

ISSN 2394-997X

Lex Revolution

UGC Approved Periodical Indexed
Journal of Social & Legal Studies
Volume IV, Issue 1, Jan-Mar 2018



Website: www.lexrevolution.in

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“If intellectual prowess and natural or cultivated power of creation is interfered with, without the permissible facet of law, the concept of creativity paves the path of extinction; and when creativity dies, values of civilisation corrode.”

Dipak Misra, C.J.

Viacom 18 Media (P) Ltd. v. Union of India,
(2018) 1 SCC 761, para 19

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Lex Revolution

UGC Approved Periodical Indexed Journal of Social & Legal Studies

Quarterly Published International 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Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.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 shall be made only in electronic form e-mailed to: **EDITOR(DOT)LEXREVOLUTION(AT)GMAIL(DOT)COM**. The submission guidelines are available at website.

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Email: editor.lexrevolution@gmail.com

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Published by

Dr. Vijay Bahadur Pandey,
Smriti Research Association

Durga Bhawan, W.N. 07, Gurudwara Mandir,
Nai Bazar, Buxar-802101 (Bihar)

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MESSAGE

It is with great pleasure we announce the release of Volume IV Issue-1 (2018) of ***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 legal luminaries Prof. Gopal Krishna Chandani, Prof. S. K. Gaur & Sr. Advocate Mr. K. N. Chaubey for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of 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.

Cite this Volume as:

LR IV (1) 2018

- **Editorial Board**

Lex Revolution

Journal's Profile

Name of the Journal	Lex Revolution
ISSN Number	2394-997X
Subject	Law
Publisher	Dr. V. B. Pandey
Country of Publication	India
Broad Subject Category	Social Science
UGC Journal Number	45256

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THE IMPACT OF CORRUPTION ON SOCIETY

Dr. Ritu Agarwal*

Abstract

Corruption is any abuse of position of trust in order to gain an undue advantage. It is a phenomenon that involves the conduct of two sides that of the person who abuses the position of trust as well as the one who seeks to gain an undue advantage by this abuse. It can occur in relation to public officials as well as between private persons. Corrupt practices can range from small favours in anticipation of a future advantage to the payment of large sums of money to senior members to public officials. The political, economic, social and environmental spheres of our daily life have been affected by corruption. Political intolerance, low level of democratic culture, the problems of accountability and transparency to the public, and principles of consultation and participation dialogue among others often manifest the impact of corruption in our society. Corruption creates frustration and general apathy among the public that finally results in a weak civil society. Corruption is not a good thing as we all know, so it is high time we all make individual and societal commitment to fighting it.

Keywords: *Corruption, Impact, Society, Accountability, Transparency*

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The political, economic, social and environmental spheres of our daily life have been affected by corruption. In political sphere, corruption impedes democracy and the rule of law. In a democratic system, public institutions and offices may lose their legitimacy when they misuse their power for private interest. The consequences that are negative in nature are brought in the society because of corruption for example encoring cynicism and reducing interest of political participation , political instability, reducing political competition, reducing the transparency of political decision making, distorting political development and sustaining political activity based on patronage, clienteles and money, etc.

Political intolerance, low level of democratic culture, the problems of accountability and transparency to the public, and principles of consultation and participation dialogue among others often manifest the impact of corruption in our society. The economic effects of corruption can be categorized as minor and major. However, both in one way or the other have serious impact on the individual community and country. National wealth is depleted because of corruption. Some of the problems like that of the increased costs of goods and services, the funneling of scarce public resources to uneconomic high profile projects at the expense of the much needed projects, diversion and misallocation of resources, conversion of public wealth to private and personal property, inflation, imbalanced economic development, weakling work ethics and professionalism, hindrance of the development of fair in market structures and unhealthy competition is often the resultant of corruption there by deterring competition. The economy is hurt because of the large scale corruption and it impoverishes entire population.

Looking into the social sphere we find that corruption discourages people to work together for the common good. Corruption creates frustration and general apathy among the public that finally results in a weak civil society. Demanding and paying bribes becomes the tradition. Civil strife, increased poverty and lack of basic needs like food, water and drugs, jealousy and hatred and insecurity, social inequality and widened gap between the rich and poor, are also the resultants of corruption. In India, corruption is said to be one of the reasons for the down fall of past regimes byway of undermining the legitimacy of the governments and weakening their structures, it is because of corruption that the productivity gets reduced, the development is hindered, the poverty problem worsens marginalizing the poor, creating social unrest and then to their downfall.

Sometime ago, corruption was synonymous to politicians so any time corruption is mentioned all eyes turn towards the direction of the politician out there. However things are changing fast.

More discoveries are been made on many sides to the issue of corruption, and public is being educated on the subject matter. Our perception about corruption for the past so many years has not done us any good; it has actually made us look at the issue in a very narrow manner rather than sort the appropriate remedy to it. It is high time we understand that the issue of corruption is deeply rooted in every aspect of our society, from the home to the school and to the work place. For instance, many a parent pay money to educational authorities in order to have their children enrolled in school, that is corruption. It is very true that many students while in school pay their ways through in order to make good grades and classes. Corruption has caused us losses in a great measure. Many of our public resources are lost through this diabolic practice by our public officials. Many government employees leave their posts before the required time for closing and yet they take full salary. Many come very late or do not come at all, and no one is complaining, their superiors are doing the same thing so who should complain. We must begin to look at corruption on a broader skill if we indeed want to fight it, we must not just be pointing fingers at the politician, after all the politicians are not the only people that engage in this evil practice. In one way or the other, many of us have received unmerited favours from someone before, being it in public or private office. This is what we have to start looking at. We must have mental re-orientation about this phenomenon in order to make the needed impact as a country. Corruption is not a good thing as we all know, so it is high time we all make individual and societal commitment to fighting it. It is our collective responsibility that can make it work. In order to fight this cancer called corruption, we must have broader base approach to the issues and look at it on a broader skill than just sitting and pointing accusing fingers. In order to fight this canker as a country and as a matter of urgency, I would like to suggest the following steps:

- Proper political reforms, including the financing of political parties and elections, so that we can all ask for the accountability from such political parties in relation to how they use their money and where they get additional funding from.
- Proper financial control measures such as, proper bookkeeping, budget, proper methods of reporting and record checking as well as auditing.
- Proper public supervision of institutions such as the media, parliament, ministries, schools, councils among others.
- Proper economic reforms, such as the regulation of markets and the financial sector.

