructure deficit and resultantly, developmental bottle neck. 21st century legislation must cater to the developmental needs of the 21st century India. It cannot utterly disregard the developmental needs of the society and mandate that India does not grow. Land acquisition is fundamental to the infrastructure development and the success of the Make-in-India programme designed to boost manufacturing and job creation with the goal of amplifying the growth of India.

¹² Pradeep Kaushal and Ruhi Tewari, 'Government climbdown: Fresh land ordinance minus key amendments likely by month-end', The Indian Express, August 26, 2015, Available at: <http://indianexpress.com/article/india/indiaothers/govtclimbdownfreshlandordinanceminuskeyamendmentslikelybymonthend/>

¹³ Amlanjyoti Goswami, Land Acquisition, Rehabilitation and Resettlement: Law and Politics, IIHS Working Paper.

THE ‘COLLEGIUM CONUNDRUM’: ANALYSING THE DYNAMIC BETWEEN JUDICIAL INDEPENDENCE AND TRANSPARENCY THROUGH NJAC, BILL

Akshara Vaishnavi Baru^{*}

Abstract

The article aims to understand the debate around the National Judicial Appointments Commission (NJAC) Bill, 2014 by delving into the analysis of the subtle dynamic which exists between Transparency and Independence of the Judiciary. The article discusses the need for bringing in greater transparency in the existing structure, which would enable the efficient functioning of the Judiciary. Further, the possible repercussions of overarching interference by the Executive and the Legislature, in the functioning of the Judiciary, under the cloak of ‘transparency’ are also discussed. Finally, the article concludes by suggesting possible solutions which would establish both a transparent system, as well as preserve the sacrosanct Independence of the Judiciary.

Keywords: National Judicial Appointments Commission (NJAC); Transparency; Independence of the Judiciary; Separation of Powers; Democracy

* Student @ Symbiosis Law School, Pune; Email: aksharabaru@gmail.com

INTRODUCTION

The National Judicial Appointments Commission aims to establish a body for the appointments and transfers of judges to the High Courts and the Supreme Court of India¹. The conception of this policy was a result of a long drawn debate over the opaque structure that previously existed for the appointments and transfers of judges. The ‘collegium’ system, as it was colloquially referred, allowed the supremacy of the Judiciary in the appointments over that of the Executive². Hence, the system snowballed into becoming an ‘imperium in imperio’- an empire within an empire, creating a ‘super-structure’, which lacked transparency and accountability³.

The NJAC Bill read with the 121st Amendment Act⁴, established a constitutionally recognised body-the National Judicial Appointments Commission, which would henceforth make such appointments and transfers. This Commission would consist of six members- the Chief Justice of India, two senior-most judges of the Supreme Court, the Union Law Minister and two eminent persons who would be selected by a committee comprising of the Prime Minister, the Chief Justice of India, Leader of the opposition party (or Leader of the largest single opposition party)⁵. After years of consistent dialogue over the need for transparency in the Judiciary, the formation of the Commission was primarily to institute this character. Despite the compelling debate that led to the policy change, a closer look at the Bill reveals cracks.

DISCUSSION

The higher courts in the India judicial system have over the years, through their proactive approach, become the protectors of the rights of the people⁶. The Supreme Court has shown remarkable Judicial Activism in cases relating to human rights, environmental issues and even corruption concerns⁷. Through its judicious directives, the Supreme Court has not only

¹ The National Judicial Appointments Commission Act, 2014; GAZETTE OF INDIA-Act No. 40 of 2014

² Sidharth Sharma, *What an independent judiciary is all about*, Business Line, October 3, 2014

³ Krishnadas Rajagopal, 1993 verdict upset ‘equilibrium’ of powers: Centre, The Hindu (New Delhi), May 6, 2015

⁴ The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, Lok Sabha, Bill No. 97-C of 2014

⁵ The National Judicial Appointments Commission Act, 2014; GAZETTE OF INDIA-Act No. 40 of 2014

⁶ Indira Jaising, *National Judicial Appointments Commission: A Critique*, Economic and Political Weekly, August 30, 2014, 17.

⁷ K.G. Balakrishnan, Chief Justice of India, Address at the Trinity College Dublin-Ireland, Judicial Activism under The Indian Constitution (October 14, 2009)

tied legislative loose ends, but has also become an authority on Affirmative Action. Hence, the Independence of the Judiciary has become imperative, both in theory and practice.

The major point of contention put forth by the critics of the NJAC is that the Bill encroaches on the Judicial Independence without fulfilling its primary objective of Transparency. The Bill contains several loopholes, which include- not defining the criteria for selection of the ‘eminent persons’, the power of veto-which disallows a recommendation if disputed by two members, the provision to override the appointment of the senior most judge as the Chief Justice, will not only allow wide interpretation thus leaving greater scope for arbitrariness, but will also violate the “basic structure⁸” of the Constitution⁹. The policy’s ambiguous provisions allow for the Executive to tread over the territory of the Judiciary, thereby violating the doctrine of Separation of Powers¹⁰, and ripping the tapestry of ‘check and balances’ so intricately knit by the Constitution of India.

It is necessary to analyse the concept of the Independence of Judiciary through the ‘Transparent’ glass and understand whether an ill-defined appointment process lacking transparency would hinder the independent functioning of the judiciary. A paper by David L. Weiden on the subject of understanding judicial politicization by analysing the Judicial Decision Making theory argues that in the judicial decision making process, subtle ‘informal’ norms in the appointment of the judiciary, play a greater role in determining the level of politicization of the Judiciary than the formal selection mechanisms¹¹. Extrapolating the inference from the argument, to the current mechanism established under the NJAC, it can be stated that such ‘informal’ norms would stem from the undefined provisions in the Bill. The paper further goes on to argue that such politicization of courts not only causes the judges to decide cases based on ideological leanings but further has an insidious influence on the process of Judicial Activism in courts.

S. P. Sathe in his book on ‘Judicial Activism in India: Transgressing Borders and Enforcing Limits’ emphasizes on the importance of Judicial Activism in Indian courts. He states the concept is practiced exclusively in the higher Judiciary with the objective of protecting the rights of the vulnerable sections as well as for compensating political circumstances which

⁸ Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461

⁹ Suhirth Parthasarathy, *Safeguarding judicial autonomy*, The Hindu, August 25, 2014

¹⁰ Indira Nehru Gandhi (Smt.) vs Raj Narain & Anr, 1975 SCC (2) 159

¹¹ David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, Political Research Quarterly, June, 2011, 335-347

limit the Executive and Legislature¹². He further goes on to stress the role of Judicial Activism as a counter for Majoritarianism in democracies¹³. These arguments stand particularly relevant in the current socio-political scenario existing in India. Hence, instituting a new model for the appointments and transfers of judges, without making it sufficiently transparent, not only negates the long advocacy efforts but imposes graver threats to crucial institutions in a democracy.

Digressing from the analysis of the ‘transparency-independence’ dynamic from the perspective of the NJAC Bill, it is also necessary to analyse whether establishing an overtly transparent system, by a directive of the Legislature, being implemented by the Executive, would hinder the independence of the Judiciary. The doctrine of Separation of Powers which has been recognized as a part of the basic structure of the Constitution¹⁴ demarcates functions between the three organs of the State. The doctrine, as practiced in India, provides a system of 'checks and balances' which allows mutual scrutiny by the organs on their exercise of powers. Therefore, the system provides for actions of the Executive to be reviewed by the Judiciary and vice-versa. It is a sine-quo-non for a well-functioning democracy, that such prescribed scrutiny does not become overarching and restrictive¹⁵. Therefore, though transparency is a welcome step, excessive interference of the Executive or the Legislature, is unwarranted.

CONCLUSION

There was an undoubted need for changing the existing system of appointment of judges to the higher courts. The Supreme Court has also recognised the excessively opaque functioning of the old collegiums system and recommended the establishment of a new process for the appointment and transfer of judges¹⁶. The NJAC Bill unfortunately establishes another ‘collegium’ with no transparency and more ambiguity. The ‘old wine in a new bottle’ trick not only devalues the efforts of the civil society, which has incessantly advocated

¹² S. P. Sathe, *Judicial Activism in India Transgressing Borders and Enforcing Limits* 278-81, Oxford University Press (2003)

¹³ S. P. Sathe, *Judicial Activism in India Transgressing Borders and Enforcing Limits* 278-81, Oxford University Press (2003)

¹⁴ Indira Nehru Gandhi (Smt.) vs Raj Narain & Anr, 1975 SCC (2) 159

¹⁵ Nidhi Singh, Anurag Vijay, *Separation of Powers: Constitutional Plan and Practice*, International Journal of Scientific and Research Publications, November 2013, Volume 3, Issue 11

¹⁶ Prashant Bhushan, *Scuttling Inconvenient Judicial Appointments*, Economic and Political Weekly, July 12, 2014, 13.

transparency, but has larger implications on the functioning of a major institution in a democracy. The primary intention of bringing in such legislation was to establish transparent mechanisms allowing competent interpretation of laws¹⁷. Establishing loose systems which leave wide scope for arbitrary interpretations becomes a much greater threat as currently there are no strong procedures for Judicial Accountability in India. The Judicial Standards and Accountability Bill, 2010 lies lapsed in the Parliament¹⁸, and a lack of transparency coupled with unaccountability is a fatal combination for a democracy.

The recommendations submitted by Justice M.N.Venkatachaliah and Justice B.R. Krishna Iyer¹⁹ for the formation of National Judicial Commission was that there should be a five-member committee which would consist of one ‘eminent person’. Such a composition with well-defined criteria for deciding an ‘eminent person’ would have ensured both transparency and independence of the judiciary. Non-subjective criterion such as acquiring specialized knowledge, having stipulated years of experience in a particular field and possessing prescribed qualifications could be taken into consideration while determining such ‘eminent persons’²⁰. Going a step further, there can be steps taken to establish a comprehensive system which would also ensure accountability of the judges. An independent investigatory agency and a three member body could be instituted for investigating charges against judges and for trying such cases respectively²¹.

The Constitutional validity of the NJAC Bill is currently under consideration with the Supreme Court of India. The Supreme Court has always maintained that striking down of legislation on the grounds on violation of the Constitution should be a “measure of last resort”. Hence, a few interpretative remedies can be put forth by the court for a more transparent functioning of the NJAC without compromising the Independence of Judiciary²². Defining the scope for the selection of the ‘eminent persons’, allowing the Chief Justice of India greater power in the appointment of at least one eminent person-where the person can only be appointed to the Commission if the CJI concurs with such recommendations, revealing the reasons for non-appointment and transfer of judges and allowing a greater say

¹⁷ Nirmalendu Bikash Rakshit, *Judicial Appointments*, Economic and Political Weekly, July 3, 2004, 2959.

¹⁸ The Judicial Standards and Accountability Bill, 2010

¹⁹ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law And Justice, Report No. 64, Rajya Sabha, 2013

²⁰ Arvind P. Datar, *A fatally flawed Commission*, The Hindu, August 17, 2014

²¹ Prashant Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*, Economic and Political Weekly, October 27, 2007, 14.

²² Chintan Chandrachud, *Interpretive remedies in NJAC case*, The Hindu, July 31, 2015

of the judges in the veto power by disallowing an appointment only if one of the judges veto's it. The Supreme Court, through its decision, can prevent the debate around the NJAC from becoming merely a turf war between the Executive and the Judiciary. A transparent Commission which does not interfere with Judicial Independence will strengthen democratic structures in India.

A BIRD'S VIEW OF THE BEST PRACTICES ON PROTECTION TO WHISTLE-BLOWERS IN US AND UK

Srishti Vaishnav *

Abstract

India being a democratic setup requires transparency and accountability in its functioning, whereas on the other hand the problem of corruption, which is deeply rooted in our society, affects the same as it drains away the resources of our country thereby causing distrust in justness of democratic institution. The idea which the founding fathers of our constitution had in their mind has still not been able to be implemented. Recent cases of Coalgate scam, Vyapam scam are examples of it.

A huge step was taken by the parliament in this regard by enacting a Whistleblowers Protection Act, 2011 which could curb the unethical practices prevailing in the country especially in government bodies. Enforcement of the Act has been left on the Central Government, which has not notified any date till date and various drawbacks are alleged in this legislation throughout India. There is a tendency to compare almost every piece of legislation with the laws of developed countries for better implementation. United States is said to have the best Whistleblower protection policy, therefore author has made an extensive research on this particular area and has covered almost each area of this law. Author has also made an attempt to highlight the whistleblower policy in United Kingdom. The idea behind this paper is to understand the international standards so as to apply them on our legislation. This article will help us to understand the possible vacuum prevalent in The Whistleblower Protection Act, 2011. Also, since Indian Whistleblower Act is yet to be enforced, detailed analysis of provisions of these countries will help us implement and amend (if needed) the law in a much more better way.

Keywords: transparency, accountability, whistleblower, United States, United Kingdom.

INTRODUCTION

A democratic model of governance was introduced by the founding fathers of Indian constitution having transparency and accountability its core components. This model is now

* Student- LL.M. (2015-16) @ Gujarat National Law University, Gandhinagar (Gujrat)

considered as the largest democracy all over the world. In the beginning years of democratic India, things went on smoothly as the country was under the leadership of those who struggled for its freedom. But in later years concentration of economic and political power led to the most loathed evil in our society i.e. corruption and in the present scenario, corruption has gone deep in to the roots of our country thereby draining away the resources of our country and causing distrust in justness of democratic institution. Constitution of India emphasizes on the principle that the holder of public office has a fiduciary duty towards the people but the reality is far away from it. The reason is corruption. The Incidents like Indian coal allocation scam, 2G spectrum scam and the most recent Vyapam scam are the examples of the current situation. Hence, there has to be a mechanism for holding public authorities accountable for corruption. One important step in this regard is the Whistleblowers Protection Act, 2011. The Act aims at extending protection to all those activists who intervene in their own organization and report unethical practices in the same. It also provides for providing mechanism for receiving complaints and inquiring into corruption but the Act is yet to be enforced. Since Indian Whistleblower Act is yet to be enforced, detailed analysis of provisions of these countries will help us implement and amend (if needed) the law in a much more better way.

The protection of public sector employees or private sector employees who make disclosure of unethical practices carried out within their corporation is necessary. The reason is to prevent their exploitation. Legislations have been passed in this regard by various major countries like Australia¹, Canada², Japan³, New Zealand⁴, South Africa⁵, United Kingdom⁶ and United States⁷ which lays down substantial provisions to protect whistleblowers. This article seeks to analyze the legislative position of U.S. and U.K. with regard to whistleblower protection.

¹ Public Interest Disclosure Act, 2003

² Public Servants Disclosure Protection Act, 2005

³ Whistleblowers Protection Act, 2004

⁴ Protected Disclosure Act, 2000 (NZ)

⁵ Protected Disclosure Act, 2000 (South Africa)

⁶ Public Interest Disclosure Act, 1998; Employment Rights Act, 1996

⁷ Whistleblower Protection Act, 1989; The Sarbanes Oxley Act, 2002; Dodd-Frank Act (Wall Street Reform and Consumer Protection Act), 2010

POSITION IN UNITED KINGDOM

United Kingdom has passed various legislations in this regard but most relevant is, the Public Interest Disclosure Act, 1998. As can be seen not only from the Parliamentary debates on the Bill but from the references to it in the White Papers on Freedom of Information Your Right to Know, the primary goal of this Act was to promote good governance and openness in organizations⁸ Due to its wider impact on governance and relevance across all sectors the legislation received broad support by the Confederation of British Industry, the Institute of Directors and all key professional groups. The Act's genesis lies in the analysis of scandals and disasters in the 1980s and early 1990s. At that time it was revealed in every public enquiry that workers had been aware of the danger but were either too scared to raise their voices against such danger or had raised the matter in the wrong way or with the wrong person. As a result of which, during this period, there were a series of disasters, which could have been averted only if insiders had communicated their concerns.

This position is better explained with various events which can be taken as example of abovementioned situation. The first and foremost is, *the Clapham Rail crash*, where the Hidden Inquiry even after hearing that an inspector had seen the loose wiring said nothing because he did not want 'to rock the boat'. Further, there was a case of *the collapse of BCCI* in which Bingham Inquiry found that, there was an autocratic environment in which nobody dared to speak.⁹ *The Piper Alpha disaster* (where the Cullen Inquiry concluded that "workers did not want to put their continued employment in jeopardy through raising a safety issue which might embarrass management"), Cullen enquiry was one of the major example of that time, the Cullen enquiry into the Piper Alpha Oil Platform explosion heard force in the UK sector of north sea field. Workers had not wanted to put their continued employment in jeopardy by raising a safety issue that might be seen as embarrassing to management and those short term contracts had been vulnerable to being 'not required back'. They had therefore suffered unsafe working practices in silence. It was the main incident due to which Public Interest Disclosure Act, 1998 was enacted.¹⁰

⁸ 'Your Right to Know' (Gov.uk 1998)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272048/3818.pdf> accessed 11 April 2015.

⁹ 'A Guide to PIDA' (Pcaw.org 2003) <<http://www.pcaw.org.uk/guide-to-pida>> accessed 15 April 2015.

¹⁰ John Macdonald and Clive H Jones, *The Law Of Freedom Of Information* (Oxford University Press 2003) 628

The G20 countries committed in 2010 to carry out adequate measures for protection of whistleblowers submitted a final report on Whistleblower Protection Laws. Its object was to analyze the current state of whistleblowers protection legislations and their application in identification of wrongdoing in both public and private sectors. The Table¹¹ stating the ratings¹² of the legislative regime against international principles is given as under-

#	Principle	Public sector	Private sector
1	Broad definition of reportable wrongdoing	1	1
2	Broad definition of whistleblowers	2	2
3	Broad coverage of organizations	2	2
4	Range of internal / regulatory reporting channels	1	1
5	External reporting channels (third party / public)	2	2
6	Thresholds for protection	1	1
7	Confidentiality protected	2	2
8	Internal disclosure procedures required	3	3
9	Sanctions for retaliators	2	2
10	Broad retaliation protections	1	1
11	Oversight authority	3	3
12	Comprehensive remedies for retaliation	1	1
13	Transparent use of legislation	2	2
14	Provision and protections for anonymous reporting	3	3

¹¹ Simon Wolfe and others, 'Whistleblower Protection Laws In G20 Countries Priorities For Action' (Transparency international Australia 2014)

<<https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>> accessed 16 April 2015.

¹² Rating: 1. Very or quite comprehensive, 2. Somewhat or partially comprehensive , 3. absent / not at all comprehensive

This report highlights the need to introduce laws for better protection of employees who work for private as well as public sector. The international principles which are only partially comprehensive or not at all comprehensive need immediate attention. For example, provisions regarding internal disclosure procedure, protection for anonymous reporting lack legislation and implementation. But on the brighter side, a significant progress has been made in certain principles like, regulating channels or remedies for retaliation which is commendable.

Overview of the provisions:

- The Public Interest Disclosure Act 1998 (PIDA) provides for comprehensive protection of whistleblowers in the UK.¹³ The main effect of PIDA was to amend the Employment Rights Act to embed whistleblower protections into employment law.¹⁴
- PIDA applies to a “worker” in both the public and private sectors, and extends protection to contractors.¹⁵
- Malpractice- The Act applies to people at work raising genuine concerns about crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health and safety or the environment and the cover up of any of these.¹⁶ It applies whether or not the information is confidential and whether the malpractice is occurring in the UK or overseas.
- Individuals covered- In addition to employees, it covers workers, contractors, trainees, agency staff, home workers and police officers. The usual employment law restrictions on minimum qualifying period and age do not apply to this Act. It does not cover the intelligence services or the armed forces.
- Internal disclosures (Section 1, ERA s.43-C)¹⁷ - A disclosure made in good faith to the employer (be it a manager or director) will be protected if the whistleblower has a reasonable belief the information tends to show that the malpractice has occurred, is occurring or is likely to occur.
- Regulatory disclosures (Section 1, ERA s.43-F) - The Act makes special provision for disclosures to prescribed persons. These are regulators such as the Health and Safety

¹³ The Public Interest Disclosure Act 1998 (PIDA)

¹⁴ Employment Rights Act, 1996

¹⁵ Employment Rights Act, 1996 s 43k

¹⁶ Employment Rights Act, 1996 s 43b

¹⁷ Employment Rights Act 1996 s 43 c (i)

Executive, the Inland Revenue and the Financial Services Authority. Such disclosures are protected where the whistleblower meets the tests for internal disclosures and, additionally, reasonably believes that the information and any allegation in it are substantially true and is relevant to that regulator.¹⁸

- Wider disclosures (Section 1, ERA s.43-G) - Wider disclosures (e.g. to the police, the media, MPs, consumers and non-prescribed regulators) are protected if, in addition to the tests for regulatory disclosures, they are reasonable in all the circumstances and they are not made for personal gain.
- Protection - Where a whistleblower is victimised or dismissed in breach of the Act he can bring a claim to an employment tribunal for compensation. Awards are uncapped and based on the losses suffered. An element of aggravated damages can also be awarded.¹⁹ Presently where the whistleblower's claim is for victimisation (but not dismissal) he may also be compensated for injury to feelings. Where the whistleblower is an employee and he is sacked, he may within seven days seek interim relief so that his employment continues or is deemed to continue until the full hearing.²⁰
- Secrecy offences - The legislation covers workers in the private and public sectors but Section 11 excludes the disclosures which would be an offence under the Official Secrets Act.²¹

Where the disclosure of the information is found to be in breach of the Official Secrets Act or another secrecy offence, the whistleblower will lose the protection of the Public Interest Disclosure Act if –

- (a) He has been convicted of the offence or,
- (b) An employment tribunal is satisfied, to a high standard of proof approaching the criminal one, that he committed the offence.

Following cases will help to understand the position in a better way.

Jonathan Aitken and the Daily Telegraph²²

In 1971, a prospective parliamentary candidate, Jonathan Aitken, was accused of offences under the Official Secrets Act for passing on classified information to the Sunday Telegraph.

¹⁸ Employment Rights Act 1996 s 43 f

¹⁹ Public Interest Disclosure Act, 2003 s 8

²⁰ Public Interest Disclosure Act, 2003 s 9

²¹ Lucinda Maer and Oonagh Gay, 'Official Secrecy' (house of common library 2008) <<http://fas.org/irp/world/uk/secrecy.pdf>> accessed 20 April 2015.

²² Maer and Gay (n 49)

This information was about the Biafran war in Nigeria. But, his plea that it was his "duty in the interests of the state" to have done so was accepted and a result of which he was acquitted of all charges.

Later on, a Report²³ was published by Public Concern at Work (PCAW), which compiled the case laws that has been decided by the Employment Tribunal. These case laws will provide us the clear understanding of the provisions of Public Interest Disclosure Act. A bare perusal of these cases signifies that the term 'detiment' has been given a broad connotation by the court.

Almond v Alphabet Children's Services (2001)

Tribunal held that the word 'Detiment' connotes an offer of less work to a casual worker. The brief facts of the case were as followed- Almond was a casual worker at a care home. ET held that after she made a protected disclosure (though to whom or about what is not stated in the summary decision), the care home offered her less work than they had previously. The ET found that this was a detriment and awarded her £1,000. Therefore, a wide connotation to the word 'Detiment' has been given by the ET.

Bhatia v Sterlite Industries (2001) - PIDA's application overseas; tribunal held, 'Detiment' includes threat to destroy the whistleblower; £800,000 award.

Evidence has suggested that due to the expense of running a whistleblowing cases, many whistleblowers accept a settlement in return for silence before going to the employment tribunal despite a ban for such clauses in Section 43J of PIDA²⁴. This has resulted in extensive use of 'gagging clauses'. These 'non-disparagement clauses' are counterintuitive to the release of information in the public interest to the public domain and removes the focus on rectifying wrongdoing. In 2013 the 'Francis Report' found: "non-disparagement clauses are not compatible with the requirements that public service organizations in the healthcare sector, including regulators, should be open and transparent".²⁵

PIDA does not apply to 'service members' i.e., employees of the armed forces, the Ministry of Defence and the intelligence services. They are not afforded protections when making public interest disclosures.²⁶ This is a glaring gap in the legislation, especially considering the

²³ 'Notable-Pida-Cases-2003' (Pcaw.org 2003)

<<http://www.pcaw.org.uk/cms/sitecontent/view/id/85/highlight/case+summaries>> accessed 20 April 2015.

²⁴ Contractual duties of confidentiality.-Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

²⁵ Robert Francis, 'Executive Summary' (The Mid Staffordshire NHS Foundation Trust 2013) <<http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/sites/default/files/report/Executive%20summary.pdf>> accessed 22 April 2015.

²⁶ Employment Rights Act 1996 s 192 and 193

highly secretive nature of such employers. In addition to this, there is restraint on disclosure of information if it concerns a matter of ‘national security’.²⁷

POSITION IN UNITED STATES

The most significant efforts for protection of whistleblowers have been made by USA. Initiation of these efforts can be traced through the Civil Service Reform Act of 1978 (hereinafter CSRA), which prohibited eleven personnel practices. Under this Act, a Federal Office of the Special Counsel (OSC or Special Counsel) was created, which was to provide adequate remedial measures to disgruntled whistleblowers before the US Merit Systems Protection Board (MSPB).²⁸ The relation between the two was that of a prosecutor and judge respectively. Along with these Acts, the major legislation in this regard is The Whistleblower Protection Act of USA (hereinafter the WPA Act). It is based on four primary principles. These are:

- (1) Giving whistleblowers an individual right of action (IRA) before MSPB so that they can control their cases.
- (2) Making the agency a risk-free option by elimination of the discretionary powers possessed by the Special Counsel.
- (3) Elimination of prior loopholes so as to expand the stage of protection, broadening the shield for protected conduct and expanding the scope of illegal employer conduct.
- (4) Focus on creating more realistic burdens of proof.²⁹

Another exclusive and commendable provision in the WPA Act is the ability of whistleblowers to *opt for a transfer*. This is a unique provision which is not available in any other country. After completion of litigation, whistleblowers often find the work environment to be hostile, where employers constantly find faults in their work in order to remove them from employment. This situation is remedied by the WPA Act, which enables whistleblowers to file petition for transfer. This provision can also be invoked during the interim stage. The legal position regarding whistleblowers in USA after commencement of WPA Act in 1989 has become a dynamic process wherein time and again new statutes come into force as per the need of time. The most recent and perhaps most significant of these statutes is the *Sarbanes-Oxley Act* which was enacted by the Congress in 2002. The need was felt, after the

²⁷ Employment Rights Act 1996 s 202

²⁸ Abhinav Chandrachud, ‘PROTECTION FOR WHISTLEBLOWERS: ANALYSING THE NEED FOR LEGISLATION IN INDIA’ (2004) 6 SCC (jour) 91

<<http://www.ebc-india.com/lawyer/articles/2004v6a9.htm#Ref35>> accessed 20 April 2015.

²⁹ ibid.

misconduct of companies such as Arthur Anderson, Enron and World.Com, to introduce a substantial legislation which provides for protection of whistleblowers who report that a company subject to the Securities and Exchange Commission's Regulations has engaged in any number of fraudulent activities, including federal mail fraud, wire fraud, securities law fraud, etc. on a reasonable belief.³⁰

Like Sarbanes-Oxley, Dodd-Frank also provides certain effective protections to whistleblowers. It defines whistleblower as any person who provides "information relating to a violation of the securities law to the SEC." It prohibits retaliation by employers (whether public or private) "because of any lawful act done by the whistleblower—(i) in providing information to the SEC in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC based upon or related to such information; or (iii) in making disclosures that are required or protected under Sarbanes-Oxley"³¹

Dodd-Frank also (unlike Sarbanes-Oxley) permits employees claiming retaliation to seek redressal in federal court directly without first seeking administrative relief, provides more time to do so (six years from the violation or three years from discovery of the violation, so long as such claim based on discovery is not asserted more than ten years from the violation itself) and provides for certain enhanced recoveries, including two times back pay with interest and attorney and expert fees. Dodd-Frank also created a bounty program, backed by a \$450 million investor protection fund, to incentivize corporate whistleblowing. The relevant provision provides that in any action by the SEC resulting in monetary sanctions exceeding \$1 million, the SEC "shall pay an award," in an amount between 10-30% of the monetary sanctions collected, to whistleblowers who "voluntarily provided original information to the SEC which led to the successful enforcement" of the action.³²

A report on Whistleblower Protection Laws in G20 Countries analyzing the current state of whistleblowers protection legislations and their application in identification of wrongdoing in both public and private sectors was submitted in 2014. The Table³³ for Whistleblower

³⁰ 'Sarbanes-Oxley Act Summary And Introduction' (soxlaw.com 2007)
<http://www.soxlaw.com/introduction.htm> accessed 18 April 2015.

³¹ Yaron Nili, 'The Expanding Scope Of Whistleblower Protections' (corpgov.law 2014)
<http://corpgov.law.harvard.edu/2014/05/21/the-expanding-scope-of-whistleblower-protections/> accessed 17 April 2015.

³² 15 U.S.C. § 78u-6(b)- Securities whistleblower incentives and protection

³³ Wolfe and others (n 36)

Protection Laws in G20 Countries Priorities for Action stating the ratings³⁴ of the legislative regime against international principles is given as under-

#	Principle	Public sector	Private sector
1	Broad definition of reportable wrongdoing	1	1
2	Broad definition of whistleblowers	1	1
3	Broad coverage of organizations	1	1
4	Range of internal / regulatory reporting channels	1	1
5	External reporting channels (third party / public)	2	2
6	Thresholds for protection	1	1
7	Confidentiality protected	1	1
8	Internal disclosure procedures required	2	2
9	Sanctions for retaliators	1	1
10	Broad retaliation protections	1	1
11	Oversight authority	2	1
12	Comprehensive remedies for retaliation	2	2
13	Transparent use of legislation	1	1
14	Provision and protections for anonymous reporting	1	1

This report highlights the need to introduce laws for better protection of employees who makes internal disclosure, but on the other hand it shows that U.S has substantial laws to protect the whistleblowers.

³⁴ Rating: 1. Very or quite comprehensive; 2. Somewhat or partially comprehensive; 3. absent / not at all comprehensive

In U.S., there exist numbers of legislations on this particular subject. The level of inconsistency among these laws, especially in corporate sector, is a concern to many US NGOs, stakeholders and regulators. The reason for this deficiency is due to increasing difficulties in implementation, inefficiencies and regulatory burdens entailed in having multiple laws that have evolved in ad hoc ways over time.

Analysis of Legal Position in USA

Government employees:

One of the world's first comprehensive whistleblower laws was The 1989 Whistleblower Protection Act, which covers most federal government employees which was significantly strengthened in 2012 by the Whistleblower Protection Enhancement Act. Among many improvements, it closed loopholes that discouraged whistleblowers from reporting misconduct broadened the types of wrongdoing that can be reported, and shielded whistleblower rights against contradictory agency non-disclosure rules through an "anti-gag" provision.³⁵ As a result of which, from 2007 to 2012, the number of new disclosures reported by federal employees increased from 482 to 1,148, and the number of whistleblower retaliation cases that were favorably resolved rose from 50 to 223.³⁶

Corporate employees:

Following the string of corporate and Wall Street scandals, two laws were passed- Sarbanes-Oxley and Dodd-Frank to grant legal protections and disclosure channels to private sector employees. These laws only cover the persons who work for publicly traded companies, thereby excluding about two-thirds of the country's non-agricultural workers. Under Dodd-Frank, more than \$14 million were paid to whistleblowers by the Securities and Exchange Commission (SEC) in recognition of their contributions to the success of enforcement actions pursuant to which ongoing frauds were stopped in their tracks. From the beginning of program in August 2011 to September 2013, the SEC received 6,573 tips and complaints from whistleblowers.³⁷³⁸

³⁵ 'Whistleblower Protection Enhancement Act Summary of Reforms' (pogo.org 2012) <<http://www.pogo.org/our-work/resource-pages/2012/20120917-whistleblower-protection-enhancement-act.html?referrer=https://www.google.co.in/>> accessed 25 April 2015.

³⁶ Carolyn Lerner, 'Annual Report To Congress' (US Office of special Counsel 2012) <<https://osc.gov/Resources/ar-2012.pdf>> accessed 27 April 2015.

³⁷ Sean McKessy, 'Annual Report to Congress on The Dodd-Frank Whistleblower Program' (US Securities and exchange commission 2013) <<https://www.sec.gov/about/offices/owb/annual-report-2013.pdf>> accessed 27 April 2015.

³⁸ Joe Nocera, 'The Man Who Blew The Whistle' (nytimes.com 2014)

Whistleblowing in intelligence agencies:

Notwithstanding the existence of internal whistleblower provisions for each of the national security and intelligence agencies (such as the CIA and NSA), US officials have time and again come under criticism for their prosecution of national security and official secrecy whistleblowers such as Thomas Drake, John Kiriakou, Bradley Manning and Edward Snowden. There are carve-outs for “classified information” but not for the agencies themselves. External disclosure is not permitted for these employees. In October 2012 President Barack Obama signed an executive order (Presidential Policy Directive 19) establishing new protections for national security and intelligence community whistleblowers.³⁹ Support for whistleblowers and advocacy for stronger legal protections, including the Government Accountability Project, Project on Government Oversight, and Public Employees for Environmental Responsibility is provided by many NGOs in the US.

The “Protected Activity” under Sarbanes-Oxley’s:

There is no dispute as to Sarbanes-Oxley’s Anti-Retaliation Provision which covers whistleblower disclosure relating to “fraud against shareholders.”⁴⁰, but, a difference of opinion has developed in the lower courts regarding whether disclosure of mail, wire, bank or other fraud must relate to “fraud against shareholders” in order to constitute protected activity under the statute. Some courts have taken independent construction of each of the statutes listed in Sarbanes-Oxley’s Anti-Retaliation Provision, and do not require that information relating to a violation of each of these statutes also “relate to fraud against shareholders” in order for protections to apply. To these courts, it is only necessary to show that the information relates to fraud against shareholders where the statute whose provision has been violated is not specifically listed in Sarbanes-Oxley’s Anti-Retaliation Provision. These courts reason that requiring each Sarbanes-Oxley retaliation claim to relate to the reporting of shareholder fraud renders the enumeration of the other fraud statutes “wholly superfluous.”

Application of Dodd-Frank’s Whistleblower Protections when an Employee Reports internally and not To the SEC:

<http://www.nytimes.com/2014/08/19/opinion/joe-nocera-the-man-who-blew-the-whistle.html?_r=1> accessed 28 April 2015.

³⁹ David Axe, 'Obama Order Protects Intelligence Community Whistleblowers' (www.publicintegrity.org/2012/10/15/11473/obama-order-protects-intelligence-community-whistleblowers) accessed 12 April 2015.

⁴⁰ 18 U.S.C. § 1514A(a)(1)-Civil action to protect against retaliation in fraud cases

An employee intending to disclose alleged wrongdoing generally has two options: external reporting (to a governmental authority such as the SEC), or internal reporting within the organization. Unlike Sarbanes-Oxley, under which a whistleblower is afforded the same protection whether he reports internally or externally, coverage under Dodd-Frank's Anti-Retaliation Provision for internal disclosures is unsettled. Dodd-Frank's anti-retaliation protections apply to three categories of whistleblowers: those who (i) provide information to the SEC; (ii) assist in an SEC investigation; or (iii) make "disclosures that are required or protected" under Sarbanes-Oxley, the securities laws, and other SEC regulations⁴¹. While the first two categories are clear (an employee is protected if he reports to or otherwise assists the SEC), courts differ as to whether the third and last category protects whistleblowers from retaliation after they have reported internally. Therefore, internal reporting is not an established principle under this Act.

Secrecy provision:

The United States does not have a broad-reaching Official Secrets Act, although the Espionage Act of 1917 has similar components. Although some has been struck down by the Supreme Court as unconstitutional because of the First Amendment, much of it still remains in force.^{18 U.S.C. § 798}, enacted in 1951⁴², makes dissemination of secret information involving cryptography, espionage, and surveillance illegal for all people, and is thus an "official secrets act" limited to those subjects. Scope of the espionage Act has been limited by the amendment and judicial pronouncement, now it is used only for certain limited provisions which are inalienable for the security of the state. The law is not restricted to properly prohibiting the release of classified information. The law is not restricted to protecting legitimate government secrets. The law broadly prohibits any publication by anyone (newspapers included) of information related to national security, which may cause an "injury to the United States".⁴³

CONCLUSION

From the above discussion it is clear that both the countries are having substantial laws to deal with the provisions relating to protection that needs to be given to Whistle Blowers. U.S had some restricted rules in the legislation but due to judicial pronouncement and

⁴¹15 U.S. Code § 78u-6 - Securities whistleblower incentives and protection,

⁴² 18 U.S. Code § 798 - Disclosure of classified information

⁴³Stephen Kohn, 'National Whistleblowers Center - The Guardian' (*Whistleblowers.org*, 2010)

<http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1320&Itemid=85> accessed 28 April 2015.

amendments, they have been liberalized. Judiciary has played a commendable role in the U.S. because of which broad protective guidelines and procedure has been established there.

In U.K, judicial and quasi-judicial authorities have played a tremendous role in providing justice to Whistle Blowers. A significant progress has been shown in providing remedies for retaliation which is commendable. Tribunal has given wide interpretation to the word ‘detriment’ and awarded compensation to the victims, which shows that even a minute impairment to whistle blower is not allowed there. Hope, Indian law adopts the same route as U.S. and U.K.

DOMAIN NAME DISPUTE RESOLUTION WITH RESPECT TO TRADEMARKS: LEGAL SOLUTIONS TO IT

Lahama Mazumdar* & Ritika Mohanty**

Abstract

In this study an endeavour will be made to examine about the concept of Domain Name Dispute Resolution. E-commerce and its link with Domain name disputes will be discussed. Domain names have been used as web addresses and their link with commercial activities on the net make them a business identifier. An attempt has been made to draw a comparison between trademark and web addresses. Various types of domain name disputes have been discussed. Indian framework with respect to domain name dispute has been thoroughly discussed along with cases.

In the last half of the paper the international legal framework of the domain name disputes has been studied. Remedies may be obtained in the two forums of Judicial Remedy and Arbitration Remedy. Judicial Remedy with respect to statutes in United States and the traditional remedy of passing off in operation in other countries and Private arbitration under the Uniform Domain Name Dispute Resolution Policy (UDRP) promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN) is within the domain of this paper. Various Cases will be discussed with respect to these policies. At last we have debated about the difference between INDRP and UDRP and various loopholes in it has been analysed.

Keywords: Domain, Addresses, Trademarks, UDRP, INDRP

* Student @ School of Law, KIIT Bhubaneswar, Odisha

** Student @ School of Law, KIIT Bhubaneswar, Odisha

INTRODUCTION

Internet has evolved from a United States government research project into a major medium of Communication. The Evolution of Domain name Systems (DNS) has facilitated international commerce and global exchange of knowledge.¹ Domain names are internet addresses that help users to locate the websites. It has assumed key role in E-Commerce. It facilitates the ability of consumers to navigate the Internet to find the websites and also Facilitates Business by serving to Identify and distinguish the business itself or its goods and services and to specify its Internet Location. E- Commerce is a very common term for the Current Generation. Commerce Conducted through electronic media facilitates an array of Activities including buying, selling, trading, advertising and transaction of all kinds which are conducted by processing and transmission of digitalized data. The Concept of Intellectual Property holds an importance in E-Commerce as otherwise they can be stolen or Pirated .Trademarks also form an integral part of The Web Business as is Branding, Customer Recognition, and goodwill. Several challenges have always appeared in the administration of E-Commerce and Trade. One of them being unauthorized copying of content causing loss of revenue of the owner of Rights. Disputes of Domain Names arise at the intersection of international trademark law and internet. Domain names having acquired increasing significance as business identifiers gave rise to policy questions due to conflict between domain names and standard intellectual property rights. The Domain name systems have a global presence where the standard IPR system has a territorial basis leading to notable disputes regarding well known trademarks being registered by entities having no relation to those trademark rights. Cybersquatting disputes are on a growing number reflecting it to be a premium business place.² To reconcile the disputes and complexities created by domain name disputes, a few remedies to has been developed by which the aggrieved parties can get their rights. The two most notable forums include - traditional litigation or private arbitration under Uniform Domain Name Dispute Resolution Policy (UDRP) promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN).

¹ Lisa M. Sharrock , *The Future Of Domain Name Dispute Resolution: Crafting Practical International Legal Solutions From Within The UDRP Framework* http://www.jstor.org/stable/1373211?Search=yes&resultItemClick=true&searchText=domain&searchText=name&searchText=dispute&searchText=resolution&searchUri=%2Faction%2FdBasicSearch%3FQuery%3Ddomain%2Bdispute%2Bresolution%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff%26amp%3Bgroup%3Dnone&seq=1#page_scan_tab_contents (Last accessed Feb 9th, 2015)

² Shahid Alikhan and Raghunath Mashelkar, Intellectual Property and competitive strategies in the 21st century 193-195 (2d ed,2011)

TYPES OF DOMAIN NAME DISPUTES

Cybersquatting

Cybersquatting is registering, selling or using a domain name reflecting the trade mark or brand name of another existing company for the purpose of making profit. Cybersquatting thus means occupying or buying domain name containing another person's trademark or brand name. Here the cyber squatter buys the domain name having the names of existing brands and then sells them to the lawful owners at a premium thus making huge money out of such transaction. A person who has nothing to do with the domain name thus pirates it to earn profits. For instance if yahoo.com is registered as yahoo.org with a top level domain or wwwyahoo.com by omitting a dot symbol or yaho.com by deliberate misspelling or yahooos.com, these are different ways in which cybersquatting can be done. Many countries have legislations to prevent cybersquatting, in US there are anti-cybersquatting consumer protection act (ACPA) along with this they have Federal trademark dilution act, 1995 that use doctrine of dilution to grant remedies to trademark owners. The Federal trademark dilution act, 1995 gives protection to the existing trademarks from those uses which dilute its distinctiveness. To come under the purview of this act a mark must be famous and the cyber squatter's use must dilute its distinctiveness. ACPA enables the owner to file a civil suit if someone uses his trade mark in bad faith to gain profit.

Profit grabbing

In this type of domain name dispute one register's the domain name that is identical or confusingly similar to the trademark or trade name of other in order to procure profit by making the website in such a way that misleads the users in believing that real owner of the trade name is the domain name registrant and no other person. It differs from cybersquatting in a way that in cybersquatting profit is made by selling back domain names to its lawful owners but in profit grabbing the registrant uses the brand name of a company in his domain and makes profit by making a site in a way that the users believe that real owner of the trade name is the registrant. In United Kingdom and Indian countries, law of passing off is applied to govern cases which involve profit grabbing. For instance in Satyam Infoway Ltd. V Sifynet Solutions Pvt Ltd. The Supreme Court held that internet domain names are subject to the legal norms applicable to other intellectual properties such as trademarks and the principles of trademark law and in particular to those relating to passing off would apply.