- Free and safe access to information and data.
- Proper maintenance of law and order so that those found culpable are dealt with drastically according to the law.
- Improving and strengthening of the judicial system.
- Institutional reforms are needed so as to have proper check of our tax systems, customs, and public administration in general.
- The encouragement of whistleblowers and civil society organizations such as NGOs.

Even though we cannot make corruption disappear totally from our society but we can make efforts to restrict it and to protect as much as possible the ‘poor’ and the ‘weak’ in our societies. In the end, all corruption costs are paid by the consumer and the tax-payer. They need to be protected. Our perception about corruption must change completely if this will be made possible. We must know that it is less damaging in total amounts but it makes it difficult to understand why we fight the grand corruption if we fail to fight the small. Major chunk of corruption thrives on a broad base of small corruption-payments or bribes. Let us together agree with one voice that we are no more going to vote for incompetent politicians who will try to bribe their ways through, let us agree that we are no more going to give ‘gifts’ in secrets, let us agree that our country has suffered in the hands of many a people as a result of corruption, and let us agree that we are resolved now than before to fight this cancer from our homes to the work place.

ROLE OF PROMOTER IN ESTABLISHING A COMPANY: AN ANALYSIS

Preeti Singh*

Abstract

There is a lot of hue and cry to decide the legal status of promoter and his liability for pre-incorporation contracts as he is not the agent because there is no company yet in existence and he is not a trustee because there is no trust in existence. But it does not mean that the promoter does not have any legal relationship with the proposed company. The Position of the promoter is quasi legal as he stands in a fiduciary position towards the company about to be formed. Thus, the aim of the paper is to examine the various characteristics of promoter of a company and understand the different kinds of promoter in a company. Also, to trace out the various, functions, duties and liabilities of promoters and analyse the legal position of promoter with regard to company, and to give suggestions with regard to liability of promoter and the company.

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INTRODUCTION

“A promoter is the one, who undertakes to form a company with reference to a given object and sets it going and takes the necessary steps to accomplish that purpose.”

- Justice C.J. Cokburn

The term ‘Promotion’ is of wide importance denoting the preliminary steps taken for the purpose of registration and floatation of the company and the persons who assume the task of promotion are called ‘Promoters’. A promoter may be individual, syndicate, association, partner or company.¹ A promoter conceives an idea for setting-up a particular business at a given place and performs various formalities required for starting a company. A promoter may be an individual, firm, association of persons or a company. The persons who assist the promoter in completing various legal formalities are professional people like Counsels, Solicitors, Accountants etc. and not promoters. Typically, a promoter takes care of all the essential activities that help to establish a company. The promoter acquires and invests the initial capital for the company. Once all the formalities are completed, the promoter hands over the authority to the directors.

Chronologically, the first persons who control or influence the company’s affairs are its promoters. It is they who conceive the idea of forming the company, and it is they who take the necessary steps to incorporate it, to provide it with share and loan capital etc. when these things have been done, they handover the control of the company to its directors, who are often themselves under a different name. On handing over the control of the company the promoter’s fiduciary and common law duties cease, and he is thereafter subject to no more extensive duties in dealing with the company than a third person who is unconnected with it.

MEANING & SIGNIFICANCE OF PROMOTER IN A COMPANY

When an individual has an idea for a new business venture, he or she may set about interesting others in the venture and persuade them to contribute capital to a company to be incorporate for the purpose of carrying on the venture. The individual will then be described as ‘promoter’ of the company. Then the question arises that who really are promoters of a company, the most important work of a promoter is in the formation of a company. The whole process of the

¹ A.K. Majumdar, Dr. G.K. Kapoor and Sanjay Dhamija, ‘Company Law and Practice’, Taxman Publications Pvt. Ltd., p 92

formation of a company may be divided into four stages, namely,² Promotion, Registration, Floatation and Commencement of business.

A company is born only when it is duly incorporated. For incorporating a company various documents are to be prepared and other formalities are to be complied with. All this work is done by promoters. To be a promoter one need not necessarily be associated with the initial formation of the company; one who subsequently helps to arrange floating of its capital will equally be regarded as a promoter. However, a person assisting the promoters by acting in a professional capacity do not thereby become promoters themselves.³ The relationship between a promoter and the company that he has floated must be deemed to be fiduciary relationship from the day the work of floating the company starts and continues up to the time that the directors take into their hands what remains to be done in the way of forming the company. The status of the promoter is generally terminated when the Board of Directors has been formed and they start governing the company.

A promoter is a generic term associated with the person who starts a business. In common parlance, this person is also referred to as the founder of the business. A promoter typically is responsible for raising capital, targeting initial leads and chasing initial business opportunities, entering into the initial contracts for the business formation and incorporating the company.