Misspelling/Typo squatting

Numerous individuals register Domain names which seem, by all accounts, to be like effectively existing Domain names. The distinction between profit Grabbing and Typo squatting is that in profit grabbing the defendant registers a domain name similar to a trade-name with the intention of trading with it, but in typo-squatting the defendant registers a domain name which is similar to an existing domain name. This entities mostly sell advertisements rather than products and services. Indian Courts use the principle of Passing off to decide cases of Typo-squatting.

Concurrent Claims

Concurrent claims are involved when two legitimate parties are involved in a dispute and both of them claim that they are the legitimate owners of the acquired domain names on account of using similar marks in their respective businesses. In the real world different people can use the same trade name due to different jurisdiction and different class of goods sold by them but when it comes to domain name a problem might arise as both will want to use their traditional names as domain names but domain names can identify only one site and is unique to that site. The remedies to it are sought in law relating to trademark, passing off, and unfair competition. Courts in cases of conflict usually give remedies against the parties who have unauthorized domain names.³

INDIAN FRAMEWORK

Overview

The use of internet in the field of education, commerce, trade has increased rapidly in the recent times which in turn increase the significance of domain names. In this scenario an efficient policy regulating the registration and addressing various issues of dispute resolution is indispensable. An .IN Internet domain name policy framework and implementation plan has been formulated and the policy was announced by the Government in October 2004. In January 2005, the Ministry of Communications and Information Technology, through the Department of Electronics and Information Technology (DeitY) and National Internet Exchange of India (NIXI) took the important step of setting up a state-of the art, hardware

³ Pankaj Jain and Pandey Sangeet Rai, Copyright and Trademark Law relating to computers, 120-135 (1d ed. 2005)

and software and recreated the .IN country code top level domain (cc TLD) Registry. For resolving the domain name disputes pertaining to the .IN domains the NIXI has evolved an Dispute Resolution mechanism namely .INDRP (.IN Domain Name Dispute Resolution Policy).⁴ .IN Dispute Resolution Policy was formulated by IN registry to resolve domain name disputes in India. It sets out terms and conditions to resolve disputes between the Registrant and the aggrieved person, arising out of the registration and use of the .in Internet Domain Name. The INDRP is in line with UDRP and other internationally accepted rules and policies. It is a policy applicable to country code top level domain (cc TLD) names⁵. In India the .IN domain names are registered with IN Registry which operates as an autonomous body under NIXI.

TYPES OF DISPUTES AND PROCEDURE FOR RESOLUTION

If any registered domain name is violating the rights of any person on the grounds that –

- The registrant's domain name is confusingly similar to a name, trademark or service mark in which the Complainant has rights;
- The Registrant has no rights or legitimate interests in respect of the domain name; and
- The Registrant's domain name has been registered or is being used in bad faith.⁶

Arbitration proceeding is mandatory in the event of filing a complaint to the .IN Registry. The .IN Registry website publishes a list of arbitrators and appoints an arbitrator out of the list maintained by it. Such arbitrators carryout the arbitration proceedings according to the Arbitration & Conciliation Act 1996. The arbitrator is appointed by the registry only after a prescribed fee is paid to the registry and when a copy of the complaint is sent to the respondent. Once the arbitrator has negotiated a reasonable award he must forward a copy to the complainant, respondent and registry. The award is passed within 60 days of the commencement of the proceeding. The registry before appointing an arbitrator also gives five

⁴ Advertisement For Arbitrators, NIXI, <http://www.nixi.in/files/Arbitrator%20advertisement.pdf>(last accessed Feb 9th, 2015)

⁵ INDRP In India (.IN DISPUTE RESOLUTION POLICY) , S.S Rana & Co. , http://www.ssrana.in/Intellectual%20Property/Domain%20Names/DomainName_INDRP.aspx last accesed on 8.2.2015 (last accessed Feb. 9th , 2015)

⁶ IN Domain Name Dispute Resolution Policy (INDRP) , [https://registry.in/index.php?q=.IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20\(INDRP\)](https://registry.in/index.php?q=.IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20(INDRP)) (last accessed Feb 8, 2015)

days' time period to the complainant to rectify and error if the complaint is not according to rules and policy of the registry. The communication with the arbitrator must not be unilateral and must be according to the rules of the registry. The arbitrator allows hearing, the general rule being that hearings are not mandatory. Except in some circumstances the arbitrator gives his decision in writing stating the reasons to the registry within 60 days from the commencement of proceedings. The registry must communicate the decision to each party within 5 days.

The registry and the registrar are not involved in the proceedings they only provide information to the arbitrator about the registration and use of domain names. Thus the proceeding is free from any kind of biasness. The authorities are not even liable for the activities of the arbitrator, in other words arbitrator is the sole authority to settle the disputes, the work of the registry ends just after appointing the arbitrator. After that they just have to exchange information between the parties and nothing else. The remedies include cancellation of the domain names of the registrant or transfer of registration of the domain name in the name of the complainant. Arbitrator may also provide damages if necessary.⁷

ADVANTAGES OF INDRP

INDRP leads to compulsory contrivance of the resulting decisions apart from this the process is legit, neutral and effective to all as there is no biasness. The registry publishes all the disputed domain names, case status and decision on its site thus making the process lucid and clear. INDRP grants relief whenever a person's interest or rights are violated or where there is similarity between domain names of the registrant and trademark of the complainant whereas in UDRP identifies only three situations upon violation of which relief is granted. Therefore we can say that INDRP covers a broader range of issues.⁸

CASE STUDY

⁷ Dispute Resolution Procedure, S.S Rana & Co. , [\(last accessed Feb 8th, 2015 \)](http://www.ssrana.in/Intellectual%20Property/Domain%20Names/DomainName_DisputeresolutionProcedure.aspx)

⁸ Differences Between UDRP and INDRP in India , S.S Rana & Co. , http://www.ssrana.in/Intellectual%20Property/Domain%20Names/DomainName_UDRPAndINDRP.aspx, (last accessed Feb 8th, 2015)

Morgan Stanley v Bharat Jain⁹

The domain name morganstanleybank.co.in was registered by Mr. Bharat Jain and the plaintiff contended that the respondent had no interest in the registered domain name and a mere extension of the cc TLD did not make the domain name distinctive and disparate and unrelated. He contended that the respondent had registered the domain name in bad faith just to make profit out of the domain name of the plaintiff. The arbitrator ruled in favor of the complainant and said that Mr. Bharat Jain was in no way related with the domain name and he was not allowed to use the brand name of the respondent.

Panavision International LP V Toeppen and Network Solutions Inc.(Case No. 97-55467)

The Toeppen argument was that the domain name was merely an address. The defendant further referred before the court a number of cases which were authority to the Fact that neither registration of Domain name nor acceptance for registration constituted commercial use within the meaning of federal Trademark Dilution Act. The court however was of the view that Toeppen's use was not as benign as he suggests. The court observed that toeppen traded on the value of Panavision's mark. So long as he held the Internet registrations he curtailed Panavision's Exploitation of the value of its trademark on the Internet.

THE INTERNATIONAL FRAMEWORK

Judicial Remedies in Domain Name Dispute

The Traditional Remedy of Passing off

The United states ACPA has been one of the most specific anti cybersquatting law. Other countries may have their own local laws but the absence of any specific legislation in other places leads the courts to use traditional infringement remedies. Cases instituted get injunction based on the threat of passing off and determination that the activities are likely to be confusing or are generally deceptive.

The issue of Jurisdiction mostly arise where it is determined by the fact whether it is accessible in the specific district or not. Other countries like Korea, Japan are trying to frame laws taking reference from United States ACPA to form a part of their own common law.

⁹ Morgan Stanley, U.S.A. v. Bharat Jain, U.S.A. , NATIONAL INTERNET EXCHANGE OF INDIA, [file:///C:/Users/SCHOOL/Downloads/morganstanleybankcoin%20\(1\).pdf](file:///C:/Users/SCHOOL/Downloads/morganstanleybankcoin%20(1).pdf)(last accessed Feb 9th, 2015)

These remedies have their own limitations as they vary from nation to nation and as known to all the procedure of these litigations are very expensive and costly leading to the victims to succumb to the threat of cyber squatters. It thus discourages the litigants to file claims. WIPO (World Intellectual Property Organisation) thus noted a need for a cost effective method which has to be internationally consistent and accepted to apply efficiently and impartially to the disputes that arise.¹⁰

Arbitration Remedy

The remedies mentioned above are basically judicial remedies that are most popular and referred by all but these remedies are territorial in nature and thus cannot provide a comprehensive solution to a conflict of a global dimension. In response to these concerns about judicial remedies and the conflict between territorial trademark systems and the global dimension of the disputes, WIPO (World Intellectual Property Organisation) in June 1998 accepted a United States Proposal for a consistent international approach.¹¹ ICANN (Internet Corporation for Assigned Names & Numbers) an internet technical coordination body was assigned a task of creating an uniform administrative procedure for the resolution of disputes concerning generic top level domain registrations. ICANN was thus responsible for the management of the Internet Domain name system and the stable operation of the Internet root server system.¹²

UDRP (Uniform Domain Name Dispute Resolution Policy) promulgated by ICANN (Internet Corporation for Assigned Names and Numbers)

ICANN implemented most of WIPO's recommendations in its Uniform Domain Name Dispute Resolution Policy (UDRP). The UDRP represents a substantial departure from traditional international trademark law. Worldwide trademark issues generally have been tended to through perplexing and prolonged arrangements that result in multinational

¹⁰ Lisa M. Sharrock ,

THE FUTURE OF DOMAIN NAME DISPUTE RESOLUTION: CRAFTING PRACTICAL INTERNATIONAL LEGAL SOLUTIONS FROM WITHIN THE UDRP FRAMEWORK
http://www.jstor.org/stable/1373211?Search=yes&resultItemClick=true&searchText=domain&searchText=name&searchText=dispute&searchText=resolution&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Ddomain%2Bname%2Bdispute%2Bresolution%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff%26amp%3Bgroup%3Dnone&seq=1#page_scan_tab_contents (Last accessed Feb 9th, 2015)

¹¹ Dispute Resolution Procedures,
<file:///C:/Users/SCHOOL/Downloads/Dispute%20Resolution%20Procedures.pdf> (last Updated Feb 9th , 2015)

¹² Pankaj Jain and Pandey Sangeet Rai, Copyright and Trademark Law relating to computers, 137 (1d ed. 2005)

settlements. Be that as it may, these conventional systems are ill suited to the quick moving, dynamic universe of the Internet. The lawful group's reaction to this novel circumstance has been blended. Some propose that a drastically new arrangement of control must develop as an Internet common law, while others keep up the oppositely inverse view that customary legitimate standards can and ought to be the selective method for securing and observing the Internet.¹³ The UDRP sets out the legal framework for the resolution of framework for the resolution of disputes between a domain name registrant and a third party over the abusive registration and use of an Internet domain name. It applies to all domain name registrars who are accredited with ICANN. The UDRP is a set of contractual provisions signed between the Domain name registrants and ICANN approved registrars. Before a registrar can cancel, suspend or transfer a domain name that is subject to dispute it must have a agreement signed by the parties, a court order or an arbitration award. The UDRP basically formed a cyber-arbitration procedure which is conclusive on the registrants. The policy further provides for mandatory administrative proceedings. The parties to an UDRP case are Complainant, respondent, dispute resolution service provider (DRSP) , panel and a registrar. The procedure goes like filing of a complaint by the Complainant then Complaint Compliance Review by DRSP, Commencement of administrative proceeding by DRSP, Filing of response by Respondent, Appointment of panel by DRSP then comes panel decision. The decision is notified by the DRSP and then implemented by the registrar. It is obligatory for the registrants to submit a mandatory administrative proceeding in case a third party asserts that the domain name is identical to a trademark or service mark in which complainant has rights, registrant has no rights or legitimate interest in respect of the domain name and the registrants domain name has been registered and is being used in bad faith. If the circumstances indicate that the registrant has been making commercial gains for the purpose of hampering the business of the competitor or by using it has the intention to attract for commercial gain internet users to registrant's website or other online location, by creating a source of confusion with the complainant's mark as to the source, sponsorship or endorsement of a product on registrants website it shall be evidence of the registration and use of the domain name in bad faith.

However a domain name proprietor can successfully guard his registration by establishing that he also has certain definite rights as regards the domain name. The remedies available to a complainant in a UDRP proceeding are limited to the transfer of the disputed domain name

¹³ *supra* note 6

to the complainant, or the option of the cancellation of the domain name. Neither monetary nor injunctive relief is available. Decisions are taken by the panel on the basis of the submitted complaint and response, without oral hearing. If the panel decides the transfer or the cancellation of the disputed domain name, the concerned registrar will normally implement the decision within ten businesses. If the complaint is denied, the registrar will unlock the domain name for the benefit of the respondent. ICANN has come up with the dispute resolution policy which has been adopted by many organisations who have formed their own panels (WIPO, CPR, NSI) approved by ICANN. Panels have focussed mainly on bad faith registrations and the extent of legitimate interest. If a party loses a UDRP proceeding, in many jurisdictions it may still bring a lawsuit against the domain name registrant under local law. For example, the administrative panel's UDRP decision can be challenged and overturned in a U.S. court of law by means of e.g. the Anti cyber squatting Consumer Protection Act. If a domain name registrant loses a UDRP proceeding, it must file a lawsuit against the trademark holder within ten business days to prevent ICANN from transferring the domain name.

LEADING CASE BY WIPO

Vodafone Group Plc v. Steve Ruston (Case No. D2001-0403)

The complainant Vodafone alleged that Defendant had registered the disputed domain name ‘vodafone.org’. The complainant had established its reputation in the famous mark of Vodafone. The panel thus held that the domain name be transferred to the complainant. The panel after going through the facts and evidence came to the conclusion that respondent had registered the domain name in bad faith and had attempted to sell the domain name to the complainant. The panel thus ordered the respondent to transfer the disputed domain name to the complainant.¹⁴

CONCLUSION

INDRP has many loopholes in its rules and regulations. The drawback of INDRP is that all the expenses with regard to the dispute are to borne by the complainant. In this case the complainant is burdened with the cost of the dispute which could have been distributed between the registry and the complainant with some expansion in the administrative panel.

¹⁴ Pankaj Jain and Pandey Sangeet Rai, Copyright and Trademark Law relating to computers, 142 (1d ed. 2005)

INDRP has made no provisions which can enable the complainant to file any complaint with any other court whereas in UDRP the procedure of appeal is present which gives the aggrieved a right to go to any other court to get justice. The URDP has a lot of benefits including Rapid resolution, Cost effectiveness, International jurisdiction, Simple procedure , Consistency in decisions and availability of appellate process but still limitations do exist including the UDRP does not apply to approximately 150 cc TLDs , under the UDRP the standards are the domain holder's bad faith and absence rights or legitimate interests , panellists may come from different backgrounds and may not be familiar backgrounds and may not be familiar with trademark law. There is no possibility of monetary damages in a UDRP proceeding. That is probably the major reason some people prefer to take their chances with a lawsuit. Finally, it's possible that the arbitration won't be the end of the dispute. These are certain drawbacks whose existence makes it really disappointing. The passing off common law action has far-reaching effects but no courts have the power to grant a remedy in passing off action of transferring the domain name back to the plaintiff as according section 135 of the Trademark Act, 1999. The trademark act only allows them to restrain the defendants from using such domain names having similar or identical nature which has been acquired with no legitimate right. ICANN has been empowered to transfer the same from the defendant to the plaintiff but noticing the rising number of cases, courts must also be empowered to do so.

CYBER FORENSIC: AN INSIGHT TO ITS GENERAL PRINCIPLES AND EXPANSE

Jacob Reji Olaserimannil* & Parvathy Manoj**

Abstract

These days, cybercrimes have increased considerably due to the tremendous advance in science and technology. The need to detect, combat and restrict such crimes are well facilitated by cyber forensics, which focuses mainly on identifying, preserving, analyzing and presenting digital evidence in a manner that is legally accepted using various methods of forensic analysis, namely network, disk, and device forensic. It is aimed at procuring the evidence of crime committed, preventing its further occurrence, presenting the evidence before the court of law and prohibiting in the future any kind of similar fraudulent activities. In this article we will discuss the need, prime objectives, tools for cyber forensics and the areas where forensic investigations can be initiated with an in depth discussion on network forensics, meta data, live-box and dead box forensics.

Keywords: Cyber Crime, Cyber Forensic, Router Log, Network Forensic, Meta data

* Student-B.B.A.LL.B.

** Student-B.B.A.LL.B.

INTRODUCTION

With the advent of science and technology, the 21st century man has progressed to an extent which was unimaginable 10-15 years back. All the qualifying phrases get prefixed before the word ‘man’ because of the advent of science and technology. None are the needs today that he can’t program and nothing sets a boundary to his imaginations. When all these technological progress are aimed at the betterment of the society, it cannot be ignored that they are used against the society too. The scope of anti-socials to harm the society is now limitless.

Today, Internet has become a way of life for millions and also a way of living, due to its rapid advent. Thus, with the increase in the use of internet and dependency of individuals in almost all fields, a number of new crimes related to computer and internet have evolved in the society. Technology coupled with internet serves both as a benefit to mankind and as a developed platform for crimes to be initiated against society using new and highly sophisticated tools.

Anything related to computer, information technology and virtual reality is collectively termed as ‘cyber’ and the crimes done with the use of computers coupled with internet as ‘cybercrimes’. Hence in the strictest legal parlance, the usage of apt forensic tools and technical knowledge to recover the electronic evidence within the contours of the rules of evidence, for it to be admissible before the court of law can be defined as cyber forensics¹.

Due to the high and exponential growth of Internet, crime rate has also raised up and legal institutions face very serious questions not only about regulating the internet, but also whether it could be regulated and what were the premises in which such criminal activities have taken place.

Traditionally Information Technology infrastructure was used to commit crimes, but with the change in scenario they are now the very target of crime. Examples such as defamation, pornography, sexual harassment, threatening e-mails, SPAM and phishing depicts computers

¹ Santanam , Raghu , *Cyber Security, Cyber Crime ad Cyber Forensics: Applications and Perspectives*, idea Group Inc, December 2010.

as a means to commit crime, when viruses, worms, industrial espionage, software piracy and hacking are examples where computers are the targets of crime².

There are two sides to every cybercrime. First, the generation side and second the victimization side. When the reconciliation aspect is taken into consideration, the number of cybercrimes should be related to the number of victimizations experienced. However equal number of correspondence won't be found often as the number of victims for a single cybercrime may be more than one or some may not even result in the same.

The threat of cybercrime should never be viewed from the narrow periscope of statistics; the scenario should be understood from a much wider montage. It is becoming an ever growing dangerous threat landscape, money laundering, terrorist activities, government offices and classified documents are at stake. It is no more a scene of an amateur hacker logging into his friend's e-mail account. Intentions are taking much deeper anti-social roots.

NEED FOR CYBER FORENSIC

'Forensic' broadly means "relating to or denoting the application of scientific methods and techniques to the investigation of crime". This can be considered a vital process with respect to investigation of any criminal activity as, even if it is for finding out and punishing the wrongdoer or preventing a future criminal activity of the same sort from taking place, the means of commission of the offence should be brought to light. And the very method of applying scientific analysis in a legal context can be termed as forensic science. However not all forensic are done to investigate crimes or present evidences in court; sometimes companies firms or organizations need to do forensic analysis for internal purposes ranging from increasing security, investigations, data recovery so on so forth. Thus, it is the technological and systemic investigation of the computer system for evidence or for supportive evidence of a civil or criminal wrong or a criminal act committed³.

"Cyber forensics"⁴ is the unique process of identifying, preserving, analyzing and presenting digital evidence in a manner that is legally accepted. Like any forensic analysis the branch of

² Dr. B. Muthukumaran, *Cyber Crime Scenario In India*, Criminal Investigation Department Review, January 2008.

³ P Tomar, B Rai, L Kharb, *New vision of Computer Forensic Science: Need of Cyber Crime Law* , The International Journal of Law, Healthcare and Ethics, Volume 4, No.2

⁴ Albert Marcella, Jr., Robert S. Greenfield, *Cyber Forensics: A field Manual for Collecting, Examining and Preserving Evidence of Computer Crimes*, CRC Press, January 2002

cyber forensics deals with collecting evidences regarding the cybercrime and try to unfold the event happened and brings to light whoever is responsible for it .Ever since technology and internet has taken over a ubiquitous role in our daily lives and the cyber realm is expanding. It does play a role in all criminal activities be cyber or not (Examples.1 You try to hack into a government server; the investigators can identify you by tracking the IP address.2. A plans to murder B. Sends a text message to C notifying him of the plan. Investigators can very well decode the text and use it as evidence against him). Thus the branch of cyber forensics of a country has to be well equipped with recent developments and technically sophisticated so as to crack all types of threats posed by the cyber criminals.⁵

The reality of the information era is having a significant impact on the legal establishments. Just simple collection of evidences of the activity using technical expertise will not get the case solved; it has to be legally admissible. Thus cyber forensic is the application of technical as well as legal interpretation into the evidences acquired. So how can investigation team make evidence admissible in court:-

1. The cyber crime investigators must be skilled competent professionals. This is essential so that they can properly conduct the investigation, collect the relevant evidences and instill confidence in the court about the admissibility of the evidence.
2. The original digital evidence must never be tampered with or altered. As far as practical, investigators must work on the image/clone of the original evidence. If that is not practical then extreme care and caution must be taken while working on the original evidence.
3. A detailed and accurate audit trail must be maintained. The chain of custody forms and other audit trail documents must be meticulously maintained. Any lacuna in these documents casts suspicion on the entire findings of the investigation.⁶

The Cyber forensic is not only useful in solving cybercrimes but also other anti-social and criminal activities like murder, terrorism, tax evasion, drug smuggling and the list goes on.

The need of cyber forensic can be construed into a three P need mix:-

⁵ Bill Nelson, Amelia Philips, Christopher Stuart, *Guide to computer Forensics and Investigations*, Cengage Learning, September 2009.

⁶ Dr. Swati Mehta, *Cyber Forensics and Admissibility of Digital Evidence*, SCC Journal Section , volume 5 (2011) pg 54.

1. Procuring evidence- The foremost and important step of gathering and analyzing of evidence of cybercrime committed falls under the first aspect procuring of evidence.
2. Prevention- Prevention of a similar attempt of activity by means of cyber tools in the future needs to be done, for which forensics has the most crucial role to play.
3. Presentation of evidences-Presentation the procured evidences in court by drawing conclusion by scientific methods. Courts till date are highly dependent on human witnesses, therefore in order to take the evidence into consideration it must presented in manner accepted by the legal system.
4. Prohibition- Prohibition of sites, blogs, activities, use etc of cyber tools which has proven fatal to interest of the society should be undertaken. Forensics helps in establishing the nexus between the prohibited elements to the offence that has been taken place.

When people's area of activity shifts, criminal activities also shift to the same area. Cybercrimes can be classified into three types; (1) Crimes directed against the computer (2) Crimes where the computer contain evidences and (3) Crimes where computer is used along with diverse technical tools to commit the crime. Therefore what is then done by the forensic experts is identifying, collecting and preserving evidences from disk, systems, networks and other peripheral components for the 4P mix.

OBJECTIVES OF CYBER FORENSIC

Cybercrime is among the top five underworld activities in the world. The objectives can be termed as the 6 A'S of Cyber forensics⁷ namely

- Assessment- Understanding the premises in which the activity as taken place as well as understanding the nature and scope of the incident
- Acquisition- Acquiring as much as of possible evidences of the incident occurred
- Authentication-Validating and verifying the evidence that has been acquired.
- Analysis-This phase involves the deep understanding of the incident and analysis of the same using tools and techniques.

⁷ N. Sridhar , Dr.D.Lalitha Bhaskar, Dr.P.S.Avadhani, *Plethora of Cyber Forensics*, International Journal of Advanced Computer Science and Applications, Vol. 2, 2011, pg 111-114

- Articulation- Writing a report in association with the legal provisions in a clear concise manner.
- Archival- Preservation of all the evidences and record in a secure manner of future references and moreover for taking preventive measures or steps.⁸

AREAS OF CYBER FORENSIC

Due to its vast extent, Cyber forensics can be divided into;

1. *Network Forensics*- Network forensics is the capture, recording, and analysis of network events in order to discover the source of security attacks or other problem incidents. It helps in identifying unauthorized access to computer system, and searches for evidence in case of such an occurrence. Network forensics is the ability to investigate, at a network level, things taking place or that have taken place across an IT system.
2. *Disk forensics* - Disk Forensics is the process of scientifically collecting and extracting digital evidence from storage media like Hard disk, USB devices, Fire wire devices, CD, DVD, Flash drives, Floppy disks, etc.
3. *Device forensics* - Device Forensics is the science of gathering digital evidence available in different types of devices such as mobile phones, PDA, iPod, printers, scanners, camera, fax machines, etc.
4. *Peripheral forensics* - This branch is related to forensics on peripheral devices like printers, scanners, plotters etc.⁹

Being of prime importance, network forensic requires detailed discussion.¹⁰

NETWORK FORENSICS

The concept of network forensics deals with the data found across a network connection mostly ingress and egress traffic from one host to another. Network Forensics analyzes the traffic from one host to another, the traffic data logged through firewalls or intrusion

⁸ K.K Mookhey , *Cyber Crime And Digital Forensics.*,

⁹ Mohd Mustafa Choudhary, *Cyber Forensics and Area of Focus*, Tata Consultancy Services White Paper , pg 6-14

¹⁰ www.cyberlawsindia.net/computer-forensics.html; (accessed on 6th march 2015)

detection systems or at network devices like routers¹¹. The goal is to trace back the source of the attack so that the cyber criminals are prosecuted.

Technically Network Forensics can be defined as “*the use of scientifically proven techniques to collect, fuse, identify, examine, correlate, analyze, and document digital evidence from multiple, activiely processing and transmitting digital sources for the purpose of uncovering facts related to the planned intent, or measured success of unauthorized activities meant to disrupt, corrupt, and or compromise system components as well as providing information to assist in response to or recovery from these activities*”.¹² Simplified, it uses scientific techniques to collect evidence from different digital sources to uncover the unscrupulous activities that occur in the cyber space.¹³

The large number of incidents affecting different organizations has paved way for extending the technique of forensic analysis towards networks. This branch of forensics monitors network traffic and checks for any anomalies in the traffic and ascertain whether there is any indication of an attack. If so, the nature of attack is being analyzed and network traffic is captured, preserved, analyzed and necessary action is taken in response.¹⁴ It is always desired by the intruder to keep his path of intrusion a mystery. But, with network forensics no such pathways remain a mystery.

What involves network forensics?

Unlike other digital forensics, network forensics deal with volatile and dynamic information. For example, if both ends of firewall are monitored, then one can easily get closer to the addresses and understand what was visited, when it was visited, and also the nature of site visited. Now, such findings will prove useful in an investigation to trace back the activities of the accused and prove his guilt or innocence.

Now how is the volatile information obtained; The devices or tools of Network Forensic captures the information packets exchanged across a network and keep a repository of the

¹¹ Rajdeep Niyogi, R.C. Joshi, Emmanuel S.Pilli , *A Generic Framework of Network Forensics*, , International Journal of Computer Applications (0975-8887) Volume 1- No. 11.

¹² Palmer G., *A Road Map for Digital Forensic Research*, 1st Digital Forensic Workshop 2001. New York, 2001pg 15-30.

¹³ Natarajan Meghanathan, Sumanth Reddy Allam and Loretta A. Moore, *Tools and Techniques for Network Forensics*, International Journal of Network Security & Its Applications (IJNSA), Vol .1.April 2009, pg 14-25

¹⁴ N. Sridhar , Dr.D.Lalitha Bhaskar, Dr.P.S.Avadhani, *Plethora of Cyber Forensics*, International Journal of Advanced Computer Science and Applications, Vol. 2, 2011, pg 111-114

same in an inbuilt or attached storage. The Network Interface Card (NIC) of these devices is configured in Promiscuous Mode, Which allows it to sniff all the packets in full packet capture mode. These devices generally keep the data in two formats, RAW packets and statistics or Meta Data. Meta data is data about data. It is the structured data which describes the characteristics of a resource. The Meta Data¹⁵ is of two types, namely – structural Meta data and descriptive Meta Data. Structural Meta data simply means ‘data about containers of data’ this is because when the data structure is designed, such an application do not have any actual data in it. Now, the descriptive Meta data contains the “data about the data”. They have samples of the data of the application and also the content of such data. Meta data offers a forensic investigator, a lot of useful information. They can trace down the original owner in case the investigation is regarding sale of unsuitable material or identify why the device was turned on and off frequently in case of a murder investigation and so on.

META DATA; REAL LIFE FORENSIC CASES

- The BTK Killer

Dennis Rader, also well-known as the BTK killer, which stands for bind, torture, and kill, started his killing chain in 1974 in Wichita, Kansas. He continued to live a deceiving life of a married father of two children and president of church until his arrest in 2005. He was responsible for 10 murders. There were DNA evidence and also a witness left at the crime scenes but the police and law enforcement were not able to capture him until 2005. After 30 years of deceiving life his murder chain ended in 2005 due to his casualness and lack of knowledge of computer forensic. He sent an email to a Wichita TV station about his crime. After inspecting the file, police and forensic experts were able to identify the author, Dennis and the organization, Christ Lutheran Church, from the metadata involved in file. Upon more investigation more details about the church, forensic experts were able to discover Dennis Rader, who was the president of the church¹⁶

- *Merck Report*

Merck is a pharmaceutical company which has been involved in various charges related to its arthritis drug medication. In 2005, important information regarding the medication’s danger

¹⁵ *An introduction to computer forensics*, Information Security and Forensics Society (ISFS) , April 2004, pg 6

¹⁶ www.acsupport.europe.umuc.edu/~sdean/ProfPaps/Bo_wie/S09/Blakeslee.pdf , *Use of computer forensics technology crime investigation*, Hyechin Blakeslee,

of causing heart attacks was deleted from a document sent by Merck was discovered by the New England Journal of Medicine. The track changes feature was used by the Merck while preparing the informational paper to be sent to the journal. The authors at Merck did not remember to accept the changes made to the original document and therefore released the document with all the metadata intact. Upon detail inspection, the Journal discovered the deleted text and after that released the information regarding the Merck's blunder¹⁷

To keep data history for backward analysis and Network Behaviour Analysis and Detection (NBAD) is a mandate to perform investigations and to understand the network behavior.

With increasing bandwidth usage and high speed networks going up more than 20 Gbps or more, it has become a challenge to record data.¹⁸ However improvised methods to overcome this are being developed.

- Types of Network Forensic Systems.

1. *Catch-it-as-you-can systems*

All the packets passing through a particular traffic point are captured and written to storage and subsequently analyzed. This requires large amount of storage.

2. *Stop-look-and-listen systems*

Each packet is analyzed fundamentally and only certain information is saved for future analysis. It basically analyses all the data as and when it comes in, filter the necessary ones and store the necessary. Since the pace of incoming traffic of data would be high, this system demands a fast processor.¹⁹

TOOLS FOR CYBER FORENSIC

The process of extracting digital evidences from various sources on the course of investigation can be carried out only with the help of specific tools (programs or specially designed circuits) specially designed for the purpose. The main objective of all these tools is

¹⁷ www.forbes.com/2005/12/13/microsoft-word-merck_cx_de_1214word.html , Ewalt, D. “When Words Come Back from the Dead,”

¹⁸ Mohd Mustafa Choudhary ,*Cyber Forensics and Focus Area*, Tata Consultancy Services White Paper pg 6-14

¹⁹ Emmanuel s Pilli, R.C. Joshi, Rajdeep Niyogi,*A generic framework for network forensics*, *International Journal for Computer Applications*, volume 11, 2010, pg 2

to make the digital or e-evidence admissible in a court of law. Just like a different spanner is required for every different nut, different tools are required for different crimes committed. A tool used for decoding a signal will be different from that used for log analysis. Following are a list of important cyber forensic tools;

1. *TCT or CORONER'S TOOLKIT*- It was created by D.Farmer and W. Venema. Mainly used for the recovery and analysis of data after cyber-attack on a UNIX²⁰ system.
2. *The Forensic Toolkit (FTK)*- It is a comprehensive forensic toolkit, used for the recovery of passwords, for gaining access to secure files and to crack encrypted files over a network.²¹
3. *NetWitness and security intelligence*-These are network traffic security analyzer tools.
4. *ProDiscover Incident Response (IR)*- This tool is developed by Technology Pathways. It is used to preview, image, search, analyze and report data. IR can be used to find data on a system without affecting it or getting it altered.
5. *MailXaminer by Sys Tools*- A forensic tool to extract email evidences from multiple email platforms through its extensive search and recovery mechanism.

These are some of the forensics tools that find application in the area of cyber forensics today.

CONCLUSION

Techniques and tools of cyber forensic, if duly made use of can reduce the discrepancies in investigations and increase the credibility of evidences produced. Effort must be made to popularize the practice of cyber forensic in all investigative scenarios. Apart from use in procuring evidence, the techniques like network forensic, disk forensic etc., cyber forensic can also be put to use to ensure internal security, data protection, and also restrict unwanted intrusion into the systems. What is required to use such facilities efficiently are qualified technicians, which is definitely in abundance, and our investigators being aware of such a platform for evidence procurement and putting the same to use.

²⁰ UNIX is a family of multitasking, multiuser computer operating systems that derive from the original AT&T UNIX, developed in the 1970s at the Bell Labs research center by Ken Thompson, Dennis Ritchie and others.

²¹ Albert Marcella Jr and Doug Menendez , Cyber Forensics A Field Manual for Collecting, Examining and Preserving Evidence of Computer Crimes. Aurbach Publications.2nd edition 2007., page 35

RIGHT TO INFORMATION AND THE PRACTICALITY OF PROGRESSIVE DISCLOSURE

Vegadarshi K*

Abstract

The Right to Information Act, 2005 laid down the guidelines for the effective realization of the fundamental right of speech and expression. In doing so, the act has opened doors to increased transparency and has been instrumental in exposing many scams in the nation. However, the procedures involved, like any other procedure, has been twisted and turned by the officials unwilling to disclose information, to deny the citizen the information he desires. The law makers, having learnt from their experiences in contemporary India were smart enough to include a mandatory section for disclosure of information. Hence Section 4 of the act deals with progressive disclosure by the government. In this comment firstly we look at a practical approach to the issue of progressive disclosure from the view point of the government and the citizens, who happen to be the stakeholders in this case. And lastly we look at certain basic steps that can be undertaken by the government to fulfill their burden under the section.

Keywords: progressive disclosure, right to information, right to know, Sec 4 RTI Act 2005

* Student- B.A.LL.B. @ National Law University Odisha, Cuttack Odisha; Email: 14ba057@nluo.ac.in

INTRODUCTION

The right of the citizens to obtain information on matters relating to public acts flows from the ‘Fundamental Right’ enshrined in Art. 19(1)(a) of the Constitution of India, 1950.¹ The Hon’ble Supreme Court has held that the Art. 19(1)(a) ensures and comprehends right to know and the right to receive information regarding matters of public concern.²

In the political arena, such a right plays an important role in determining our law makers. Let’s look at it this way, expression has many fold meaning, from something written to something spoken orally or even a display of emotion. This also envisages the right to hold an opinion. Now voting on the face of it is not expression, however when the voters turn up at the polling booth to cast his vote and has to make a choice, then the freedom of expression materializes.³ The object of such expression will be lost if the voter is not making an informed choice and hence it is essential to maintain the true integrity of the elections that people have access to the records of their candidates.⁴

So in all matters, *right to express and the right to know are interlinked by the right to information*. If the objective is to achieve a well informed citizen who can make rational decisions on the political front, this essential link has to be upheld in full stature.

*Dinesh Trivedi, M.P. and others v. Union of India*⁵ is a case on the point where the Supreme Court dealt with the right to information, and observed that “in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government, which having been elected by them, seeks to formulate sound policies of governance aimed at their welfare”.

The Hon’ble Supreme Court being an activist judiciary⁶ has done a lot to strengthen this right. But given that there are mainly two stakeholders, the government and the citizens of India, it becomes crucial that the two are fully aware of such developments. India has 26.96% of its population as illiterates (2011 figure) and 29.5% below poverty live (as per Rangarajan

¹ PUCL v. Union of India (2003) 4 SCC 399.

² State of Uttar Pradesh v. Raj Narain AIR 1975 SC 865 at 884.

³ M P JAIN, INDIAN CONSTITUTIONAL LAW (LexisNexis, 7th edition) 2007 at 1023.

⁴ *Supra note* 1.

⁵ (1997) 4 SCC 306.

⁶ Gardiner Harris, *India’s Supreme Court Restores an 1861 Law Banning Gay Sex*, THE NEW YORK TIMES, DEC. 11, 2013.

Committee 2014), quality education therefore is a luxury in most parts of India. In this scenario a balance has to be brought about by an active government. The recent trend has been that the government shuns away from their responsibility of ensuring the utilization of such rights,⁷ thanks to the enormous amount of scandals ranging from a few crores to few lakh crores.

SECTION 4 OF THE RIGHT TO INFORMATION ACT

However, a fresh change is seen in Sec 4 of the Right to Information Act, 2005⁸. This section calls for *suo moto* disclosure of information by various departments of the government. Obligations such as compulsory computerization within a reasonable time, ensuring availability of records of boards, councils and committees have been formulated. The budget, implementation plan, manner of execution of subsidy programmes and detailed allocations are now to be voluntarily disclosed.

The essential difference between Sec 3 and 4 of the act is that, Sec 3 remains a freedom whereas Sec 4 practically is everyone's right. In the sense that under Sec 3 the people can 'ask' for information, but under Sec 4 people will get information irrespective of their request.⁹ This is a very progressive piece of legislation as it seeks to bring in to reality what the Supreme Court has visualized since a long time.

This is also in conformity with Principle 2 of the Basic Principles of Freedom of Information Legislation developed by Article 19 (Global Campaign for Free Expression), one of the foremost activists for free speech in the world.¹⁰ Similarly these were endorsed by the UN special Rapporteur, Mr. Abid Hussai, on Freedom of Opinion and Expression in his report of 2000 session of the United Nations Commission on Human Rights.¹¹ In fact such steps are also in line with the idea of a modern 'open government'.¹² The policies rolled out by the government for the welfare of the people are best utilized when people are actually aware of

⁷ Himanshi Dhawan, *Reluctance to penalize weakening RTI: Study*, TIMES OF INDIA, Oct. 26, 2014.

⁸ Act No. 22 of 2005. [Hereinafter referred to as 'the act'].

⁹ SRIDHAR M, **RIGHT TO INFORMATION: LAW AND PRACTICE** (Wadhwa Nagpur, 1st Edition) 2007 at 110.

¹⁰ For more information See Article 19, *Peoples right to know* (International Standard Series) at <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> last accessed on 07/08/2015.

¹¹ UN Economic and Social Council, Commission of Human Rights, U.N.DOC/E/CN.4/2000/63 dated 5 April 2000 available on <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/16583a84ba1b3ae5802568bd004e80f7/> last accessed on 07/08/2015.

¹² OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE (O'Reilly Media, 1st Edition) 2010.

such policies existing solely for their benefit. Here we see, *the idea of welfare and awareness being linked through the right to receive information*. When for a government disclosure takes precedence, it instills a sense of accountability in the minds of the people and strengthens their trust in the capacity of the administration.

On a larger scale this rather facilitates the smooth functioning of the executive as well. For the government one of main hurdles, as they see it, is the open minded rational activist citizens thrusting for enforcing their rights. Failing such requests the government is put on a pitch battle with the groups who go on campaigns and protests thus affecting the smooth functioning. What the government fails to see here is that if there is actual transparency in the system, the activists groups have nothing to worry about. The crux of the point being, that once the government realizes its flaws of trying to cover up their tracks and move towards transparency, the friction is greatly reduced without anyone having to break a sweat about it.

PRACTICAL IMPLICATIONS: A CITIZENS PERSPECTIVE

Effectively right to know and the right to gather information, which is inherently a part of the right to information, is practically useless if there is no proactive disclosure by the government. The amount of time and tedious work put into gathering information by people can be greatly reduced. The general attitude of government official's reluctance, many a times is assisted by the fact that one can sit of a RTI application for a whole of 30 days and has been deterrent to people in need of quick information. The fundamental right of information qualified by the RTI act 2005 which calls for proactive disclosure needs to be followed a bit more seriously.

Such disclosures are not a burden on the government too. Though the section makes it compulsory for the offices to disclose certain grades of information at the time of the enactment of the act, there is also provision of the liberty to choose the most suitable mode and method of such disclosure. It wouldn't make sense for officials to be forced to convert all primary data on record in hard copies to soft copies on a hard disk, neither is it good for people of villages who do not have access to such electronic devices to be made accessible to such information. The aim of such implementation should be based on the common pillar of achieving maximum practical benefits. The execution plays a major role in such laws.¹³

¹³ For a more detailed discussion See Commonwealth Human Rights Initiative on Proactive Disclosure as at 08/08/2015 http://www.humanrightsinitiative.org/programs/ai/rti/india/officials_guide/proactive_disclosure.htm.

As effective as the section may seem, it does have its fair share of troubles. The law does not prescribe any mode of resource allocation and attention required to achieve the goal. Even if resources are being allocated towards it, the adequacy of such allotments is a very pertinent issue. As of this hour there is no clear guideline as to how the departments should go about executing it. Giving such a wide ambit for interpretation and the general lack of enthusiasm by government officials in such circumstance, begs the question: Is the purpose of the section truly being fulfilled?

Having said that, what we also have to look into is the scope of the officials who comprise of such government departments to carry out such a task. Many officials are ignorant of the existence of such laws and lack the basic training in whistle blower protection and basic mechanisms of the RTI.¹⁴ It is not enough to say that officials are reluctant to provide information, as it is also true that officials are unaware of their own obligation arising out of their office.