The expression ‘promoter’ has not been defined under the Companies Act, 1956, although the term is used expressly in sections 62, 69, 76, 478 and 519⁴. Section 62 of Companies Act, 1956 defines ‘promoter’ for the limited purpose of that section only. Section 62(6)(a) defines the expression ‘promoter’ to mean a promoter who was a party to the preparation of the prospectus or of a portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity in procuring the formation of the company. Even in English law, no general statutory definition of ‘promoter’ is available. In the old Companies Act, 1956 there was no static definition of promoter although it was mentioned in various sections, but Section 2(69) in the new Companies Act, 2013 defines promoter. The expression ‘promoter’ means a person -

- a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

² *Ibid*

³ Proviso to section 2(69) of the Companies Act, 1956

⁴ The Companies Act, 1956

- b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

The term is used expressly in sections 35, 39, 300 and 317⁵. The term promoter is also defined under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009⁶ under Regulation 2 (1) (za)- “Promoter” includes:

- i. the person or persons who are in control of the issuer;
- ii. the person or persons who are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to public;
- iii. the person or persons named in the offer document as promoters;

Provided that a director or officer of the issuer or a person, if acting as such merely in his professional capacity, shall not be deemed as a promoter:

Provided further that a financial institution, scheduled bank, foreign portfolio investor other than Category III foreign portfolio investor and mutual fund shall not be deemed to be a promoter merely by virtue of the fact that ten percent or more of the equity share capital of the issuer is held by such person;

Provided further that such financial institution, scheduled bank and foreign portfolio investor other than Category III foreign portfolio investor shall be treated as promoter for the subsidiaries or companies promoted by them or for the mutual fund sponsored by them;

The SEBI (Substantial Acquisition of Shares Takeovers) Regulations, 2011 also states about the term promoter⁷ having the same meaning as above.

⁵ The Companies Act, 2013

⁶ Definition Clause: Regulation 2(1) (za): Promoter

⁷ Definitions clause: Regulation 2(1) (s) - promoter has the same meaning as in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and includes a member of the promoter group;

In USA, the Securities Exchange Commission Rule 405(a) defines promoter as a person who, acting alone or in conjunction with other persons directly or indirectly takes the initiative in founding or organizing the business enterprise.

Cockburn CJ., in *Twycross v. Grant*⁸ described promoter as ‘one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose.’ Bowen L.J., in the case of *Whaley Bridge Printing Co. v. Green*⁹ observed that the term promoter is ‘a term not of law but of business’ usefully summing up in a single word, i.e. promotion means a number of business operations familiar to the commercial world by which a company is brought into existence. In *Lagunas Nitrate Co. v. Lagunas Syndicate*¹⁰ it was stated that ‘to be a promoter one need not necessarily be associated with the initial formation of the company; one who subsequently helps to arrange floating of its capital will equally be regarded as a promoter.’ In *Official Liquidator v. Velu Mudaliar*¹¹ a person who does not take a prominent part may also have so acted in the formation of a company as to bring himself under the term promoter.

A person who acts in a professional capacity like solicitor, accountant etc. is not a promoter. But any such person may become a promoter if he helps the formation of the company by doing an act outside the scope of his professional capacity. A person cannot however become a promoter merely because he signs the memorandum as a subscriber for one or more shares.

In conclusion, it may be said that word ‘promoter’ is used in common parlance to denote any individual, syndicate, association, partnership or a company which takes all the necessary steps to create and mould a company and set it going.

Therefore, the difficulties in defining the term led the judges to state that the term promoter is not a term of art, nor a term of law, but of business.

TYPES OF PROMOTER

The promoters may be professional, occasional, financial or managing promoters.¹²

⁸ [1877] 2 C.P.D. 469 p.541 C.A.

⁹ [1880] 5 B.D. 109 at p.111

¹⁰ [1899] 2 Ch.392 p.428, C.A.

¹¹ [1938] 8 Comp. Case 7

¹² DeeKay, Kinds of Promoters in Business, Available at: <http://dailyjojo.com/articles/kinds-of-promoters-in-business.html> (Accessed on 03/11/2016 at 04:14 PM)

Professional promoters are those who handover the company to the shareholders when the company starts. Unfortunately, such promoters are very scarce in the developing countries. They have played an important role in many countries and helped the business community to a great extent. In U.K., Issue house; in U.S., Investment Bank and in Germany, Joint Stock Banks have played the role of promoters very significantly.

Occasional promoters are those whose main interest is the floating of companies. They are not in promotion work on regular basis but take up promotion of some companies and then go to their earlier profession. For example, engineers, lawyers etc. may float some companies.

Financial promoters do the task of promoting the financial institutions. They generally take up this work when financial environment is favorable at the time.

Managing promoters played a significant role in promoting new companies and then got their managing agency rights.

In the developing countries, promoters try to become managing directors of the companies promoted by them, so they do not charge anything separately. In other countries, promoters may be given lump sum amount for their services or they may also be allotted shares or debentures too. They may even be offered some kind of commission that is linked to the purchase price of the business. A promoter is neither an agent nor a trustee of the company as it is a non-entity before incorporation. Some legal cases have tried to spell out the standing of promoters.¹³

FUNCTIONS OF PROMOTER

In their capacity as promoters, they perform the following functions in order to incorporate a company and to set it going.

- To originate the scheme for formation of the company.
- The first persons who conceive the idea of business.
- To carry out the necessary investigation to find out whether the formation of a company is possible and profitable.
- To organize the resources to convert the idea into a reality by forming a company.
- To settle and ascertain the name the name of the company.
- To nominate the directors, bankers, auditors and etc.

¹³ *Supra Note 14*

- To decide the place where registered office (head office) have to be situated.
- To prepare the Memorandum of Association, Prospectus and other necessary documents and file them for incorporation.

The promoters, in accordance with whether they want to incorporate a private or public company, try to secure the cooperation of persons needed to form the company. Depending upon the form chosen, the promoters may decide upon the number of primary members. The company has a system of representative management and is managed by individuals appointed as directors. The first directors of the company are, however, generally appointed by the promoters. The promoters seek the consent of some individual whom they seem appropriate so that they agree to be the first directors of the proposed company. The promoters have to seek the permission of the Registrar of companies for selecting the name of the company.¹⁴

DUTIES & LIABILITIES OF PROMOTER

The early companies' acts contained no provisions regarding the duties and liabilities of promoters, and even today legislation is largely silent on the subject, merely imposing liability for untrue statement in listing particulars or prospectuses to which they are parties.¹⁵ The promoters occupy an important position and have wide powers relating to the formation of a company. It is, however, interesting to note that so far as the legal position is concerned, he is neither an agent nor a trustee of the proposed company. But it does not mean that the promoter does not have any legal relationship with the proposed company. The promoters stand in a fiduciary relation to the company they promote and to those persons, whom they induce to become shareholders in it.

Duties of the promoters

Duty to disclose secret profits

In case of *Re Cape Breton Co.*¹⁶ the commonest way in which professional promoters used to make secret profit was by purchasing property or business themselves and reselling it to the company at an enhanced price. But the difference between the two prices in such a case shall be a secret profit only if the promoter has begun to promote the company at the time he buys the

¹⁴ Rahul Pandey, Promoters of company, Available at: <http://www.legalindia.com/promoters-of-company> (Accessed on 05/11/2016 at 07:00 PM).

¹⁵ Gower & Davies, 'Principles of Modern Company Law', 8th Edition, Thomson, Sweet & Maxwell, 2008, p.107

¹⁶ [1885]29 Ch.D 795

property or business, so that he owes a duty to the company at the time not to profit on a re-sale to it. A promoter is not forbidden to make profit but to make secret profit. He may make a profit out of promotion with the consent of the company, in the same way as an agent may retain a profit obtained through his agency with his principal's consent. In *Gluckstein v. Barnes*¹⁷ a syndicate of persons was formed to buy a property called Olympia and re-sell this Olympia to a company to be formed for the purpose. The syndicate first bought the company itself £1,40,000. Out of the money provided by themselves, the debentures were repaid in full and a profit of £20,000 made thereon. They promoted a new company and sold Olympia to it for £ 1,80,000. The profit of £40,000 was revealed in the prospectus but not the profit of £ 20,000. Held, profit of £ 20,000 was a secret profit and the promoters of the company would be bound to pay it to the company because the disclosure of the profits by themselves in the capacity of directors of the purchasing company was not sufficient.

Duty of disclosure of interest

In addition to his duty for declaration of secret profits, a promoter must disclose to the company any interest he has in a transaction entered into by it. This is so even where a promoter sells property of his own to the company, but does not have to account for the profit he makes from the sale because he bought the property before the promotion began. Disclosure must be made in the same way as though the promoter was seeking the company's consent to his retaining a profit for which he is accountable.¹⁸

Duty under the Indian Contract Act

Promoter's duties to the company under the Indian Contract Act have not been dealt with by the courts in any detail. They cannot depend on contract, because at the time the promotion begins, the company is not incorporated, and so cannot contract with its promoters. It seems, therefore, that the promoter's duties must be the same as those of a person, who acts on behalf of another without a contract of employment, namely, to shun from deception and to exercise reasonable skill and care. Thus, where a promoter negligently allows the company to purchase property, including his own, for more than its worth, he is liable to the company for the loss it suffers. Similarly, a promoter who is responsible for making misrepresentations in a prospectus may be held guilty of fraud under section 17 of the Indian Contract Act and consequently liable for

¹⁷ [1900] AC 240

¹⁸ *Re Lady Forest-(Murchison) Gold Mine Co. Ltd.* [1901] 1 Ch.582

damages under section 19 of the Act.¹⁹

Termination of Duties

A promoter's duties do not come to an end on the incorporation of the company, or even when a Board of directors is appointed. They continue until the company has acquired the property or business which it was formed to manage and has raised its initial share capital and the Board of directors has taken over the management of the company's affairs from the promoters. When these things have been done, the promoter's fiduciary and contractual duties cease.²⁰

Remedies available to the company against the promoter for breach of his duties

Since a promoter owes a duty of disclosure to the company, the primary remedy in the event of breach is for the company to bring proceedings for rescission of any contract with him or for the recovery of any secret profits which he has made. *Rescission of contract-* So far as the right to rescind is concerned, this must be exercised on normal contractual principles, that is to say, the company must have done nothing to show an intention to ratify the agreement after finding breach involving non-disclosure or misrepresentation. *To recover secret profit-* If a promoter makes a secret profit or does not disclose any profit made, the company has a remedy against him.

Liabilities of Promoter

A promoter is subjected to liabilities under the various provisions of the Companies Act. The Section 26 of the Companies Act, 2013 lay down matters to be stated in a prospectus. A promoter may be held liable for non-compliance of the provisions of the section. Under section 34 and 35, a promoter may be held liable for any untrue statement in the prospectus to a person who subscribes for shares or debentures in the faith of such prospectus. However, the liability of the promoter in such a case shall be limited to the original allottee of shares and would not extend to the subsequent allotters. According to section 300, a promoter may be liable to examination like any other director or officer of the company if the court so directs on a liquidator's report alleging fraud in the promotion or formation of the company. A company may proceed against a promoter on action for deceit or breach of duty under section 340, where

¹⁹ The Indian Contract Act, 1872

²⁰ *Twycross v. Grant*, 1877 2 C.P.D. 469 p.541 C.A.; *Lagunas Nitrate Co. v. Lagunas Syndicate Ltd.* [1899] 2Ch.392 (p.428, C.A.)

the promoter has misapplied or retained any property of the company or is guilty of misfeasance or breach of trust in relation to the company. The Madras High Court in *Prabir Kumar Misra v. Ramani Ramaswamy*²¹ has held that to fix liability on a promoter, it is not necessary that he should be either a signatory to the Memorandum or Articles of Association or a shareholder or a director of the company. Promoter's civil liability to the company and also to third parties remains in respect of his conduct and contract entered into by him during pre-incorporation stage as agent or trustee of the company.