CONCLUSION

The present scenario calls for an inclusive awareness programme both for the public and the employees. One way of achieving such objective is for the government to work in close relation with RTI activist groups and NGO's or other institutions that specialize in such mechanisms. Other ways include, imparting basic training on the officials during their official training periods, or having compulsory seminars for them. The government can also utilize the social media and other print media to help aid the spread of such news. Overall, this is never a one sided effort. For achieving the true potential of such a law, the government and the citizens have to be reasonable and work in close proximity, with due regards to the practical implications and sometimes political ramifications.

¹⁴ *Supra note 9.*

ENABLING THE DISABLED

Ashita Bali* & Devanjali Chadha**

At present, there are four pieces of legislation for India's disabled. The earliest, the 1987 Mental Health Act, predates the discourse on assenting action¹ for the disabled in India and to that extent, the status of mental illness as a disability remains uncertain. There is a separate law that deals with the creation of qualified and trained personnel for the provision of rehabilitation and education services for this segment of the population. The third, the PWD Act of 1995, is reinforced by a prominence on anti-discrimination and guarantees of equal opportunities. Even though the latter was visualized as a comprehensive law, it did not take into account fully the conditions of persons with other equally severe disabling conditions. Hence the 1999² Act for people with autism, cerebral palsy, mental retardation and multiple disabilities. An incapacitated person is someone with a physical or noetic impairment which has a substantial and long-term effect on his ability to carry out mundane day-to-day activities.

Though there is **no clear definition of disability in India's Disability Act of 1995**, it gives out **types of disabilities** in section 2 (b) (i), being:

- i. *Blindness*
- ii. *Low Vision*
- iii. *Leprosy Cured*
- iv. *Hearing Impairment*
- v. *Locomotors Disability*
- vi. *Mental Retardation*
- vii. *Mental illness*

India has seen many disability rights activists like Javed Abidi, S. Ramakrishnan and Shyama Chona amongst others. **Such efforts have led to the introduction of The Rights of Persons with Disabilities Bill, 2014** which replaces the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995³; its features are as

* Student @ Amity Law School, Noida

** Student @ Amity Law School, Noida

¹ Available at: <http://www.thehindu.com/opinion/editorial/a-law-that-enables/article3540036.ece>

² Available at: <http://www.thehindu.com/opinion/editorial/a-law-that-enables/article3540036.ece>

³ Available at: <https://sadm.maharashtra.gov.in/sadm/GRs/PWD%20Act.pdf>

follows:

- In lieu of seven disabilities designated in the Act, the Bill covers 19 conditions.
- Persons with at least forty percent of an incapacitation are entitled to certain benefits such as reservations in inculcation and employment, predilection in regime schemes, etc.
- The Bill confers several rights and entitlements to incapacitated persons. These include incapacitated amicable access to all public buildings, hospitals, modes of convey, polling stations, etc.
- In case of mentally ill persons, district courts may award two types of guardianship. A constrained guardian takes decisions jointly with the mentally ill person. A plenary guardian takes decisions on behalf of the mentally ill person, without consulting him.⁴

Contravention of any provision of the Act penalizes confinement up to six months, and/or fine of Rs. 10,000. Subsequent breaches carry a higher penalty.

BODY

There is no denying the fact that India's Disability Act of 1995 provides sundry facilities for both children and adults with disabilities in India. Under this act, children with disabilities have the right to liberate inculcation until they reach the age of eighteen in schools that are integrated, or in 'special schools'. Children with disabilities have the right to congruous conveyance, abstraction of architectural barriers, as well as the restructuring of curriculum and modifications in the examination system. Scholarships, uniforms, books, and edifying materials are all provided to children with disabilities for free in India.⁵

A school cannot relent admission to a child with an incapacitation, or if a ramp or other betokens of access is destitute, parents have the option of taking the matter up with the Disabilities Commissioner for redressal. They are required to obtain a 'disability certificate,' in order to access the facilities mentioned above; this can be obtained from their most

⁴ Available at:

<http://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Legislative%20Brief%20-%20Disabilities%202014.pdf>

⁵ Available at: <http://www.mapsofindia.com/my-india/society/the-differently-abled-people-they-too-have-equal-rights-of-space>

proximate regime hospital, where an Identity Card from the, 'Office of the Commissioner for Disabilities,' will issue it. People in rural areas can obtain this Identity Card from their Block Development Officer's Office (BDO).

Three percent of all government jobs in India are reserved for people with disabilities and India's Disability Act includes affirmative action for people with disabilities.

People with disabilities in the nation of India who are seeking information in regards to the facilities available to them have to visit the Office of the Commissioner for Disabilities.⁶

However, the problem lies in the implication of the features laid down by the various acts enacted in order to protect the rights of the disabled. Also, what has to be taken into consideration is the fact that the current laws for the especially abled people are outdated. For example, considering the technological advancement, there should be special provisions for the visually impaired to access banks through ATM. Another example is of India's Railway Act which states that a person with leprosy may not board trains; however it is a well-known fact that leprosy is not contagious and a person suffering from it becomes non-infective within twenty-four hours of beginning the treatment.

India has taken a step towards promoting the rights of the disabled by signing the UN Convention on the Rights of Persons with Disabilities in 2007; however, the nation hasn't done much to protect the rights in accordance with the convention. National Director of the Disability Rights Initiative of the Human Rights Law Network, Rajive Raturi, states that present legislation does not include as many as twenty provisions of the Convention on the Rights of Persons with Disabilities⁷; particularly those that pertain to political and civil rights such as liberation from cruel and inhuman treatment, access to information, liberation of expression, the right to espouse and have a family, or liberation to participate in public and political life. According to current provisions of the law in India, people with noetic health disabilities cannot enter into contracts; they additionally have no property rights even though the Convention states the contrary.

To improve the condition of the especially abled in India, as mentioned above, The Rights of Persons with Disabilities Bill, 2014 has been introduced in the Parliament. It aims at fulfilling the obligations under an international treaty, punishing any person who violates the provisions with imprisonment and/or fine and in "extraordinary situations" district courts

⁶ Available at: <http://www.disabled-world.com/news/asia/india/>

⁷ Available at: <http://www.disabled-world.com/news/asia/india/>

may appoint plenary guardians for mentally ill persons.

CONCLUSION

An estimated 70 million disabled Indians are treated as second-class citizens and are forced to confront segregation, discrimination, barriers and stereotypes. To overcome this, various laws have been passed in the sub-continent. Supreme Court has also dealt with some famous cases including *Deaf Employees Welfare Association v. Union of India*⁸ wherein it held that the dignity of persons with hearing impairments must be protected by the state and equality by law and equal protection of law should be applicable to all persons.

In *Suchita Srivastava v. Chandigarh Administration*⁹, where at a government welfare institutions in Chandigarh, a disabled woman run became pregnant due to a rape by an in-house staff who wanted to keep the baby. Questions regarding this were raised, the Supreme Court granted the right to espouse and have a family under the UN Convention on the Rights of Persons with Disabilities.

In *Javed Abidi v. Union of India*¹⁰ the Court held that those suffering from locomotion disability to the extent of 80% and above would be entitled to the concession from Indian Airlines for travelling by air within the country at the same rate as has been given to those suffering from blindness

The nation of India very clearly has quite a ways to go afore it reaches a sense of equipollence in relation to people with disabilities. The fact that India has signed the Convention on the Rights of Persons with Disabilities is promising. One can hope that India will pursue the Convention, and find itself with parity in society for their denizens with disabilities.

⁸ Deaf Employees Welfare Association V. Union of India- Writ Petition (CIVIL) NO. 107 OF 2011

⁹ Suchita Srivastava v. Chandigarh Administration-(2009) 9 SCC 1

¹⁰ (CIVIL) NO. 326 OF 1997

ANALYSIS OF INDIAN AGRICULTURAL SECTOR AND POSSIBLE MEASURES TO STRENGTHEN IT

Aviral Arora*

Abstract

India is known for its vast expanse of agricultural land and its biodiversity of crops and cash crops grown in the nation.

Important crops such as rice, wheat and cash crops like tea, cotton are grown for domestic as well as for export to various countries. 60 percent of the total population of India is involved agricultural practices, though in an unorganized manner. Every year thousands of Indian farmers commit suicide due to several factors like government policy failure, market depreciation, crop failure, debt etc.

Strict measures for stopping this epidemic for our country are being taken but at a very sluggish rate and also the aids provided by the government only benefit the big land owners and often even don't reach to the small farmers.

A unique channel of work-survey-improve is needed to ensure proper growth of agricultural sector.

* ASET (Mechanical Engineering Department), Amity University Uttar Pradesh, Lucknow Campus; Email: aviralar@gmail.com; Contact: +91-8604811159

AGRICULTURE

The science of practicing farming, namely cultivation of soil for growing crops and rearing of animals to provide food, wool, and other products.

INDIAN AGRICULTURE

The history of agriculture in INDIA dates back to Rigveda. Today, India ranks second in world for farm output.

Agriculture is demographically the broadest economic sector and plays a significant role in the overall socio-economic fabric of India.

INDIAN AGRICULTURE: ECONOMIC CONTRIBUTION

- ❖ Agriculture continues to be the backbone of Indian economy.
- ❖ Agriculture sector employs 54.6% of the total workforce.
- ❖ The total Share of Agriculture & Allied Sectors (Including Agriculture, Livestock, forestry and fishery sub sectors) in terms of percentage of Gross Domestic Product is 13.9 percent during 2013-14 at 2004-05 prices. [As per the estimates released by Central Statistics Office]

The crop production of china is lesser than India and despite of holding the rank of the country with largest population it is the top second wheat exporter of the world(India being third).

Cases of farmer suicides in India, as of year 2014, were 5,650¹

Although GDP contribution of agriculture in India is higher than China and U.S. , still agricultural sector of India is highly unorganized.

Organizing and planning agricultural sector of India would decrease its poverty ratio and hence would enhance per capita income of the country.

¹ Available at: <http://ncrb.gov.in/ADSI2014/chapter-2A%20farmer%20suicides.pdf>

China and U.S. lead the world in agriculture only because of use of clever planning and regularizing its sector for maximum productivity. Modernization of Indian agriculture should be the prime concern for the government now

China has lesser agricultural land than India and China also possesses the largest population in the world, still it has lesser cases of farmer suicides.

PROBLEMS FACED BY INDIAN FARMERS

1. Agriculture is unorganized activity today

Indian agriculture is largely an unorganized sector. No systematic institutional and organizational planning is involved in cultivation, irrigation, harvesting etc.

Institutional finances are not adequately available and minimum purchase price fixed by the government do not reach the poorest farmer.

2. Most farms are small and economically unfeasible

The ground reality is that majority of the farmers in India own as little as two acres of land. Cultivation on such small area is not economically feasible. Such small farmers have become vulnerable.

In many cases, the farmers are not even the owners of the land, which makes profitable cultivation impossible because significant portion of the earnings go towards the payment of lease for the land.

3. Middlemen and economic exploitation of farmers

Exploitation by the middlemen is the reason put forth for not getting the best price for the produce of the agriculturists.

4. Government program do not reach small farmers

Government has implemented agricultural debt, waiver and debt relief scheme in 2008 to benefit over 36 million farmers.

However, most of the subsidies and welfare schemes announced by the Central and State governments do not reach the poor farmers. On the contrary, only big land lords are benefited by those schemes.

5. High indebtedness and exorbitant interest rates

The root cause of farmers taking their lives is the increase in their indebtedness and debt burden.

Exorbitant interest rates have to be declared illegal and the government has to take strict measures against greedy money lenders. Easy access to institutional credits has to reach the small and marginal farmers, without cumbersome procedures.

6. Real estate mafia

We can see even fertile land best suited for agricultural purpose being sold to real estate people, who prepare plots and give attractive advertisements to sell at exorbitant price. There is need to implement strict measures to prevent land grabbing.²

SOLUTIONS TO THE PROBLEM

1. *Multiple crops*

Cultivation of multi crops such as coconut, turmeric, pine apple, banana, apple, papaya, ginger will yield profitable results to the farmers.

2. *Special agricultural zone*

Just like industrial zone, there is an urgent need to establish special agricultural zones, where only farming and agriculture related activity should be allowed.

3. *Need to modernize agriculture*

By introducing farm techniques which guarantee a definite success, an increase in youth participation on agricultural fields is economically possible. This can be attained only by implementing new technologies. Research efforts should continue for the production of crops with higher yield potential and better resistance to pests.

Technological advancement in agriculture should be passed down to the small farmers.

Where the existing crops would not do well under drought and weather conditions, the farmers should be helped to shift to cultivating crops that would be easy and economical to cultivate.

4. Educate the farmers

Many farmers in India are not aware of crop rotation. Though education in urban areas has improved a lot, the government has ignored the same in rural areas in general and in agriculture sector in particular. This is the reason why farmers are not adequately aware of the various schemes provided by the government.

5. Clubbing of small fields may help

Several farmers who own small piece of land can join together and combine all small fields into one large chunk. This may help in variety of ways.

6. Need for meaningful crop insurance policies

Crop insurance is must and the claim should be settled easily under the supervision of the district collectors.

Traditional crop insurance depends on the direct measurement of the damage suffered by a farmer to determine his/her pay-out. However, field loss assessment is often not feasible or expensive, since most of our farmers are small holders.

Index based insurance, on the other hand, responds to defined parameter.

Index based insurance has the advantages that it is transparent and all the insurers within the defined geographical area are treated equally. It has low operational and transnational costs, while also ensuring quick pay-outs.

7. Need for better water management

Irrigation facilities that are currently available do not cover the entire cultivable land. Apart from the areas where perennial rivers flow, most of the agricultural fields do not have irrigation facility.

In most cases, it is not the lack of water but the lack of proper water management that causes water shortage. Improved modern methods of rain water harvesting should be developed.

Water management can be made more effective through interstate co-operation on water resources, where surplus water from perennial rivers can be diverted to the needy areas.

Connecting the rivers throughout the country will solve this problem. Construction of National Waterways will improve the irrigation facility, which in turn can save the farmers, if the monsoon would fail.

8. Alternate source of income for farmers

Small farmers should be encouraged to develop alternative sources of income and the government should take up the responsibility for providing training to the farmers to acquire new skills. In drought affected areas, the government should start alternative employment generation programs to reduce the dependence on agriculture as the sole source of income. Such programs should be standardized.

Farmers should be enabled to divide their activities into three parts. One for regular crop production, one for animal husbandry or fisheries and another for timber production. These activities complement each other and also alternate sources of income of farmers can be ensured.

9. Need for national weather risk management system/disease alert system

Facilitating national weather risk management system that alerts farmers when there is a danger of extreme weather, would go a long way in reducing losses in agriculture.

Value added services like pest and disease alert applications, in combination with the weather forecast would equip the farmers to handle and manage their crops better.

For example, Water Watch Cooperative, a Netherlands based organization, has developed a disease alert system that sends an alarm to farmers, if probability of a pest/disease would be detected.

Similarly, system that detect the amount of water to be provided to a field based on the field water content, biomass and rainfall probability, would aid in optimization of water provision to the crop and ensure efficient crop management.²

² Available at: <http://www.newsgram.com/the-farmer-question-6-main-problems-of-indian-agriculture/>
[Published on Sunday, July 5 2015]

SOLUTIONS BY GOVERNMENT

Details of the Initiatives are as follows:

- **Rashtriya Gokul Mission**

Rashtriya Gokul Mission a project under the National Program for Bovine Breeding and Dairy Development is being launched with the objective of conserving and developing indigenous Breeds in a focused and scientific manner. The potential to enhance the productivity of the indigenous breeds through professional farm management and superior nutrition, as well as gradation of indigenous bovine germplasm will be done with an outlay of Rs. 550 crores.

- **Rail Milk Network**

In order to promote Agri Rail Network for transportation of milk, orders have been placed by AMUL and NDDDB on behalf of Dairy Cooperative Federations for procurement of 36 new Rail Milk Tankers and will be made available by Railways. This will help in movement of milk from milk surplus areas to areas of demand providing dairy farmers with greater market areas.

- An allocation of Rs. 50 crore for development of indigenous cattle breed has been provided.
- ‘Blue Revolution’ for development of inland fisheries being initiated with a sum of Rs. 50 crore
- Target for providing institutional agricultural credit to farmers during 2014-15 has been enhanced to Rs. 8 lakh crore which is expected to surpass.
- Agriculture credit at a concessional rate of 7% with an interest subvention of 3% for timely repayment will continue during 2014-15.
- An allocation of Rs. 5,000 crore for 2014-15 has been made for scientific warehousing infrastructure for increasing shelf life of agricultural produce and thereby increasing the earning capacity of farmers.
- A higher allocation of Rs. 25,000 crore has been made to the corpus of Rural Infrastructure Development Fund during 2014-15 which helps in creation of infrastructure in agriculture and rural sectors.

- An initial corpus of Rs. 4,000 crore is being created to set up long term rural credit fund in NABARD to give a boost to long term investment credit in agriculture.
- For ensuring increased and uninterrupted credit flow to farmers and to avoid high cost market borrowings by NABARD an amount of Rs. 50,000 crore during 2014-15 has been made for Short Term Cooperative Rural Credit (STCRC-refinance fund).
- To improve access to irrigation, Pradhan Mantri Krishi Sichayee Yojana has been initiated with a sum of Rs. 1,000 crore in the year 2014-15.
- To mitigate price volatility in the agricultural produce a sum of Rs. 500 crore has been provided for Price Stabilization Fund.
- Government has initiated a scheme for Soil Health Card for every farmer in a mission mode with an initial allocation of Rs. 100 crore in 2014-15.
- An additional amount of Rs. 56 crore has been made to set up 100 mobile soil testing laboratories countrywide.
- National Adaptation Fund for climate change has been established with an initial allocation of Rs. 100 crore.
- To protect landless farmers from money lenders 5 lakh joint farming groups of Bhoomiheen Kisan will be financed through NABARD in the current financial year.
- A Kisan TV - Channel dedicated to agriculture will be launched with the initial allocation of Rs. 100 crores in the current financial year.
- An initial allocation of Rs. 200 crore has been allocated for establishing Agriculture Universities in Andhra Pradesh and Rajasthan and Horticulture Universities in Telangana and Haryana.
- An allocation of Rs. 100 crore has been made in the current financial year for setting up of two institutions of excellence in Assam and Jharkhand which will be at par with Indian Agricultural Research Institute, Pusa.
- An allocation of Rs.100 crore is made for 2014-15 for setting up Agri-tech Infrastructure Fund with a view to increasing public and private investments in agriculture and making farming competitive and profitable.
- In order to increase profitability for small and marginal farmers, Rs. 200 crore has been earmarked for setting up of 2000 Farmer Producer Organisations.

- Wage employment under MGNREGA will be mainly used for more productive asset creation substantially linked to agriculture & allied activities.
- Sum of Rs. 14,389 crore for Pradhan Mantri Gram Sadak Yojana for 2014-15 which will improve access for rural population including farmers.
- With a view to promoting farmers and consumers interest setting up of a national market will be accelerated by encouraging States to modify their APMC Act and other market reforms.
- With a view to develop commercial organic farming in the North Eastern Region a sum of Rs. 100 crore has been allocated.¹

Central Government recognizes and discharges its responsibility to assist State Governments in overall development of Agriculture sector. Effective policy measures are in position to improve agricultural production and productivity and address problems of farmers. State Governments are also impressed upon to allocate adequate funds for development of agriculture sector in State plan, as well as initiate other measures required for achieving targeted agricultural growth rate and address problem of farmers.³

FUTURE SOLUTIONS TO THE AGRICULTURAL PROBLEM

- * A separate committee should be formed which would perform as an extension of CAG (Comptroller and auditor general) India dedicated fully towards the audit of agricultural sector.
- * The committee hence formed should be headed by the CAG itself and comprising of the representatives from the Indian Administrative Services.
- * The sole work of the former should be to check whether the policies implemented by the Government have successfully reached to the beneficiaries or not.
 - To check whether the policies implemented are benefiting the beneficiaries and their efficiencies in the public grounds.
 - To audit the institutes dedicated towards development of Indian agriculture by scientific and educational means which are funded by the government.
 - To audit the contributions and rate of implementation of these contributions to the Indian farmers.
 - To audit state wise development of agriculture.

³ Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=113870> [Published on 22 December 2014 15:28 IST]

The sole purpose to form this committee is to improve the conditions of Indian farmers and abolish the corruption by middlemen and land mafia which is a major factor of failure of government policies.

CONCLUSION

2,02,090 crore is the total money allocated and earmark for agricultural sector (combined) by the government in the fiscal year 2014-2015 (sum distribution given above).

Assuming a puny share of 20% which would have been implicated after the release of 2,02,090 crore which would amount to INR 40,418 crore, the suicide rate was still 5,650 (data published by NCRB). Strict implications need to be applied for stopping this grave practice like Farmer's suicide because of high debt, crop failure, natural calamity etc. After their death, their families suffer poverty and suffering which is highly unfavorable for a nation like India which is on its path of development. Agriculture is the backbone of our country and hence strengthening it should be our prime concern.

THE ARMED FORCES SPECIAL POWER ACT AND THE QUESTION OF HUMAN RIGHTS

Madhulika Mishra *

INTRODUCTION

The Armed Forces Special Powers Act, 1958 (hereinafter referred to as the AFSPA) has been a contentious one since its very inception. Its application and justification in the north-eastern states of India has put it under the scanner time and again bringing with it the debate on human rights, their nature and the question of violation of such rights.¹ The aim of this paper is not concentrated on a critique of the AFSPA, rather the aim here is to highlight the issue surrounding the discourse on Human Rights, in the modern context, which is exceedingly nuanced and complex. The AFSPA an ongoing issue serves to characterize in stark hues the very nature of this discourse. It shows that the nature of the discourse is a ‘cross-talking’ of human rights, a lack of synthesis on what human rights are and how such conceptions differ in differing paradigms and the dominant paradigm in today’s context is the perspective of the state. This facet is brought to clearer focus by applying Emanuel Wallerstein’s Core-Periphery theory to the problem of AFSPA and thereby shows how the state is at the very Centre of the human rights dynamism.

This argument is juxtaposed in the context of the idea of collective rights and minority rights as human rights as naturally the claim of moral stance and repugnancy of the AFSPA are made by the ethnic minority as a collective.² It is this fascinating aspect of their claim of human rights violation in the larger landscape of issues of universality of human rights and who orders the discourse today that makes intriguing reading, bringing into sharp focus a concept of human rights that I call ‘personal’ as opposed to a universal notion of human rights and thereby suggesting a need to rethink what human rights actually is. I do not make a claim as to how to aind the minimum standard of human rights but rather the objective is to trace and an attempt to highlight a new understanding of the nature of human rights discourse and show that how the problem of its qualities, or lack thereof, of universality and commonality can be traced to an individual paradigm that is often unique to each individual situation.

* Student @ Gujarat National Law University, Gandhinagar (Gujrat)

¹ Rupert Emerson, *The Fate of Human Rights in the Third World*, 27(02) World Politics 201 (1975)

² Id. The author points out that there are more than sixty international treaties and conventions dealing with human rights issues, thus showing the evolution of human rights into a concrete force.

The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the more draconian legislations that the Indian Parliament has passed in its 45 years of Parliamentary history. Under this Act, all security forces are given unrestricted and unaccounted power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to ‘maintain the public order’.

This argument is juxtaposed in the context of the idea of collective rights and minority rights as human rights as naturally the claim of moral stance and repugnancy of the AFSPA are made by the ethnic minority as a collective. It is this fascinating aspect of their claim of human rights violation in the larger landscape of issues of universality of human rights and who orders the discourse today that makes intriguing reading, bringing into sharp focus a concept of human rights that I call ‘personal’ as opposed to a universal notion of human rights and thereby suggesting a need to rethink what human rights actually is. I do not make a claim as to how to find the minimum standard of human rights but rather the objective is to trace and an attempt to highlight a new understanding of the nature of human rights discourse and show that how the problem of its qualities, or lack thereof, of universality and commonality can be traced to an individual paradigm that is often unique to each individual situation.

PROBLEMS OF INTEGRATION

Much of this historical bloodshed could have been avoided if the new India had lived up to the democratic principles enshrined in its Constitution and respected the rights of the nationalities it had taken within its borders.³ But in the over-zealous efforts to integrate these people into the ‘national mainstream’, based on the dominant brahminical Aryan culture, much destruction has been done to the indigenous populations.⁴

³ To elaborate further, a lot of the demand for human rights is seen from the basis of the natural rights argument that certain rights are absolutely essential for humans and therefore they must have them. Contrast this with the social justice argument which traces human rights origin to the need to do social justice. Who does social justice? It is the state, and it is the very same state which determines the nature of the rights acceded to. See Jack Donelly, “Human Rights as Natural Rights”, 4(03) Human Rights Quarterly 391 (1982), who discusses Charles Beitz’s hypothesis that the aspiration of social justice is the root of human rights.

⁴ Robert McCorquodale, “Self-Determination: A Human Rights Approach”, 43(04) The International and Comparative Law Quarterly 857 (1994)

Culturally, the highly caste ridden, feudal society is totally incompatible with the ethics of North-East cultures which are by and large egalitarian. To make matters even worse, the Indian leaders found it useful to club these ethnic groups with the adivasis (indigenous peoples) of the sub-continent, dubbing them ‘scheduled tribes’. As a result, in the casteist Indian social milieu, indigenous peoples are stigmatized by higher castes.

Politically dependent, the North East is being economically undermined; the traditional trade routes with South East Asia and Bangladesh have been closed. It was kept out of the Government of India’s massive infrastructural development in the first few five-year-plans. Gradually, the region has become the Indian capitalist's hinterland, where local industries have been reduced to nothing and the people are now entirely dependent on goods and businesses owned predominantly by those from the Indo- Gangetic plains. The economic strings of this region are controlled by these, in many cases, unscrupulous traders.

IMPUNITY TO THE ARMED FORCES

Under Section 6 of the Armed Forces Special Powers Act, “No prosecution, suit or other legal proceedings shall be instituted, except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of powers conferred by this Act.”

This provision violates India’s treaty obligation under Article 2(3) of the ICCPR according to which: “Each State Party to the present Covenant undertakes:

To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;⁵ To ensure that the competent authorities shall enforce such remedies.”

⁵ See Louis Henkin, “The Universality of the Concept of Human Rights”, 50(06) Annals of the American Academy of Political and Social Science 10 (1989).

What is more worrying is the fact that Section 6 of the AFSPA has been overtaken by Section 197 of the Criminal Procedure Code¹⁰² (CrPC) amended in 1991 to provide virtual impunity to the armed forces. Impunity has been made a feature of normal criminal jurisprudence. In fact Section 197 of the CrPC has made section 6 of the AFSPA redundant. If the Central government were to give permission under section 197 of the Cr P.C., there is no reason as to why the same permission will not be granted under Section 6 of the AFSPA. In its Concluding Observations, the United Nations Human Rights Committee noted “with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant”.

There are adequate legal guarantees for preventing vexatious and frivolous actions. However, by making it mandatory to seek prior permission of the Central government to initiate any legal proceedings against the armed forces, the Executive has expressed its lack of faith in the judiciary of the country.

LEGAL ANALYSIS

The Armed Forces Special Powers Act contravenes both Indian and International law standards.

This was exemplified when India presented its second periodic report to the United Nations Human Rights Committee in 1991. Members of the UNHRC asked numerous questions about the validity of the AFSPA,⁶ questioning how the AFSPA could be deemed constitutional under Indian law and how it could be justified in light of Article 4 of the ICCPR. The Attorney General of India relied on the sole argument that the AFSPA is a necessary measure to prevent the secession of the NorthEastern states. He said that a response to this agitation for secession in the North East had to be done on a "war footing." He argued that the Indian Constitution, in Article 355, made it the duty of the Central Government to protect the states from internal disturbance, and that there is no dutyunder international law to allow secession.

⁶ Stamatopolou, "Indigenous Peoples and United Nations - Human Rights as a developing Dynamic", 16(01)Human Rights Quarterly 58 (1994) at 62

This reasoning exemplifies the vicious cycle which has been instituted in the North East due to the AFSPA. The use of the AFSPA pushes the demand for more autonomy, giving the peoples of the North East more reason to want to secede from a state which enacts such powers and the agitation which ensues continues to justify the use of the AFSPA from the point of view of the Indian Government.

INDIAN LAW

There are several cases pending before the Indian Supreme Court which challenge the constitutionality of the AFSPA. Some of these cases have been pending for over nine years. Since the Delhi High Court found the AFSPA to be constitutional in the case of Indrajit Barua and the Gauhati High court found this decision to be binding in People's Union for Democratic Rights, the only judicial way to repeal the act is for the Supreme Court to declare the AFSPA unconstitutional.

It is extremely surprising that the Delhi High Court found the AFSPA constitutional given the wording and application of the AFSPA⁷. The AFSPA is unconstitutional and should be repealed by the judiciary or the legislature to end army rule in the North East.

- **Violation of Article 21 - Right to life**

Article 21 of the Indian Constitution guarantees the right to life to all people. It reads, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Judicial interpretation that "procedure established by law means a "fair, just and reasonable law" has been part of Indian jurisprudence since the 1978 case of Maneka Gandhi. This decision overrules the 1950 Gopalan case which had found that any law enacted by Parliament met the requirement of 'procedure established by law'.

Under section 4(a) of the AFSPA, which grants armed forces personnel the power to shoot to kill, the constitutional right to life is violated. This law is not fair, just or reasonable because it allows the armed forces to use an excessive amount of force. This directly contradicts Article 14 of the Indian Constitution which guarantees equality before the law. This article guarantees that "*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*" The AFSPA is in place in limited parts of India. Since the people residing in areas declared "disturbed" are denied the protection of the

⁷ See H.K.Barpurjari, The Comprehensive History of Assam, Vol. 1, (Gauhati: Publication Board Assam, 1990).

right to life, denied the protections of the Criminal Procedure Code and prohibited from seeking judicial redress, they are also denied equality before the law. Residents of non-disturbed areas enjoy the protections guaranteed under the Constitution, whereas the residents of the Northeast live under virtual army rule. Residents of the rest of the Union of India are not obliged to sacrifice their Constitutional rights in the name of the "greater good".

- **Protection against arrest and detention - Article 22**

Article 22 of the Indian Constitution states that "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."⁸ The remaining sections of the Article deal with limits on these first two sections in the case of preventive detention laws. On its face, the AFSPA is not a preventive detention law therefore the safeguards of sections (1) and (2) must be guaranteed to people arrested under the AFSPA.⁹

THE VOLATILE NATURE OF HUMAN RIGHTS: QUESTIONABLE FOUNDATIONS?

A review of literature on the nature of what human rights are suffices to show the very volatility of the concept. It is commonly accepted that there exists this notional entity called human rights but proscribing boundaries to it seems to be a fool's task. Let us as the starting point take the fundamentals of human rights and dignity as is embellished in the United Nations Charter. Oppression has always taken the form of denial of human rights. These emerging states have in their early existence stressed on the need to protect the human rights and have looked to champion their cause. This posits interesting connotations in the context of this paper – considering that it is the objective of the state to protect the human rights of its people but what happens when it is the question of the power and continued dominance and legitimacy of the state versus the space needed for human rights to prosper especially

⁸ David R. Penna & Patricia J. Campbell, 19(01) Thirdly World Quarterly 7 (1998)

⁹ Federic L.Kirgis, Jr., "The Degrees of Self-Determination in the United Nations Era", 88(02) The American Journal of International Law 304 (1994)

amongst the marginalised sections? In such a situation, what are the human rights that are in question? Are human rights a necessary subset and gift of obligation to the state

AFSPA & THE HUMAN RIGHTS OBLIGATION: WHAT OBLIGATION?

The AFSPA was enacted in 1958 with the objective of suppressing the brazen naga insurgency and rebellion. The Act was meant to be valid for a period of one year only. The reason behind this was that the Act was known to be a tough measure and if it could not cure the problem facing it in that span of time, continued use would in all likelihood lead to excesses. That the AFSPA has failed in its objective is a stark reality. The tension has only further escalated with the ethnic militant groups on one side and the army on the other. The harsh nature of the act has led to a series of human rights violations being perpetrated by the army which has seen the local populace become all the more hostile to them. The demand for separation and autonomy from the regime of what they conceive to be an apathetic and vengeful state has only grown since the inception of the act. Clearly then there are two things *prima facie* wrong. First, it is the fact that the act in its application seems to have long been run to the ground and secondly, the nature of questions that have evolved out of its application do not seem to meet a common consensus. Section 4 posits a major problem in that it allows the state machinery to deprive any citizen of their live if they are suspected to be carrying anything that can be used as a weapon. The language is ambiguous and leads to long shadows for violators to hide in. Furthermore the sole qualification is that the armed force officer only has to give “such due warning as he may consider necessary.” When force of such kind is authorized, it must be within prescribed limits. These limits do not exist in this case and a strong case for arbitrariness may be made out.

The Act in its provision has created further resentment and a sense of injustice in that it provides for legal immunity to members of the armed forces forcing the notion that the guilty may often go scotfree and appearing to give a blank chit to engage in excesses. The reasons for the ‘alleged’ human rights abuses perpetrated by the armed forces under this act can be traced to the wide powers that the act vest in the armed forces to arrest people without warrants, and to shoot to kill in order to maintain public order. What can be enumerated here is that the situation at the time of enactment was not one where the public order in terms of the people of the territory was under danger rather the state’s ability to remain in control and legitimate that was in danger by the attempts of denial of the existing state structure by these groups. Let us take an example of the implementation of this draconian law.

HUMAN RIGHTS OBLIGATIONS - WHAT, WHEN, WHY?

Human Rights have attained a significant position in the International discourse today. As such, in India remains a signatory to the ICCPR amongst others. Article 4 of the ICCPR provides for the framework within which emergency may be declared. What is required is that there must be a ‘public state of emergency’ and must threaten the very life of the state and the state must also proclaim such emergency situation. According to the United Nations Human Rights Committee, measures so taken must be of an exceptional and temporary nature. Manipur has been declared a disturbed area on September 8, 1980 justifying the application of the AFSPA there. Under our legal norms, this has to be reviewed every six months with the effect that Manipur has been a disturbed area for the last twenty years and the number of secessionist/separatist outfits have grown from five to twenty five in that period. There has also in addition been external pressure from other non-state actors on the nature of the AFSPA. The United Nations Human Rights Committee for example after examining India’s third periodic report expressed its regret on the approach of the state to the ‘disturbed area situation’ in Manipur and its continued usage of the AFSPA.

LEGAL ARTICULATION: ONE OF BLIND DEFIANCE?

In Naga Peoples Movement for Human Rights v. Union of India, the supreme court held that the act was valid given the context in which it was enacted and where it was implemented, it was a reasonable and justified means even though it may appear to be harsh on the face of it, it was a necessity. The legal machinery is but an extension of the state – the state in disguise. The reliance on the competency of the Parliament dealing with matters of public Order under Entry I of List II has already been disputed in this paper. Another contention upheld by the Court is that the deployment of the Army is mean to supplement and not replace the existing state machinery.¹⁰ The larger issue here is that the army does not seem to be doing any ‘supplementing’; rather its excesses has propagated further violence and resentment towards state structure. Rather than trying to achieve public order it is actively contributing to public enragement.

RECOMMENDATIONS

¹⁰ H.K.Barpurjari, The Comprehensive History of Assam, Vol. 1, (Gauhati: Publicaton Board Assam, 1990).

The only way to guarantee that the human rights abuses perpetrated by the armed forces in the North East cease is to both repeal the AFSPA and remove the military from playing a civil role in the area. Indeed with 50% of the military forces in India acting in a domestic role, through internal security duties, there is a serious question as to whether the civil authority's role is being usurped.¹¹ As long as the local police are not relied on they will not be able to assume their proper role in law enforcement. The continued presence of the military forces prevents the police force from carrying out its functions. This also perpetuates the justification for the AFSPA.

Among the recommendations made by the Working Group on Arbitrary Detention, from 1994 was the statement that “*Governments which have been maintaining states of emergency in force for many years should lift them, limit their effects or review the custodial measures that affect many persons, and in particular should apply the principle of proportionality rigorously.*”

The National Human Rights Commission is now reviewing the AFSPA. Hopefully, the NHRC will find that the AFSPA is unconstitutional and will submit this finding to the Supreme Court to influence its review of the pending cases. However, the NHRC has a very limited role. In past cases, the Supreme Court has not welcomed such intervention by the NHRC. This was evident when the NHRC attempted to intervene in the hearing against the Terrorist and Disruptive Activities (Prevention) Act.

CONCLUSIONS

The Supreme Court of India reached a low for its lack of enforcement of fundamental rights in the Jabalpur case of 1975. The country was in a state of emergency and the high courts had concluded that although the executive could restrict certain rights, people could still file habeas corpus claims. The Supreme Court rejected this conclusion and said the high court judges had substituted their suspicion of the executive for “*frank and unreserved acceptance of the proclamation of emergency.*” Noted Legal luminary, H M Seervai notes that this shows the lack of judicial detachment. Indeed, it exemplifies deference to the executive which leaves the people with no enforcement of their constitutional rights. Jabalpur has since been deemed an incorrect decision, but it remains an apt example of the judiciary’s submission to the executive.

¹¹ David R. Penna & Patricia J. Campbell, 19(01) Thirdly World Quarterly 7 (1998)

The Supreme Court has avoided a Constitutional review for over 9 years, the amount of time the principal case has been pending. The Court is not displaying any judicial activism on this Act. The Lok Sabha in the 1958 debate acknowledged that if the AFSPA were unconstitutional, it would be for the Supreme Court to determine. The deference of the Delhi High Court to the legislature in the Indrajit case also demonstrates a lack of judicial independence. Moreover, there is an absence of creative legal thinking. When the Guwahati High Court was presented with international law argument in People's Union for Democratic Rights, the court ignored it. Justice Raghuvir said in a personal interview that the court could not use international law. If the government has signed an international convention like the ICCPR which requires the government to guarantee rights to its citizens, how can these are enforced if the judiciary does not turn to the text of the convention in its rendering of decisions? The courts are not turning to the spirit of the law which guarantees the fundamental right to life to all people and as a result violations of human rights go unchecked.

ALTERNATE DISPUTE REDRESSAL: ALTERNATIVES TO ALTERNATIVES; CRITICAL REVIEW OF THE CLAIMS OF ADR

Etisha Khaneja*

Abstract

Human conflicts are inevitable and so are disputes. The phenomenon, Law itself can be seen as an outcome of the quest to solve potential problems. For resolution of disputes there is a legal system in every state that constantly attempts to devise methods of establishing a cohesive society.

This Paper, to begin with offers an understanding of what Alternate Dispute Resolution Method is. The quest, advocacy and legitimacy of ADR vis-a-vis the positive aspect of reinforcement of the existing conventional system of litigation would be the next focus. The Paper also analyses the ADR mechanism on whether they deliver the promised outcomes. To conclude, an approach to access to justice has been put forward that would help achieve the goal as envisaged by the framers of our Constitution in its true spirit.

* Student- BSL.LLB, ILS Law College, Pune, University of Pune, Email: etishakhaneja.ilsl@gmail.com

CONCEPT AND ORIGIN OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM

“Everything has been said already, but as no one listens, we must always begin again”

- Andre Gide¹

Equality is the basis of all modern systems of jurisprudence and administration of justice in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and laws which are meant for his protection have no meaning and to that extent fail in their purpose.²

The movement towards the ADR was endorsed by a resolution at a meeting of Chief Ministers & Chief Justices.³ The meetings brought out that the courts were not in a position to bear the whole burden of determination of disputes and that a certain number of disputes were capable of being resolved by alternative methods of resolution such as Arbitration, Mediation, Conciliation and Negotiations.

Broadly speaking, ADR procedures fall into two categories, namely, adjudicatory and non-adjudicatory or consensual. In adjudicatory procedures like arbitration and binding expert determination it is the ruling or award given by the expert or arbitrator which is binding on the parties, the decision is an imposed one, meaning to say the parties do not participate in the decision making. In consensual procedures like conciliation, mediation and good offices the parties retain their freedom to decide the outcome of their dispute. The conciliator or mediator only facilitates the dispute resolution by helping parties identify the grounds for arriving at an amicable settlement. Thus, they always have a right to recourse to litigation or arbitration.

ADR is being increasingly appreciated in the field of law as well as in the commercial sector. It offers to resolve matters of the litigants, whether in business causes or otherwise, and reach a settlement. There are many disputes that go beyond the reach of litigation where an unconventional approach is to be taken especially suited to the needs of the dispute and joint

¹ French Thinker and writer

² Government of India, Ministry Of Law, 14th Report By Law Commission of India on Reform of Judicial Administration 587 (1958)

³ Held on 4-12-1993

interests of the disputants. It has great importance in private law and is considered to offer the best solution in respect of commercial disputes of international character.

QUEST FOR ALTERNATIVE DISPUTE REDRESSAL: ALTERNATIVE TO ALTERNATIVES

ADR has broken through the resistance of the vested interests owing to its broad range of methods used in an equally broad array of circumstances. It is being promoted as an escape route from the exasperating process of adjudication. They are designed to be offered as an alternative option to litigation and intended only to supplement and not supplant the legal system.⁴ According to an official report of the year 2000, there is a pendency of over two crore cases in our District Courts. Naturally Litigants have to face so much loss of time and money that at the long last when the relief is obtained, it may not be worth the cost.

Hence began the search for alternatives to the conventional court system. In its ideal form, ADR is perceived not only as resolving the dispute but also as placing back the relationship of the parties status quo ante the conflict.⁵ The Supreme Court of India has also suggested making ADR as ‘a part of a package system designed to meet the needs of the consumer of justice’.⁶ For example pre-litigation counselling, mediation points and other such informal methods have been introduced that operate within the shadows of law and help in performing conciliatory functions.

The is no single explanation, not even the convenient if simplistic argument that ADR is a way of avoiding court congestions, delays, expenses and procedural inconveniences and it seeks to justify the search for alternatives. The Act specifically on the issue of ADR & Arbitration was the new Arbitration Act, 1996 enacted to accommodate the harmonisation mandates of the UNICTRAL model.

The goals pursued by the users of ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contractual relationship

⁴ Examples are the Permanent Lok Adalat under the Legal Services Authorities Act, 1987 and Section 89 of Civil Procedure Code in India.

⁵ Sarvesh Chandra, *ADR: Is Conciliation The Best Choice?*, In Alternate Dispute Resolution: What It Is And How It Works 83 (P.C. Rao & William Sheffield eds., 1997)

⁶ FCI v. J Mohinderpal, AIR 1989 SC 1263, 1266; Salem Advocates Bar Association v. Union of India (2005) 6 SCC 344, 375-379.

and make their joint project a success.⁷ Such procedures offer the disputing parties an opportunity to solve their disputes amicably, without adversely affecting the fabric of their relationship so that their on-going relationship is preserved and the conflict is avoided to pave a better future and to do that, they have to break out of the usual legal barriers, mutually agree to take the risk involved and introduce a neutral party whose approach will not necessarily be a legal one.