STATUS OF PRE-INCORPORATION OF CONTRACTS

The promoter is obligated to bring the company in the legal existence and to ensure its successful running and in order to accomplish his obligation he may enter into some contract on behalf of prospective company. These types of contract are called 'Pre-incorporation Contract'. Nature of Pre-incorporation contract is slightly different to ordinary contract. Nature of such contract is bilateral, be it has the features of tripartite contract. In this type of contract, the promoter furnishes the contract with interested person and it would be bilateral contract between them. But the remarkable part of this contract is that, this contract helps the perspective company, who is not a party to the contract.

One might question that 'why is company not liable, even if it a beneficiary to contact' or one might also question that 'doesn't promoter work under Principal-Agent relationship. Answer to these entire questions would be simple. The company does not in legal existence at time of pre incorporation contract. If someone is not in legal existence then he cannot be a party to contract.

Before the passing of the Specific Relief Act 1963, the position in India, regarding pre-incorporation contract, was similar to the English Common Law. This was based on the general rule of contract where two consenting parties are bound to contract and third party is not connected with the enforcement and liability under the terms of contract. And because company does not come in existence before its incorporation, so the promoter signs contract on behalf of company with third party, and that is why the promoter was solely liable for the pre-incorporation contract.

However, the provisions of the specific relief Act, 1963 makes the pre-incorporation contracts valid. Section 15(h) and Section 19 (e) of the Specific Relief Act of 1963, deviate from the

²¹ [2010] 104 SCL 174

common law principles to some extent. Under section 15 (h) of the Specific Relief Act, 1963, except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by, (a) any party thereto, (b) the representative in interest or the principal, of any party thereto.

Provided that where the learning , skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party; when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.

Under Section 19 (e) of the Specific Relief Act, 1963, except as otherwise provided by this Chapter, specific performance of a contract may be enforced against the company, when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation.

In *Weavers Mills Ltd. v. Balkies Ammal*²² the Madras High Court extended the scope of this principle through its decision. In this case, promoters had agreed to purchase some properties for and on behalf of the company to be promoted. On incorporation, the company assumed possession and constructed structures upon it. It was held that even in absence of conveyance of property by the promoter in favor of the company after its incorporation, the company's title over the property could not be set aside.

Promoters are generally held personally liable for pre-incorporation contract. If a company does not ratify or adopt a pre-incorporation contract under the Specific Relief Act, then the common law principle would be applicable and the promoter will be liable for breach of contract.

In *Kelner v. Baxter*²³, where the promoter in behalf of unformed company accepted an offer of Mr. Kelner to sell wine, subsequently the company failed to pay Mr. Kelner, and he brought the action against promoters. Erle CJ found that the principal-agent relationship cannot be in existence before incorporation, and if the company was not in existence, the principal of an agent cannot be in existence. He further explain that the company cannot take the liability of

²² AIR 1969 Mad 462

²³ (1866) LR 2 CP 174

pre-incorporation contract through adoption or ratification; because a stranger cannot ratify or adopt the contract and company was a stranger because it was not in existence at the time of formation of contract. So he held that the promoters are personally liable for the pre-incorporation contract because they are the consenting party to the contract.

In *Newborne v. Sensolid (Great Britain) Ltd*²⁴, Court of Appeal interpreted the finding of *Kelner* case in a different way and developed the principle further. In this case an unformed company entered into a contract, the other contracting party refused to perform his duty. Lord Goddard observed that before the incorporation the company cannot be in existence, and if it is not in existence, then the contract which the unformed company signed would also be not in existence. So company cannot bring an action for pre-incorporation contract, and also the promoter cannot bring the suit because they were not the party to contract.

This case created some amount of confusion that, if the contract was sign by the agent or promoter, then he will be liable personally and he has the right to sue or to be sued. But if a person representing him as director of unformed company enters into the contact then the contact would be unenforceable.

In *Natal Land Co. Ltd v. Pauline Colliery Syndicate Ltd*²⁵ N company agreed with Mrs. Carrey an agent of a syndicate before its incorporation that N company would grant a mining lease to the syndicate. The syndicate was incorporated as Pauline Colliery. Pauline Company discovered coal whereupon Natal Land Co. Ltd refused to grant the lease. It was held that there was no binding contract between Natal Land Co. Ltd and Pauline Company as the latter was not in existence when the contract was signed. If the company were allowed to ratify the contract it would mean that it contracted on the date the contract was formed. This in effect would mean that the company contracted before it was formed. If the company wishes to revive the abortive contract it must make a fresh offer and if the offer is accepted by the other party, a contract will come into existence from the moment of acceptance.

These principles were found applicable in Indian case. In *Seth Sobhag Mal Lodha v. Edward Mill Co. Ltd.*²⁶, the High Court of Rajasthan followed the approach of Common Law regarding liability of pre-incorporation contract. This case was criticized by A. Ramaiya in Guide to

²⁴ [1954] 1 QB 45

²⁵ [1904] AC 120 (PC)

²⁶ 1972 42 CompCas 1 Raj

Companies Act (Sixth Edition), he found that learned judges did not noticed the Specific Relief Act, 1963.

Although under common law promoter is personally liable for the pre-incorporation contract, but there are some scope where the promoter can shift his liability to company. He can shift to company his liability under the Specific Relief Act 1963 or he can go for novation under contract law. In *Howard v. Patent Ivory Manufacturing*²⁷, the English Court accepted the novation of contract.