The solution may also take innovative forms that are not available to the courts. A well-known settlement agreement accompanied by an amendment to the contract is an example of the same. This type of agreement embodies a subtle balance between remedying a contractual breach, an agreement on purely technical questions, and amendments to the provisions of the contract such as extension of the time for its performance. A compromise involving painful sacrifices but reached at the right time is far better than an award that is legally correct but has come too late or whose remedies and relief granted are inappropriate.⁸

It is a voluntary procedure that can be abandoned at any time by either party. There is open communication, mutual agreement and also most importantly, ADR can lead to a broader array of possible solutions as compared to the Courts. To continue, there are disputes whose determination is urgent and crucial since the technical and financial consequences of waiting would be too adverse for both the parties and hence not a feasible idea. In theory, Litigation and even Arbitration provide solutions to these needs, but in practice, the story is way different.

The Indian Judiciary has been facing flak for sacrificing the expediency of the litigatory process which has led to a large number of cases pending to what is called docket explosion. The surge of establishment of Special Courts and Tribunals⁹ started early in Independent India. Founding of labour Courts, Industrial tribunals, Consumer Forums, Motor Accidents Claim tribunals, Family Courts and then later Lok Adalats¹⁰ were all aimed at expeditious and efficacious disposal of matters. The Government cast under a legal duty to provide legal

⁷ 2 Jean Francois Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in *Adr In Business, Practices And Issues Across Countries And Cultures* 14 (Arnold Ingen-Housz, 2011)

⁸ See *id.* at 27

⁹ L Chandra Kumar v. Union of India (1997) 3 SCC 261,303-305 (Where it has been observed that ‘tribunals are set up to meet docket explosion’)

¹⁰ State Bank of Indore v. M/s Balaji Traders AIR 2003 MP 252-254

Aid¹¹, coupled with the decisions of the apex Court¹², led to the constitution of Lok Adalats which got legal backing from the Legal Services Authorities Act, 1987. “Resolving disputes through Lok Adalat not only minimises litigation expenditure, it saves valuable time of the parties and their witnesses and also facilitates inexpensive and prompt remedy appropriately to the satisfaction of both the parties”.¹³

Constitution of Fast Track Courts is next on the list. According to P.N. Bhagwati on the need to create adequate and effective delivery system of justice, the following are needed: creation of an ultra-modern disseminating infrastructure and manpower; sympathetic and planned system; need for new juridicare technology and models; remedy-oriented jurisprudence; and reforms of the justice administration and conflict management¹⁴. Successive Law Commissions have recommended reforms and have suggested multifaceted measures to grapple with the crisis¹⁵, meaning to say that there are absurdities in the justice delivery system of the nation that are being consistently attempted to remedy. Such absurdities of the legal system and attempts of establishing fora alternate to conventional litigation seemed to be perfect for the Introduction of ADR. From Special Tribunals and Courts to Fast Track Courts and then to Lok Adalats, the noticeable question that arises is that are we going on creating alternatives to alternatives? Perhaps the search will culminate in a remedy someday. As and when such a method of dispute resolution is discovered or devised or if it has already been discovered or devised it will be entitled to be given the name of ADR.

The above section of the paper aims to provide a clear framework for understanding and analysing the relevance and appropriateness of using ADR. It is thus important to have an understanding of certain relevant questions. What are the possible outcomes? What would be the best approach? What will be the risks involved if they proceed to binding adjudication? Suggest a form of amicable dispute resolution? Or what would be the most opportune time to initiate ADR? Does ADR present an advantage or disadvantage? It is thus important to

¹¹ Article 39A Indian Constitution. *Also see*, K. RAMASWAMY J, while delivering his key note address at Law Minister's Conference, at Hyderabad, 25-11-1975.

¹² M. H Hosket v. State of Maharashtra, AIR 1978 SC 1548, Hussainara Khatoon v. Home Secretary, State of Bihar AIR 1979 SC 1369.

¹³ K. RAMASWAMY J, Legal Aid News Letter, December 1995.

¹⁴ COMMITTEE ON JURIDICARE, DEPARTMENT OF LEGAL AFFAIRS, INDIA, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE, SOCIAL JUSTICE 33 (1977).

¹⁵ Besides the 114th, which is specific on the issue, the 14th, 76th, 77th, 124th and the 129th reports of the Law Commission of India, consider the need for reformation in Judiciary.

analyse all issues involved, circumstances involved and their objectives and critically examine all factors to determine which approach will permit the fewest possible errors.

LEGISLATIVE RECOGNITION OF ALTERNATIVE DISPUTE REDRESSAL; REENFORCEMENT OF THE EXISTING SYSTEM

There are varied models of conflict management and are categorised into four: rights-based, power based, interest-based and legislative¹⁶. The conventional method of access to justice is the recourse to formal adjudication mechanisms as provided by the state, meaning approaching the courts. In the legislative model, rules and laws are formulated by the appropriate authority for determination of disputes and creates a win-lose situation or both the parties may find themselves at the losing end.

The present model of legal system in India is of British import. It is also known as adversarial model of litigation. It is argued that the faith in the present day justice administration system is gradually being eroded.¹⁷ For some, as mentioned above, the crisis is the justification for seeking alternatives.

The movement towards ADR has received much support and acknowledgement from the Parliament. The Legal Services Authorities Act gave a strong legal backing to Lok Adalats which were considered as ‘People’s festivals of Justice’ because settlements are not always necessarily according to legal principles but on social goals like ending quarrels; restoring family peace; proving succour for destitutes.¹⁸ Section 30 of the Arbitration and Conciliation Act, 1996 encourages Arbitrators, with the agreement of the parties, to use mediation, conciliation or other such procedures at any time during the Arbitration Proceedings in order to encourage settlement. Section 89 of the Civil Procedure Code (Amendment) Act, 1999 was designed in such a manner so as to enable the courts to bring about out of court settlement listing four methods known as court-ordered or court-annexed ADRs as statutory alternatives to litigation and legally enforceable.

Before introduction of 2002 amendment, Justice Malimath Committee in its Report recommended:

¹⁶ Stephen B. Goldberg Et Al., *Dispute Resolution: Negotiation, Mediation, And Other Processes* 3-6 (2nd ed. 1992)

¹⁷ Reddy K. Jayachandra, *Alternate dispute resolution*, in *Alternate Dispute Resolution: What It Is and How It Works* 79 (P.C Rao & William Sheffield eds., 1997).

¹⁸ Avtar Singh, *Law of Arbitration & Conciliation; Alternative Dispute Resolution Systems* 504 (10th Ed. 2013)

“If a law is enacted giving legal sanction to such machinery for resolution of disputes and resort thereto is made compulsory, much of the inflow of commercial litigation in regular civil courts gradually moving up hierarchically would be controlled and reduced”.¹⁹

Where litigation is the mainstream and ADR as the abbreviation suggests an alternative, the legitimacy of the existence of alternatives needs to be validly established and conceptualised. Richard C. Reuben remarks “the incorporation of constitutional values into seemingly private ADR is achievable, necessary, and desirable.” However, creation of alternate fora doesn’t solve all problems. Many argue that the current position of litigation is such that our courts are bursting in themselves that it calls for a spring cleaning.

Huge pendency of cases and poor rate of conviction are the major problems of the Indian judiciary. With huge inflow of cases on a daily basis and substantial amount of arrears, the problem of arrears is taking a gargantuan shape.²⁰ The structure of our judiciary creates loopholes at all levels and there is a need to maintain a certain ratio of appellate courts to subordinate courts. At higher levels of judiciary, increasing the number of benches, at least the minimum, filling up of existing vacancies²¹ will help in addressing this issue. Quality of appointment has suffered enormously. Complaints are heard everywhere that judicial arbitrariness has replaced executive arbitrariness.²² Judiciary is independent but that doesn’t give it license to function arbitrarily. Thus the fault lies not in the institution but in the administration.

Loss of social harmony due to litigation is one major compelling reason to advance the cause of ADR.

The concept of litigation has no inherent loopholes and the complexity created by the existing laws and enactments is the case in point. The solution is the reformation and revamping of the system that is haunting our society.

The problem of delay lies in the extended role of the advocates who despite being officers of the court don’t have any accountability towards the expedient disposal of cases. Granting

¹⁹ Government of India, Ministry of Home Affairs, Report By Committee on Alternative Modes and Forums of Dispute Resolution Headed by Justice Malimath 112, 168, 170 and 171 (1990).

²⁰ See for details, B. Debroy, In The Dock: Absurdities Of Indian Law (2000).

²¹ It has been noted that 228 posts of High Courts judges remain vacant.

²² Government of India, Ministry of Home Affairs, Report by Committee on Reforms of Criminal Justice System Headed by Justice Malimath 134 (2003)

frequent adjournments by Judges on trivial grounds is another problem which everyone complains.

In this regard, the remarks of eminent jurist, Nani A. Palkiwala are relevant:²³

“....legal redress is time consuming enough to make infinity, intelligible. A lawsuit once started in India is the nearest thing to eternal life ever seen on this earth....

I am not aware of any country in the world where litigation goes on for as long a period as in India. Our cases drag over a length of time which makes eternity intelligible. The law may or may not be an ass, but in India it is certainly a snail and our cases proceed at a pace which would be regarded as unduly slow in a community of snails. Justice has to be blind, but i see no reason why it should be also lame: here it just hobbles along, barely able to walk.”

The price escalation of securing justice is a repercussion of the adversarial model of litigation which makes justice illusory in India.

In our constitutional framework, petitions for protection and enforcement of fundamental rights can be filed only in the High Courts and the Supreme Court. Hence, the issue of accessibility is another matter of great concern.

Uncertainty as to the forcible execution of the judgment, lack of finality of judgement, obsolete rules of admissibility of evidence, problem of bringing third parties to the proceedings are also notorious enough to be attended.

However, even the people endorsing ADR will agree that ADR cannot succeed in all situations and there are circumstances when litigation is inevitable. Each of the As in ADR- amicable and alternative and appropriate eventually take support of judicial assistance for enforcement. Cases that involve questions of law, constitutional issue and matters involving public interest need to go through the watchful eye of the judiciary. Also, the application of judicial wisdom can bring justice, is an accepted proposition. The courts even lay down a principle or set sail the development of law. The Courts’ role, their responsibility and their authority shouldn’t be misinterpreted or restrained to be just that of dispute resolvers. What we can hope is a vigilant judiciary that uses its discretion with responsibility.

²³ Nani A. Palkhivala, *We The Nation : The Lost Decades* 215 (1994)

HOW FAR THE EXISTING ADR FRAMEWORK HAS DELIVERED THE PROMISED OUTCOMES?

The often-quoted statement of Abraham Lincoln conveys the message to “discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expenses, cost and time” and this statement is the beginning point of many discussions on ADR. And the argument ends here.

Paradoxically though, this powerful, separate and independent branch of legal discipline has certain underlying weaknesses which can lead one to say that effectiveness of the present form of ADR system can be questioned. It has many detractors in the legal field, who claim that its importance is exaggerated. For some it makes businessmen think they can practise the law and lawyers that they can do business, a dangerous switch of roles that could lead to notorious problems.

From Special Tribunals/Courts to Lok Adalats to Arbitration, Conciliation, Nyay Panchayats, all are institutionalised and operate within the bounds of legislations. Hence the nature of informality in proceeding doesn't exist in reality.

Arbitration was the mother source of all the ADR mechanisms, recognised by statutory laws in India. However, it did not fulfil the intrinsic functions of ADR, failing to become an end in itself. Various criticisms have been levelled at Arbitration: High Costs; Delaying tactics; Set of procedural rules with unnecessary provisions; Bureaucracy by the Arbitration Institutions; Appointment of arbitrators with their interests in pleasing the parties for obtaining future projects; Risk that neither party will be satisfied which will result in uncertainty; Plethora of written submissions, hearings, witnesses, expert opinions; The methods used to resolve the dispute might lead to objections or a hasty assessment of the situation; fostering of unethical practices; Lack of confidentiality, since the procedure and Award may create rights to go to Courts; the transfer of public power to private bodies, leading to the risk of power play and privatization of justice.

The promotion and development of ADR mechanisms as a means of grappling with the increasing impediments posed by the rickety and mystified civil judicial system, is in its nascent stages in India. However, it does have some inherent problems:

- a) Mediator's opinion or decision is not enforceable by a process of forcible execution.²⁴
- b) Recourse to these practices can be dangerous if one of the parties does not act in good faith and uses important information to initiate arbitration or litigation proceedings.
- c) ADR can be transformed into a method of extremely effective delaying tactics, with one party seeking to manipulate the neutral or stringing out negotiations by causing continuous incidents or making false or minor concessions.²⁵
- d) It is a revocable procedure. If negotiations become too long and drawn out, or the neutral proves clumsy or incompetent, or obstacles emerge, the parties don't hesitate to abandon the process at anytime.
- e) In a society where power relationship plays a vital role the presence of free will is a mirage.
- f) Owing to considerable amount of antipathy met by ADR by the legal fraternity the following issues need attention like awareness, advocacy and most importantly effective implementation.
- g) Other causes of popular dissatisfaction with the process²⁶:
 - i. Prevents elaboration of development of law and judicial precedent.
 - ii. Public trials and publication of the decision results in protection of individual rights. Most of the ADR processes do not give scope for the same.
 - iii. Lack of public accountability.
 - iv. Loss of law's educative function.
 - v. Obscuring unequal social powers using the language of compromise, settlement and relationships.
 - vi. Prejudices forming part of the dispute settlement process. Prejudices of the parties are more likely to be apparent in informal proceedings and especially when they are away from public eye.
 - vii. Women and other traditionally marginalized sections of societies would be worse off in ADR proceedings.

²⁴ See *supra* note 9.

²⁵ See *supra* note 9.

²⁶ Bryant G. Garth, Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution, 18 Ga. St. U. L. Rev. 570, 570-571(2001). Kimberlee K. Kovach, Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With the Administration of Justice, 48 S. Tex. L. Rev. 1003, 1026-1042 (2007).

AUTHOR'S VIEW AND SUGGESTIONS

All the legal systems try to attain the legal ideal that whenever there is a wrong there must be a remedy and nobody can take law into his own hands. Law derives its authority from its people and resolution mechanism chosen by a society reflects the concept of justice in that society since Justice stands in intrinsic nexus with conflict management. The notion of Justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality.²⁷

A model where there is a fine synchronization and integration of the Adversarial Litigation and ADR methodologies can answer the requirements of access to justice in a country like India. But the means and ends of such a model must be creditable, practicable and conducive to the demands of justice.

Critical analysis of both the approaches must be taken into consideration with a view to set right all the loopholes in both these approaches at all levels. Attempts must be made with regard to revamping and reinforcing the traditional system of litigation by new comprehensive legislations, amendments in the existing enactments; specially the procedural laws and create constitutional safeguards with effective execution, formulating practical and workable solutions to the problems mentioned with detailed analysis and effective case management system. There is a dire need to address the issue of enforcement of fundamental rights guaranteed by the Indian Constitution by the three organs of the State. A special mention for the Judiciary to play a more pro-active role at all levels to set things right and bring back the faith in the people of this country in the approach of access to justice. The lacunae in both these approaches need to be deeply understood, analysed and channelized in the right direction in order to ensure a combined and synchronised system which is free from antipathy and resistance, feasible to a society like ours.

²⁷ J Rawls, *A Theory of Justice* (1997)

LEGAL ASPECTS OF CHARACTER MERCHANDISING

Anuttama Ghose* & Satya Prakash Mishra**

Abstract

In this study an endeavor will be made to examine the concept of Character Merchandising along with various legal liabilities associated with it. Character Merchandising alludes to the exploitation of that of the personal elements like appearance, acclaim etc of a fictional or non-fictional personality for financial gains. Character Merchandising to some extent also involves principles and rules of Advertising business and furthermore protected under Intellectual Property Laws.

The concept rose with Walt Disney and continuing with its immeasurable effect in the present world as well. . Shoppers of all age, uncommonly kids find these merchandised products to be monstrously attractive and engaging. Thus such an impactful strategy is protected under legal framework- Copyright laws, Trademark laws, Personal rights, Contractual obligations etc focusing on the Indian scenario.

Merchandising a famous character can wind up being very advantageous. But such a claim could lead to the charge of monopoly prices. Sometimes over notoriety of a personality and when such merchandised products are sold in the mass market at a cheaper rate can hamper the profit margin of the creator. The article concludes by highlighting the inadequacy of a more exhaustive and effective legal framework on safety standards for character merchandising in order to curb such unlawful activities.

Keywords: Intellectual Properties, Merchandising, Celebrity Rights, Fictional characters, Advertisement Strategies.

* Student- B.A.LL.B. @ School of Law, KIIT University, Bhubaneshwar (Odisha); Email: anuttama1993@gmail.com Contact:+91-78942708479

** Student- B.A.LL.B. @ School of Law, KIIT University, Bhubaneshwar (Odisha); Email: satyaprakahmishra15@gmail.com; Contact:+91-9040216932

INTRODUCTION

Recently, I went over a store for Chota Bheem merchandise in Chennai that had each item (towels, packs, footwear etc.) one could envision and I'm certain each kid who strolled into that store hasn't left without having a fit to possess one of those items! That truly made them consider how character merchandising has been a quickly developing market in India at this point. We've all been aficionados of kid's shows and anecdotal or imaginary characters sooner or later in our life and today; we have the chance of purchasing stock of our most favourite characters. I'm certain a large portion of us will admit to such liberality despite the fact that it's a bit heavy on the pocket and that shortcoming is the thing that the manufacturers of such products are likely taking advantage of!

Character marketing may be described as the commercial exploitation of the most basic elements, for example, the name, picture or appearance of a genuine or fictional character in connection to goods and services; shoppers are prone to buy the items because of the way that they feel acquainted with the well-known character and not just in light of the fact that they are concerned with the nature or quality of the item. As a rule, for example, in the marketing of Spiderman T-shirts, or toys, the picture of the character is the main reason that the purchaser will buy the item.

I would like to bring clarity on the different issues associated with character merchandising through this paper managing the sorts of security that can be looked for, issues relating to authorizing and why one should steer clear of selling counterfeit merchandise.

BRIEF HISTORY OF ORIGIN AND PRACTICES

The practice of Character Merchandising was initially introduced in USA in 1930 in Walt Disney Studios in California. It was Walt Disney that conceptualized this thought and started offering shirts, mugs, badges and different items with Mickey Mouse, Minnie Mouse and Donald Duck in 1940's. Since the time that maker of such fictional characters and identities are engraved for commercial exploitation and are appropriated among low priced business markets¹.

¹ Achilles C. Emilianides, Principles for the Protection of Character Merchandising in Cyprus, https://www.academia.edu/4050708/Principles_for_the_Protection_of_Character_Merchandising_in_Cyprus (last seen on 07.07.2015)

The traces of existence of the idea of secondary exploitation of reputation of characters prevailed even before the 20th century. For example, in Southeast Asia the religious character of Ramayana- Prince Ram, Hanuman, Sita for centuries have been presented in form of sculpture, toys, and have formed a well-known image to that of the people.

This thought in the later years were used for commercial purpose such as decorative plates, articles etc. For example, in French character Perrot Gourmand (famous mark for lollipop), work of Lewis Carol (Alice in Wonderland), character which additionally turned out to be delicate toy and was later received in film. In 1970 and 1980's promoting projects were situated up on premise of well-known characters from movies like Star Wars, E.T or Rambo.

In 1978, Walt Disney merchandising division sold \$ 27 million in their goods, while in 1979 Kenner Products sold over \$ 100 million in merchandising goods relating to character portrayed in the movie Start War.

ASPECTS AND NATURE

Character merchandising is the secondary exploitation of the essential features of a popular anecdotal character or a real person in respect of commercial articles, so that customers are ultimately purchase such products due to their love for the character or person. From a commercial or marketing point of view, character merchandising can presumably be managed within a single category.² However, from the legal perspective it is important to differentiate between the various subjects of merchandising, since the scope and duration of legal protection may differ according to the subject involved.. Broadly speaking, there are two types of character merchandising-

1. The first one is use of key features of a famous **fictional human character**, either appearing in a literary work or in a movie or as an artistic work, for merchandising. The examples of fictional character merchandising include, Pinocchio, GI Joe, James Bond toys, and t-shirts imprinted with images of Popeye, Scooby and other Disney characters. In India, the significant case of fictional character merchandising is the one based on comic character Chhota Bheem that was introduced in a television series in 2008. Because of popularity of the series and wide acknowledgement vast majority

² Raman Mittal, Character Merchandising: International Experience And Indian Perspective, <http://www.lesi.org/les-nouvelles/les-nouvelles-online/march-2011/2011/05/01/character-merchandising-international-experience-and-indian-perspective> (last seen on 05.07.2015)

of the characters procured within a short span of time, several movies have been made taking into account the character of Chhota Bheem and others.

2. The second type is **personality merchandising** where a renowned genuine individual, who could be a big name from the entertainment or sports industry or a national hero or worldwide legend, or some of their essential personality features, are utilized for promoting. Like utilisation of Madonna's name in respect of perfumes and fragrances; branding of Sachin Tendulkar enlivened personal care products under the name 'Sach'; endorsements of energy drinks and cosmetics by various celebrities. This is also called celebrity merchandising.³

This category can be subdivided into two forms.

- The first form comprises in the utilisation of the name, image or symbol of a real person. This form relates predominantly to famous acclaimed persons in the film or music business. However persons connected with other field so of activity maybe concerned.
- The second form occurs where masters in specific fields, such as renowned sports or music personalities, show in advertising campaigns in relation to goods or services. The appeal for the potential consumer is that the personality represented endorses the product or service concerned and is regarded as an expert. Here the product or service advertised is concerned with the activity of the personality.

Today, “merchandising” programs (may use personality character or not) may concern:

- universities organizations (with their official initials and logo)
- advertising campaign for Amnesty International in France with the participation of famous film actors,
- merchandising of the representation of a panda by the World Wide Fund for Nature (WWF))
- sports events (merchandising of the mascots of the 1992 Olympic Games in Albertville (France) and Barcelona (Spain))

³ Louis C Schimd, Legal Aspect of Merchandising, <http://www.olivares.com.mx/En/Knowledge/Articles/CopyrightArticles/Legalaspects ofmerchandising> (last accessed on 07.07.2015)

- personalities in many fields of activity (actors, pop stars, sportsmen, etc., whose names and images are reproduced on various goods, packaging, documents or other material).

Is Character merchandising a part of Intellectual Property Right?

Merchandising of fictional/cartoon characters includes utilisation of exceptional qualities of a renowned character such as the appearance, name, image, sounds/dialogues on buyer products. Some examples from India incorporate the utilisation of images of Mickey and Minnie on Cadbury chocolates, images of Spiderman on clothes etc. The premise of promoting could run from a simple cartoon character to a non-human character derived from a literary source to a character played by a genuine individual in a motion picture, drama or TV series to a real celebrity⁴.

1. **Literary works:** From classic children's stories such as The Adventures of Pinocchio, Alice in wonderland to cartoon characters like Garfield, Calvin and Hobbs, literary works have been the largest source of origin of the fictional and cartoon characters. While some of these legendary literary sources describe characters in such detail that readers can easily imagine the characters. Tintin, one of the well-known cartoon strips, was created by the Belgian cartoonist Georges Remi, and was first published in 1929 in a Belgian daily newspaper. The cartoon strips became so widely popular around the world that the character of Tintin was featured in numerous animated movies and television shows.
2. **Artistic works:** Artistic works such as Leonardo Da Vinci's Mona Lisa also form part of merchantable characters around the world. A number of paintings by Raja Ravi Varma, a famous Indian artist of the 19th century, have found their path into merchandising.
3. **Cinematograph films:** Cinematographic movies or motion pictures achieve a more noteworthy area of the populace over the globe because of their high diversion esteem. Characters from prevalent films can hit a moment harmony with the purchasers and consequently, organizations crosswise over different areas use motion picture characters to advertise their products and services. Animate films, for

⁴ Pauline Sadler, Character Merchandising and the Sporting Industry, http://espace.library.curtin.edu.au/webclient/StreamGate?folder_id=0&dvs=1435751434718~824&usePid1=true&usePid2=true (last seen on 07.07.2015)

example, shark, Kung Fu Panda, Lion King and Cars are hugely famous among not just children however over all age bunches. The human character utilized for promotion of aerated soft drink s, 7-up and Zoo characters that highlighted in Vodafone commercial ad series are best illustrations of fictional characters made through advertisement movies.

4. **The icons or mascots of famous brands or events:** The mascots or several sports and cultural events like Appu elephant of Asian Games in India and 'Footix' of FIFA world Cup in France provide lot of opportunity for merchandising during the organisation or the event the iconic characters presenting well-known brands such as the Android bot, Kellogg's rooster, Kingfisher bird, etc., are utilized on goods other than the ones they represent, for brand recognition purposes.

Merchandising of intellectual property (IP) is the showcasing system where the goods or services are improved and adorned with established IP with a point that such frivolity will instigate the consumers to purchase them. A coffee mug conveying the picture of Spiderman, a toy made in the fiddle of He-man, a T-shirt with a logo of Harvard University, a rakhi in the fiddle of Donald Duck are all ceses of merchandising of various forms of IP. In all these examples, IP such as trademarks, copyrights and designs belonging to others have been used by the maker of goods/services. The producer could, however, do that just through licensing of significant IP rights.

The list of products or services covered by 'merchandising' increased over years, for example, in the United States of America, it concerns,at least 29 of the 42 classes of the International Classification of Goods and Services as per the Nice Agreement.

LEGAL FRAMEWORK BEHIND CHARACTER MERCHANDISING IN THE INDIAN SCENARIO:

Character Merchandising is not just a fight ground for clashing business interest nut also for lawful interest at the other end. Right of proprietorship in respect of the topic of Character Merchandising doesn't belong to one single individual or party when real and fictional

characters are utilized. So single laws do not direct Character Merchandising, it is group of law that gives security to distinctive aspects of Character Merchandising.⁵

Constitution of India: Article 21 of the Indian Constitution, 1950 relates to fundamental rights to life and personal liberty. Right to Privacy is an essential part of Article 21. Delhi High Court in 2003 guaranteed right to publicity along with right to privacy to celebrities under Article 21, quotes as "The right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice, etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc. However, that right does not inhere in the event in question, that made the individual famous, nor in the corporation that has brought about the organization of the event. Any effort to take away the right or publicity from the individuals, to the organizer (non-human entity) of the event would be violative of Articles 19 and 21 of the Constitution of India"⁶

No person can be monopolised. Hence it states that no celebrity shall be subject to any publicity against his own authorisation and consent. For example, Sachin Tendulkar or Kapil Dev's name cannot be used in any World Cup campaign without their permission.

Personal Rights: Broadly, there are two main personality rights that everybody enjoys are-the right to privacy and the right to publicity. A celebrity is a real life person with legally recognized rights and duties. Any commercial or business application of his/her personality and the character associated with it should be made with due regard to their personal rights. The producer of a movie or TV series might not have full rights to exploit the character. In such case, personality rights of the performer also apply in addition to copyrights of the producer. This, at times, gives rise to conflict between the two kinds of rights.⁷

In order to oppose this, the supporters of personality rights argue that publication for the purposes of news reporting should be distinguished from use of a celebrity's likeness for financial profit. By virtue of being well known, a celebrity possesses the

⁵ Louis C Schimd, Legal Aspect of Merchandising, <http://www.olivares.com.mx/En/Knowledge/Articles/CopyrightArticles/Legalaspectsofmerchandising> (last accessed on 07.07.2015)

⁶ ICC (Development) International Ltd v. Arvee Enterprises & Another, 2003 (26) PTC 245 (Del)

⁷ Pauline Sadler, Character Merchandising and the Sporting Industry, http://espace.library.curtin.edu.au/webclient/StreamGate?folder_id=0&dvs=1435751434718~824&usePid1=true&usePid2=true (last seen on 07.07.2015)

right of commercial exploitation of his well known-ness and goodwill, which is known as right of publicity. He may decide whether to let his persona to be used to promote a particular good, service, cause or agenda.

Copyright Laws: When a fictional character is created in a literary work or as an artistic work, it is regulated by the principles of copyright law. Authors or creator of the works hold copyright over their fictional characters. However, if the character is a work for hire, the party providing financial aid to the creation of the character holds copyrights. Again, when a fictional character is a part of a movie or a TV series, the producer of the series has copyrights over the character.

In the Indian Copyright Act 1957, Section 2(d) identifies producers as authors of cinematograph films and Section 14(d) of the Act provides that the owner of the cinematograph films has exclusive rights to make copy of the film including photograph or images from it. Again Section 38(4) enforces about performers consent about his own performance.

In the landmark case of *Star India v. Leo Burnett*⁸, the same preposition, mentioned above, was noted: “*The fictional characters are generally drawings in which copyright subsists, e.g., cartoon, and celebrities are living beings who are otherwise very famous in any particular field, e.g., film stars, sportsmen. It is necessary for character merchandising that the characters to be merchandised must have gained some public recognition, that is, achieved a form of independent life and public recognition for itself independently of the original product or independently of the milieu/area in which it appears. Only then can such character be moved into the area of character merchandising. This presumes that the character has independently acquired such reputation as to be a commodity in its own right independently of the goods or services to which it is attached or the field/area in which it originally appears. It is only when this is established on evidence as a fact, that the claimant may be able to claim a right to prevent anyone else from using such a character for other purposes.”*

Trademark Laws: Since the vital identity elements of fictional and real persons are utilized as a part of connection to articles of business, trademark law standards likewise come in

⁸ *Star India Pvt Ltd v. Leo Burnett India (Pvt) Ltd* (2003) 2BCR655.

picture in instances of character merchandising. In India, a trademark is depicted as any device, heading, configuration, name, word, name, signature, and so forth, which is fit for a graphical representation and which ought to be fit for recognizing goods and/or services of one gathering from those of the other. Attributable to this wide clarification, it gets to be conceivable to have the key identity components of any fictional and real individual ensured as trademarks. Name of a character, as well as his picture, signature, character plans, voice, catchphrases utilized by him, and so forth, could be secured under the extent of trademark law.

While in case of a celebrity or an artist, one has to consider the most distinctive personality traits that are famous and deserving of trademark insurance, for any fictional character created from a literary source or a cinematograph film or as artistic work, like a cartoon, it is simply treating such fictional character as a trade indication and using the same in respect of articles of commerce.⁹ The Indian Trademark Act is the most utilized statute for adjudicating character merchandising related conflicts. A registered owner of a trademark can prevent others from using an identical or deceptively similar mark without permission on their goods or services for sale, offering or advertisement and can also prevent import of goods with such marks in India (Section 29 of the Act). A registration also grants the owner the advantages of presumption of validity of the trademark. As per Sections 102 and 103 of the Act, falsifying a registered trademark or falsely applying a registered trademark on goods and services.

The Delhi High court validated the transfer of trademark on the name 'Daler Mehendi' by the singer to his company DM Entertainment and held that the defendant's act of selling dolls that clapped, sang and danced like Daler Mehendi, amounted to passing off" likeness, even where a character or a celebrity's name or likeness are not registered as trademarks, the courts have recognised their proprietary value and granted remedies for passing.

Contractual Obligations: Given the notoriety of celebrity merchandising, endorsement conflicts are not phenomenal if both the copyright owner and the celebrity are permitted to carry out their promoting activities.¹⁰ For example, a particular celebrity may be endorsing a

⁹ Achilles C. Emilianides, Principles for the Protection of Character Merchandising in Cyprus, https://www.academia.edu/4050708/Principles_for_the_Protection_of_Character_Merchandising_in_Cyprus (last seen on 07.07.2015)

¹⁰ Louis C Schimd, Legal Aspect of Merchandising, <http://www.olivares.com.mx/En/Knowledge/Articles/CopyrightArticles/Legalaspects ofmerchandising> (last accessed on 07.07.2015)

particular brand or home decor. The celebrity has a contractual commitment that he will not embrace any competing home decor brand during the subsistence or his endorsement contract. The producer of a cinematographic film, where in the celebrity assumes a part, licenses one of the stills from the film to a home decor brand for the purposes of merchandising. These two liberal actions by the celebrity and the producer will result in a conflict of interest between the own home decor companies and the one that has an endorsement contract with the celebrity may bring an action against the him for breach of agreement.

CONCLUSION: TOWARDS A BETTER APPROACH

Regardless of how enormous or little the creation, it could be a character in a story book or the brand envoy of an e-commerce website, it is essential to secure it. As mentioned before, the intentioned is two-fold – it gives you the exclusive right to utilize the mark and furthermore keeps others from using the mark. It can be noticed from preceding decisions interpret passing off works very narrowly, since courts seem unwilling to acknowledge that the character merchandising business has grown into a highly profitable and productive commercial activity. It becomes obvious that traditional legal instruments existing under the English law are ill-equipped to guarantee satisfactory assurance to the character merchandising¹¹.

Merchandising a famous character can end up being very beneficial. It is thus, unavoidable that celebrities and authors of popular fictional characters would assert that merchandising rights should become part of their property as a reward. But such a claim could lead to the charge of monopoly prices. Therefore, there exists a conflict between the need to preserve competition, rivalry and the demand for security of character merchandising.¹²

The legal uncertainties not only prove to be an obstruction to the business intrigues additionally bring about unanticipated losses to the legitimate copyright owners. There is a requirement for the law to discover, the adjudicating authorities can neither wait for a specific legislation to come in nor does resorting to trademark encroachment and passing official

¹¹ Louis C Schimd, Legal Aspect of Merchandising, <http://www.olivares.com.mx/En/Knowledge/Articles/CopyrightArticles/Legalaspects ofmerchandising> (last accessed on 07.07.2015)

¹² Raman Mittal, Character Merchandising: International Experience And Indian Perspective, <http://www.lesi.org/les-nouvelles/les-nouvelles-online/march-2011/2011/05/01/character-merchandising-international-experience-and-indian-perspective> (last seen on 05.07.2015)

reasonable results. Simply on ground of certain support contract between a celebrity and another entity well be affected, it cannot be enough reason to prevent a copyright owner from carrying on a rightful business activity with respect to his or her own content the need of the hour is to use the existing laws with a new perspective and evolve a mean path where the celebrity can reap the benefit or fame without hindrance while at the same time the copyright owners can utilize their substance to the most extreme.

WOMEN EMPOWERMENT AND INDIAN POLITICS

Atrayee De*

Abstract

The norm of gender equality is unspoiled in the Indian Constitution. Of late, the Women's Reservation Bill has been a political globule for nearly a decade and half. It has uninterruptedly elicited fiery debates within Parliament and outside. The anticipated bill to reserve 1/3rd seats in the Parliament and State Legislatures for women was conscripted first by the H D Deve Gowda-led United Front government. The Bill was familiarized in the Lok Sabha on September 12, 1996. Although it has been familiarized in Parliament numerous times, the Bill could not be approved because of absence of political consensus. Nonetheless our Constitution and various other legislative enactments and different Commissions recognized for women from time to time have made a number of efforts for the accomplishment of the objective of gender equality, yet in genuine practice, the planned efforts to unshackle women pedagogically, parsimoniously and predominantly politically did not harvest the desired results over the decades after independence. This paper pact with the women manumission through its political participation. The principal objective of this paper is to upkeep and embolden the enactment of the Women's Political Reservation Bill. Additionally its aim is to kindle the initiatives for preventing corruption, criminalization and communalization of politics, for imposing inflexible ceiling of funding expenditures incurred for election campaigns and crafting consciousness in the society in order to indoctrinate the values of gender equality and gender justice. To achieve these objectives, the present work is based heavily on Indian Constitutional provisions, International norms and conventions and other statutory enactments providing favourable laws rendering special privileges for the welfare of women, NGO reports, Government of India reports and imperative works by contemporary jurists who donated a lot concerning the fruition and progression of feminist jurisprudence and studies.

* Student @ Amity Law School, Noida

INTRODUCTION

“Woman is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him.”

- Mahatma Gandhi

All human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion...birth or other status.¹ But it is the most unfortunate that women have suffered inferior position to men in almost all societies of world. The standing of women in the family and society at large was no better than those of slaves and had been treated like ordinary chattels-incapable of enjoying any rights as human beings. They were condemned to perpetual subjugation to their fathers, husbands and guardians. Under the old Christian law, the woman was not even considered a ‘person’. Thus, she had no right of a human being such as she could not join a college, she could not be enrolled as a medical practitioner or a lawyer for the same reason.² In any political system, contribution of women is very low as compared to men right from the developed to developing countries. It is quite vibrant that voting is the most conjoint and putative political action in elections. Due to sundry reasons, large mass of women are kept out of political arena. However, until the twentieth century, women did not have any right to vote in the Christian countries. In many countries women had to wage long skirmishes to get right to vote. Despite that in the arena of politics, they were not able to get equitable position. Because there was no stern attempt made for women’s Political Participation.

Political participation has been demarcated in innumerable ways. Political participation means not only exercising the right to vote, but also power sharing, co-decision making, co-policy making at all levels of governance of the State.³ Political participation is generally defined as being a process through which individual performs a role in political life of the social order, has the occasion to take part in deciding what the common aim of that society

¹ Universal Declaration of Human Rights adopted by General Assembly on 10 December 1948

² Burrell, Barbara (2004). Women and political Participation: a reference handbook. Santa Barbara (California): ABC-CLIO, Inc.

³ Singh, J.P. (2000), *Indian Democracy and Empowerment of Women*, The India Journal of Public Administration, XLVI (4). 617-630

are and the most excellent way of achieving these goals. Political participation refers to actual participation in these voluntary activities by which members of the society share in the selection of rules and directly or indirectly in the formulation of public policy.⁴ It means that by the process of political participation, the people essentially take part in political activities. No doubt, one of the important political activities of the people is exercising voting rights during elections; however, political participation is not just casting vote rather extensive range of other activities is also encompassed in it-like membership of political party, electoral campaigning, attending party meetings, demonstrations, communication with leaders, holding party positions, contesting elections, membership in representative bodies, influencing decision making etc. So, political participation may be defined as voluntary participation in the political affairs through membership, voting and contributing in the activities of legislative bodies, the political parties and/ or politically stirred movements.

The study deals with the empowerment of women who are necessitating in power and position and are over epitomized amongst the poor. The concept of empowerment is based on the augmentation of their participation in the political arena. It deals with the totality of devouring decision-making power of the women. In the present scenario, the participation of women in the politics is very imperative for their overall deliverance and empowerment. The study divulges the current political status of women at national and international level. The impact of patriarchal structure can be seen during ancient, medieval and in the present era also. In the customary society, Government and politics were concerns of tapered elite. However, even then during ancient times, the status and decision-making and power-sharing were much higher as paralleled to present times. At global level, a number of norms and treaties relating to empowerment of women through their political participation have been made which are of definite concern since majority of the nations have ratified these standards and made them an imperative part of their local laws targeting at the overall growth and development of women. As political participation is the hall mark of democracy and modernization but notwithstanding of all the efforts made at national (Indian) level, Political Reservation Bill could not be endorsed which would have far reaching bearings on the gender equality as well as empowerment of women which is leading objective of Indian Government as a welfare State.

⁴ Srivastava, Rashmi (2000), *Empowerment of Women through Political Participation, with special reference to Madhya Pradesh*. In Niroj Sinha (ed), *Women in Indian Politics: Empowerment of Women through Political Participation* (PP. 195-217). New Delhi: Gyan Publishing House.

OBJECTIVES OF THE STUDY

The target of the present study is to investigate into the deficiency of law relating to political participation of women in the present scenario and then try to develop the concept of empowerment of women through the accomplishment of the following objectives: (a) To scrutinize equal access of women in the decision-making in order to participate in political and economic empowerment. (b) To help in removing paucity in law in order to reinforce legal system aimed for eradication of all forms of acumen against women. (c) To recommend measures for founding of supporting platform for women by building alliances so that they realize higher level of energy and obligation.

METHODOLOGY

The present works depend heavily on International norms and conventions, Government of India reports, NGO reports and important works by modern jurists who contributed a lot towards the fruition and evolution of feminist jurisprudence and studies. Help of various libraries located at Jalandhar, Delhi and Phillaur is taken. This paper studies various Constitutional provisions and other statutory enactments providing distinctive privileges and favorable laws for the benefits of women. It also studies the deficiency of law and its various inadequacies in real circumstances.

A CASE FOR POLITICAL RESERVATION IN FAVOUR OF WOMEN IN INDIA

In India, the legal Constitutional framework seems to be an amalgamation of Communitarian perspective on one hand and that of tolerant democracy on the other hand. The Constitution of India guarantees adult franchise and provides full opportunities and agenda for women to participate actively in politics. But it is misfortune that women could not expansively avail of the Constitutional provisions due to a number of social, cultural and political constraints. So, the decade's subsequent independence witnessed debility in the participation of women in the politics. The election statistics demonstrates that for the last two decades almost equal numbers of men and women have gone to the polling booths to vote. However, the number of women filing their nomination papers in any election, national or State, is only a segment of the corresponding number of men. The percentage of winning candidates has been below eleven in the Parliament in all the past elections. The State Assemblies too display the similar situation. Thus, it is clear that the number of women winning elections is so trifling that their percentage in the legislative body is nominal. A number of seats provided to the women have

not been in proportion to women's forte in population. No variation has occurred in more than six decades. So, the politics has proved to be a very adamant terrain for women and continues to be the male realm where there is severe restriction on the admission of women. The percentage of women in the Lok Sabha in relation to the total number of seats was 4.4% in the year 1952. In the year of 1957, it increased marginally to 5.4% and to 6.7 in 1962, and then fell again to 4.2% in 1971, 3.4% the lowest was in 1977 and again it increased slightly to 8.9% in the year 1984. Then it upgraded to 8.2% in 2004. So, it is clear from this examination that the percentage of women representatives in the Lok Sabha has always been very little from the beginning onward after independence. Till date it has not crossed 11%. However, in contrast to Lok Sabha, in the upper house the presence of women has been observed to be slightly inferior. It may probably because of indirect election and nomination of women members there. Similarly, since 1952, in the Council of Ministers that were designed, the representation of women has been very little and they were always provided with less significant portfolios like, health, welfare, local Government etc. In the State Governments as well the case has been the same. The power of women MPs (Members of Parliament) is generally much delimited. They (Women MPs) have been accorded low priority to issues concerning women because they are anticipated to support the party line rather than formulate their own agendas. Between women's MPs and women's groups, there seems to be very little regular dealings. There is one exemption that the women's wings of political parties act as a go-between with women MPs, who can, therefore, become outlets between the party's leadership and the women members. On the issues regarding the family and women's rights, they are also consulted by the party leadership from time to time. However, non-party women's groups do not seem to predispose women MPs.

The number of women contesting elections is very low in comparison to the men in Indian society. Compared to the population also, the percentage of women contestants is very stumpy. It augmented from 2.3% in 1952 to 6.5% in the year 1999. In the year of 2009, of the total contestants, more than 93% were men. However, fascinatingly, the percentage of women winning elections has always been higher than men. In 1952, the percentage of men who won the elections was 26.05% whereas women winning elections were 51.16%. In the year, 1999, out of the total male contestants, 12.3% won the elections. And out of the total female contestants, 17.3% women won. 12.6% female contestants won the elections in the 14th Lok Sabha elections. From the above analysis, it is quite patent that percentage women winning elections are more than the percentage men winning even though political parties

negate tickets to the women candidates on the conjecture that they are not proficient of winning elections.

Distant from political parties and Parliament, women are also utterly under-represented in other domains of decision-making, in a country like India, there seems paradoxical-on the one hand, women have progressed into the professions and civil services in far higher numbers than in other South Asian countries. They have made foremost inroads in various male dominated professions. Women are provided the opportunity for demonstrating their skills even in the fields of business; art; medicine; engineering; law and culture. However, on the other hand, their ticket into the upper echelons seems to be restricted by a glass ceiling. But beginning with 1980's began the effort of political empowerment as it was professed to give women the needed fillip to a forward surge towards all round development and to a status of uprightness and partnership in decision making. To make a political empowerment of women a reality, the issues of reservation of 1/3 of the seats for women at the grass-root level organization was taken by women's organizations and social activists. It was also pragmatic by the Committee on the Status of Women in India, 1974 (CSWI) that 'the rights guaranteed by the Constitution have helped to shape an insinuation of equality and power which is frequently used as an argument to repel protective and hastening measures to enable women to achieve their just and equal position in society'. It was then the finding of the Committee that as voters, the participation of women was amassed at a faster pace than males but as candidates there was the opposite trend. 30% reservation for women in the local Governments and other decision making bodies was acclaimed by the National perspective Plan for Women, 1988 in order to encourage the participation of the women in grass root politics.⁵ Finally this debate occasioned in the passing of the 73rd Amendment Act, 1992.

In 1992, Seats and Pradhan positions were also earmarked for the two underprivileged minorities in India, Scheduled Castes and Scheduled Tribes, in the form of authorized representation proportional to separate minority's population share in apiece district by the 73rd Amendment. Even though, this Amendment also delivered that one-third of the seats in all Panchayat councils, and also one third of the Pradhan Positions, must be reticent for women. It was expected that the Panchayati Raj institution would safeguard political empowerment removing the social and economic acumen against them. This legislation cemented the way for the entry of more than one million women into the local Governments,

⁵ Ibid.

presidents and vice-presidents. It means it hastened the stride of the participation of women in the policymaking decision only at grass root level. The reservation for women was realized in all major States except Bihar and Uttar Pradesh (which has only reserved 25% of the seats to women). A sizable percentage of women representatives perceived enhancement of their self-esteem, confidence and decision-making ability.⁶ However, the representation of women in the continual Lok Sabha's is concerned; it has never gone beyond 11 percent. In the same way, reality seems to be very alarming that out of 117 members of the Legislative assembly of Punjab only 14 are women which are just about 12% of the total members. So is the case in other States and the percentage of women members is just 3% to 9%. Diagnosing the fact of low political participation of Women in Lok Sabha and State Legislatures in India, the Bill seeking to reserve the seats in Lok Sabha and each of the State Legislative Assemblies was for the first time introduced in the Parliament in 1996. Almost 19 years have been elapsed since its first introduction in the Parliament but the Women's Reservation Bill has still not stood enacted as a law. Following is the chequered history of the Women's Reservation Bill which was moved in the Rajya Sabha on 9 March 2011 seeking to reserve 33 percent seats for women in the Lok Sabha and in each State Legislative Assembly:

12 September 1996 -- After protracted negotiations, as a first step, in September 1996, the Deve Gowda Government announced in the parliament the Women's Reservation Bill as 81st Constitutional Amendment Bill.

But subsequent opposition, the bill was referred to the scrutiny of the Joint Select Committee of Parliament. The report was produced in the Rajya Sabha and the Lok Sabha but nothing constructive happened.

26 June 1998 - The bill was re-introduced in the 12th Lok Sabha as the 84th Constitutional Amendment by the National Democratic Alliance Government headed by Atal Bihari Vajpayee. This time also, the bill failed as 12th Lok Sabha was dissolved precipitately with the Vajpayee Government being reduced to a minority.

⁶ National Institute of Advanced Studies-Gender Studies Unit (NIAS), Women's Voice, National Alliance of Women (NAWO) and Initiatives-Women in Development (IWID) Baseline Report on Women and Political Participation in India., pp.8, available at http://www.iwrawap.org/aboutus/pdf/FPwomen_and_pol_pax.pdf (Last assessed 31 march 2015)

22 November 1999 -- The National Democratic Alliance (NDA) Government re-introduced the bill in the 13th Lok Sabha. However, there was again disappointment on the part of the Government for gathering consensus on the issue.

2002 -- The bill was familiarized in Parliament but unsuccessful to sail through.

2003 -- The bill was presented twice in Parliament by the NDA Government but could not get it passed even though NDA had been assured by the Congress and the Left, constituting a majority, of their support.

May 2004 -- The United Progressive Alliance Government incorporated it in the Common Minimum Programme (CPM).

6 May 2008 -- The Government tabled the bill in the Rajya Sabha so that the legislation did not hiatus and then it was raised to the Standing Committee on Law and Justice.

17 December 2009--The report was presented by the Standing Committee and the bill was tabled in both the Houses of the Parliament amid protests by Samajwadi Party, JD (U) and RJD.

22 February 2010--President Pratibha Patil in her address said that the Government was loyal to early passage of the bill.

25 February 2010-- Union Cabinet sanctioned Women's Reservation Bill and cleared it (the bill) for taking it up in the Rajya Sabha.

8 March 2010—the bill was enthused in Rajya Sabha but after unruly divisions and threats of pulling out sustenance to the UPA Government by SP and RJD, voting on it deferred.

9 March 2010—Women's Reservation Bill was passed by Rajya Sabha with prodigious majority.

The Bill, having been passed in the Rajya Sabha in 2010, can become a law only if it is also passed in the Lok Sabha. Anticipated to provide reservation for women at each level of legislative decision-making, the Bill warranted that one-third of the total available seats would be reserved for women in National, State and Local Governments. On 10 March 2010 the 14year dangerous political struggle to give women passable representation ended with the Rajya Sabha finally debating the contentious issue and then voting 186-1 on the Constitution

(One Hundred and Eighth Amendment) Bill, 2008 amidst acrimony, political rifts and dreadful scenes of dissent. In the 245member House with an actual strength of 233, the bill required the sponsorship of at least 155 members. The reserved seats would be prearranged by gyration to different constituencies and would be valid for 15 years after the commencement of the Amendment Act. The Bill seeks to reserve for women 181 out of the 543 seats in the Lok Sabha and 1,370 out of a total of 4,109 seats in the 28 State Assemblies. Only the last step remained-of the Lok Sabha endorsing it. However, Lok-Sabha Speaker Meira Kumar had nothing encouraging saying as she appeared from over an-hour long meeting with known critics of the Women's Reservation Bill on 14 July 2011. On the 15-year old Bill, her second foremost attempt within a month to forge a consensus had been disastrous as socialist and Muslim leaders precluded her advances and flagged their old "conspiracy" concerns. Leading Andhra Muslim leader from Asaduddin Owaisi of the Majlis-e-Ittehadul Muslimeen (MIM) told that Women's Reservation Bill would sound a death-knell for the representation of all Muslim Members of Parliament – male and female-in the Lok Sabha. The Rashtriya Janata Dal (RJD) chief Lalu Yadav was the most vociferous in his protest.⁷

For the Bill, these are dejected bodings at a time when United Nations Women has revealed new worldwide proof supporting the intrinsic worth of quotas as device to augment the incidence of the women in the Parliament. Another protuberant example of Costa Rica can be quoted here which approved the momentous Responsible Paternity Act 2001 for reassuring shared upbringing of the children, just five years after authorization of 40% representation for the women in its Parliament. Out of 28 countries with more than 30 percent women in the Parliament, several pulled out of clang, including the neighboring Nepal, which has 33 percent women in the Parliament. However, in India, even the monsoon session of Parliament didn't clinch much promise for the Constitution (one Hundred and Eighth Amendment) Bill, 2008 which looks for reserving one third seats for the women in the Lok-Sabha and State legislatures.⁸

Even as the debate frenzies on the need for protecting women in the country, the long pending issue of the Women's Reservation Bill seems to have been put on the backburner. But why is that about 12 years after its conscripting, the Bill has still not seen the light of

⁷ Ibid.

⁸ AC-Nielsen ORG-MARG (2008), Study on Elected Women Representatives in Panchayati Raj Institutions, Ministry of Panchayati Raj, Government of India, New Delhi.

day? Why it is that traffic to promote gender equality in decision-making bodies has not been allowed to get applied? The efforts of sequential Governments to amend the Constitution of India in order to provide for the reservation in country's legislatures are not being emerged because of unresponsive behavior towards gender equality of certain leaders who are supposed to be unwavering to the cause of social justice. Politicians camouflage their vested interests with the argument that the Bill would deny passable representation for the backward sections of society. What they recommend is a quota within a quota for definite classes. India ranks 109 in the world arrangement of Women in National Parliaments, with 11 per cent in the Lower House and 10.6 in the Upper House. Thus, in spite of the realization, gender sensitivity in administration is still distraught to acquire a grip because of the general anxiety that women might surpass men in all spheres and also interject in their political affairs, which is largely scrupulous to be a male domain. Political parties are using this issue just to women voters. And it is fairly palpable that there is a long way to go for the enactment of the Bill.

CURRENT STATUS OF WOMAN'S POLITICAL PARTICIPATION FROM GLOBAL TO NATIONAL LEVEL

No doubt today, there is substantial increase in the percentage of women as voters. The participation of women as voters is virtually equal to men. But the political participation (as a whole) of the women is not equal to men and so they are still not able to get a share alike to men in organization that require decision making. Still politics is subjugated by men at every level of participation and women have not been regarded as noteworthy part of the political arena. The representation of women as policy formulators and decision makers in the legislative bodies is very low. In legislative bodies women have been laborious and more space but most nations in the world have failed in providing due space as well as representation to women in their political system. Thus, from local level to global level, leadership and participation of the women in the political fields are always bargained. Women are always underrepresented in leading positions, whether in civil services, academia, elected offices or private sector. Such kind of situation prevails despite their abilities and capabilities which have been proved as leaders and their right of participating at par with men in democratic governance.

Women are moving equally with men only in a few countries, like Germany, Sweden, Norway, Denmark and Finland. In these countries, substantial inroads are being made by the women into decision making process. Female manifestation in legislature remains small and

relatively trivial in the advanced countries like Western Europe and North America. It is indicated by the statistics (2010) that the world average of exemplification of women in legislature is 19.1%, in both the houses combined. It is 19.3% in lower house and 18.2% in upper house. As of 1 October, 2013, only 21.4 percent of national parliamentarians were women, a slow increase from percentage in 2010.⁹ At the International Level, as on 1 October, 2013, there are only 37 States in which there are less than 10 percent of women parliamentarians in single or lower houses.¹⁰ However, at parliamentary floor, the representation of Indian women is still far from satisfactory. India ranks 110th in the world according to the data released by the Inter-Parliamentary Union, an international group that works for the promotion of democracy, peace and co-operation in the world.¹¹ The above-stated statistics divulge that India lags behind many countries including its neighboring countries Pakistan, China and Nepal, when it comes to women's participation in the politics.

FINDINGS & DISCUSSIONS

India as a welfare State is devoted to the welfare and development of its people in general and of susceptible sections in particular. Though Indian Constitution and various other legislative enactments and different Commissions established for women from time to time have made a number of efforts for the achievement of the objective of gender equality, yet in actual practice, due rights are denied to women and they continue to be the victims of male domination.¹² Violations of the rights of the women linger in practice. The women are lacking in position and power and are over represented amongst the poor. As a result, women lack in political participation, educational triumphs thereby showing under-representation in employment spheres. It means that the planned efforts to unshackle women parsimoniously, pedagogically and predominantly politically did not yield the anticipated results over the decades after independence.

For this sorry state of affairs, many other factors are also accountable. History of freedom movement indicates very evidently that there was participation of a large number of women in that freedom movement. However, after that it went on declining due to the fading of the

⁹ Tandon, Aditi (July 15, 2011). More Trouble for Women's Reservation Bill: Socialist, Muslim Leaders Cry Conspiracy. The Tribune, Chandigarh, India

¹⁰ Ibid.

¹¹ Inter-Parliamentary Union. 31 march, 2015, Women in National Parliaments: World Average
<http://www.ipu.org/wmn-e/world.htm>

¹² Inter-Parliamentary Union, 31 march, 2015, Women in National Parliaments: World Classification.
<http://www.ipu.org/wmn-e/arc/classif011013.htm>

ideology of the Nehru-Gandhian era. The sharp deterioration in juvenile sex ratio; persistent high maternal mortality rate and infant mortality rate; high gender gap in literacy at all levels; high rate of dropouts of girl students; and increasing incidence of crime against women; inadequate access of women to the property rights and employment opportunities; and their less political participation and undernourishment raises many questions about the role of institutional machinery to appliance the law. In the present time, two types of barriers are faced by women as far as their participation in political life is concerned. First, structural barriers, still a number of restrictions are imposed on women's options to vote or to run for offices through discriminatory laws and institutions. Second, capacity gaps which mean that women are always less likely in appraisal to men to have contacts, education as well as different resources required to becoming operative leaders. Therefore, in the women's participation in the political fronts, gender roles have become major obstacles. Besides, the traditional division of labor; economic barriers; the type of electoral system, lack of sufficient training and rampant violence against women in Indian society in the form of dowry deaths, sexual assaults, honour killings, acid attacks, domestic violence etc. are also some of the contributories to keep women away from every sphere of public life including politics. Apart from this, the process of elections has become a very costly affair. Women are not capable of spawning large amount of money required for fighting elections. Most of them fail to take off due to indecorous planning at the grass root level. This upsetting state of affairs is also an outcome of the incessant failure of women's welfare policies. Corruption and centralization of powers are the basic major obstacles for political participation of women in India because Corruption and nepotism portend to eat into the little good that has been done for women's empowerment in this country.

CONCLUSION & SUGGESTIONS

Undeniably, there is need to remove the *deficiency of laws (Constitutional provisions) and policies* pledging a place of honour and equality to women because they are not sufficient to contest the menace of inequality. For the emancipation of women and conversion of their de-jure equality into de-facto equality, the educational, economic and political independence of the women is of paramount importance. This can lead to total improvement of the women. This goal of economic independence and empowerment of the women can be achieved only through gainful employment opportunities. Women's gainful employment especially in more rewarding occupations clearly will play a role in improving the lot of the women especially in

increasing their status and standing in the society. The economic empowerment inevitably shadows political empowerment so it is quite vibrant that the socioeconomic state of women will recover only if they are also a part of the governing process is a fact that is extensively recognized the world over. Therefore, it becomes obligatory for the women's organizations as well as the Government of India to hunt for remedial measures to improve the political status of the women. The bill propositioning quota for women is a step forward in mainstreaming women in politics by giving them representation in the utmost elected bodies both at national and provincial levels where they can deliberate on all the glitches in order to seek their redressal and thereby to get an occasion to acme them on a national as well as local platform. Without appropriate representation of women in the legislative bodies and political participation at all echelons, issues regarding women would remain neglected.¹³ Comprehending women's suppression and relegation and affirmative discrimination against women in general has materialized the need of their empowerment – both political and economic. In order to achieve this objective, Reservation Law for providing political participation to women is the need of the hour. Therefore, the individuals who oppose the Bill tooth and nail should be made to reach at an unanimity in the interest of the nation. The Government must be insatiable enough to safeguard the Bill and pass it even if it is at the cost of losing its allies because only a nation which has empowered its women to be a part of all forms of governance, can achieve true liberation and economic success. In India, this can originate by enacting the Women's Political Reservation Bill.

Further *suggestions* which can be recommended are as follows: (1) To implement rigorous procedures to stop corruption, proscription and communalization of politics. (2) To guarantee that women are taken seriously in their elected post by assigning important portfolios and restraining their functions to social welfare and women and child development. (3) To implement stringent ceiling of funding expenses incurred for election campaigns. (4) Legal system targeting at purging of all forms of acumen against women should be reinforced. In accumulation to that, awareness level about laws should also be elevated among women. (5) Women should be provided leadership and communication training. (6) The Representation of People Act, 1951 should be amended to coerce political parties to deliver for obligatory nomination of the women candidates for at least one-third of the seats to circumvent de-recognition as a national party. (7) All the women organizations must come on a common podium with lone objective of pressing the political parties to either upkeep the passing of

¹³ UN Women, checked monthly against updates from the United Nations.

Reservation Bill or face the antagonism of women voters in the next general elections because a precarious mass of women is a pre-requisite for the effective political participation of women. (8) The media both print as well as electronic can play an imperative role in generating awareness in the society. It can act as an agent of political socialization for indoctrinating the standards of gender equality and gender justice.

LETTER TO FORMER JUSTICE OF THE SUPREME COURT MARKANDEY KATJU

Pratheek Maddhi Reddy*

Abstract

The world has been a better place for Indian women after Upendra Baxi, Vasudha Dhagamwar, Lotika Sarkar and R. V. Kelkar, four professors of Law at Delhi University wrote on 16th September 1979, to the Chief Justice of India about the arrant judgment of the Supreme Court in the infamous Mathura Rape Case.

Even after the huge outrage it garnered in the country and subsequent changes to rape law in years 1979 and 2013 both, the law still is too far from immaculate. This is an attempt to analyze what a letter today should seem like if it has to be sent to the giants of law – that could effect a revival of year 1979 today in the year of 2015 and lead to expansion of consciousness towards the suffering India women, especially in the rural areas of the country, resulting in changes of the law.

* Student @ Jindal Global Law School, Sonipat, Haryana 131001; Email: [reddypratheek68@gmail.com](mailto:redypratheek68@gmail.com); Contact:+91-8816817408

Respected sir,

I, as an Indian citizen and student of law, in the humblest, write this letter to you for drawing your attention towards the veracity and the effect of a decision Hon'ble Justice Gyan Sudha Mishra and Hon'ble yourself have rendered on 27th Feb 2011.

In the case of **Baldev Singh & Ors. v. State of Punjab**, the three appellants have raped and beat the prosecutrix and the Hon'ble Supreme Court accepted the same as facts. In your decision, you have awarded the appellants a punishment of only 3 ½ years of imprisonment already undergone, much lesser than what section 376 prescribes as minimum (10 years), invoking the proviso to section 376(2)(g) of adequate and special reasons.

Sir, the reasons you have given are mentioned with no ambiguity in the judgment; but the same are fallacious to be considered as adequate and special in the legal context. The reasons you have given are, that the appellants and the prosecutrix are married (not to each other) and the latter also has two children; the incident being 14 year old; and the parties, wanting to finish the dispute, having entered into a compromise.

While the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment generally is imperative. In your reasoning, you say, "*Section 376 is a non-compoundable offence, however, the fact that the incident is an old one, is a circumstance for invoking the proviso to Section 376(2)(g) and awarding a sentence less than 10 years...*" Unfortunately, these reasons seem neither special nor adequate.

Firstly, rape under Section 376, as mentioned by you, is a non-compoundable offence. Technically, in light of this, how then can such compounding be considered an adequate and special reason (more so in a gang rape)?

Through such consideration by the Hon'ble court under your hand, the legislative intent, mandate and recognition of social needs and impact in making such a crime a non-compoundable offence is absolutely defeated. The legislative wisdom behind such making is to abstain the accused who would usually exert every possible pressure on the victim to take back the case; to not let money and muscle overpower legal processes. Rape is an offence against the society and not a matter to be left for the parties to compromise and settle.

People are still raking over the ashes of a rape case in Patiala, where even the police have pressurized the victim for a compromise, eventually resulting in victim committing suicide. Shouldn't then a compromise in such cases be a cause to look at them with suspicion? But the Hon'ble Court did not even call the rape-victim to authenticate the truthfulness to ascertain if the compromise is voluntary and genuine.

On your blog Satyam Brayut, answering to the criticism on this case, you say that making the appellants undergo any further imprisonment would not help the victim. But sir, while compensation is to be looked at from the victim's situation, shouldn't punishment be a result of nature of criminal act and gravity of the crime and not essentially from what benefit it is to the victim?

Secondly, in more than three crore cases pending in the Indian courts, very less cases have the luxury of reaching the Supreme Court. Naturally, almost all of those cases take long periods of time before the Supreme Court decides them. If 14 years of long period of time can be a special reason, then thousands of such cases pending before the court should be eligible for this proviso. How then can it be called 'special'?

Also, the judgment of Baldev Singh seems to be unreasonably short and cryptic, ignoring previous decisions with precedential value, like the case of *Kammal Kishor v. State of Himachal Pradesh*, which clearly stated that occurrence of crime 10 years before is in no way an adequate and special reason. Justice K. T. Thomas goes on to say that both 'adequate' and 'special' are conjunctive; not disjunctive, showing how exceptional a reason should be to qualify under the proviso.

An administrative anomaly or laxity should not in any case be a pressure thrust upon a victim of a crime, especially in one as heinous as rape, one that reduces a man to an animal. Such thrusting by giving scarce punishments, I feel, would neither do justice to the victim nor would deter the criminals from such acts in future, the primary and avowed object of law.

Thirdly, in the case of *Karnataka v Krishnappa*, socio-economic status, religion, race, caste or creed of accused were rendered irrelevant to the sentencing policy. Justice A. S. Anand says that penalization should rather depend upon conduct of the accused, gravity of the criminal act and the state and age of the sexually assaulted female.

In light of the above, marriage and conceiving of children by the victim, by no stretch of imagination seems to be a special and adequate reason. It is in fact true that marriage of rape-victims is usually deeply affected and people fear of STDs, pregnancies, and psychological, emotional and spiritual disorders. However, such victims' subsequent marriages do not lessen the seriousness of the crime and cannot by themselves be construed as adequate and special reasons.

Further, in such long periods of time as 14 years, it is very common for people to get married. Is the court implying, by using this as a special and adequate reason, that the victims of rape keep suffering and not cope so as to eligible themselves for justice; so as to punish the criminal? Sir, a crime as serious as rape should not be restricted to restorative principles of justice but should be looked at from ex ante view too, to prevent such acts in future.

Many studies on the sentencing practices followed in India revealed that subjectivity of the judge plays a crucial role in the decision making process. For this reason, Article 142 of the Indian Constitution allows the Supreme Court substantial discretion in deciding cases. But, if I am allowed the liberty to say, discretion oriented sentencing is done in idealistic spirit to enable courts to individualize punishment; not to degrade into liberalization of punishment.

In the words of Justice P. K. Balasubramaniam, in the case of *State of M. P. v. Bala*, “adequate and special reasons are to be used very sparingly and not indiscriminately and routinely.” However, judgment of *Baldev Singh v. State of Punjab* seems to interpret the proviso in a casual and cavalier manner.

This more or less an assertion of mine is tremendously supported by the then Chief Justice of India, P. Sathasivam in his judgment of the case *Shanbhoo v. State of Haryana* where he mentions explicitly that *Baldev Singh* cannot be cited as a precedent and should be confined to that case only.

But, what Justice Sathasivam also must not have realized in entirety is the magnitude of the rupture caused by *Baldev Singh*'s judgment to subsequent legal judicial processes. Just about two years after the Supreme Court judgment in *Baldev Singh v. State of Punjab*, Justices M. Y. Eqbal and Pinaki Chandra Ghose have decided upon the case of **Ravindra v State of Madhya Pradesh** on the same lines of faulty reasoning in *Baldev Singh* case's judgment by considering the factual incident being 20 year old, parties having married, and

they having entered into compromise with each other, as special and adequate reasons. For this outcome, ***Baldev Singh v State of Punjab has been used as a precedent.***

Respected sir, you are widely accepted as an epitome of judicial conscience and a bastion of human rights and civil liberties. Your fine sense of judgment and assurances to the general public through your blog and other media to protect our rights warrants us of a strong and well-directed judiciary of the future. But a judgment such as Baldev Singh v State of Punjab negates all that assurance, at least to hundreds of law students and professors who find the judgment nothing less than threatening to the quality of the present day judicial decision making process.

What can we say now! Reconsidering the case and deciding on it by the Hon'ble Supreme Court again is an idea too farfetched.

Sir, with the highest respect that I hold towards you, I appeal before you, requesting you to come forward and announce to the judiciary as well as the general public about the fault in the judgment and warn loud against using it as a precedent in any future case; so that, if not your statement, at least the publicity it would garner would work as a conscience for judges while deciding on similar cases.

The above made appeal of mine might seem unruly and disoriented. But I appeal so in order to not let further silencing of women's voices as they have always been – through systematic use of patriarchal power and authority. If an organ as trustworthy as judiciary tolerates violence against women, what pursues is nothing less than cultural devaluation, negation of human rights and intensified militarism against women by the country's society chauvinistic as it already is.

Most respected sir, with this view I plead, do the needful before this judgment comes to worse ends.

Better late

Than never!

AFTERMATH OF THE BHOPAL GAS TRAGEDY: DEVELOPMENT OF ENVIRONMENTAL LEGISLATION IN INDIA

Raagya P. Zadu*

Abstract

The explosion in the Union Carbide factory in Bhopal, on the fateful winter night of 1984, still remains the most horrific and the world's most lethal industrial disaster. It led to thousands of deaths and millions of people suffered from genetic mutations and diseases of the respiratory and neurological system. Studies and theories pointed out that this disaster was evitable and could have been prevented had precautionary measures been taken and a thorough environmental assessment been done by the authorities at the State and Central level. It was only after this catastrophe that the environmental legislations in India were seriously worked upon and various laws, which are now expedient to the functionaries, were brought into existence. The model of Environment Impact Assessment which was followed in India at that time was the Discretionary Model, which gave a lot of discretion to the Central Government to sanction projects without mandating environment assessment. This meant that the projects could be sanctioned without carrying out of any form of impact assessment, which led to this fatal accident. The Public Liability Insurance Act of 1991 was hurriedly brought into existence after this accident, to provide liability insurance to the public at large in case of any environmental disasters which were to take place in the future. The most important environment legislation in India today, the Environment Protection Act of 1986 was devised only after the Bhopal Gas Tragedy. It will not be entirely incorrect to say that environment legislation in India accelerated and developed only when a tragic accident which killed thousands of people took place. It was only then, that the legislators realized the expedient need of formulating laws, which should have been there before hand and which could have averted this industrial disaster and saved thousands of lives and the suffering which followed.

Keywords: Public Liability Insurance, Bhopal Gas Leak, Environmental Legislation, Absolute Liability, Environment Impact Assessment

* Student-LL.M. @ Hidayatullah National Law University, Raipur (CG)

INTRODUCTION

December 2014 marked the thirtieth anniversary of the deadly disaster in Bhopal which left thousands of people dead and thousands others maimed for life. The lethal Methyl Isocyanate gas which leaked from the Union Carbide Factory on that fateful winter morning made it the worst industrial disaster India and the world had ever seen. In the 1970s, the Indian government initiated policies to encourage foreign companies to invest in local industry. Union Carbide Corporation (UCC) was asked to build a plant for the manufacture of Sevin, a pesticide commonly used throughout Asia. As part of the deal, India's government insisted that a significant percentage of the investment come from local shareholders. The government itself had a 22% stake in the company's subsidiary, Union Carbide India Limited (UCIL)¹. The plant was established in Bhopal due to the central location of the city and easy availability of transport throughout the country. The specific site within the city was zoned for light industrial and commercial use, not for hazardous industry. The plant was initially approved only for formulation of pesticides from component chemicals. However, pressure from competition in the chemical industry led UCIL to implement "backward integration" – the manufacture of raw materials and intermediate products for formulation of the final product within one facility. This was inherently a more sophisticated and hazardous process.² At 11.00 PM on December 2 1984, while most of the one million residents of Bhopal slept, an operator at the plant noticed a small leak of methyl isocyanate (MIC) gas and increasing pressure inside a storage tank. The vent-gas scrubber, a safety device designed to neutralize toxic discharge from the MIC system, had been turned off three weeks prior. Apparently a faulty valve had allowed one ton of water for cleaning internal pipes to mix with forty tons of MIC. A 30 ton refrigeration unit that normally served as a safety component to cool the MIC storage tank had been drained of its coolant for use in another part of the plant. Pressure and heat from the vigorous exothermic reaction in the tank continued to build. The gas flare safety system was out of action and had been for three months. At around 1.00 AM, December 3, loud rumbling reverberated around the plant as a safety valve gave way sending a plume of MIC gas into the early morning air. Within hours, the streets of Bhopal were littered with human corpses and the carcasses of buffaloes, cows, dogs and birds. An estimated 3,800 people died immediately, mostly in the poor slum colony adjacent to the UCC plant. Local hospitals were soon overwhelmed with the injured, a crisis further

¹ Fortun K: *Advocacy after Bhopal*. Chicago, University of Chicago Press;2001. P.259.

² Shrivastava P: *Managing Industrial Crisis*. New Delhi , Vision Books; 1987. P.196.

compounded by a lack of knowledge of exactly what gas was involved and what its effects were.³ The exact figures of the number of people that died on the first day and over the next one week cannot be estimated, as there is no definite figure of the same.

Immediately after the accident, the UCC decided to withdraw its liability from the disaster denying responsibility. Its principal strategy was to shift culpability to the Indian subsidiary running the plant by stating that the running and upkeep of the plant was the responsibility of the UCIL (Union Carbide India Ltd). The UCC tried to bring into ambit, the possibility of sabotage by the Sikh employees of the Indian subsidiary as a deliberate attempt to take revenge of the 1984 Sikh riots in the country. The city was still reeling under the post-effects of the city turning into a ghetto, when on December 7th 1984; the first multi-billion dollar lawsuit was filed by an American attorney in a U.S. court. This was the beginning of years of legal machinations in which the ethical implications of the tragedy and its effect on Bhopal's people were largely ignored. In March 1985, the Indian government enacted the Bhopal Gas Leak Disaster Act as a way of ensuring that claims arising from the accident would be dealt with speedily and equitably. The Act made the government the sole representative of the victims in legal proceedings both within and outside India. Eventually all cases were taken out of the U.S. legal system under the ruling of the presiding American judge and placed entirely under Indian jurisdiction much to the detriment of the injured parties. In the end, the Union Carbide Corporation agreed to take responsibility and claim up to \$470 million which it agreed to pay to the Indian government as full and final settlement. The figure was partly based on the disputed claim that only 3000 people died and 102,000 suffered permanent disabilities. The compensation which was given was negligible and nothing compared to the one given in the lawsuit concerning the mining of asbestos in 1984. The supporters of the claims of the victims of the gas disaster long argued and blamed the administration and the government for the non-availability of apt laws regarding the safety of environment and the settlement of claims through establishment of liability. Had such laws been in place, the victims and the people who suffered the gas tragedy would have been able to get better compensation and the Union Carbide Corporation would not have easily gotten off the radar of being guilty. The U.C.C., throughout the lawsuit and later, did not give correct information about the reason and the cause of the accident. It only shifted its responsibility and tried to put the blame entirely on to the Indian subsidiary. As further insult, UCC discontinued

³ The Bhopal disaster and its aftermath: a review; Edward Broughton. Environ Health. 2005. Published online May 10, 2005 (accessed on 9.1.15)

operation at its Bhopal plant following the disaster but failed to clean up the industrial site completely. The plant continues to leak several toxic chemicals and heavy metals that have found their way into local aquifers. Dangerously contaminated water has now been added to the legacy left by the company for the people of Bhopal⁴.

DEVELOPMENT OF ENVIRONMENT LEGISLATION IN INDIA

In the wake of the Bhopal Gas Tragedy, the government of India passed and enacted the Environment Protection Act (E.P.A.) of 1986 under Article 253 of the Constitution of India. The purpose of the Act is to implement the decisions of the United Nations Conference on the Human Environment of 1972 (The Stockholm Convention), in so far as they relate to the protection and improvement of the human environment and prevention of hazards to human beings, other living creatures, plants and property. The EPA is an umbrella legislation designed to provide a framework for the Central Government coordination of the activities of various central and state authorities established under previous laws such as the Water (Prevention and Control of Pollution) Act of 1974 and the Air (Prevention and Control of Pollution) Act of 1981. The primary legislative responses to the Bhopal Gas Leak Tragedy were the Bhopal Act of 1985 and the E.P.A. Consequently, the E.P.A. bears the stamp of the legislature's immediate concern to strengthen the regulatory framework for hazardous industries and pollution control. It is only after the enactment of the Environment Protection Act of 1986 that the evolution of environment legislation started in India. It gave a lot of power to the Central Government, especially through the Section 3(1) of the Act which empowers the Centre 'to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution'. It was only under this Act that the first draft notification of the Environmental Impact Assessment was passed which was later converted into the E.I.A. notification of 1994 which laid the foundation for a more 'Mandatory' form of E.I.A. in India. It has been noted by an eminent Professor of Law, P. Leelakrishnan in his book titled 'Environment Legislation in India', about the faulty assessment done by the Central as well as State authorities in granting permission to the MIC producing plant in Bhopal. Firstly, the plant which would be producing chemical fertilizer and be discharging toxic waste in form of effluent and gaseous pollutant, was allowed to be setup in a partially

⁴ Chander J. Water contamination: A Legacy Of The Union Carbide Disaster In Bhopal, India. Int J Occup Environ Health. 2001;7:72–73

residential area. There was a township near the location of the plant and there was a slum in very near proximity of the Plant. Secondly, a plant of the identical design as of the UCC plant in Bhopal was rejected for being faulty in Canada and Australia. But that plant design was passed without doing a background check by the Bhopal Municipality authorities. It evidently shows that the State and Central authorities had not paid heed to the environmental aspect of setting up the plant, but were only desirous of making profits which would arise in the future. The UCC took advantage of the same fact and there was multi-dimensional corruption and malpractice. The disaster demonstrated that seemingly local problems of industrial hazards and toxic contamination are often tied to global market dynamics. UCC's Sevin production plant was built in Madhya Pradesh not to avoid environmental regulations in the U.S. but to exploit the large and growing Indian pesticide market⁵.

It is astonishing to note that in and before 1984, India did not have any concrete legislation to deal with or regulate environmental pollution or degradation. Except for The Water (Prevention and Control of Pollution) Act of 1974 and The Air (Prevention and Control of Pollution) Act of 1981. The 42nd Amendment to the Constitution of India made the Indian Constitution the first of its kind in the world to have specific provisions relating to the protection and improvement of the environment but the Indian Parliament still had not enacted any law for the same. *The Environment Protection Act, 1986* was the first umbrella legislation which was passed by the Central Parliament in the wake of the Gas Leak in Bhopal. This statute today is the only statute in India which regulates and brings into the ambit of it, all forms of activities which are of detriment to the environment. It is the source of the power of the Executive wing to legislate in form of notifications and orders which become guidelines for the administrative agencies. The Environment (Protection) Rules, 1986 was brought into effect in pursuance of Section 25 of the Environment Protection Act, 1986 which gave the Central Government the power to make rules for the protection of environment. It has seven schedules which specifically lay down rules regarding standards for emission or discharge of environmental pollutants from industries, prescribing standards for ambient air quality, standards for emission of smoke, vapor etc. from vehicles, providing a list of authorities or agencies to be intimated in case of discharge of any pollutant in excess of prescribed standards and the prescription of general standards for discharge of environmental pollutants. Another major set of Rules, which were passed under provision of Section 25 of the Environment Protection Act, 1986 was the *Hazardous Waste (Management*

⁵ Shrivastava P. Bhopal: Anatomy of a Crisis. Cambridge, MA , Ballinger Publishing; 1987. p. 184.

(and Handling) Rules, 1989. These set of rules apply to the management and handling of 18 categories of wastes like Cyanide Waste, Metal Finishing Waste, Waste containing water soluble compounds of lead, copper, zinc, chromium etc. Basically including all the toxic chemicals which could be stored in factories engaging in business of production or handling of such chemicals and substances. This notification directs the occupier generating hazardous wastes to take all practical steps to ensure that such wastes are properly handled and disposed of without any adverse effects. The occupier shall also be responsible for proper collection, reception, treatment, storage and disposal of these wastes either himself or through the operator of facility.⁶ *The Environment Impact Assessment Notification of 1994* was a benchmark for environmentalists whose major concern has been the destruction of the environment in the garb of development. Through this tool of E.I.A., the form of impact assessment became mandatory and the Central Government was mandated to carry out an extensive form of environment impact assessment before passing of any project which was listed in the category A and B of the notification. It included a ‘Public Hearing’ and through that, a Right to Know was established wherein the general public who would be affected, were given a chance to speak out and made aware of the proposed project. A lot of transparency was introduced in the administration entrusted to pass and give validation to developmental projects which included setting up of industries, factories, production houses and also start mining projects, irrigation projects, dams and also townships and infrastructure projects. The schedule of the 1994 notification included almost all kinds of projects and activities which could affect the environment in the least. One year and one day later from the Bhopal Gas Leak, another minor gas leak accident took place in New Delhi, in the Sriram Fertilizer Factory. A public spirited individual who also is an eminent environmental lawyer practicing in the Supreme Court, Mr. M.C. Mehta, took up this case and filed a Public Interest Litigation, **M. C. Mehta v. Union of India**⁷. Some amount of Oleum Gas leaked from this plant situated in Delhi and it resulted in one fatality and many injuries. It was contended by the petitioners that this factory was setup in a locality which was densely populated and any such mishap in the future could lead to another Gas Leak catastrophe which recently occurred in Bhopal. Considering that Shriram Food and Fertilizers was in the business of manufacture and handling to hazardous substances, injurious to public health the onus of prevention and caution should have been entirely upon them. The court decided apt to use the concept absolute liability against Shriram Food and Fertilizers. Citing the case of

⁶ S. ShanthaKumar; Introduction to Environmental Law; 2nd Edn. LexisNexis, p. 157-158

⁷ (1986) 2 SCC 176

Rylands Vs. Fletcher⁸ “a person whom for his own purpose brings onto his land, collects or keeps anything likely to do mischief must keep at his peril and if he fails to do so is prima facie liable for the damages which is the natural consequences for its escape.”⁹ It held Shriram responsible for all the damages and liable for paying compensation for its reversal. The only exception for this case was that of a natural calamity or an act of a third party. The court determined that the” leakage was caused by a series of mechanical and human errors. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted” and not by an act of sabotage by a third party and hence the concept of absolute liability was applicable. After this judgment, a significant principle was evolved by the Supreme Court, that of ‘Absolute Liability’. It did not exist in black and white in the enviro-legal sphere of the Indian Legal System and this principle, today, is of utmost importance.

What happened in Bhopal was an unprecedented tragedy which was the outcome of legislative and administrative incompetence in India. The lack of adequate legal and legislative framework was the reason for the loss of thousands of lives and the cause of the sufferings which continue to haunt the citizens of Bhopal. It would not be completely wrong to state that environmental legislations started evolving only after this huge disaster. The Indian Government and authorities realized the dearth of missing administrative framework only on the eleventh hour when the tragedy had already struck. Had the laws been in place and the legislature been competent, this accident could have been averted or the sufferings of the people could have been lessened. The main accused of the Union Carbide Corporation, C.E.O. Warren Anderson has died and the lawsuit against him has been shut down forever. But the pain and suffering of the survivors continue till today.

⁸ (1868) LR 3 HL 330

⁹ Public Interest Litigations, <http://cpcbenvis.nic.in/newsletter/legislation/ch18dec02a.htm>, (accessed on 7.1.15)

UNIFORM CIVIL CODE IN INDIA

Diksha Dwivedi* & Ashutosh Bajaj**

The aim of this paper is to understand the Uniform Civil Code in India and its impact on the Indian Society by discussing the pros and cons of the adoption of the code. A Uniform Civil Code in India is a debate to replace personal laws which are based on custom. These laws are different from the public laws and cover issues like marriage, divorce, inheritance, adoption and maintenance. India is a land of different religion and it governs the different set of family laws like the Christian have their Christian Marriage Act, 1872 the Parsis have their own Parsi marriage and Divorce Act, 1936, the Hindus and the Muslims have own separate laws. Article 44 of the Directive Principles of the Constitution specifies that *the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.*¹ Goa is an exception to the rule and it is a state which governs the Uniform Civil Code in India. The question arises why there is a need of Uniform Civil Code in India? Uniform civil code will help to promote secularism and it will allow all the citizens of India to follow the same civil code, whether they are Hindus, Muslims Christians, or Sikh. Article 14 of the Indian Constitution says *equality before law*. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.² Women in the lower sections of our society are still struggling with their rights and duties and they should be treated equally as men. It will help women get their rights. When there is the same set of rules and regulation to punish a criminal then why not Uniform Civil Code? Muslims in many countries like Australia, the United States and the United Kingdom have agreed to follow the Uniform Civil Code then why they have a problem to follow the similar thing in India. The Uniform Civil code will bring uniformity in the country and every citizen of India and most women will get their rights and will be treated equally in the eyes of law.

India is a country which is much known for its culture and tradition. India is a diverse country where people of different religions stay together peacefully with their own culture and the personal laws which governs them. The question arises what are personal laws? India is a

* Student- B.A.LL.B. @ Amity Law School, AUUP, Noida

** B.Com. @ University of Delhi, New Delhi

¹ Article 44 of the Indian Constitution

² Article 14 of the Indian Constitution

land of different religion and each religion has their own laws to govern them like the Hindu, Muslim, Christian and Parsi's are governed by their own personal laws as The Hindu law (Acts 1955-56), Muslim Law (1937) and Christian and Parsi law (Parsi marriage and divorce act 1936). Uniform Civil Code is a debate to replace these personal laws which still exist in our country which is based on custom and religion. It is the most debated topic till now. Politically, the nation is divided into many political parties including BJP who is strongly in favor of implementing the Uniform Civil Code in India whereas the other non BJP, including the Congress Party, Samajwadi Party are against the implementation of Uniform Civil Code.