In conclusion we can say that, a promoter is personally liable for the pre-incorporation contract, because at the time of formation of pre-incorporation contract, the company does not come in existence, so neither the principle agent relationship exist nor the company become the party.

Company is not liable for the pre-incorporation contract when it come in existence, but under the arrangement of section 15(h) and 19(e) of the Specific Relief Act 1963, company can take the rights and liability of promoter. It is also found that promoter is personally liable for the pre-incorporation contract in American Law, English Law and Indian Law.

CONCLUSION AND SUGGESTIONS

The word ‘Promoter’ is used in common parlance to denote any individual, syndicate, association, partnership or a company which takes all the necessary steps to create and set it going. The Promoter originated the scheme for the formation of the company; gets together the subscribers to the memorandum; gets memorandum and prepared articles, executed and registered; finds the bankers, brokers and legal advisors; located the first directors, settle the terms of preliminary contracts with vendor and agreement with underwriters and makes arrangements for preparation, advertisement and circulation of the prospectus and arrangement of the capital. So, Promoters act as a molding format for the company and gives it a shape which can exist in the world although they cannot take anything in this regard.

To conclude, it can be said that legal position of promoter is now quiet clear that the promoters occupy an important position and have wide powers relating to the formation of the company. He is neither an agent nor a trustee of the proposed company because there is no company yet in existence for him to be called as agent and no trust in existence for him to be called as trustee. But it does not mean that the promoter does not have any legal relationship with the proposed

²⁷ (1888) 38 Ch. D 156

company. The correct way to describe his legal position is that he stands in a fiduciary position towards the company about to be formed making it thereby that the position of the promoter is quasi legal as he stands in a fiduciary position towards the company about to be formed.

BRINGING IN EMOTIONAL INTELLIGENCE IN THE SOCIETY- GENDER DEBATE

Kanika Sharma *

Abstract

Emotional Intelligence is the nouveau scientific nomenclature given to the ability of an individual to comprehend, assess and evaluate emotions of one and of others. Since 1990, Peter Salovey and John D. Mayer have been the leading researchers on emotional intelligence. In their influential article “Emotional Intelligence” they defined emotional intelligence as, “the subset of social intelligence that involves the ability to monitor one’s own and others feelings and emotions, to discriminate among them and to use this information to guide one’s thinking and actions” (1990). The object of my present paper titled ‘Bringing in Emotional Intelligence in the society-gender debate’ is to highlight the imperative requirement of emotional intelligence in the current scheme of the society. Going by the turbulent spate of crime in the society, there is an urgent necessity to generate awareness and sensitization towards Human Rights so as to curb the criminal act from the inception itself. Gruesome incidents like the infamous Nirbhaya gang rape incident blatantly exemplify that our society is passing through a transition phase where practicing emotional intelligence and humane empathy is the need of the hour. The theoretical scope of my study would be focussed centrally around the genesis of the problem that lies essentially in the social construct of our society and by addressing the socio-legal issues in a psychological and emotive manner, the pathology of social-gender and criminological issues can be dealt with effectively. Emotional Intelligence essentially can be viewed as the new successful model to modify and regulate delinquency and anti-socio apathy.

Keywords: Emotional-Intelligence, Psychological, Human Rights, Society, Gender

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Emotional Intelligence is the nouveau scientific nomenclature given to the ability of an individual to comprehend, assess and evaluate emotions of one and of others. Since 1990, Peter Salovey and John D. Mayer have been the leading researchers on emotional intelligence. They defined Emotional Intelligence (E.I.) as, “the subset of social intelligence that involves the ability to monitor one’s own and others’ feelings and emotions, to discriminate among them and to use this information to guide one’s thinking and actions” (1990)¹. The notion of E.I. emanates from Cognitive Intelligence which is defined as a general mental capability that, among other things, involves the ability to reason, plan, solve problems, think abstractly, comprehend complex ideas, learn quickly and learn from experience.

For centuries, common sense, religion, and philosophy have focused on wisdom, the classical version of what is now being called “emotional intelligence.” Wisdom, however, has not fared well in our modern culture. The rush of science and its technologies have brought in not just advancement, convenience and comfort but also confusion and societal dilemmas. There is an unavoidable flipside to every good thing. If there are immense opportunities of research and development, employment via the internet, there are also multiple cybercrimes to regulate. We boast many a times of the clichéd saying ‘unity in diversity’, but the sporadic incidents ranging from the death of ‘Nido Tanian’ who was thrashed and beaten to death by shopkeepers in Lajpat Nagar area of south Delhi, when he retaliated after they made fun of his hairstyle tells an altogether different story. He was the son of Arunachal Pradesh Congress Legislator yet his distinct profile did nothing to protect him from the intolerance that was unleashed on him victimising him for his North-east Indian descent.

Women’s safety and liberation is the most favourite issue of all politicians and seems to be on the propaganda and manifesto of every competing party, be it old and established or new and upcoming, the Congress/B.J.P or the AAP. Ironically, ever since the December 16, Gang Rape incident, there only seems to be an upsurge on the rape criminal statistics. There has been the criminal law amendment 2013 but in effect it has been, followed by numerous other bone-chilling statistics of rape.

Incidents like these reek of bias, discrimination and sheer intolerance. Hate crimes like these unapologetically show the cultural conflict, hate propaganda and emotional apathy of the perpetrator. Catering to any of these incidents in isolation is not the remedy as the solution in

¹ Mayer, John D., Brackett, Marc A., Salovey Peter (Eds.). (2004). *Emotional Intelligence: Key Readings on the Mayer and Salovey Model*. New York, United States of America: National Professional Resources Inc.

effect lies in curing the societal woes. There is a profound void in the sensitivity and emotional make-up of the society. Values, morality, and religion, have been severed from the complete picture, and have been largely relativized and compromised. To top it all, there is the all escalating stress. Other than the obvious physiological problems to individuals, a high degree of stress affects congenial relations between colleagues. It often leads to decreased morale, decreased productivity, increased in-fighting and increased absenteeism. If left unchecked, it can also lead to a toxic work culture. When people can recognize their own emotions and those of others understand these emotions and learn to respond to emotional situations in an effective way, they are able to work in harmony, maintain strong, mutually supportive relations and increase morale and productivity.

In the absence of a strong sustaining foundation, individuals are left with no conceptual system or framework of thought in terms of which they can develop, educate, critically assess, or rationally reconstruct their feelings, emotions, and impulses. There is an imperative requirement of emotional intelligence in the current scheme of the society. Going by the turbulent spate of crime in the society, there is an urgent necessity to generate awareness and sensitization towards Human Rights so as to curb the criminal act from the inception itself. Erosion of certain basic values like respect, tolerance and mutual co-existence blatantly exemplify that our society is passing through a transition phase where practicing emotional intelligence, empathy and tolerance is the need of the hour. The genesis of the problem can be essentially probed in the social construct of our society and by addressing the socio-legal issues in a psychological and emotive manner, the pathology of social-gender and criminological issues can be dealt with effectively. For centuries, common sense, religion, and philosophy have focused on wisdom, the classical version of what is now being called “emotional intelligence.” The Emotional Intelligence model as introduced by Daniel Goleman focuses on E.I. as a wide array of competencies and skills that drive leadership performance. Goleman’s model outlines four main EI constructs²:

- i. Self-awareness: The ability to read one’s emotions and recognize their impact while using gut feelings to guide decisions.
- ii. Self-management: Involves controlling one’s emotions and impulses and adapting to changing circumstances.

² Goleman, D. (1998). *Working with emotional intelligence*, New York: Bantam Books

- iii. Social awareness: The ability to sense, understand, and react to others' emotions while comprehending social networks.
- iv. Relationship management: The ability to inspire, influence, and develop others while managing conflict.

These are summarized as:

- a) Awareness of self and others, or congruency and empathy,
- b) Approval of self and others, or unconditional caring for others and self,
- c) Self-management or discipline without fear,
- d) Self-awareness or congruency and un-conditioning of the mind in relationships,
- e) Valuing honesty and ethics, or congruency.

Later, the definition was elaborated as “the ability to perceive and express emotion accurately and adaptively, the ability to understand emotion and emotional knowledge, the ability to use feelings to facilitate thought, and the ability to regulate emotions in oneself and in others” (Salovey & Pizarro, 2003, p. 263). Salovey and Pizarro assert that the concept of emotional intelligence is valuable in that it provides a theoretical framework to deal with individual differences in the emotional areas, as well as extend traditional views of intelligence by unifying both cognitive and emotional domains of human ability. Before the popularity of emotional intelligence in the 1990s, Gardner (1983) proposed the existence of seven intelligences (to which he has added more, such as natural, spiritual, and existential) consisting of linguistic, logical-mathematical, musical, bodily-kinesthetic, spatial, interpersonal, and intrapersonal. Of these separate intelligences, interpersonal and intrapersonal intelligences, called personal intelligences, are about the capacity to interact effectively with other people via understanding their feelings, emotions, intentions, and motivations, and the capacity to regulate one's own life through accurate self-understanding of emotions and abilities. Gardner (1999), as well as others (see Mayer et al., 2001), acknowledged that interpersonal and intrapersonal intelligences are comparable to Goleman's (1995) emotional intelligence in that the three have to do with knowledge, awareness, and control of one's own and others' feelings, and empathy with and sensitivity to emotional states. Sternberg (2000) defines wisdom as the application of tacit knowledge in relation to intrapersonal (e.g., good ends for oneself), interpersonal (e.g., good outcomes for others) and extra personal interests (e.g., fits environmental contexts). The major function of wisdom is to balance all these three interests with consideration of the common good. Wisdom is similar to emotional intelligence in that it involves tacit knowledge about

oneself and others, but is also like practical intelligence because it only applies to the context of normal daily life (beyond the context of ability tests, achievement tests, or novel creative situations) of individuals.

According to Gardner (1999), morality, though not as a separate domain of human intelligence, is about personality, individuality, will, and character that subsumes certain cultural values and is essential for the highest realization of human nature. Piechowski (1979) asserts that advanced moral development is associated with emotional sensitivity, compassion, and moral belief, and ultimately facilitates self-actualization. He links moral characteristics to emotional aspects of human development in that the emotional mode of developmental potential generates mental functioning, which is crucial for the formation and development of high levels of moral sensitivity. Factually, Research has demonstrated that an individual's Emotional Intelligence is often a more accurate predictor of success than the individual's IQ. No matter how intellectually intelligent someone is, their success is still governed by how well they communicate their ideas and interact with their peers.