Article 44 of the Indian Constitution itself says "*The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.*"³ The Supreme Court of India first directed to implement UCC in the year 1985 in the case, ***Mohammad Ahmed Khan v. Shah Bano Begum***⁴, Shah Bano, a 62 year old Muslim lady along with her five more children claimed for maintenance under section 125 of Criminal Procedure Code from her husband after she was given triple talaq from him. After seven years the court claimed her maintenance of ₹500, under section 125 of the Criminal Procedure Code which says order for maintenance of wives, children and parents and if any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself.⁵ The minority people were threatened and protested against this judgment. A Muslim man gave an open challenge to the Indian Parliament that implementing Uniform Civil code will not bring any changes to India and they will not accept any changes with the existing personal laws.

Why women are still suffering? In the pre- Islamic Arabic society the status of women was very bad. They were inferior as compared to men. In those days the customary laws were in all favour of men. The females were treated as properties and were used for the enjoyment of sex and procreation of children. The male members enjoyed limitless polygamy and can have as many wives they can accept the blood relations, such as the mother or the real sisters. When Islam came the females were given some social status in the society. Against the uncertain relationship of the husband the Islam introduced a marriage (Nikah) in which the husband and wife were given a dignified status of being married. The females in our society are still suffering because they bind with their personal laws. Uniform Civil Code will help to improve the situation of Muslim women. Monogamy should be made mandate for every

³ Article 44 of the Indian Constitution

⁴ AIR 1985 SC 945

⁵ Section 125 of CrPC

citizen in India and this will lead to gender justice and this can only happen through Uniform Civil Code in India. Article 14 of the Indian Constitution states equality before the law⁶ which means every person who is a citizen of India will be treated equally in the eyes of law. Then why there are different laws of inheritance for different section of society? Why women of Muslim community cannot enjoy an equal share as compared to Hindu Women? A Uniform Civil Code will help to remove old traditions which have no existence in today's generation. When the Fundamental Rights Sub Committee decided to make the uniform civil code a directive principle, Amrit Kaur along with two other members wrote, "One of the factors that have kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life."⁷ Personal laws based on religion shows inequality. When there is one criminal code which is applicable to every citizen of India then why not a Uniform Civil Code for the equal rights on marriage, divorce, maintenance, adoption, inheritance and succession. Uniform civil code means the imposition of Hindu Code? This is absolutely incorrect. It is a code to bring uniformity in India and it means equal laws for every citizen of India rather than providing justice discriminating on the basis of customs and religious belief. Uniform civil code will not take away the freedom of religion because it is granted to every citizen of India as their Fundamental rights to practice their own religion. Uniform Civil Code will be neutral and it has nothing to do with religion.

India should implement the Uniform Civil Code to be secular. It will help to promote unity throughout the nation and it will help in the progress of the nation. In India, Goa is an exception to this rule it is the only state in India, which follows a uniform code known as the Goa Civil Code also known as the Goa family law. The Goa Civil Code or Family law is based on the Portuguese Civil Code of 1867. Goa has had the Uniform Civil Code for the last 500 years, even though it was written by the Portuguese it had been translated to English. The Goa government realized to change and altered these laws based on old custom and traditions and is now successfully followed by the people of Goa. The Uniform civil code of Goa asks all the couples to register after marriage and if they are not registered they are not recognized by the court. The divorce laws aim to be fair for both the parties. Women enjoy equal share on property. If no contract has been signed, it is assumed to be community property. All

⁶ Article 14 of the Indian Constitution.

⁷ Shiva Rao, *The Framing of India's Constitution: Select Documents II*, Available at: www.indiafacts.co.in [Accessed on: 2/8/2015 at 1:08 pm]

property acquired during marriage is equally divided in case of divorce. Goa uniform civil code is an example how every member of the society is being treated equally and the personal laws have no role. The caste system in India became unfair for the people. The Uniform Civil Code will help to reduce the vote bank politics. The political parties target the different sections of the society to grab votes. The Bahujan Samaj Party (BSP) is one such example who supports Dalit groups. The candidates divide their vote according to their caste and are forced to gather support. The judiciary is the most important organ of the government. It is the third organ of the Government and its main function is to apply laws to certain cases and settle disputes. Judiciary protects the constitution and the fundamental rights of the people and is more respectable than the other two organs. Judiciary has been always in favor of implementing the Uniform Civil Code in India as discussed earlier in the Shah Bano Case. In the case *Sarla Madgal v. Union of India*⁸, Kalyani (the main petitioner) an NGO working along with other women was fighting for justice. The Hindu husband who married a Hindu woman being a Hindu sooner had love for other women. To avoid legal complications the only purpose to implement second marriage was to convert himself to Islam, whose personal laws allow marrying 4 wives. The court held that the husband getting married second time by conversion of Islam without dissolving the first marriage was held to be an invalid marriage and he was held guilty under section 494 of Indian Penal Code, which states whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extent to seven years, and shall also be liable to fine.⁹ The personal laws in India are misused by the people. The main social issues have come from Muslim Society and it has forced the judiciary to implement the Uniform Civil Code in India. The Supreme Court has continually called for the Uniform Code for the women who are ill-treated in our society under the veil of these personal laws.

⁸ 1995 AIR 1531

⁹ Section 494 of The Indian penal code, 1860

SURROGACY IN INDIA & ITS CORRESPONDENCE WITH HUMAN RIGHTS

Manisha Chava * & Sparshi Agarwal**

Abstract

In India, the concept of surrogacy means “womb for rent” which aids those who cannot otherwise have children, making it possible for them to procreate genetically through the process of artificial insemination.

This Article additionally converses, the extent to which the proposed legislation, the Assisted Reproductive Technologies (Regulation) Bill and rules (2009), adequately deals with interest of women engaged in surrogacy (surrogate), intended parents and child, keeping in view that their human rights are not being infringed.

However, it is not unknown that the surrogates are EXPOSED TO greater menace and trouble as compared with those allied with pregnancy and childbirth. The menstrual cycles of a gestational surrogate must be precisely matched to that of the egg donor, SO that the fertilized egg in the womb operates receptively during THE IMPLANTATION. SURROGATES ARE then ingested large doses of hormones, which have unknown long term effects associated. Further it has been noted that, after UNDERGOING SUCH IMMENSE PAIN, THE surrogates are mostly exploited due to illiteracy and poverty. The bill proposed in the parliament of India must be more vigilant in regulating laws relating to surrogacy, in the manner which is appropriate and just and does not act in contravention to any human right. The emphasis of the author (s) in this article is vis-à-vis the conception of surrogacy and its correlation with human right

Keywords: Surrogacy, Gestational, Traditional, Insemination, Embryo Implantation, Anonymous Donor, Human Rights & Laws.

* Student- B.Com.LL.B. (H) @ Amity Law School, AUUP, Noida; Email: chava.manu@gmail.com

** Student- B.Com.LL.B. (H) @ Amity Law School, AUUP, Noida; Email: sparshi.3dec@gmail.com

INTRODUCTION

The word surrogate is derived from the Latin word ‘*subrōgare*’ which in literal term means ‘to substitute’. Surrogate pregnancy is the trend which is referred in the form of assisted conception. In general, it is characterized as the practice whereby one woman (the surrogate mother), carries a child for another person or persons i.e. for the commissioning couple as the aftereffect of an agreement prior to conception, that is the child should be handed over to that person after birth. According to, the **Surrogacy (Regulation) Bill** which was proposed in **2009**, ‘surrogacy’ means an arrangement in which a woman agrees to a pregnancy, achieved through Assisted Reproductive Technology (ART), in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.¹

This observable fact derived in 1978 depicts a girl named Kanupriya alias Durga as a baby born through IVF (In Vitro Fertilization) technology in Kolkata, just about 67 days subsequent to the first IVF baby born in the United Kingdom.² The concept of surrogacy in India is not new. It is a practice that has been predominant from an elongated duration of time. Generally, two known methodologies can be pulled out in the greater part of the nations are traditional surrogacy and gestational surrogacy. Traditional surrogacy is a practice whereby a surrogate mother is artificially inseminated, either by the intended father or a anonymous donor, and carries the baby to term. The child is thereby genetically related to both the surrogate mother, who provides the egg, and the intended father or anonymous donor.³ Wherein, in gestational surrogacy, an egg is detached from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term. In this case, genetically the child is related to the woman who is the donor of the egg and the intended father or sperm donor, but the surrogate cannot be so associated.⁴

Consequently, there is a difficulty which is allied as regards to the paternity rights over the child, as there is involvement of multiple parents i.e. the surrogate mother, intended father,

¹ Assisted Reproductive Technology Bill, 2008 (pending)

² *It' official: Kanupriya's India's first test tube girl, dna*, Available at <http://www.dnaindia.com/india/report-it-s-official-kanupriya-s-india-s-first-test-tube-girl-210> , last seen on 14/08/2015

³ Admin, *Commercial surrogacy in India*, Civil Sadda Blog, available at <http://civilsadda.in/blog/commercial-surrogacy-in-india/> , last seen on 14/08/2015

⁴ Ibid

intended mother & donor. In actual fact surrogacy is not merely a biological verity but is interrelated to legal facets and socially construed aspects in conjunction with liabilities, rights and duties.

The hindrance which arises due to surrogacy is not unknown. Many fundamental issues can be raised at this point, such as, whether surrogacy agreements enforceable, void or prohibited? Who is the person liable when parenthood is in question? In the event of separation between intended parents, in that case what happens to the child? What if the commissioning couple transforms their mind set or passes away before the contracted surrogacy term? Law differs extensively from one jurisdiction to another in response to the above mentioned questions.

WHY SURROGACY IS DIFFERENT

The essential need for surrogacy is that it lends a hand to the sterile couple to have a baby of their own. It is favored over adoption in light of the fact that in most surrogacy agreements, the child will be genetically identified with either or both the parents. Surrogacy is an agreement which is contracted between the surrogate mother and the intended couple describing the details along with the compensation to be paid to the surrogate. A Surrogate mother in this way creates a superior life for herself. For infertile women or for single guardian, surrogacy gives the most ideal approach to have a child. There are various social, moral, restorative and emotional subject matters that join the surrogacy arrangements which influence both sides. Additionally, surrogacy is extravagant as many expenses add up to it, apart from medicinal costs like counseling and legal expenses. It is likewise conceivable that at the time of giving over the child the surrogate may encounter grief and mental issues for she has carried the baby for so long and conveyed it. This may place the intended parents in possibly troublesome position and lawfully may get entangled.

Traditional surrogacy is more disputable than gestational surrogacy in extensive part as the biological relationship between the child and the surrogate frequently convolutes the certainties of the case, if paternity or the validity of the surrogacy contracts are challenged. Thus, most nations deny agreements regarding traditional surrogacy. So far as India is concerned, gestational surrogacy has a higher achievement rate than traditional surrogacy. Also, numerous countries that allow surrogacy agreements forbid payment of medicinal and legal costs caused as a consequence of the surrogacy agreement. Surrogates' ovulatory cycle

is suppressed by injecting estrogen which builds her uterine lining. Subsequent to such transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation.⁵ Surrogacy is not as simple as adopting a child, it is a prudent method of procreation of child where there is an implication of artificial insemination.

COMMERCIALIZATION OF SURROGACY IN INDIA

India today is seen as blooming in the surrogacy industry. A new stream of medical tourism is seen to enter into medical arena with surrogacy as a part of it. The basic reason for growing outsourcing services is that India provides satisfactorily efficient workers at relatively lesser cost. India not only provides a number of successful IVF clinics with excellent technology and services, there are many women willing to provide surrogate services. According to some estimates, Indian surrogacy market is already a whooping \$445 million a year.⁶ No wonder India is already gaining fame as the cradle of the world, poised to become the surrogacy outsourcing capital. Not only foreigners visit India for gaining cheaper medical services, foreign couples suffering from infertility are gaining interest in India because of the same reason. Surrogacy costs about \$12,000 in India, including surrogate mother's fees and all medical expenses. In the U.S., the same procedure can cost up to \$70,000.⁷ A surrogate mother can gain some \$6000 for her services. Now \$6000 is not a small amount, it is equivalent to almost Rs30, 000.⁸ Some people may argue that foreigners are exploiting poor Indian women using them as surrogates, but same argument one can put forth for every outsourcing job Indians provide. India provides fairly advanced medical system and services and English speaking doctors, but above that, Indian surrogate market is yet not suffering

⁵ Anne R Dana., *The State Of Surrogacy Laws: Determining Legal Parentage of Gay Fathers*, 18:353 Duke Journal of Gender Law & Policy 353, 362 (2011) , available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1192&context=djglp> , last seen on 14/08/2015S

⁶ Anu, Pawan Kumar, Deep Inder, Nandini Sharma, *Surrogacy and woman's right to health in India: Issues and perspective*, 57 India Journal Of Public Health 65, 72 (2013) , available at <http://www.ijph.in/article.asp?issn=0019557X;year=2013;volume=57;issue=2;spage=65;epage=70;aulast=Anu%2C#ft22> , last seen on 14/08/2014

⁷ *Womb for Rent: Surrogate mother in India*, Web MD, available at <http://www.webmd.com/infertility-and-reproduction/features/womb-rent-surrogate-mothers-india> , last seem on 14/08/2015

⁸ Brooke Lea Foster, *The Hunt For Golden Eggs: Young Woman Donation Eggs* , Washingtonian (01/07/2007), available at <http://www.washingtonian.com/articles/health/the-hunt-for-golden-eggs-young-women-donating-eggs> , last seen on 14/08/2015

with the legal-red-taping, ill-defined surrogacy laws and governmental interference, making things easy and economically viable. Surrogacy is not a new conception for Indian nationals. From a long time, infertile or sterile couples used to hold services of other woman in the form of mistress or second-wife, for procreation of a child.

INITIATIVES TAKEN BY THE GOVERNMENT

To address such issues and to regulate surrogacy arrangements, the Government of India has taken certain steps including the introduction and implementation of National Guidelines for Accreditation, Supervision, and Regulation of Assisted Reproductive Technology (ART) Clinics in 2006, and guidelines have been issued by the Indian Council of Medical Research (ICMR) under the Ministry of Health and Family Welfare, Government of India.

However, till now there is no legal provision dealing directly with surrogacy laws to protect the rights and interests of the surrogate mother, the child and the commissioning parents. Nonetheless, Assistant Reproductive Technique (ART) Regulation Bill, 2010 lays down few guidelines.

SURROGACY LAWS

Since 2002 the Supreme Court of India legalised the commercial surrogacy. *Surrogacies together with the exceptional medical skill in India have made India a hotspot for Surrogacy requirements.*

In order to make surrogacy process more vigilant and strictly supervised, Indian Parliament is in the process of finalizing Surrogacy Bill. Besides to this Indian Council of Medical Research turned out with a draft for the ART (Assisted Reproductive Technique) Guidelines, which makes the stand for the Surrogacy arrangements and IVF clinics in India.

A child conceived through surrogacy does not get the citizenship of India by virtue of nativity in India. In fact the child has the same citizenship as that of his parents. For example: A couple from USA come to India to have a baby through surrogacy. Once the baby is born, the couple needs to get in touch with their countries consulates/ high commissioner in India and local visa authorities in USA and make requisite arrangements for the visa/ passport and citizenship of the child as being a citizen of United States of America. As per Indian laws, the

birth certificate of a baby born through surrogacy contains the name of the intended parents itself, nowhere is the name of the surrogate mother mentioned.⁹

The Indian Council for Medical Research prescribed rules to manage Assisted Reproductive Technology systems. The Law Commission of India presented the 228th report on Assisted Reproductive Technology techniques examining the significance and requirement for surrogacy, furthermore the tramps taken to control surrogacy arrangements. The following observations had been made by the Law Commission:¹⁰

- Surrogacy arrangement will continue to be governed by a contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear the child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.
- A surrogacy arrangement should provide for financial support for the surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child, which is resorted to if biological (natural) parents and adoptive parents are different.

⁹ Legal Aspect of Surrogacy, Surrogate India End To End Solution for Surrogacy, available at <http://www.surrogateindia.co.in/surrogacy/legal-aspect>, last seen on 14/08/2015

¹⁰ What does the Law says on surrogacy?, The New Indian Express, available at <http://www.newindianexpress.com/cities/bengaluru/article599047.ece>, last seen on 14/08/2015

- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right to privacy of donor as well as surrogate mother should be protected.
- Sex-selective surrogacy should be prohibited.
- Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

After understanding the laws, can we answer to the question whether surrogacy is void, voidable or enforceable in India? This question is highly debatable and the answer varies according to the jurisdictions. Though in India, the essential feature of an agreement is meeting of mind that is the party to an agreement must have consensus ad idem at the point of entering into an agreement. Therefore, the parties must pay attention in making of perfect agreement (document), which authenticates the birth of a baby born, so it should be made with such prudence that the agreement is able to meet the worst twirl of a situation. Indeed such agreements are connoted as enforceable and not void and voidable.

SURROGACY IN RELATION WITH HUMAN RIGHTS

Reproductive Rights

Reproductive rights are increasingly recognized in international human rights law. To the extent surrogacy enables those otherwise unable to “achieve their reproductive goals and have children by choice,” If the government disfavors surrogacy and its practice then it would be considered erroneous as it would be a violation of reproductive right.

On December 18th, 1979, **Convention on the Elimination of all forms of Discrimination against Women (CEDAW)** was signed by various nations which assure the rights of pregnant women. India was one amongst its signatories. Article 11.2 sets out the measures to be taken by states to “prevent discrimination on the grounds of marriage or maternity and to ensure women’s effective right to work.” These measures include the prohibition of dismissal

for pregnancy or maternity leave, maternity leave with pay or “comparable social benefits,” and the “necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment of childcare facilities.”¹¹ Article 12 requires the state to “ensure access to healthcare services, including those related to family planning” and, more specifically, to “ensure to women appropriate services in connection with pregnancy, confinement in the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.”¹² Article 14 reiterates the right to family planning services for rural women in particular.¹³ Finally, Article 16 requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”¹⁴ In addition to these specific guarantees, Article 5 more broadly demands recognition of maternity as “a social function,” rather than a commercial function.¹⁵ To the extent CEDAW though focuses on the health of the pregnant woman but it is not inconsistent with gestational surrogacy. Rather, it safeguards the human rights by protecting the health of the surrogate.

Child Rights

Surrogacy is associated with certain specific rights allocated to the child Under **CRC (Convention on the rights of the child)**. Firstly, the child’s rights are to be “valued and guaranteed” exclusive from discrimination of any sort. According to, UNICEF, UN Convention on the Rights of the Child, there were provisions which originally dealt with protection of illegitimate child’s rights, it later on underwent an expansive application which was inclusive of children born through surrogacy.

Article 7 of CRC is quite complicated here, as Article 7.1 states that “the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents.”¹⁶ There are two difficulties with this provision, both grounded in its presumptive

¹¹ *Convention on Elimination of All Forms of Discriminations Against Woman*, UN Entity for Gender Equality and the Empowerment of Woman, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, last seen on 14/08/2015

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ *Convention on the Rights of the Child*, United Nations Human Rights, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, last seen on 14/08/2015

incorporation of national law. If that law provides that a mother is the person giving birth, the child's status is unclear. If that law provides that a child born of surrogacy cannot acquire the nationality of her intending parties, similarly, the child may be in a precarious situation.¹⁷ Such setback can be set right by restructuring domestic laws or as proposed in the pending Indian Surrogacy Regulation Bill, which recommends that, the intending parents are required to prove, before entering into a surrogacy arrangement, that the resulting child will be granted citizenship of that of the intended parents, also, they will be legally recognized as the child's parents in that nation.

This Bill further proposes that:

- A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother.¹⁸
- The legal guardian of a minor child may apply for any information, excluding personal identification, about his / her genetic parent or parents or surrogate mother when required, and to the extent necessary, for the welfare of the child.¹⁹
- Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother, provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.²⁰

Surrogates Rights

In a lifetime a surrogate women can only give birth to five successful babies including her own children. The baby so born has the liability linked with the person(s), availing the facility of a surrogate mother. In case if the intended parents reject to accept the child or in case of separation of the commissioning couple, it will be considered as a serious offence according to the bill.

Wherein the embryo transfer fails, the surrogate will be paid monetarily as per the conditions of the agreement. Confidentiality is the right allocated to the surrogate mother and if she

¹⁷ Ibid.

¹⁸ Supra 1

¹⁹ Supra 1

²⁰ Supra 1

intends to hide her identity from the commissioning couple, she is permitted to do so. It is the main concern of the ART clinic to keep confidentiality. In India it is obligatory to appoint a local guardian who will take care of surrogate mother during and after the pregnancy. These are the rights accessible by the surrogate mother.

CONCLUSION

This Article has described surrogacy in India has got several snags, which need to be statuted out and treated in a coherent way. The genuine apprehension should be drawn to recognize the omitted priorities of the proposed bill and must be reviewed from the perspective of surrogate mother. To safeguard the human rights of the surrogate mother, numerous provisions are enacted. Even then, there are persistent problems existing in relation to find a way out. The Government has to juggle around with and make such regulations which will look after the rights of the surrogate as well as the intended parents of the child who entered into a contract with the surrogate in order to achieve their dreams.

DEVELOPMENT OF FORENSIC SCIENCE AND CRIMINAL PROSECUTION IN INDIA

Sana Sharma*

HISTORY

The early times lacked uniform methods of forensic practices. The older method of criminal investigation implied confessions which were not voluntarily but were one which were forced to confess. This practice of forcing to confess gave birth to unlawful practices as use of force to make someone to confess is not lawful. The concept of forensics is not new in India though its usage in solving crimes is comparatively very low as to developed countries.

Sir William Herschel an officer in Indian civil services during pre-independence was the foremost who advocated in favor of using finger-prints in identification of crime suspects. During 1858 he was the one who started to use thumbprints for securing the measures to avoid the frauds. Following this in year 1977 he initialized using the finger prints in lawful contracts and other legally enforceable deeds in order to avoid the frauds. The basic aim for the same was to avoid the fraud then caused by the relatives in drawing pensioner's money fraudulently during their lifetime or continues drawing money after their deaths. He started to take and preserve the finger-prints of the prisoners so as to put a check on their escape and to prevent any possible frauds¹.

Approximately 20 years later to this in 1897 Kolkata witnessed the establishment of finger-print bureau which was result of the approval of a committee report by council of Governor General. The reports contained the proposal of classifying the criminal records on the basis of finger-prints. Sir Edward Richard Henry was the first scientist to devise a systematized finger-print system which was later co-devised by Azizul Hague and Hem Chandra Bose. England and Wales were among the first to accept this co-devised system. The system is known as Henry Classification System named after Sir Henry who primarily devised this system. On the other hand, Scotland witnessed the establishment of first finger-print bureau in Britain².

After independence in 1947 the government of India through the ministry of home affairs established the first forensic science laboratory of free India in Delhi in assisting Delhi police and central bureau of investigation which were left under the control of central bureau of

* Student-B.B.A.LL.B. @ Mody University, Sikar, Lakshmangarh, Rajasthan

¹ Herschel, William James (November 25, 1880). Skin Furrows of the hand. *Nature* 23(578):76

² Sodhi J.S.; Kaur, asjeed (2005). —The Forgotten Indian Pioneers Of Fingerprint Science. *Current Science* 88 (1): 185-191.

investigation. At present this oldest forensic science laboratory of free India provides expert opinions in crime related cases. Its assistance is not only limited to Delhi police and CBI but also extends to State Forensic Science Laboratories, Defense Forces, Government Undertakings, Universities, and Banks etc. In 19th century a startling discovery was made which supported the positive advocacy of using finger-prints in certain criminal matters that was finger contains its own oily substance. The fingers whenever comes in contact with any surface lefts an impression so called latent mark that could be traced by using various methods(e.g., using of fine power over such surface where one is suspected to find the finger-print). Not long after this, in 1894 while moving towards the end of the century Home Secretary in England established a committee called the Troup Committee. The main aim for the establishment of this committee was to determine the best way of personal identification. The committee accepted the fact that no two individual could have same finger-print that is, finger-prints make two individual different. Although, still much reliance were not paid to this findings until 1900 when Argentine court first accepted the finger-print evidence in determining the case. Following this England adopted such finger-print evidence in 1902, which encouraged other countries also to use this type of evidence³. British government before independence gifted India several such laboratories which forms the base of Indian forensic system today.

Anthropometric Bureau (1892), Finger Print Bureau (1897), Inspectorate of Explosives (1898), Office of Government Handwriting Expert (1904), Serology Department (1910), Foot Print Section (1915), Note Forgery Section (1917), Ballistics Laboratory (1930) and Scientific Section (1936). Having subsequently undergone clubbing / regrouping / spreading, as of now, there are 28 State / Union Territory Forensic Science Laboratories (State / UT FSLs) along with their Regional FSLs (32 RFSLS) and Mobile FSLs (144 MFSLS); they are mostly with the respective Home Department either directly or through police establishment⁴.

Present day:

Various prominent jurists in older and present era has made an attempt to define the crime in some of the best possible way they could, some of such definitions are as:-

- In his ‘Commentaries on Law of England’, Sir William Blackstone defined Crime as “an act committed or omitted in violation of Public Law forbidding or commanding it”.

³ <http://www.britannica.com/EBchecked/topic/142953/crime/53437/The-role-of-forensic-science>

⁴ Dr. Gopal Ji. Misra & Dr. C. Damodaran, —Perspective Plan For Indian Forensics|, Final Report presented to the Ministry of Home Affairs Government of India, New Delhi

- Sir James Stephen defined, “Crime is an act forbidden by law and revolting to the moral sentiments of the society”.
- Kenny defined “Crimes are wrongs whose sanction is punitive and in no way remissible by a private person, but is remissible by the Crown alone, if remissible at all.”

Thus, DNA analysis is just like identifying the individual's characteristics. Where characteristics, nature, behavior, likes, dislikes of two individual do not match in the same DNA of each individual differ from other individual in one or the other form. The DNA analysis thus, is also called DNA finger-print. There is no doubt that the sciences has given many tools to us for analyzing the forensic evidences and determine the fate of the case. It would not be incorrect to state that the most powerful among them is DNA analysis, the material responsible for making the genetic code of each and every individual. DNA finger-print or DNA typing or DNA profiling analyses the DNA from the physical evidence and match it with the blood, hair etc of the person, if those two matches exactly to each other that simply means that the person was either involved, present, assisting in any criminal or civil issue. The DNA analysis is of great use not only in criminal but also in civil cases.

In simple words it would not be wrong to say that it is modern way to investigate the case whether civil or criminal, the technique have ability to give answers to those questions which could not be answered through ordinary way of investigation. It not only helps to deliver more precise judgments but its merits also include that there could be narrower or we could say that no chance of the wrongdoer to escape through any way. The case starts with the investigation of the case; the experts collect the material evidences. Each of such evidences are so unique in their own way that their arise the need to examine them and analyze them separately. Sometimes, cases are so complex that the evidences so collected needs more than one expert to analyze those collected evidences.

At present more than 30 million cases are still pending in the courts of India. Not only the courts are overburdened but also the justice is delayed to those who every day waits for it. With the help of forensics we not only help the victims but also the court to speed-up the justice system and to reduce the burden over-lying them.

Sub-divisions:

- a) **Forensic accounting** is a method of using accounting skills for investigating crime combined with analyzing the financial condition with the aim to use this in legal proceedings.
- b) **Forensic aerial photography** also called as forensic imaging is the recreation of crime scene in front of investigators and analyzers through photographs in order to carefully scrutinize it. This aids the investigation as well as its regarded as evidence which could be produced in court.
- c) **Computational forensics** this branch of forensics is concerned with algorithms development and software development to assist in forensic examination.
- d) **Criminalistics** amalgamation of various sciences in order to compare and examine Biological evidences, Ballistic evidences, Finger-prints etc. these evidences are scrutinized and processed in lab to reach a result which either correlates it to the wrong done or otherwise.
- e) **Forensic dactloscopy** is a science of studying, analyzing finger-prints.
- f) **Digital forensics** is a science to recover the data from electronic and digital media (e.g., search history of a particular computer used by the accused).
- g) **Forensic document examination** is the forensic examination of the disputed document. The most common and known under this category is handwriting examination. Handwriting examination is the one where examiner address concerns in relation to a particular authorship.

RESEARCH QUESTION

The main objective of this paper is to trace and understand the evolution of forensics in India and to explain its meaning. The paper contains a genuine effort to explain how this branch of science known as forensics became an inseparable and important limb of justice delivery system.

ANALYSIS

Forensics is a science with the aim to answer the questions of legal importance. Forensics aims to interpret the evidences of crime scene, with the objective to use the same in investigation. People from various academic background such as chemistry, life-sciences, law

enforcement contribute to this field as forensic scientists or technicians⁵. NABL (National Accreditation Board for Testing and Calibration Laboratories) enshrines four objectives defining the purpose and nature of the program.

- To improve the quality of laboratory services provided to criminal justice system.
- To develop and maintain criteria which can be used by a laboratory to assess its level of performance and to strengthen its operations.
- To provide an independent, impartial and objective system by which laboratories can be benefited through a total operational review.
- To offer to the general public and users of the laboratory services a means of identifying those laboratories which have demonstrated that they meet established standards⁶.

International forensic science (organization), forensic laboratories etc are those which are legally identifiable. The forensic science laboratories must meet the accreditation requirements. Field works are also covered under the work ambit of these laboratories. The labs must ensure the following standards:

- The laboratory does not engage in any activities that might diminish trust in its competence, impartiality, judgment or operational integrity, and
- The laboratory personnel are free from commercial, financial or any other pressure that might adversely affect the quality of their work⁷.

Forensic science and other statutes:

Civil and criminal cases in India are guided by the same law of evidence, though the degree of proof differs in both the cases. But as far as mode of presenting such evidence is concerned the mode remains the same in criminal as well as in civil cases. As per the Indian practice the expert opinion as to a particular matter is only admitted when such expert gives the evidence orally and administer oath in regard to his findings. The following are the exception to this rule:

- When evidence has already been admitted in a lower court;
- Expert opinions expressed in a treatise
- Evidence given in a previous judicial proceeding;

⁵ Sir Krishna, *Forensic Science*, Symbiosis Law School, Pune, India,
<http://www.legalservicesindia.com/article/article/forensic-science-601-1.html>, visited on 14/11/2014.

⁶ NATIONAL ACCREDITATION BOARD FOR TESTING AND CALIBRATION LABORATORIES, specific guidelines for accreditation of forensic science laboratories and checklist for assessors

⁷ www.ifs.edu.in/IFS.EDU.BROCHURE.pdf

- Expert cannot be called as witness;⁸

The common perception Indians do have in their minds are that the birth/death certificates as well as recording the discharge and admission of the patients in the hospital consumes so much of the time. In fact, not only this medical practitioners often hesitate to be the part of the case which is of medico-legal nature. Some of the possible reasons for the same could be as follows:

- Undue time consumption;
- Repeated adjournments;

India is a rich land in terms of law. India has almost a law on each and every subject. In regard to the criminal cases the criminal procedure code (CrPC) together with Indian Evidence Act are the parent laws governing the criminal cases in India. Criminal procedure code prescribes the method of admitting and the procedure thereafter to be followed throughout the trial of the case while, on the other hand the Indian evidence act prescribes that how an evidence in the criminal trial has to be admitted as well as to what extent it has to be admitted, the relevancy of the evidence etc.

In a case accused fails to answer any of the most important and relevant question in the trial section 313 of CrPC must be amended as to enforce against him for DNA test. This could provide the law enforcers opportunity and easiness for investigating the crime as well as to bring the truth from back row to the front and make it wrong done visible.

The principle of *Onus Probandi* has been recognised as the important principle in each and every criminal trial. The meaning of the principle is that, every person should be presumed innocent until proved guilty. The proving of such guilty should not be simply just proving this; the guilt of the person should be proved beyond reasonable doubt. This principle of Onus Probandi has been recognised under the Indian evidence act and thus it forbids the use of forensics in criminal trials. In olden times the forensic findings could be doubted about the findings but with the evolution of modern techniques which are definitely more advanced than the older ones the results and the tests could be more accurate and reliable.

FORENSIC SCIENCE AND CRIMINAL PROSECUTION: SCENE OF OCCURRENCE

A scene of occurrence in simple words means the place where one or more person assembles to commit an act which has been prohibited by any law for the time being in force. While the crime is committed the traces are exchanged between the persons committing the crime,

⁸Arindam Datta, —*Forensic Evidence: The Legal Scenario*”, Dept. of Law, University of Calcutta, <http://www.legalserviceindia.com/article/l153-Forensic-Evidence.html>

between the crime scenes and the culprits etc. these traces are usually transported by the human as well as other agencies which helps to investigate the crime and the crime scene to find out the untold story of, how crime happened?, when does it happened?, etc. the information, traces so collected are useful to:

- Establish corpus delicti
- Provide link between the criminal, the victims and the scene of occurrence; and
- Evaluate the patterns of events.

Some of the evidences are of such a nature that they perish soon and there remains only one or no chance of examining them. Such evidences have to be fully exploited to secure the full opportunity of putting the culprit behind the bars. (For example, if the crime scene was a beach there are high chances that before the foot-print traces could be examined and taken to any expert they would be perished and available no more.)⁹

Cases solved using forensic science:

In case of *Marachalil Chandra Tukaram Talekar v. State of Gujrat*,¹⁰ The particular case was argued in sessions as well as high court over the trail of blood found from front door to the vakil's corridor door respectively marked as H and H-1. The theory of the defense was that the victim was stabbed somewhere else as the serious stabbed person cannot move from the front door to the corridor and hence the victim was stabbed somewhere else and brought to the house in question. The high court took the view that doctor had come to the conclusion that it was very possible for the deceased victim to cross the door and come to corridor after he had received the stabs and hence, the high court concluded on the materials placed on record that there arises no seed of doubt the place where the deceased victim received injuries was the same room and not anywhere outside, after which he was carried from there while he still had hold of life. With this, the fact that the blood was still dripping outside the body is supported and hence the deceased victim was alive at that moment.

*Vasu v. Santha 1975 (Kerala)*¹¹ the court in the respective case laid down certain guidelines to be followed whenever the forensic evidence has to be taken and admitted to ascertain the parentage of the child.

- As a matter of course the blood tests could not be ordered by the Indian courts
- There should be a prima facie case and a strong ground from which court could render the non-access so as to eliminate the presumption of section 112 of the evidence act.

⁹ *History and development of forensic science in India* by RK Tewari, KV Ravikumar Bureau of Police Research & Development, Ministry of Home Affairs Government of India, New Delhi, India.

¹⁰ 1980 Cri. L.J.5 (Guj.)

¹¹ AIR [1986] M.P. 57

- Before blood test could be ordered the court should in advance ascertain the consequences of such order
- No one could be compelled for giving samples for the purpose of analysis. And no adverse conclusion to be drawn on the refusal of the person for giving blood samples.

Tandoor Murder Case (1995) Delhi¹² this case was the first case in the history of Indian case laws that has been solved with the help of powerful forensic science. In this particular case Susheel Sharma murdered his wife Naina Sahni whom he suspected of having love affair with his old fellow classmate and then congress worker Matloob Karim. In heat of his anger and suspicion he killed his wife Naina by shooting her on head three times with his revolver. Susheel Kumar drove the dead body of his deceased wife to a restaurant and with the help of restaurant manager he burnt her body in the tandoor. Later police got the blood stained clothes and revolver from the custody of the accused (susheel kumar) and sent it to lodhi road laboratory for collecting the blood samples from the weapon and the clothes. The blood samples form the cloth and revolver matched with the blood samples collected from Naina's biological parents Jasawant Kaur and Harbhajan Singh. Thus, the conclusion that was drawn was that the charred body remains that were recovered from the tandoor were that of Naina Sahni and Susheel Kumar was found guilty.

Changes required:

- Though there are tons of legislatures in India but a need to systematize and regulate the forensic science could be felt clearly by looking at the plight that India still is far behind other countries in application of forensics for solving the cases.
- The lack of work culture in this field could be traced with the help of the thing that there is hardly any forensic data available and recorded.
- Medico-legal experts should be encouraged. Experts should be encouraged to work in field of forensics.
- A national database system for keeping and maintaining DNA should be designed like the Americans have CODIS (combined DNA index system) where DNA of all the persons who are accused and suspected to involve in any crime could be recorded and kept in the data base. This system would also help to control and detect the serials criminals as well as terrorists.

¹² 1996 CriLJ 3944

CONCLUSION

With the help of this article at least a shallow knowledge could be gained that medical's forensic branch plays a very important role in legal system to determine and punish the crime. The medical experts must be encouraged to join and research on this field and to make this branch stronger and helps the forensics to grow. There is acute necessity to include more and more professionals trained in forensic to enlarge the scope in India. With this it could be said no doubt that the more the forensics will grow the less changes would be left for the criminal to escape from any sorts of loop holes and avoid the crimes and make justice live longer, bringing happiness to the people.

A RESEARCH PROJECT ON SEXISM IN INDIAN LAWS - A JURISPRUDENTIAL ENQUIRY

Gayathree P Thampi*

Abstract

The basic purpose of this project is to examine why law as it is does not confirm to any jurisprudential schools but rather, a fair amalgamation of it. Any given law, on close examination is apt to prove the same. So, easiest way to examine how inter-related law is with society, is to prove the very existence of this hesitation of Indian judiciary when dealing with sex and sexuality. The conformity of law to the wish of the general public and the resistance to change despite of the fact that change being inevitable to law, leads to a new theory of jurisprudence which has nothing new but everything unlike the past. - The unifying theory of jurisprudence, a perfect amalgamation of all existing jurisprudential theories.

Keywords: Indian law, Jurisprudence, Unifying theory, Sexism, gender bias

* Student- B.A.LL.B. @ Dr Ram Manohar Lohiya National Law University, Lucknow, U.P.; Email: gayathreepthampi@gmail.com

INTRODUCTION

Law is like a work of art where jewels of simple logic of good and bad embed itself in the intricate ornament of popular opinion, emerging as a beauty in itself, transcending the meaning and form apportioned to it by its own creator. What law is has been debated more than what law ought to be. Is law merely a scale of calculus where pleasure and pain are weighed to decide the best course of action? Or is it a holy book bound with leather of morality and inscribed with the golden nib of conscience and styled with the secrets of a greater knowledge? Or is it something much simpler – a middle path through which a society threads without greater considerations of morality or conformity to dry lifeless calculus? The true solution to this conundrum must lie somewhere in between. Someplace where all the theories propounded on law are proved and disproved simultaneously. The relevance of unifying theory comes into picture at this very juncture. More often than not, jurisprudential theories are found on a particular social condition in existence. Therefore its purview would be restricted to that particular society at that specific time period. There would be limited application on law outside this sphere but that would not be an exclusive application nor would the definition of law be the accurate. Now let us see how a close examination on gender bias seen in Indian laws might help us to arrive at a new theory known as the great unifying theory of jurisprudence.

India fears sex. Whether taken in the meaning of gender or in that of intercourse, society is customized to fear it, hate and prejudice against it. Generations that went by taught the present generation that sexual intercourse is to be shunned from, to be ashamed of and to be fought against. Gender differences are so glaring that it sits proudly in the crown of our legal leviathan.

The latest trending practices include but are not limited to shunning homosexuality, intolerance to public display of affection and live in relationships, making separate and gender based laws in the name of protective discrimination which with its lacunas in written law present to be more detrimental than useful, blind eye to marital rape and most importantly keeping uniform civil code inside the cupboard in the name of cultural sentiments. Where did that ‘turn’ of events take place- Those specific incidents that kick started the whole process or that catalyst that hastened up the growing inequalities in gender? Or was it a gradual dip, if so then what would have caused the dip towards the male end of the scale. At which point in the history did the laws begin changing its colour? And if the

laws do change its colour, then why we are seemingly stuck with the unjust and pointless laws in existence. Why do laws show that resistance to change that it did not show previously when it took a turn for the worse? Law is more of a social consent than historical conformity.

Bias in criminal law

Marital rapes get a silent nod whereas laws such as Domestic Violence Act are accepted despite of its cons outweighing the pros. Sec 376, 363, 354, 509 of IPC is in their language, highly ‘unsettling’ when it comes to equality. We must not forget the SLLs like the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; The Protection of Women from Domestic Violence Act, 2005; Indecent Representation of Women (Prohibition) Act, 1986; Immoral Traffic (Prevention) Act, 1956; Now moving on to other laws like rape legislations and other legislations subject to bias. It is a sad joke that the law perceives that only females can be kidnapped, immorally trafficked, harassed or raped. For reason incomprehensive to the author, the traditional law says that females cannot commit adultery. There also exists the harm of over interpretation of art 15 (3) of the constitution of India¹. The harm done by this clause is seen in sec 498 (A) of Indian Penal Code, 1860. Further, sec 376, 363, 354, 509 of IPC² is in their language, highly ‘unsettling’ when it comes to equality. We must not forget the SLLs like the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; The Protection of Women from Domestic Violence Act, 2005; Indecent Representation of Women (Prohibition) Act, 1986; Immoral Traffic (Prevention) Act, 1956; The author is not of the view that these legislations have entirely failed in its purpose. In fact, authors concern is in the very existence of these legislations. Why does the government think that females need protection? The gender biased laws have proven to be disastrous in many aspects and yet why is the government hesitant in amending and altering them?

Before we go deeper in this regard let us focus on the infamous 498 (A) of IPC.

498A. - Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

¹ 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

15.3 Nothing in this article shall prevent the State from making any special provision for women and children.

² Assumption that only females can be raped, kidnapped or sexually abused or indecently represented.

There are three fundamental problems with this law – a) excessively gender biased in favor of women, b) it has high chances of misuse c) the definition of domestic violence is too vague and extensive.

The major flaw in this section is that it assumes that females are the only victims of domestic violence. But the statistics show a different story. Statistics show that 40% of domestic violence victims are men. Additionally, heterosexual male victims of IPV are often judged harshly for "allowing" themselves to be beaten by a woman. This view is based upon the general rule that men are physically stronger than women, and, therefore, should be able to prevent any kind of female violence; a view which disregards that violent women tend to use objects during IPV at a higher rate than violent men.³ The misuse is another major issue of this legislation. Every 8 minutes an innocent male is arrested for domestic violence suit. Around 2286 woman are annually arrested annually on fake law suits of domestic violence. Every 8 minutes a married man commits suicide in India due to the misuse of sec 498 (A) of IPC. After years of legal turmoil, 82.5 percent of the total FIRs filed under Section 498- A (non- bailable) were found false.⁴ The shame affects not just the husband but also his mother and sister and other relatives, posing itself as a threat to their peaceful family life. It is ironic how a legislation intending to protect the peaceful marital life of one endangers that of others. The effect of this legislation is so fatal that Supreme Court called this legislation 'legal terrorism'.⁵ The existence of this legislation is based on the presumption that females are weak and prone to domestic violence. Societal attitude combined with selective reporting of the media is the main reason for this law. Domestic violence laws incriminate people on claims by the victims and are hardly based on any other criteria and the penalty can extent up to 7 years of rigorous imprisonment. Such a powerful law indeed prevents domestic violence but is it not fair to amend the laws so as to suit both gender than to presume that only females can be victims of domestic violence. The question why hasn't the law changed? The answer is simple – society cannot comprehend the male being harassed, though that is the hardcore reality now.

³ Anant Kumar, 'Domestic Violence Against Men in India: A Perspective', (2012) Journal of Human Behavior in the Social Environment 22 (3): 290–296, doi:10.1080/10911359.2012.655988, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2034049> March 2012, Last visited date Feb 24 2015.

⁴ 'In every 8 minutes, a married man commits suicide in India', The Free Press Journal, Apr 17 2014, <<http://www.freepressjournal.in/in-every-8-minutes-a-married-man-commits-suicide-in-india>>, Last visited date Feb 24 2015.

⁵ Sushil Kumar Sharma v. Union of India JT (2005) (6) SC 266

Sec 377 and unnaturality.

The mere description of the two articles, 13 (2) and 21, read with section 377 of IPC is enough to prove the invalidity and unconstitutionality of section 377 of IPC. The judiciary would have no right to deprive an individual of his right to have sexual intercourse with anyone he deems fit provided that there is mutual consent and that the both consenting parties are adults and is prudent enough to understand his acts and that his acts are done in places where he is reasonably expecting privacy.

But here is the stand of the Supreme Court of India in the same. In *Suresh Kaushal v. Naz Foundation* the honourable court has said that the details provided to the High Court were thus “wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment” and that the party ‘failed miserably’ to provide the details and evidences of such practices.⁶

As for the contradiction with Art 14, the court has said,

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.”

But despite of the well detailed judgment the court seem to fail miserably as to why gay couples cannot have a family life or intimate relationship. Why is their relationship termed as unnatural? The answer is because the society says. Rather, the majority of the people in this country seems to think that homosexuality is unnatural and the scale of justice always weighs a little down on the prejudice the society seems to carry. In simpler terms, what society fears and frowns, law fears and frowns too. An exaggerated inference would be that ‘Law is nothing but a projection of the society it rules over’. For the blind denial of the naturality of homosexuality there is simply no excuse.

Personal Laws

The inherent gender bias is all prevailing in our personal laws. From marriage to succession, law is what the society thought it should be. Restitution of conjugal rights is a practice which

⁶ Case Summary, *Suresh Kumar Koushal & another v NAZ Foundation and others*, Supreme Court of India: Civil Appeal No. 10972 of 2013

is a violent and blatant denial of fundamental rights, where the spouse is dragged by the law to an unwilling sex and cohabitation. Age of consent sometimes stooping down to 14 years of age and this age differences varying for different communities is another example. We are still prejudiced about custody of a child after divorce. The courts would give mothers 5 or lesser year old child's custody as somehow females are seen more caring and fathers go under the inherent presumption that they cannot care for a child. The examples are many but the reason, just one – The society thinks so, agrees so and insists so.

The famous example would be *Kaur v. Chaudhary*⁷ the issue was whether the statutory remedy of the restitution of conjugal rights violated the constitutional right of 'personal liberty' in Article 21⁸ The Delhi High Court held that "*in the privacy of the home and the married life neither Article 21 nor Article 14 have any place.*"⁹ Restitution of conjugal rights in literal terms can be perceived as a weapon with which the law drags an unwilling wife or husband to her partner for sexual intercourse. This crude form of legal-marital rape exists because the society thinks it is ideal for it to be that way. It is nothing but an indirect way to state that individual rights and basic human rights are no match for societal compulsion, even in this modern era. And then we have the famous quote from Delhi High Court "Introduction of constitutional law in the home is the most inappropriate. It is like introducing a bull in a china shop.... In the privacy of the home and the married life neither Article 21 nor Article 14 has any place."¹⁰ What more could exemplify the author's assertion than this statement by the court? A ray of hope comes in the form of Personal Laws Amendment Act, 2010 and now we are ever so proud to announce that after 60 years of democracy and largest written constitution, we finally gave women equal rights in adoption and guardianship. Irony laughs at how ironic hypocrisy can be. We have finally broken free from a 120 year old law and it happened a decade into the new millennium. Another 'interesting' development in family law happened was the Marriage Amendment Bill which has caused so much raucous in the 'conservative' parts of the society. The law was passed in the Rajya Sabha but failed to get voted in Rajya Sabha. The very introduction of the bill caused those self-proclaimed men's activists to go hyper on it.

⁷ 331984 A.I.R. 66 (Del.)

⁸ Article 21 protects life and personal liberty

⁹ Kaur, (1984) A.I.R. at 75 Kaur, 1984 A.I.R. at 75. The court further stated:

Introduction of constitutional law in the home is most inappropriate. . . . In a sensitive sphere which is at once intimate and delicate the introduction of cold principles of constitutional law will have the effect of weakening the marriage bond.

¹⁰ Harvinder Kaur v. Harmander Singh AIR (1984) Delhi 66; ILR (1984) Delhi 546; (1984) RLR 187

The Unifying Theory of Jurisprudence

Having discussed why what we perceived to be the rules of law has at times nothing to do with the course of law, and that law seems like a public drum where anyone can tune it to his liking. And now we have finally arrived at that question. What is law? It is not any but all. It is that cannot be defined yet be explained by many terms. Law is like its very genetic material – human thoughts and emotions, something that can be described but never defined. We have before us the great theories of jurisprudence names the felicific calculus, imperative theory of law, the theory of volksgeist, the grundnorm theory of law and Dworkin's soundest theory of law.¹¹

Felicific calculus is a simple method of counting heads – the happy ones and the not so happy ones and if the happy ones exceed the unhappy ones by even the smallest of margins, it is the law of the land. One major drawback of this theory is that it does not take into consideration the intensity of pain and pleasure. The core contention of the theory goes thus “quantity of pleasure being equal, push-pin is as good as poetry”¹² Though law, it its roughest of sense is indeed a mere felicific calculation where pleasure and pain are weighed. But law as we see it is much more than that. If it were simple pleasure and pain counting, then many laws protecting minorities or the laws like Special legislations for Dalits or other minorities would not exist and if the theory was utterly pointless then homosexuality would have been legal in India long back. Next is the imperative theory of law. Imperative theory views law as the command of the sovereign backed up by sanction¹³ and what sovereign is, is an entity which receives habitual obedience from and the bulk of the society and who pays habitual obedience to none.¹⁴ Despite of the huge flaw that it fails to explain the existence of International laws and other customary laws, one of the major issues in this definition is the assumption that sovereign is an entity or a personality in itself. What is a sovereign? It is claimed to be a determinate human superior. But in reality, there is no determinate human superior. Sovereign is nothing but a mirror image of the people it rules over. The will of the sovereign is nothing but a translation of the collective conscience of its people and hence the core contention fails.

¹¹ R. Dworkin, The soundest theory of law (1979) Oxford Journals, 88th ed, pg 522 - 537

¹² Moore G.E. Principia Ethica (1903), Chapter 3

¹³ Denise Meyerson, Understanding Jurisprudence (2007), Routledge Cavendish, pg 10

¹⁴ Ibid.

Now for the more ‘purified’ of theories – The grundnorm theory of law by Hans Kelson. This theory states that laws are based on norms which are arranged in hierarchical order and has a basic norm called grundnorm at the bottom of it. He advocated for the separation of law and morality and called for the division of law into its dynamic and static aspect. A daringly straight forward positivist approach, sadly suffers from some severe and inherent problems while separating law and morality. Grundnorm cannot be questioned further on its existence. In the later years of his life, Kelson himself has admitted that the grundnorm was hypothetical and just a mere presupposition. It is nothing but a mere assumption to exert that law is completely separated from morality and used to obscure the roots of law in the moral reasoning of the people of that society. This is mentioned in the second edition edition of pure theory of law as follows

“A father orders his child to go to school. The child answers: Why? The reply may be: Because the ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey the father, the answer may be: Because God has commanded ‘Obey Your Parents’, and one ought to obey it. If the child now asks why one ought to obey the commands of the God, then the answer is that such an authority cannot be questioned.”¹⁵

There is a silent admission that the grundnorm exists without possible explanations for its existence and that it has may be from the preexisting beliefs of the people. These are the beliefs which form the base of what would be later called as morality and therefore it would seem that the law is not different from morality but rather an extension of it, which would clearly contradict the basic assumptions of this theory. Grundnorm also gets invalidated with the advancement of technology and the technological laws that are connected to it. These laws are in existence for mere convenience and not because of any basic norm for its support. Yet, it would be preposterous to say that law is completely a-moral. With the provisions of mercy petitions and the very existence of a choice of punishment with its minimum and maximum prescribed prove that laws have their roots in morality and law is not completely apathetic.

Savingy’s theory is about law and its origin from the will of the people. The law is but the spirit of its people and that the collective national conscious that has evolved along with its society is none other than the fairy god mother of that state’s legal system. He popularized

¹⁵ H. Kelson, Pure theory of law, 2nd ed, trans. M. Knight, Berkley, university of California Press, (1967) pg 196 – 197

the German term by J. G Herder, volksgeist that means ‘the spirit of the people’. The core contention was that law is an expression of will of the people. It doesn’t come from deliberate legislation but arises as a gradual development of common consciousness of the nation.¹⁶

While the concept of collective conscience of people as source of law seems closer to the reality, it is also filled with flaws. While asserting that law has its origin from the spirit of the people, it must be noted that people hardly have a collective consciousness. Every individual perception of law would be fueled by a selfish motive and something with a selfish motive cannot evolve to become an unbiased law. Let us not ignore the fact that collective consciousness is not the only source of law.

And finally to Dworkin’s claim that morality can veto a law¹⁷, morality essentially arises from the society, and if the society happens to have a ‘bad’ moral, that would imply that it is justified to have bad laws in that particular society. That is to say that in a cannibalistic society, murder would be perfectly moral and hence legal. This would mean law for barbarians and hence no law at all.

If all these theories fail, then where do they fail and why? The basic mistake happens when we connect law to ambiguous and subjective terms like morality or justice. Something as definite as law cannot be related to something as subjective as morality or justice. Them what is law? Law is the residue from cultural and traditional practices modified by people’s changing views on what are and ought to be right and wrong. Law of a land can be well explained by the monkey experiment. In a 2011 PT blog post called “*What Monkeys Can Teach Us About Human Behavior*”, Michael Michalko described an experiment involving five monkeys, a ladder, and a banana. An experimenter puts 5 monkeys in a large cage. High up in the cage, bananas are placed which can only be accessed by a ladder. But every time a monkey climbs the ladder, other monkeys are sprayed with cold water, that they soon started beating up any monkey who attempts to climb the ladder. Now one monkey is removed and a new monkey is introduced to the cage. This monkey is beaten on its attempt to climb the ladder. One by one the monkeys were replaced and all got beaten up when attempting to climb the ladder. By the end of the experiment, none of the original monkeys were left and yet, despite none of them ever experiencing the cold, wet, spray, they had all learned never to

¹⁶ Doherty Michele, *Jurisprudence: The Philosophy of Law*, 2nd edi., Old Bairy Press, London, p.g. 233

¹⁷ H. Baxter, Dworkin’s ‘one-system’ conception of law and morality, *Boston Law Review*, vol 90, pg 857 - 861

try and go for the bananas. If monkey could talk, they would have told you that ‘it’s the way things are done here’.

This is exactly what law is about. A common code of conduct prescribed generations back and modified with time that it loses its initial intention and ends up being entirely different in its form. Law is not any of these theories but a perfect mixture of all these theories. In right amount, all the theories have their implications and none the full. Thus only a layered chocolate fudge cake of all these theories would represent what law in real life is.

CONCEPT OF INDIVIDUAL RIGHTS IN THE LIGHT OF LAND ACQUISITION BILL 2015: A JURISPRUDENTIAL CRITIQUE

Sujeet Kumar*

Abstract

As Land plays a very pivotal role in the life of the common mass who are totally depended on it for their survival. Law acts as a tool for protecting the interest in it, so that individual rights of the mass can be protected. Every law which is made by the state should be made in conformity with the natural law in the manner that the individual rights can be served and protected. Land Acquisition in India refers to the process of land acquisition by the central or state government of India for various infrastructure and economic growth initiatives¹. The paper shall critically analyse how the present Land Acquisition Bill of 2015 is violating the individual rights and is contrary to the principle of natural law on the basis of different jurisprudential philosophies given by different Natural law thinkers. This paper shall highlight how this Act is transferring agriculture lands into the hands of capitalists. The author shall also discuss the clash of individual rights and public order in special reference to the Land Acquisition Bill, 2015.

Keywords: Individual Rights, Land Acquisition Bill, Social Impact Assessment, Jurisprudential philosophy, Make In Project.

* Student-B.A LL.B. @ National Law University and Judicial Academy Assam, Email: sujeetkumar@nluassam.ac.in, Contact: 09085731248

¹ Chetna Upadhyay, *Land Acquisition In India*, South Asia Journal of Multidisciplinary Studies (SAJMS), July Vol. 1, No.6,2015

INTRODUCTION

The concept of individual rights is very dynamic and has been ever-changing. There has always been tussle between individual rights and state order to claim superiority. From the very ancient time, the debate is going on this two complex topic. The question which arises here is that whether individual rights can be infringed by the state order, or state power is a subject of individual will. In various countries, it is said that individual rights cannot be infringed unless proper procedure has been followed, and India too following the same rationale.

But in recent years, the topic of individual rights has become a debated topic under the light of Land Acquisition Bill, 2015 and the ordinance passed by the National Democratic Alliance (NDA) government to amend the legislation of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (LARR Act) in order to remove consent clause from it .When we compare individual rights and state order, both have different dimensions to work, but they are related to each other for the development of the society. So, individual rights can be better understood by taking into consideration the power of the state, as they are related to each other. With regard to property, civil law can be divided into three clearly defined groups: the law of property, the law of obligation and the law of status. The first deals with proprietary rights *in rem*, second with proprietary rights *in personam* and the third deals with non-proprietary rights, whether *in rem* or *in personam*. With regard to individual right on land, Right in rem is important. As Rights *in rem* are characterized as those rights which bind the entire world, *i.e.*, rights which must be respected by all of the subjects of the legal system: “everybody must refrain from trespassing on my land.”²

Through this paper, author wants to analyze the jurisprudential intricacies that how individual rights are being easily undermined in the name of ‘public purpose’ without taking the consent of the people, and the result of the transformation of an agrarian economy to capitalist. The paper shall focus on the individual rights perspective on the basis of different theories given by Natural law thinkers. Individual rights are inseparable, as being human or not being human is usually considered as the unchallenged and undamageable truth of existence, not something which can be achieved or lost. Thus, individual rights are universal rights

² J.E Penner, *The Idea of Property in Law*, (Clarendon Press, Oxford), p. 23.

possessed universally by all human beings.³ And to understand that when our individual rights can be taken away or when they are subject to the control of state order, it is important to understand the relation between two.

HISTORY ABOUT THE LAND ACQUISITION ACT

Before understanding, what constitute individual rights, firstly we have to understand the reason and circumstances behind the enactment of Land Acquisition Act in India. Land Acquisition law whether in the year 1894 or 2013 was made to bring an institutional arrangement and conveniences to address the issues related to land. Amid colonial period, before 1894, the issues identified with area were administered by distinctive regulations of diverse august states like the Bengal Regulation I of 1824, the Act I of 1850, the Act XXII of 1863, the Act X of 1870, the Bombay Act No. XXVIII of 1839, the Bombay Act No. XVII of 1850, the Madras Act No. XX of 1852 Madras Act No. 1 of 1854 X of 1861, the Act VI of 1857 - all ordered by the frontier organizations, first in the Presidency towns and later spread the nation over, to encourage for the simple procurement of area and other resolute properties for streets, trenches and other 'open purposes' with remuneration to be dictated by particularly selected authority⁴. These enactments enabled the crown to re-establish there power in India after the battle of 1857 was the power of British East India Company was taken away by crown.

The main problem that lies with all the above legislations was that they did not allowed any opportunity to object the acquisition of land but nevertheless they allow only to object for the compensation which the people have been given for their land. The debate related to compensation is similar to the debate related to "public purpose" for acquiring the land in the 19th century. Even in the late 19th century, allegations of 'inadequacy, corruption and misconduct' were rife⁵. It all led to the enactment of Land Acquisition Act of 1894. It meant to bring down the uniformity in acquiring of the land. The preamble of the act states that, *it meant to 'amend the law for the acquisition of land for public purposes and for companies and to determine the amount of compensation to be made on account of such acquisition'*.⁶ It

³ Esmaeil Saghiri; Abasat Pourmohammad, *The Concept of Individual Rights from a Legal and Jurisprudence Approach*, NATIONALPARK-FORSCHUNG IN DER SCHWEIZ (Switzerland Research Park Journal), Vol. 102, No. 4; April 2013.

⁴ Radhey Shyam v State of Uttar Pradesh and others, decided on April 15, 2011; Bench comprising Justice GS Singhvi and Justice Ashok Kr. Ganguly; see also PK Sarkar, 'Law of Acquisition of Land in India' (2nd Edition), Eastern Law House, 2007;

⁵ <http://iihs.co.in/>, Accessed on 14th July 2015.

⁶ <http://megrevenuedm.gov.in/>, Accessed on 14th July 2015.

means single law to govern the administration related to land and also legitimise the activity of different empire.

It was only after the Non-Cooperation Movement that Indian leader entered into the administration through elections that lead to the amendment of Section 5A to the Act of 1894 was introduced, one that allowed the possibility of raising objections, albeit with a warning on its limitations. Even after independence the Act of 1894 continued to be in practise with some amendments⁷. It was only after 1991 when India adopted the policy of LPG, acquisition of land by private entity become rampant that lead to the exploitation of general people, even the government had now started acknowledging the private sector as it was thought that it would lead to the development of the economy on the cost of people of marginal sect of the society.

Land Acquisition Act (LAA) that has been supplanted by the Right to Fair Compensation, Transparency in Land Acquisition, Rehabilitation and Resettlement Act (LARR) 2013, seven years after two different enactment, Land Acquisition (Amendment) Bill 2007 and Resettlement and Rehabilitation Bill 2007, were presented by the UPA in Parliament in wake of Nandigram, Singur, Kalinganagar and numerous other aggressor restriction to land procurement by ranchers⁸. The Act claims to better reflect the purpose for which the land was being acquired. The Land Acquisition Act, 2013 was prepared after a long discussion, keeping in mind the dependence of farmers on the land. So, consent and social impact assessment⁹ was given paramount importance so that individual rights to the land can be protected.

What was happening in 2013 Act was that land was being taken without the consent of the owner even if the land was being used for the public purpose. The term ‘public purpose’ has been not defined anywhere, but time to time it has been interpreted in different ways to suit the situation and facts. In the 2013 Act, the consent of 80% land owners in case of private projects and 70% land owners in case of government projects was made mandatory and

⁷ The LAA 1894 has been amended in 1919, 1921, 1923, 1933, 1962, 1967 and 1984. See <http://www.deccanherald.com/content/202342/replace-archaic-land-acquisition-law.html>. Accessed on 24th July 2015

⁸ <http://counterview.org/2013/11/21/new-land-acquisition-act-fails-to-deal-with-historic-injustices-committed-in-the-name-of-development-is-aimed-at-facilitating-corporates/>, Accessed on 24th July 2015

⁹ Social Impact Assessment (SIA) includes the processes of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment, available at, <http://www.socialimpactassessment.com/>

handsome amount of compensation was assured to the farmers by giving due notice to the rights of the farmers. Social impact assessment was being done to see if what will be the effect of the acquisition of the land on the community who has been using that land for their productive purpose. This was done keeping in mind that the individual rights do not get violated. It can be observed that the Act of 2013 is giving very much importance to the individual rights as it has been laid down in different theories by Natural Law thinkers.

Natural Law school gives emphasis on individual rights and explains the importance of individual rights in daily life. It explains that individual rights as nothing but basic rights which are essential for the survival. The 2013 Act emphasises that no land should be taken by force or compulsion from anyone, and thus we can say that the Act of 2013 was quite similar to the some of the point given by natural law theory. As Natural Law school propounds that law is nothing but the rights reason with nature, every individual rights should be protected and should not be infringed by anyone harshly. The school explains that rights is nothing but constitute morality in other words. Morality should be given due consideration before taking any action, for example, when land of someone is being acquired, he must be given proper and fair compensation. Under Land Acquisition Act of 2013, morality has been taken into consideration in the law directly or indirectly in the form of consent, social impact assessment and public purpose for which the land was being taken.

But the main problem arose after the amendment in Land Acquisition Act of 2013 by the process of ordinance passed by the present NDA government to acquire land. The scope of 'public purpose' was broadened, and land could be acquired without the consent of the owner. Some of the major amendments which were done by the government in regard to the Land Acquisition Act of 2013 were¹⁰:

- i. Evacuation of 'assent' provision: According to the 2013 demonstration, area could be procured just with support of 70% of area proprietors for PPP (Public Private Partnership) ventures and 80% for private elements. The correction brought up by the present Government evacuated this procurement of "assent" for getting terrains for five reasons – Industrial hallways, Public Private Partnership ventures, Rural Infrastructure, Affordable lodging and Defence. This has drawn a significant part of the feedback from political circle as well as from activists like Anna Hazare who has dispatched a mass dissent against the bill.

¹⁰ <http://www.newindianexpress.com/nation/Controversy-Over-Land-Acquisition-Bill-All-You-Need-to-Know/2015/03/07/article2701536.ece>. Accessed on 27th July 2015

- ii. Return of unutilized land: According to the Act 2013, if the land remains unutilised for five years, then it needs to be returned to the owner. But, according to the ordinance promulgated by the NDA government, the period after which unutilised land needs to be returned will be five years, or any period specified at the time of setting up the project.
- iii. According to the new law, if any administration authority confers an offence amid the procedure of procurement, he/she can't be arraigned without former assent from the legislature.
- iv. While the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 permits privately owned businesses to obtain land, the proposed revision permits any private element to procure land.
- v. The corrections propose is to incorporate 13 different legislations, which are at present exempted under the domain of this Act in the remuneration, recovery and resettlement procurements. This is, nonetheless, seen as a pro-agriculturist move as there was no uniform and proper approach of restoration and resettlement.

An argument which was given by the present government in bringing this reform was to boost the development process. As govt is very much focus on “Make in India” project as a result, lots of foreign company want to establish business in India but because of land dispute among people the aim is not getting fulfilled. Even they claim that the Act of 2013 which contain consent part which is necessary for acquiring land even for public purpose, results into the failure of acquiring of the land as majority of the population never comes to the same point. Results of that development process slow down. So it is necessary that in some field this type of clause should not be present.

When you are acquiring the land from any one without the consent of that man it is total violation of his natural rights or basic rights. It is another situation and question that you are acquiring the land for public purpose. Now the question arises is that when any one acquire the property of another without the consent of that another person, it is total violation of his legal or natural rights.

JURISPRUDENTIAL FRAMEWORK OF THE TERM ‘INDIVIDUAL RIGHTS’

To understand the concept of individual rights in the light of land laws, we have to understand the meaning of individual rights first. Based on its common definition, individual rights are those rights which a person possesses, due to mere fact of him/her being a human. Hence, they are universal rights possessed universally by all human beings.

The second article of Universal Declaration of Human Rights says that the aim of each political society is to preserve human being's natural and unreviewable rights.¹¹

In this definition, what is important, is human being; society is formed to support his rights and liberties. These rights result from nature not society. The history of wisdom is replete with thoughts of humanism as well as search for happiness and liberty. Before the birth of Christ, Sophists and Epicure based the principle of their philosophies on human being's happiness and pleasure. Christ also did his best to edify and support mankind. The period of revitalizing old wisdom also shared these thoughts¹².

Descartes founded his philosophy based on individual's 'self' i.e. individual rights. However, in our era, it was John Locke who, for the first time, gave this theory and its legal affects a scientific basis he has focused on the individual rights. By announcing that "government does not create ownership, but it is built to support such rights or protect rights," he expressed everything. Because what he meant by "ownership" was not only the exclusive rights to external possessions but it also constitute of some rights which are internal. Human beings possess their own body and work and therefore have the rights to own the outcome of their forbearers' work. Government is created to defend this right; a right which is concomitant with 'liberty' and seems inseparable from it.¹³

The idea of individual rights developed from political theories of natural rights of the early new epoch. Such theories arose initially from the need to set limits to behave with others, especially the behavior of those who had political powers or in other words government right to interferes with the members of the society. It was necessary in the society as in order to maintain peace and harmony in the society. In the 17th century, John Locke defined the rights of life, property and liberty as natural rights.

A century later, Thomas Jefferson defined these rights as life, liberty and search for happiness. These rights were defined as natural because they were God-given and therefore were a part of human nature.

The condition of individual rights was clearly expressed in American Declaration of Independence by Jefferson¹⁴: "and we know these facts to be clear and unambiguous that all

¹¹ <http://www.newindianexpress.com/nation/Controversy-Over-Land-Acquisition-Bill-All-You-Need-to-Know/2015/03/07/article2701536.ece>, Accessed on 23th July 2012

¹² <http://www.newindianexpress.com/nation/Controversy-Over-Land-Acquisition-Bill-All-You-Need-to-Know/2015/03/07/article2701536.ece>, Accessed on 23th July 2012

¹³ ibid.

¹⁴ Thomas Jefferson was an American Founding Father, the principal author of the Declaration of Independence, and the third President of the United States, available at, <https://www.whitehouse.gov/1600/presidents/thomasjefferson>, Accessed on 1st August 2015

human beings have been created equal, that God has granted them certain inseparable rights" which cannot be infringed by any one. Many have said individual rights are inalienable rights meaning that they should be maintained in all times and under any conditions without any discrimination¹⁵.

PHILOSOPHICAL ANALYSIS OF RIGHT TO PROPERTY IN THE LIGHT OF VARIOUS JURISPRUDENTIAL THINKERS

Before comprehending what constitute individual rights, the inquiry emerges is that, whether people have any privilege to protest when state obtains the area for open reason? Acquisition of land, whether it has any ethical or moral impact on the general public? As Natural Law thinkers mainly talk about the rights of the individual on the basis that whether the law or any act has any social or moral effect on the society or not. Philosophers like Jean Jacques Rousseau, Aristotle, Thomas Aquinas, John Locke and David Hume held the view that property acquired by the person by putting the labour on it, is his property.

In a situation in which a poor farmer, who is putting his labour on the land to live a life with dignity with his family members, and his land gets acquired on the ground of it being used for public purpose and for the development of the country. Whether the prudence given in the above statement by the government sound appropriately for the society. In any way, the state shall defend its objective by quoting the general welfare of the society. For that, government has balanced out the ordinance by including thirteen so far excluded Acts under the Land Acquisition Act.¹⁶ To the knowledge of the author, nowhere in the world under any statute the term 'public purpose' has been defined, and the term is very ambiguous and broad in nature. Wherever the term has been used, it has been in some perspective or the other, without it being defined. In the State of Bombay v. R. S. Nanji¹⁷, Supreme Court observed, It is impossible to precisely define the expression 'public purpose'. In each case, all the facts

¹⁵ Esmaeil Saghiri; Abasat Pourmohammad, *The Concept of Individual Rights from a Legal and Jurisprudence Approach*, NATIONALPARK-FORSCHUNG IN DER SCHWEIZ (Switzerland Research Park Journal), Vol. 102, No. 4; April 2013.

¹⁶ <http://www.dnaindia.com/india/report-decoded-what-changes-has-the-narendra-modi-government-made-in-the-land-acquisition-ordinance-2048240>, Accessed on 5th August 2015

These Acts include the Coal Bearing Areas Acquisition and Development Act 1957, the National Highways Act 1956, Land Acquisition (Mines) Act 1885, Atomic Energy Act 1962, the Indian Tramways Act 1886, the Railways Act 1989, the Ancient Monuments and Archaeological Sites and Remains Act 1958, the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act 1962 and the Damodar Valley Corporation Act, 1948. The Electricity Act 2003, Requisitioning and Acquisition of Immovable Property Act 1952, the Resettlement of Displaced Persons (Land Acquisition) Act 1948 and the Metro Railways (Construction of Works) Act 1978 are also brought under its purview to provide higher compensation, rehabilitation and resettlement benefits to farmers whose land is being acquired.

¹⁷ AIR1956 SC 294

and circumstances will require to be closely examined in order to determine whether a public purpose has been established. *Prima facie*, the government is the best judge as to whether public purpose is served by issuing a requisition order, but it is not the sole judge¹⁸.

With the enactment of the new Land Act, the government has gained capacity to take away any land on the ground ‘public purpose’, which may or may not be used for public purpose. The power of the state to acquire land, without the owners’ consent, under any of the five conditions under the Bill can be questioned with regard to individual rights as stated by Natural Law thinkers. For example, Thomas Hobbes stated that whatever the power state has, has been given by the common mass of the society, in a way that every law should be in the conformity with the natural law. Natural Law thinkers believe that all the laws state enacts should made in conformity with natural law. Natural law is nothing but the rights and privileges which nature had granted, to live a peaceful and prosperous life. Taking away the land in the name of public purpose, in a way, is the violation of one’s natural rights. The lands, on which people are depended for the welfare of the family, are now being acquired by the government without the consent of the owner and without making any social evaluation, without wondering the destiny impact on the circle of relatives whose sole earning is relied on the land.

In the light of the individual rights, the Labour theory, propounded by John Locke, requires special mention. “The Lockean labour theory is the justification of private property that is based on the natural right of one's ownership of one's own labour, and the right to nature's common property to the extent that one's labour can utilize it. Locke's theory is often used to analyze the natural rights of inventors, authors, and artists in their own creations.”¹⁹

This theory clearly states that if any person engages his labour on a property, it becomes his property, which is also supported by the various theories of Natural Law. This property is property rights *in rem*, with no interference from the outside world. ‘The state does not have any right to infringe into my property because of my labour.’ But, under the Land Acquisition Bill, 2015, the idea of individual rights has totally been scrapped. There is no meaning of natural rights of the common individual under the Bill. The state is being changed over from majority rule government to a tyranny in the connection of Land Acquisition Bill. The manner in which the land acquisition Bill was passed. it clearly shows that individual rights is

¹⁸ G. Raghuram ,Simi Sunny, *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance 2014: A Process Perspective*, July 2015. Indian Institute of Management India Research and Publications, Ahmedabad.

¹⁹ <http://definitions.uslegal.com/l/lockean-labor-theory/>, Accessed on 8th August 2015

now being controlled by the state which can be clearly evident from the five condition in which land can be acquired without the consent of the owner and without the social impact assessment.

This can be clearly evident from day to day protest which is taking place by poor farmers in different state against the amendment which had taken place in the Land Acquisition Bill of 2013. Farmers are very afraid that even though if they did not want to give their land, government will forcibly taking away their land in the name of development of our country. They are of opinion that government is trying to convert the agrarian society to capitalist society by forceful method of taking away of their land without having done any social assessments. This incident clearly shows that, individual rights have no meaning in modern world. It is right nothing other than the right which govt provides us.

CONCLUSION

After going through different intricacies related to Land Acquisition Bill of 2015, we can say that the present Land Acquisition Bill does not gives any scope to the importance of individual rights. The present act is like a command of state and no one can challenge it, even though if it violates our rights. Similarly as explained by different positivist philosopher, law is the command of sovereignty and no one can challenge it as has been well supported and articulated by the thinkers like Austin, Hegel, and Bentham etc. Government by adding the 13 legislation which was not included in the 2013 Act, it shows the clear intention on the part of government ,who want to done away with land in any condition by defending that it is being used for public purpose and violating the individual rights of the mass. As law is made by the government to suit their needs of the present time especially when it is related to land, so in any way government will be able defend his action.

As the matter of law, every law should be made in conformity with the natural law so that it does not violate individual basic rights. As poor farmers are of the believe that the government were protect their interest but when we see the present Bill, any one can say that society is getting transformed into the capitalist Society with having no individual will . Different leaders of the present government in any manner they are justifying the decision of their party by opposing the action of the opposite party. But no one is thinking about the individual rights which are directly or indirectly harming the people living in the society. As a matter of fact present land Acquisition bill, had exploited the common mass by forcibly acquiring the land without the consent. Further, the acquisition is not just a matter of displacement of a segment of population for development but it's a matter of providing the

citizens with the all means and help for development and not depriving them from mere means of survival. But government had failed in doing so. Recently in first week of August government had decided to done away with the ordinance in order serve the farmer interest but till now it has been in words only no further action had been taken in this regard.

Through this Paper, author would like to suggest that, the present land bill should be amended as soon as possible in order to protect the individual rights and to serve natural justice. Individual rights are of very paramount importance which cannot be negated in any changing society.

Along these lines, the assent of individuals of the nation is essential as this would affect their present and future. With the ramifications of this new bill, the distress and situation of the workers, ranchers and other dislodged ones is quieted out which negates the whole idea of Democracy.

TRUTH, KNOWLEDGE AND POWER

Kruthika Vasireddy

Abstract

This short commentary is a response to an article, “Colonial Construction of a Criminal Tribe: Yerukulas of Madras Presidency,” penned by Ms. Meena Radhakrishna. I try to evaluate it in light of several concepts and ideologies. This include, viewing it from the lens of ‘law and society’ and tying it with broader ideas of Truth, Knowledge and Power, as propounded by Michel Foucault. This commentary attempts to look at a larger picture concerning the British colonization.

INTRODUCTION

Meena Radhakrishna, in her article, “*Colonial Construction of a Criminal Tribe: Yerukulas of Madras Presidency*,” talks about how the British Administration by way of legislation, criminalized the Yerukula tribe and the effects that followed it. The Yerukula Tribe is a community that was once involved in salt and grain trade. The community also constituted of acrobats, singers, dancers, street entertainers, etc. However, due to numerous reasons and prejudices, the British Administration criminalized them. Once they were labeled as criminals, they had to be reformed by the British Administration. They did this with the help of Salvation Army, which was a missionary organization, who were put in charge of the special settlement, Stuartpuram where the Yerukula community were interned. Although they call this process reformative, Meena Radhakrishna notes that the spirit behind them was more punitive. The article then proceeds to look at how the Yerukulas were forced to ‘reform’ and change, which included changing their lifestyle, their practices, their occupations. Finally, she concludes by stating how, the current generation of the Yerukula tribe believes that their ancestors were dangerous criminals, thereby showing how the criminalization project was successful.

‘LAW’ AND ‘SOCIETY’

The project of criminalizing the Yerukulas, in order to reform and settle them, created a great impact on how this tribe is perceived even today. This can be understood in many ways. Firstly, it portrays the interplay between law and society. It reiterates the argument propounded by several law and society advocates that the relationship between law and society is not just one way bound, rather, it goes both ways and is congenital. As said by Lynn Mather, law is not autonomous to the social world but is rather embedded within the society.¹ The discipline of law and society rests on the belief that legal rules and decisions need to be understood in context because law reflects and impacts culture, reinforcing inequalities.² This reading is a classic example to show how law can shape up the society and effect the social relations. The British Administration, under the Criminal Tribes Act, 1871, labeled Yerukulas as criminals. This legislation- the law, affected this tribe so much so that, today’s generation of Yerukulas believe that their ancestors were criminals and that their tribe was, in fact, a criminal tribe. This is similar to how Hijras, who were treated with respect in

¹ Lynn Mather, *Law and Society*, The Oxford Handbook of Law and Politics (2008)

² Lynn Mather, *Law and Society*, The Oxford Handbook of Law and Politics (2008)

pre-colonized India, have become a subject of humiliation, discrimination today due to the very same reason of being criminalized by the British Administration under this act.

LEGAL FACT v. HISTORICAL FACT

It is interesting to note how an apparent ‘fact’ that Yerukula is a criminal tribe overshadowed the ‘other’ fact that they were in fact traders of salt and grain, for a very long period of time until the British Administration decided to label them. All that the younger generations now know about their ancestors is what the British portrayed them to be, that they were criminals. This was because, as a part of the settlement program- when they were put to reside in, the children were kept away from their parents and were allowed to meet them only once a week, on Sundays- for Church. This was strategically carried out by the Salvation Army to ensure the truth doesn’t pass down the generations and it is needless to say that they were successful at it. Such a fact repression and creation also reminds us of how Marc Galanter talks about the difference between facts in the legal materials and an evident conflict between lawyers and historians concerning logic of authority and logic of evidence. While lawyers look to the legal authority, historians look beyond it, at the real evidence. The existence of this dichotomy is also another pillar on which the study of law and society rests on. Chandra’s Death³ and the Princely Imposter also portray this connection between a historical/real fact being superseded by the ‘legal’ fact. In Chandra’s death we see the legal materials constructing a completely new factual matrix which overshadowed the original truth and similarly in the ‘A Princely Imposter’⁴, official notices and rules made sure people are convinced to forget and erase certain facts and instances from their memory, thereby creating an alternative factual discourse.

ORIENTALISM

It is true that the Criminal Tribes Act has criminalized Yerukulas and it affected them to a very great extent. We may now emphasize on who made this law and see why this becomes important. The fact that this law came into force during colonization, by the colonizers becomes very crucial here. As Sandria Freitag noted, the British Colonial rule, along with the bringing of rule of law, also brought with it emergency legislations designed to control large groups of people that it deemed to be a threat to its authority, through extraordinary

³ Ranajit Guha, *Chandra’s Death*, Subaltern Studies V (Delhi: Oxford, 1987), pp. 135-165.

⁴ Partha Chatterjee, *A Princely Imposter? The Kumar of Bhawal And the Secret History of Indian Nationalism*, Princeton University Press (2002)

measures. This is exactly what had happened with the Criminal Tribes Act and Yerukulas. Similar to what Henry Schwarz says about the Anti-thugee campaign, this also seems to be a draconian extermination of a type of life that was no longer deemed viable under the interests of the British.⁵ How did they deem which kind of life style is viable or not? They juxtaposed the Indian itinerant communities with the gypsies of Europe and applied all the prejudices here.

This is again a classic example of the West applying known information and knowledge to the unknown facts concerning the ‘others’ and creating knowledge, epistemology, which resulted in a sea of stereotypes.⁶ This is because, as per *Orientalism*⁷, rationalization for European colonialism is based on a self-serving history in which the West constructed the East as extremely different and inferior, thereby giving them the power to intervene and rescue. Colonial settings were immense laboratories wherein categories were created to identify and define the large quantities of new knowledge that was present half way across the globe. These categories were based on vast amounts of confusing and unfamiliar data compiled by the servants of the Empire and interpreted through pre-existing habits of thought developed in Europe.⁸ It was least of their concern that their interpretation did not fit the facts or the ways that colonized subjects understood them. If something was not according to their beliefs and practices, it was deemed wrong and inferior. This is why they wanted everything to abide by the Catholic, Victorian morals, which is also seen in the reading where the Salvation Army restructures the position and role of women in the tribe by transforming them from hard workers and bread earners to a domesticated position where all they were meant to do was to cook, take care of children and look beautiful.

As Said noted, most of these stereotypes are more often than not, represented by the local politics. This can be seen in this reading as well, where most of the information about the Yerukulas was given to the British Administration by the local high caste, landlord sections who shared similar prejudices against this tribe, due to various reasons.

⁵ Henry Schwarz, *Constructing the Criminal Tribe in Colonial India- Acting like a Thief*, Wiley-Blackwell (2010).

⁶ Edward Said, *Orientalism*, New York: Vintage (1979)

⁷ *Ibid.*

⁸ Henry Schwarz, *Constructing the Criminal Tribe in Colonial India- Acting like a Thief*, Wiley-Blackwell (2010).

KNOWLEDGE AND POWER

This takes us to the final theme I wish to relate this reading with, that is of Knowledge and Power, as propounded by Michel Foucault.⁹ He says that power produced knowledge and they both imply one another. According to him, there is no power relation without the correlative constitution of a field of knowledge, or any knowledge that does not presuppose power relations. Therefore, to understand the formation of knowledge, we must consider the power dimensions within which it was produced. Knowledge is a major resource of power and the will to knowledge is the instrument of power. This explains the British Administrations efforts to categorize, criminalize certain groups of people, as seen above, who they deem to be dangerous to their regime, thereby creating knowledge, a fact.

⁹ Alan Hunt, Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, Pluto press (1994)

ENVIRONMENT PROTECTION AND HUMAN RIGHTS: INDIAN PERSPECTIVE

Saira Kausar* & Rucha A. Gami**

Abstract

This article focuses on the study of Human Rights and its importance in the protection and preservation of environment. The Indian constitution upholds the human rights of the citizens. The Article 51-A(g) of the Part of Indian constitution specifically states the duty of the citizens to protect and improve the natural environment including forests, lakes, rivers and wildlife; Article 48-A requires the State to take steps for the same. Another focus lays on the various interlinked reasons for the degradation of environment and how the government is trying to cope with the crisis. By way of including various cases and their landmark judgments, the authors have tried to emphasise on the efficient role of the judiciary in the healthy interpretation of fundamental rights and duties with regard to environment.

Keywords: Human rights, environment protection, Indian constitution, Article 51-A (Fundamental Duties), Directive principle of State policy.

* Student-B.A.LL.B. (H) @ BSLS, Faculty of Law, Maharaja Sayajirao University of Baroda- Vadodara (Gujarat)

** Student-B.A.LL.B. (H) @ BSLS, Faculty of Law, Maharaja Sayajirao University of Baroda- Vadodara (Gujarat)

INTRODUCTION

Human Rights have been conferred upon the human beings by the virtue of them being human. So they are basically birth rights. Human Rights are moral principles or norms that are regularly protected as legal rights in municipal and international law. These are inherent in all human beings without any discrimination on any basis. They are applicable everywhere and at every time in the sense of being universal. The concept of human rights is a very deep-rooted one and the doctrine of natural rights founded on natural law and the protection of those rights has now become a key stone for achieving all round peace, development and maintenance of democracy.¹

The attention now is to be drawn towards the study of human rights along with the issues in environment protection which gives the concept a whole new angle². There is no doubt that the world is moving gradually towards doom. The world has reached a stage where an industrial way of life is no longer sustainable and the time has come where we must put an end to it. Meeting the demands of the consumerist society is resulting in rapid exhaustion and making the planet unlivable.³ Environmental disturbances related effects have direct and indirect range of implications on the effective enjoyment of human rights. Enjoyment of basic rights relating to the environment in which a person lives is a pre-requisite for ensuring the enjoyment of human rights. Hence, the state has a duty to ensure the environment protection necessary to allow the full exercise of protected rights of the citizens. The right to safe, healthy and ecologically balanced environment is a human right in itself.

Honourable Former Chief Justice of India, Y. K. Sabharwal while referring to the relationship between human rights and environmental protection, described the duty of protection of environment by the state as a public means of fulfilling human rights standards. The second view highlights the fact that the legal protection of human rights is an effective means to achieving the ends of conservation and protection of environment. Lastly it is felt that there is no need for a separate environment human right as the international environmental law has developed to such extents that even the domestic environment of states has been internationalized.⁴

DEVELOPMENT OF THIS CONCEPT

¹ Pramod Mishra, Human Rights: Global issue (Delhi : Kalpaz Publication, 2000)

² B.N.Kirpal, M.C.Bhandari Memorial Lecture: Environmental Justice in India (2002)7 SCC(Jour) at 1

³ P.N. Bhagwati, *The crucial conditions*, The Hindu Survey of the Environment, 1991, pp. 165-167, at 167

⁴ Y.K.Sabharwal, Human Rights and the Environment, Available at: supremecourtofindia.nic.in/speeches.../humanrights.doc

It is an age old conception that the basic elements like earth, water, air, aether and fire make up the foundation of all the creatures of the world. Most of the ancient scriptures and philosophical writings expressed concern for the protection and adequate use of natural resources. The Hindu mythology incarnates various living creatures as the gods and goddesses and preaches non-violence against the resources gifted by god. The Upanishads, Vedas and Smritis also emphasise the preservation of the natural bounty. The religion and environmental protection have a very harmonious relation. So, nature is to be respected, worshipped and thus sheltered. The Yajnavalka Smriti speaks of the purity, prosperity and health brought by the environment if it left to remain undisturbed.

Not only Hinduism but many religions and traditions have upheld the same concept. King Ashoka, after embracing Buddhism, recognised the system of planting trees. Also, Islam and Christianity preach the importance of water and its heavenly being. The five elements were regarded as the boon provided by the creator of life.

In ancient times, there was absence of a systematized administration of justice. Hence, the religion was recognised as an uncoded law, the breach of which is considered a devil act. All the religions thus care for the environment. Kautilyas' teachings and the Manu Smriti impose the duties on human beings to protect forests and environment.

Later, under the British rule, there was no codified law at all to deal with the preservation of environment. The first initiative was taken only in 1860 by incorporating certain punitive measures in the Indian Penal Code to control environmental pollution.

Apart from the Indian penal code, 1860 the law of easements was in operation during the British rule. Section 28(d) of The Indian Easements Act, 1882 provides that it is a prescriptive right to pollute air or water but it is not an absolute right as illustration (f) of section 7 declares that no person will be allowed to pollute land of another person by means of water. In *Prabhu Narayan Singh v.Ram Niranjan* it was held that it is not an easementary right to discharge dirty water of the drain into ones house or property. The right to commit nuisance in others property is not an easement to be acquired by prescription.

As observed in today's scenario, the environmental law and human rights are seen as having a very close relation. But going back to the time when the constitution was framed, the law regarding environment was not so specific. It was only after the Stockholm conference on human environment, 1972 that this issue was recognised under the fundamental duties and Directive Principles of State Policy regarding protection of forests and wildlife were incorporated by 42nd Amendment in 1976.

CONSTITUTION AND ENVIRONMENT

- Environment Protection under Fundamental Rights and Duties

We exclusively find a duty given under Article 51-A(g) of Part-IV of Indian constitution. In case of *Abhilash Textile & Ors. v. Gujarat Municipal Corporation*⁵, it was held that though all the citizens hold the right to free trade or carry on business, the nature of their business should not override their duties towards the environment as stated under Article 51-A(g) of constitution of India.

Human rights in India have a long way ranging from first generation to third generation. The first generation human rights are legal and political in nature. Right of economic and social in nature are of second generation and the third generation human rights include developmental rights. This, the third generation human rights are the result of process of judicial innovation. The Part-III and Part-IV of the Indian Constitution deal with human rights of first and second generation. But the third generation human rights are discovered by the judiciary while interpreting the rights given in constitution right to information, right to environment, right to good governance, etc are included in the third generation human rights. Even though any right is not expressly mentioned in Part-III, it can be recognised as a fundamental right. There are a number of such rights and environment protection is one of them. For bringing them within the ambit of Part-III of the constitution, an activist judiciary has taken the lead.

We already know that rights and duties are the two sides of the same coin. Every duty implies the existence of a correlative right of another person which needs to be protected. But as far as incorporation of the fundamental duty relating to the environment is concerned, we did not have any specific fundamental right in the constitution of India. The Indian judiciary has however concretized the right in this regard by making a bold and innovative interpretation of article 21. S. Shantakumar is of the opinion that though the supreme court was reluctant for a short period to explicitly declare that the right to life under article 21 included the ‘right to clean and healthy environment’, the High Courts in the country declared that the right to clean and healthy environment is an integral part of the right to life and comes under the ambit of Article 21⁶ which states that “No person shall be deprived of his personal life and liberty except according to the procedure established by law”. Today, the trouble of environmental pollution poses a great peril to the very existence of human beings as well as

⁵ AIR 1986 Gujarat 57

⁶ S. Shantakumar in S. Shantakumar (ed.), *Introduction to Environmental Law* (Nagpur : Wadhwa & Company 2005) pp. 95-96.

other living creatures. The Gulf war has aggravated this problem. Taking all these factors into reflection, the courts in India have shown a very healthy stance in recognising ‘The Right to live in a healthy environment’ as a fundamental right and hence, enforceable.⁷

1. ENVIRONMENT AND RIGHT TO EQUALITY

Article 14 provides for the equality before law or the equal protection of laws within the territory of India to everyone. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment.⁸

In the case of Kinkri Devi v. State⁹, Article 14 was invoked as there had been indiscriminate granting of mining leases and there was unscientific exploitation of mines by the lessees. So there were adverse consequences. These had far reaching and lasting impact on the natural wealth and the local population. In this case, the allegation was that the government arbitrarily granted the permission for mining activities without adequate consideration of environmental impact which amounted to the violation of Article 14. The Court accepted this and held that till the government evolves a long term plan based on a scientific study to regulate the exploitation of mineral resources in the state without adversely affecting the environment, the ecology and natural wealth, it will be unable to achieve the constitutional objective of safeguarding and protecting the environment. Similarly, in the wake of exercising the power of granting of mining leases in the arbitrary manner and without the regard to the safety of the forests, the lakes, the rivers, wildlife, the life, liberty and property of the people living in the vulnerable areas from its harmful effects, the court will be left with no other alternative but to intervene effectively by way of issuing writs, orders and directions including direction for closure of mines whose operations are proving to be harmful to the environment.

The court in the case of Enviro-legal Action v. Union of India¹⁰ has held that the principle of intergenerational quality would be violated if there was substantial adverse ecological effect caused by industry. The court has even taken into consideration the rights of the unborn generations stating that environmental statutes have been enacted to ensure good quality of

⁷ Paramjit Singh Jaswal and Nishita Jaswal , “Making Right To Live in Healthy Environment as Fundamental Right: An Assessment of Judicial attitude and People’s Concern”, B.P.Singh Sehgal (ed.), Law, Judiciary And Justice in India (New Delhi : Deep and Deep Publication 1993) pp. 396-408 at 397

⁸ Bhagwati J.- Maneka Gandhi v. Union of India

⁹ AIR 1987 HP 4

¹⁰ AIR 1996(5) 281.

life for upcoming generations since they would be bearing the impact of ecological degradation. Here the concept of sustainable development comes in which improves the human well-being that allows us to meet the needs of the present without compromising the ability of future generation to meet their own needs. In Karnataka Industrial Areas Development Board v. C. Kenchappa¹¹, the land were acquired for development, however, by the High Court issued directions to the authority concerned to leave one km area from the village limits as a free zone or green area to maintain ecological equilibrium. It was held by the Supreme Court that if directions in question are rigorously implemented, the authority concerned could not acquire any land for development. In the view of matter, the said directions were liable to be set aside.

2. ENVIRONMENT AND RIGHT TO PRACTICE ANY PROFESSION OR TO CARRY ON ANY OCCUPATION OR BUSINESS AND PROTECTION OF ENVIRONMENT

Article 19(1)(g) of the Indian Constitution guarantees to all the citizens of India, the right to practice any profession or to carry on any occupation or trade or business. Most of environment pollution is caused by trade and business activities and different types of industries which are contributing pollutants in environment. When question came to these industries, they contended that they were not committing any violation, but only exercising their right under Article 19(1)(g) of the constitution. So, it was brought into serious attention of these industries that the right under Article 19(1)(g) of the constitution is not absolute in nature and is subject to certain reasonable restrictions. Accordingly, any act of theirs, which is offensive to flora and fauna or human beings, would not be permitted to be carried on in the name of fundamental rights.¹²

In the case of M.C.Mehta v. Kamal Nath¹³ the Honourable Supreme Court held that a hotel discharging untreated effluent into the river Beas, thereby disturbing the aquatic life and causing water pollution could not be permitted to work and any disturbance of the basic environment elements, viz. air, water and soil which were necessary for life would be hazardous. The court further pointed out that in exercising its jurisdiction under Article 32, the court could award damages as well as levy exemplary damages on the erring industry/hotel which will prove to be a deterrent for others from causing pollution.

¹¹ A.I.R. 2006 S.C. 2038

¹² S.C.Shastri, Environmental Law (Lucknow : Eastern Book Company, 2002) at 45

¹³ (2000) 6 SCC 213

In the known case of Ganga Water Pollution Case¹⁴, the Supreme Court considered the problem of pollution of Ganga water by the effluent discharge from the tanneries. The SC directed the owners of the tanneries to establish the primary treatment plants so as to prevent the pollution of Ganga water which is being used by a large number of people of the country. The polluted water affected the health and life of the people. The court observed that the financial capacity of the tanneries should be taken into consideration while requiring them to establish the treatment plants¹⁵.

ENVIRONMENT PROTECTION UNDER DPSP

It is clearly stated under the Article 48-A of the constitution that the state should take steps to protect and improve the environment and to safeguard the forests and wildlife of the country. It has also been directed by the Supreme Court that the government boards under the various statutes should take strict steps for prevention of environment pollution¹⁶. The protection of environment under human right includes the protection of wildlife as well. Wildlife makes up the major and most important part of the environment. The state governments are supposed to do everything possible to save the endangered species from extinction without any excuse as held in T.N. Godavarany Thirumulpad v. Onion of India¹⁷. Though the DPSP is not enforceable like fundamental rights, the idea of welfare state can be achieved only if the states endeavour to implement it with a high sense of moral duty.

There have been many instances when the Apex court has granted Directive Principles of State Policy the status of Fundamental Rights. As in Unnikrishnan v. State of AP¹⁸, the Directive Principles of State Policy were elevated to the status of a fundamental right to free and compulsory education. They are supposed to be supplementary and complementary to each other and Part-III should be interpreted alongside the preamble and Directive Principles of State Policy.

ROLE OF PUBLIC INTEREST LITIGATION IN ENVIRONMENT PROTECTION

Public Interest Litigation is an exception to the general rule that only the person whose fundamental right is visited or infringed or threatened can file a petition under Article 32 of the constitution. The SC in its recent judgments shows a broader approach and the traditional

¹⁴ AIR 1988 SC 1037

¹⁵ Ibid., p. 1045

¹⁶ M.C.Mehta v. Union of India AIR 1988 SC 1057

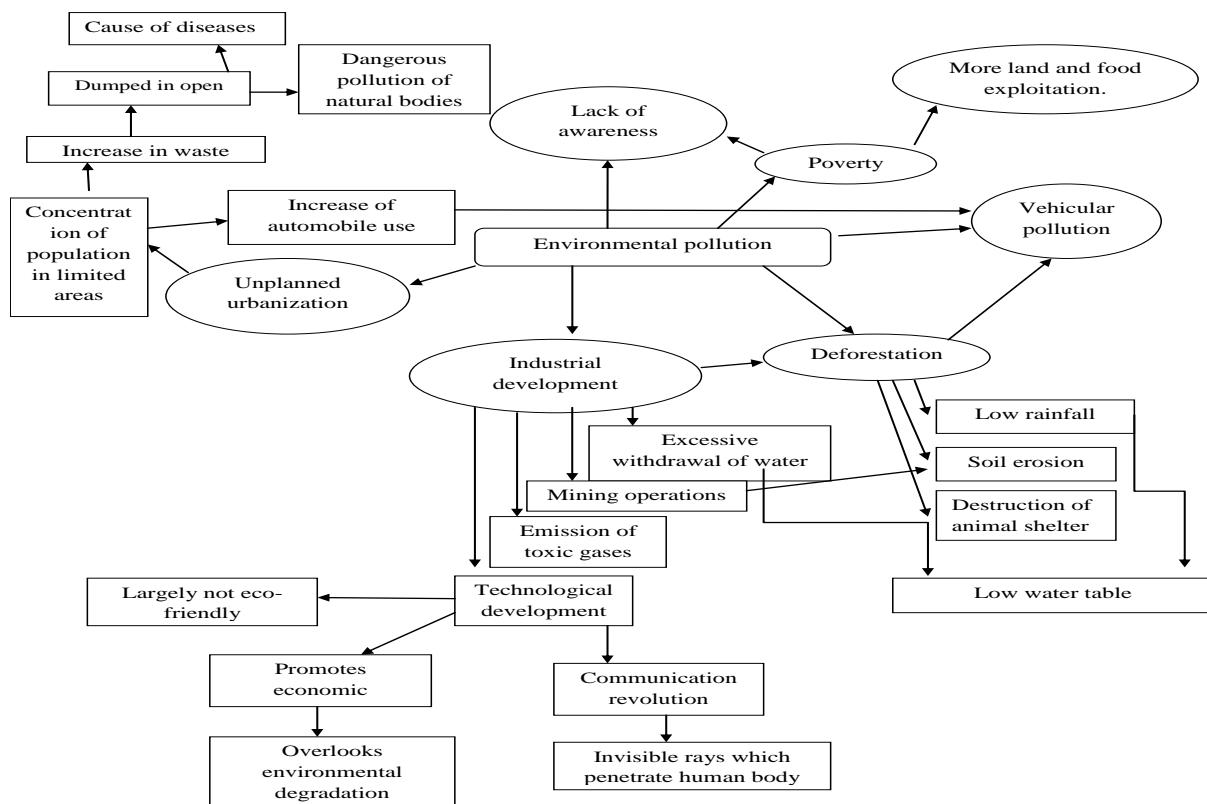
¹⁷ (1988) 1 SCC 471

¹⁸ (1933) 1 SCC 645

rule of 'locus standi' under which only the affected person has the right to move the court has now been relaxed. Now, PIL at the instance of 'Public Spirited Citizens' for enforcement of constitutional and legal rights of any socially or economically disadvantaged person is allowed. It should be noted that the member of the public in such case must be acting bona fide for securing the human rights of someone and not for private gain¹⁹.

The main agenda should be regarding the upholding of human rights which also includes the well-being of environment.

REASONS FOR DEGRADATION OF ENVIRONMENT AND EFFORTS OF THE STATE



We can never hold a single aspect in the society to be the sole cause of environment degradation. A single cause automatically affects various other basic rights of people and further compels them to commit more damage in order to make their ends meet. Bringing about an improvement in only one particular aspect is not enough as it will always be the part of a gigantic web which engulfs the society. Poverty acts as an enemy to the environment. The poor are constrained to exploit natural resources extensively to meet their 'needs'.

¹⁹ S.P.Gupta v. Union of India AIR 1982 SC 149, A.R.C. Cement Ltd. v. State of U.P. 1999 Suppl. 1 SCC 426 and M.C.Mehta v. Union of India 1993 Suppl. 1 SCC 434

Hence, as said by the former Prime Minister, Mrs. Indira Gandhi, “Poverty and need are indeed the greatest polluters.”

Now-a-days due to high urbanisation and over-stuffed population in a limited area, the problem of sanitation has become very acute. This is creating hazard to the life of the citizens. In present scenario, the civil amenities are in an urgent need to be upgraded and the government should take up appropriate measures to deal with urban problems causing environmental as well as health crisis. The honourable Supreme Court has recognised that there is a need to take appropriate steps to make the masses know about the environment they live in. It also expressed its views regarding the study of environment being made a compulsory subject in educational institutes for a general growth of awareness amongst the youth. Poverty is also one of the main concerns. The cinemas and exhibitions were directed to display slides containing environmental information in regional languages. Also the regular broadcast of awareness messages on All India Radio and also on televisions was directed by the court²⁰.

The Indian government is taking many steps under various legislations which concern many aspects affecting the environment either directly or indirectly. The National Forest Policy was adopted by the parliament in 1988 shortly before the passage of the amendment to Forest (Conservation) Act to check the undue exploitation of the forests. The Hazardous Wastes (Management and Handling) Rules, amended in January 2000 prescribes a permit system administered by the control boards of pollution for handling and disposal of such hazardous wastes are also checked by the road agency. The National Green Tribunal was established under the National Green Tribunal Act 2010 for effective and expeditious disposal of cases relating to environment protection, conservation of forests and other natural resources including enforcement of rights, relief and compensation for damage and upholding the spirit of a healthy environment.

CONCLUSION

In the concluding part, we can say that the human rights and the environmental rights are inseparable and always go hand-in-hand as every damage inflicted on the nature will directly or indirectly affect the well-being of the humans. The Supreme Court has widened the ambit of Article 21 by giving certain landmark judgments and thus, declared the right to life in a healthy environment as a fundamental right.

²⁰ M. C. Mehta v. Union of India AIR 1992 SC 382

The concern for protection of human rights would be incomplete as long as we do not make adequate efforts to provide people with a clean and healthy environment. Our government has taken the initiative in which they are facing enigma and it has achieved the objective to an extent but not the soul. The concern that human beings can lead a dignified life only in a clean and healthy environment has been seen in different stages of human evolution. The preservation of natural resources i.e., plants, trees and other living creatures is a necessity for sustainability to ensure the movement of the natural cycle or else mankind itself would be on the verge of elimination. It should be our moral duty to ensure that future generations have enough natural resources for their utility otherwise it may be possible that they might only read or hear about such resources which were in existence on the earth.

Reference:

- Tripathi, Dr. S.C.(2015), Environmental Law, (Central Law Publications)
- Leelakrishnan, P., (2006), Environmental Law Case Book, 3rd Edn.(LexisNexis Publications)
- Pandey, Dr.J.N., Constitutional Law of India, 52nd Edn. (Central Law Agency)
- Pramod Mishra, Human Rights: Global issue (Delhi : Kalpaz Publication, 2000)
- B.N.Kirpal, M.C.Bhandari Memorial Lecture: Environmental Justice in India (2002)7 SCC(Jour)
- P.N. Bhagwati, “the crucial conditions”, *The Hindu Survey of the Environment*, 1991
- Y.K.Sabharwal, Human Rights and the Environment, available at supremecourtindia.nic.in/speeches.../humanrights.doc
- S.C.Shastri, Environmental Law (Lucknow : Eastern Book Company, 2002)
- S. Shantakumar in S. Shantakumar (ed.), Introduction to Environmental Law (Nagpur : Wadhwa & Company 2005)
- Paramjit Singh Jaswal and Nishita Jaswal , “Making Right To Live in Healthy Environment as Fundamental Right: An Assessment of Judicial attitude and People’s Concern”
- B. P. Singh Sehgal (ed.), Law, Judiciary And Justice in India (New Delhi : Deep and Deep Publication 1993)

COMMON CAUSE *versus* UNION OF INDIA: CASE COMMENT

Aashna Jain *

COMMON CAUSE v. UNION OF INDIA

WRIT PETITION (CIVIL) NO. 13 OF 2003 on May 13, 2015.

Relevant Laws Involved: Article 14, 21, 32 & 142 of the Constitution of India

Relevant case laws Discussed: *Manzoor Ali Khan & Anr. v. Union of India & Ors.*(2014) 7 SCC 321, *Umesh Mohan Sethi v. Union of India & Anr.* (Delhi High Court) (WP (C) No.2926 of 2012 decided on 12.12.2012)

FACTUAL SITUATION

Common Cause and Center for Public Interest Litigation have approached the court to restrain the Union of India and all State Governments from using public funds on Government advertisements, which are primarily intended to project individual functionaries of the Government or a political party.

They have also prayed for laying down of appropriate guidelines by this Court to regulate Government action in the matter so as to prevent misuse/wastage of public funds in connection with such advertisements.

ISSUES OF LAW

Whether the issues of large-scale advertisements pertain to governmental policies and executive decisions? and;

Whether it is appropriate for this Court to lay down binding guidelines under Article 142?

ARGUMENTS FOR PETITIONER

1. Personification Of Party Leaders:

In the garb of communicating with the people, in many instances, undue political advantage and mileage is sought to be achieved by personifying individuals and crediting such

* Student @ National Law University, Jodhpur, Rajasthan

individuals or political leaders (who are either from a political party or government functionaries) as being responsible for various government achievements and progressive plans.

2. *Harmful Results:*

It leads to gross wastage of public funds, misuse of government powers and derogation of Fundamental Rights as enshrined in Article 14 and 21 of the Constitution.

ARGUMENT FOR THE RESPONDENT

Issues sought to be raised pertain to governmental policies and executive decisions in respect of which it may not be appropriate for this Court to lay down binding guidelines under Article 142. They relied on *Manzoor Ali Khan & Anr. v. Union of India & Ors.* and a pronouncement of the Delhi High Court in *Umesh Mohan Sethi v. Union of India & Anr.*

BACKGROUND OF THESE AFOREMENTIONED WRIT PETITIONS: RELEVANT TO THE CASE AT HAND

There is no dispute that “*primary cause of government advertisement is to use public funds to inform the public of their rights, obligations, and entitlements as well as to explain Government policies, programs, services and initiatives.*”

It was further held that only such government advertisements, which do not fulfil the above requisites, would fall foul of the area of permissible advertisements. This Court acknowledged the fact that the dividing line between permissible advertisements that are a part of government messaging and advertisements that are “politically motivated” may at times gets blurred.

Keeping in view the prevailing scenario in other jurisdictions across the globe, this Court felt the necessity of constituting a Committee to go into the matter and submit a report to the Court. In terms of the order of this Court, the Committee was duly constituted and after full deliberations in the matter, a report had been submitted by the Committee suggesting a set of guidelines for approval of this Court.

PLEA OF THE PETITIONER

It is the plea of the petitioner that the said guidelines should be approved by this Court and

directions be issued under Article 142 of the Constitution of India for enforcement of the said guidelines until an appropriate legislation in this regard is brought into effect by the Parliament.

OBSERVATION OF THE SUPREME COURT

Bench observed that in a situation where the field is open and uncovered by any government policy, to guide and control everyday governmental action, surely, in the exercise of jurisdiction under Article 142 of the Constitution, parameters can be laid down by Supreme Court consistent with the objects enumerated by any of the provisions of Part IV of the Constitution.

It observed that such an exercise would be naturally time bound till the Legislature or the Executive, as the case may be, steps in to fulfill its constitutional role and authority by framing an appropriate policy.

Holding that it was a fit case for using its power under Article 142 of the Constitution, the Bench observed:

Article 38 and 39 of the Constitution enjoin upon the State a duty to consistently endeavour to achieve social and economic justice to the teeming millions of the country who even today live behind an artificially drawn poverty line. What can be the surer way in the march forward than by ensuring avoidance of unproductive expenditure of public funds. This is how we view the present matter and feel the necessity of exercise of our jurisdiction under Article 142 of the Constitution to proceed further.

VERDICT

(1) *Publication of photographs of the Government functionaries and political leaders along with the advertisement(s).*

The Supreme Court banned the Centre and states from using photographs in government advertisements of ministers or political leaders, except the President of India, the Prime Minister and Chief Justice of India to glorify its achievements. The bench banned the publication of photographs of chief ministers/ministers and governors in advertisements to commemorate a project or an event. The bench permitted advertisements with photographs to

mark anniversaries of acknowledged personalities like the Father of the Nation or a departed leader.

Reasoning: - The publication of government advertisements with photographs of leaders in power leads to “personality cults”, also;

The legitimate and permissible object of an advertisement, as earlier discussed, can always be achieved without publication of the photograph of any particular functionary either in the State or a political party.

(2) Appointment of an Ombudsman.

To sort out the problems of that are bound to show from time to time the government should constitute a three member body consisting of persons with unimpeachable neutrality and impartiality and who have excelled in their respective fields.

(3) The recommendation with regard to performance audit by each Ministry.

There is no need for any special audit as of now because the machinery available is adequate to ensure due performance as well as accountability and proper utilization of public money.

(4) Embargo on advertisements on the eve of the elections.

As long as advertisements do not violate any norms of equality, etc there is no need to curb the advertisements on the eve of elections. It rejected the Central government's plea that the judiciary should not tread into policy decisions, saying the courts can step in if there is no policy or law in place.

(5) It rejected the Central government's plea that the judiciary should not tread into policy decisions, saying the courts can step in if there is no policy or law in place.

CONSTITUTIONAL VALIDITY OF THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT 2008 AND NATIONAL INVESTIGATION AGENCY ACT, 2008: A COMMENT

Rudra Dutta * & Priyanshu Gupta **

Unlawful Activities (Prevention) Act or UAPA Act is Indian law aimed at effective prevention of unlawful activities associations in India. Its main objective was to make powers available for dealing with activities directed against the integrity and sovereignty of India.¹

The National Integration Council appointed a Committee on National Integration and Regionalization to look into, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the acceptance of recommendations of the Committee, the Constitution (Sixteenth Amendment) Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. In order to implement the provisions of 1963 Act, the Unlawful Activities (Prevention) Bill was introduced in the Parliament.²

The Unlawful Activities (Prevention) Amendment Act, 2008³ and the National Investigation Agency Act, 2008⁴ are both violative of the fundamental rights guaranteed under Article 14⁵ and Article 21⁶ of the Constitution of India and that Parliament is not competent to enact the NIA. It is hence implored that both the said Acts should be struck down as *ultra vires* the Constitution.

National Investigation Agency (NIA) is a federal agency established by the Indian Government to combat terror in India. It acts as the Central Counter Terrorism Law Enforcement Agency. The agency is empowered to deal with terror related crimes across states without special permission from the states. The Agency came into existence with the

* Student- B.A.LL.B. @ Amity Law School, AUUP, Noida

** Student @ Hidayatullah National law University, Raipur (C.G).

¹ The Unlawful Activities (Prevention) Act; Available at: www.nia.gov.in

² Ibid.

³ Hereinafter referred as UAPA

⁴ Hereinafter referred as NIA

⁵ Article 14

⁶ Article 21

enactment of the National Investigation Agency Act 2008 by the Parliament of India on 31 December 2008.⁷

NIA was created after the 2008 Mumbai terror attacks as need for a central agency to combat terrorism were realized. The founding Director-General of NIA was Radha Vinod Raju, and he served till 31 January 2010. He was succeeded by Sharad Chandra Sinha⁸ till March 2013 when he was appointed the member of the National Human Rights Commission of India. In July 2013, Sharad Kumar was appointed as the Chief of National Investigation Agency succeeded by N. R. Wasan.⁹

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2008 IS VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA

Article 14 of the Constitution of India does not only prohibit only unwarranted discrimination it looks down upon unregulated discretion bestowed upon any instrument of the State¹⁰. The Supreme Court has held¹¹ in a catena of cases that the discretionary powers given to the government authorities must contain ample guidelines¹² and that it should not allow excessive subjectivity¹³ to come into it.

The case of *R.D Shetty v. International Airport Authority of India*¹⁴ talks about the fact that that in a democracy that is governed by the Rule of Law, it would be unthinkable if the executive or any of its officers possess arbitrary powers over the rights and interests of any individual. Also, the Hon'be Court in the case of *Naraindas v. State of M.P.*¹⁵ held that "... if the power conferred by a statute on any authority of the state is vagrant and unconfined and no standards are laid down by the statute to control the exercise of such power, the statute would be violative of the equality clause, because it would permit arbitrary and capricious exercise of power, which is the antithesis of equality before the law." Hence, it is put forth

⁷ "Govt tables bill to set up National Investigation Agency", PTI, Dec 16, 2008, 07.40pm IST (2008-12-16)

⁸ "Sharad Chandra Sinha new NIA chief, Deccan Herald, February 2010

⁹ "Sharad Kumar to be new National Investigation Agency chief", NDTV, 30 July 2013

¹⁰ *Sheo Nandan Paswan v. State of Bihar*, AIR 1987 SC 877

¹¹ *Subhash Chandra v. State of Uttar Pradesh*, (1980) 2 SCC 324

¹² *Accountant General v. S. Doraiswamy*, (1981) 4 SCC 93; *R.R Verma v. Union of India*, (1980) 3 SCC 402; *Ramakanya Devi v. State*, AIR 1980 Kant 182; *State of Punjab v. Gurdial Singh*, AIR 1980 SC 319; *Chanderbhan v. S. Kumar*, AIR 1980 Bom 48

¹³ *A.R. Antulay v. R.S Nayak*, (1988) 2 SCC 602; *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; *Re: Special Courts Bill, 1978*, (1979) 1 SCC 380

¹⁴ (1979) 3 SCC 489

¹⁵ AIR 1974 SC 1232

that unfettered and almost absolute discretion to any executive authority can be said to be the archenemy of the Rule of Law¹⁶. In fact, it has been held¹⁷ and affirmed¹⁸ by the Hon'ble Court that when subjective discretion is fraught without sufficient guidelines, the Court has refrained from upholding the same. If power is conferred on a high official and there is no reasonable restriction on this power conferred then such discretion and arbitrary power would be violative of Article 14 of the Constitution of India¹⁹. Abundant discretion is laden with authoritarian potential even in a high person if reasonable guidelines are not provided²⁰.

The UAPA is full of provisions which confer arbitrary powers onto the executive, which is violative of Article 14 of the Constitution and thus the Act must be declared as *ultra vires* the Indian Constitution. When defining a “*terrorist act*”²¹, the UAPA includes certain acts that are done with the “*intent to strike terror or are likely to strike terror*” in the people. The definition has a wide ambit of subjectivity and hence confers unbridled discretion to be exercised by the executive in declaring an act to be a “*terrorist act*”. There is an absence of guidelines to judge as to what act has been committed with the intent to strike terror or is likely to strike terror in people. The same definition also states that apart from the various means mentioned in the section if “*by any other means of whatever nature*”²² the criteria of the section may be fulfilled then the same may amount to a terrorist act. Hence this, read along with the earlier mentioned statement in the definition imparts a high amount of discretion upon the administrative authorities. The aforementioned clauses bring a wide range of acts within the ambit of the definition and allow the authorities to arbitrarily decide as to what would amount to a terrorist act. Such subjectivity is not permissible²³ and violates Article 14 of the Constitution of India.

Further, the UAPA provides²⁴ that if an officer of the designated authority finds a reason to believe from his “*personal knowledge*” or from the “*information given by any person or any other thing*” that an offence under the UAPA may be committed then he can authorize any

¹⁶ Sudhir Chandra v. Tata Iron and Steel Co. Ltd., AIR 1984 SC 1064

¹⁷ B. B. Rajwanshi v. The State of Uttar Pradesh, AIR 1988 SC 1089

¹⁸ V. K. Thomas and Ors. v. Industrial Tribunal and Ors., JT 1989 (1) SC 18.

¹⁹ State of Punjab v. Khemchand, (1974) 1 SCC 549; Kishan Chand v. Commissioner of Police, AIR 1961 SC 705; Jaswant Singh v. Sub Divisional Officer, AIR 1982 P&H 69; State of Punjab v. Chand Gian Chand and Co., (1983) 2 SCC 503.

²⁰ Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851

²¹ Section 4, Unlawful Activities (Prevention) Amendment Act, 2008

²² Id., Section 4(a)

²³ State of Madras v. V.G Row, AIR 1952 SC 196; Ramkrishnaiah v. President, District Board, AIR 1952 Mad 396

²⁴ Section 12, Unlawful Activities (Prevention) Amendment Act, 2008

subordinate officer to arrest the individual(s) so involved. The aforementioned provision hence gives power to the designated authority to arrest a person under this Act for any reason whatsoever. Additionally, the Officer who has been given such power is not required to explain his beliefs to any authority. Hence, this provision confers unbridled discretion on the State and is violative of Article 14 of the Constitution as per the law mentioned earlier.

The UAPA confers²⁵ upon the Central Government with the power to “freeze, seize or attach the funds and other financial assets or economic resources” of any individual or organization on the mere “suspicion” of them being involved in terrorism. Also on mere suspicion that a person is involved in terrorism the Government may “prevent the entry into or transit through India” of such individual(s) and also disallow any other person or organization from extending financial aid to them²⁶. This clause is evidently arbitrary as it allows the Government to use its subjective satisfaction while implementing this power. Without a check imposed on the Government controlling this power, the said provision is not justifiable on the acid test of Article 14 of the Constitution.

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2008 IS VIOLATIVE OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

The right to personal liberty has been assured under Article 21 of the Constitution. The phrase ‘personal liberty’ as used in Article 21 does not only protect an individual against bodily arrest but is of the widest possible amplitude and covers many rights which constitute the personal liberty of man²⁷. Further, the principle of reasonableness applies with equal magnitude to a procedure contemplated under Article 21 and hence has to be fair, just and reasonable and not fanciful, oppressive and arbitrary²⁸. The explicit law under the Constitution law cannot be arbitrary or irrational²⁹ and no man shall be deprived of his life or personal liberty except according to a fair just and reasonable procedure established by law³⁰.

²⁵ Section 14, Unlawful Activities (Prevention) Amendment Act, 2008

²⁶ *Ibid.*

²⁷ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295

²⁸ *Ibid; R.C Cooper v. Union of India*, (1970) 1 SCC 248; *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494

²⁹ *Maneka Gandhi v. Union of India*, *supra*, n. 18; *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360; *Ram Narayan Agarwal v. State of U.P.*, (1983) 4 SCC 276; *Kartar Singh v. The State of Punjab*, (1994) 3 SCC 569

³⁰ *Jumman Khan v. State of U.P.*, (1991) 1 SCC 752; *Bachan Singh v. State of Punjab*, (1979) 3 SCC 727; *Mithu v. State of Punjab*, (1983) 2 SCC 277

As the Hon'ble Court scrutinized in ***Joginder Kumar v. The State of Uttar Pradesh***³¹ that “...arrest can cause incalculable harm to a person's reputation and self-esteem. Arrest should be made only after a reasonable satisfaction is reached after some investigation as to the genuineness of the suspicion regarding a person's complicity in the matter”. Thus, the Hon'ble Court drew a line between the power to arrest and the justification to arrest and lay down that the justification should be in harmony with procedure established under Article 21. It is hence, put forward that the impugned Act provides that if an officer of the designated authority finds a reason to believe from his “*personal knowledge*” or from the “*information given by any person or any other thing*” that an offence under the UAPA may be committed then he can authorize any subordinate officer to arrest the individual(s) so involved.³². Such a clause granting the arrest of a person without investigation but on a mere reason to believe on grounds that allow heavy discretion to the State is violative of Article 21 of the Constitution.

THE PARLIAMENT IS NOT EMPOWERED TO ENACT THE NATIONAL INVESTIGATION AGENCY ACT, 2008

Under Article 246³³ of the Constitution of India the Centre has the exclusive power to make laws in relation to matters enumerated in List I provided in the 7th Schedule, whereas the States have the Exclusive right to make laws in respect to the matters enumerated in List II attached in the 7th Schedule to the Constitution.

The doctrine of Colourable Legislation states that the legislature cannot enact an Act which is beyond its competence to enact. In ***K.C. Gajapati Narayan Deo and Anr, v. The State of Orissa***³⁴ the Hon'ble Court held, and duly affirmed³⁵ in subsequent cases, that “... the whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the Legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. The crucial question to be asked is whether there has

³¹ *Joginder Kumar v. The State of Uttar Pradesh*, AIR 1994 SC 1349.

³² *Supra* note 17

³³ Article 246

³⁴ *K.C. Gajapati Narayan Deo and Anr, v. The State of Orissa*, AIR 1953 SC 375

³⁵ *State of Kerala and Anr. v. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc.*, AIR 1973 SC 2734; *K. Rajendran and Ors v. State of Tamil Nadu*, AIR 1982SC 1107; *B.R. Shankaranarayana and Ors v. The State of Mysore and Ors*, AIR 1966 SC 157; *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Anr*, AIR 1965 SC 1017; *Karimbil Kunhikoman v. State of Kerala*, AIR 1962 SC 723; *The Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. The State of Delhi and Anr.*, AIR 1962 SC 458.

been a transgression of legislative authority as conferred by the Constitution." Therefore, if a statute, apparently enacted under one Entry in the List, falls in plain truth, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable³⁶.

Also, according to the doctrine of Pith and Substance the actual nature and character of the legislation in question should be seen to establish which List it relates to³⁷. The doctrine of Pith and Substance is used in determining the true character of a statute. Due regard must be given to the statute as a whole and to the scope and effect of its provisions³⁸. The word of the Hon'ble Supreme Court in **Kartar Singh v. State of Punjab**³⁹, which was duly affirmed in a catena of cases⁴⁰, is relevant here. It was held that "*On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence, otherwise the same is invalid.*"

It is contended that the pith and substance of the NIA falls within the ambit of Entries 1⁴¹ and 2⁴² of List II attached to the 7th Schedule. Various provisions of the Act⁴³ confer the powers of police onto the National Investigation Agency and empower the Agency to carry out police functions. It is reiterated that police is a State subject and its functions cannot by a Parliamentary law be bestowed on an existing or a new central force⁴⁴. Further, investigation of crimes forms an integral part of maintenance of public order which is a matter under the State List. Hence, in pith and substance the NIA relates to entries in List II of the 7th Schedule and thus the Parliament cannot enact the same.

THE NATIONAL INVESTIGATION AGENCY ACT, 2008 IS VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA

³⁶ *Ashok Kumar v. Union of India*, AIR 1991 SC 1792; *Naga People's Movement of Human Right v. Union of India*, (1998) 2 SCC 109

³⁷ *Subramaniam Chettiar v. Muthuswami Goudan*, AIR 1941 FC 47; *Prafulla Kumar v. Bank of Commerce*, AIR 1947, PC 60; *A.S. Krishna v. State of Madras*, AIR 1957 SC 297

³⁸ *Central Bank of India v. State of Kerala*, (2009) 4 SCC 94; *State of Maharashtra v. Bharat Shantilal Shah and Ors.*, 2008 (12) SCALE 167

³⁹ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569

⁴⁰ *State of Maharashtra v. Bharat Shantilal Shah and Ors.*, 2008 (12) SCALE 167; *Jamshed N. Guzdar v. State of Maharashtra and Ors.*, AIR 2005 SC 862; *E.V Chennaiah v. State of Andhra Pradesh and Ors.*, AIR 2005 SC 162; *M.P Vidyut Karamchari Sangh v. M.P Electricity Board*, (2004) 9 SCC 755; *Union of India and Ors. v. Shah Goverdhan L. Kabra Teachers College*, AIR 2002 SC 3675

⁴¹ Seventh Schedule, List II, Entry 1

⁴² Seventh Schedule, List II, Entry 2

⁴³ Sections 3(2), 3(3), 6(5) and 6(6), National Investigation Agency Act, 2008

⁴⁴ *Prakash Singh v. Union of India*, (2006) 8 SCC 1

The Right to equality as enumerated in Article 14 of the Constitution of India prohibits the conferring of arbitrary, unfettered and unbridled subjectivity on the Executive. Such discretion endowed upon the executive should be bounded by sufficient safeguards and guidelines else such discretion is in violation of the Constitution.

Accordingly, a provision⁴⁵ of the NIA enumerates that the Central Government can, *inter alia*, on the basis of '*other relevant factors*' decide as to whether a particular matter is to be referred to the Agency or not. There are absolutely no guidelines to decide as to what the '*other relevant factors*' may be. It is therefore submitted that expansive and free-for-all discretion has been allowed to the Executive to decide which matter may be referred to the Agency. Hence the provision is *ultra vires* Article 14 of the Indian Constitution.

CONCLUSION

It is safe to say that the provisions of the UAPA and NIA Act are draconian in nature and are against the principle of natural justice as they are against the principle of fair trial. It can be said that if these laws are permitted to exist they can and will be misused to no end. These acts are ultra vires the constitution which through its articles provides for fair trial, equality before law and right to life.

In light of the articles of the constitution these acts should be struck down, as they are or be amended to an extent wherein the provisions of the act are no longer against the provisions of the constitution of India.

It has been held⁴⁶ that the constitution of India is the basic structure of our country and no laws can be made against the constitution unless the constitution has been amended to make the laws valid.

⁴⁵ Sections 6(3), National Investigation Agency Act, 2008

⁴⁶ (1973) 4 SCC 225

SUBSCRIPTION/MEMBERSHIP FORM

I wish to Subscribe/renew to my subscription to ***Lex Revolution*** ISSN 2394-997X Journal of Social & Legal Studies for **1year / 2years / 3years / 5years** towards subscription for _____ years.

Please tick (✓) appropriately the subscription details:

New/Renewal Existing Subscription No. _____ **Category**
1year/2years/3years/5years.

Name: Dr/Mr/Ms/Mrs

Institute/Organisation:

Correspondence Address:

Date: _____ Signature _____

Send this Subscription Form to:

Animesh Kumar,
Editor-in-Chief, Lex Revolution
Shanti Sadan (ITRC Computer Centre),
BDO Block, Nai Bazar, Buxar-802101(Bihar)
Email: editor.lexrevolution@gmail.com
Contact: +91-9336853484

Subscription/Membership Fee

INDIA				
Category	1year	2year	3year	5year
Individual/Institutional	Rs. 2000	Rs. 4000	Rs. 6000	Rs. 9000
Student	Rs. 1800	Rs. 3500	Rs. 5200	Rs. 7500
ABROAD				
UK	£ 40	£ 80	£ 120	£ 200
US	\$ 60	\$ 120	\$ 180	\$ 300

Note: Mode of payment will be acknowledged after approval.