In this manner Emotional Intelligence essentially can be viewed as the new successful model to modify and regulate delinquency and anti-socio apathy. Acting out of empathy, propriety and a sense of awareness amidst all situations will definitely go a long way in healing the current social maladies. A sense of self-discipline and conditioning of mind towards respect for all communities and towards the opposite sex can undeniably be the lasting solution for peaceful co-existence. Violence against Women has been a chronic problem plaguing the society in not just today's times but since the olden times. Manifestations and forms of violence may have been added to the already tormenting existing ones but empowerment and safety of women has been a hollow concept. The Gender debate in the society is a highly volatile one and depends largely upon the interaction of the diverse elements and constituents within it. The practice of bringing human rights sensitization on this platform particularly in today's contemporary times has brought in rights awareness and mobility. This has been as a result of avid movement towards emotional intelligence. Men and women are the two conspicuous actors propelling forward the progression of the society. Emotional Intelligence here again plays a very pivotal role in ensuring significant results for empowerment, safety and security for women. Intelligence is a function of the intellect; it is a cognitive matter, involving comprehension and critical judgment. However, cognition is widely regarded as restricted to facts and the formal realms of grammar, logic, and mathematics. Feelings and impulses are taken to be subjective

effects of bodily conditions or comprehended facts, not modes of awareness in a judgmental form, not modes of comprehension or belief in their own right. Thus, we do not take our feelings and desires to be subject to being culturally informed, critically assessed, and rationally corrected. When the above statement is scientifically evaluated it shows that if there can be a homogenous conglomeration of cognitive with emotional intelligence, people will be better groomed, better informed and sensitized.

Goleman and his fellow psychologists talk about empathetic awareness of the feelings and awareness of others. Empathy involves not just awareness of the feelings and impulses of others but being aware of them as though they were one's own. It is a matter of imaginatively putting one's self in the other's place and sharing in his or her emotive responses to the comprehended situation. Nevertheless, for Goleman, empathetic awareness of the feelings and impulses of others takes them to be simply part of the factual situation. What is being proposed by Goleman and company is that one's own feelings and impulses and those of others involved are always relevant facts in any situation. The emotionally intelligent are said to be those who are especially sensitive to such facts. Certainly one must be aware of one's own feelings and impulses and the feelings and impulses of others in order to respond to a situation intelligently³. We human beings are innately emotional creatures, which is why an inability to manage our emotions, or influence the emotions of those around us, can undermine our interactions and endeavors at every turn.

The sheer awareness of one's own feelings and desires and those of others as though they were one's own may causally transform one's emotions and desires by further enlightening one about the factual situation. Emotional intelligence is an all-encompassing notion that covers under its ambit prudent decisions, whether these are taken personally, professionally or towards the society. Happiness the ultimate goal of every human action is a state of mind and is seemingly the simplest but pragmatically the most complex human emotion. Emotional Intelligence stabilizes this oscillating emotion and an ironic factum of this most sought after emotion is simply that definitions of happiness neither exist nor do they concur. These definitions could be completely polar or marginally similar. Yet, the universal undisputed notion is that every individual aspires towards this amorphous feeling and every action is pioneered towards achieving this well-demarcated human emotion that will render a person finally as 'happy'.

³ Adams, E.M. (1998), Emotional Intelligence and Wisdom, *The Southern Journal of Philosophy*, Vol. XXXVI, pp. 1-14.

These clichéd checklists of ambitions and priorities are paradoxically common to most. But, does a person really realize contentment and joy, after accomplishing that daunting check list.

According to Seligman⁴, father of positive psychology talks about happiness having three dimensions that can be cultivated; “The pleasant life” is realized if a person learns to savor and appreciate basic pleasures such as companionship, the natural environment and bodily needs. An individual can remain pleasantly stuck at this stage or can go on to experience “the good life,” which is achieved by discovering unique virtues and strengths and employing them creatively to enhance their lives. The final stage is “the meaningful life,” in which a person finds a deep sense of fulfilment by exploring and mobilizing their unique strengths for a purpose much greater than themselves. Cultivating the very same components fundamentally means to be stable, peaceful and wherein a calm and composed emotional intelligent person can evolve the simple emotion of harmony and happiness.

According to Gary van Warmerdam author of the popular book ‘Mind Works: A Practical Guide for Changing Thoughts Beliefs, and Emotional Reactions’⁵, self-awareness is the key to change and lasting happiness. In essence, achieving sustainable happiness also denotes a stable, equally gendered and peaceful society. Cultivating mindfulness, yoga, meditations etc. are some perennial practices, which enable in attaining the above.

Spiritually stating, human nature in its very essence is full of bliss and tranquility. It could be the material, technological and external elements that compel man to act in delinquent ways. So as social scientists and social beings we are always endeavoring to evolve ways to achieve that stable sense of gender equilibrium in the society wherein society’s tenacious inclinations are curtailed by inevitable regulations that discipline human behaviour, checking criminal tendencies and assuring safety and security of all.

To conclude, it can be stated unanimously, that imbibing the concept of Emotional Intelligence within the society and observing our behaviour and demeanor along those lines would lead to a harmonious co-existence within the society. It has been reiterated that concepts like Globalization and Liberalization have shrunk the world. However, it is still a gender-divided world. Violence against women has magnified and has reached alarming proportions. Hate and

⁴ Seligman, Martin E.P. (2012). *Flourish: A Visionary New Understanding of Happiness and Well-being*. New York: Free Press.

⁵ Warmerdam , Gary V. (2014), *Mind Works: A Practical Guide for Changing Thoughts Beliefs, and Emotional Reactions*, California: Cairn Publishing.

racial crimes are a clear manifestation of the widening cultural conflict, and in fact within this category women are yet again, a soft easy target for further exploitation. The intelligentsia of the society has in many ways stepped forward and is bringing about a change. The previous ‘silent voices’ have now assumed a strong slogan. Women, youth, and above all, the common people are now occupying the central pedestal and rhetorically stating the imperative of rights awareness. This is all courtesy the culmination of a heightened Emotional Quotient of the masses with the projection of the appropriate Human Rights sensitization in the society. It is now an accepted and admitted fact, that a more emotionally aware populace will be more emotionally stable and responsible. All in all, a complex situation in which the expression of emotion is expressed depends on:

- the gender of the person concerned;
- the particular emotion being experienced;
- the social circumstances in which it is being expressed

And if all three elements are in sync in a harmonious mixture, then scientifically and sociologically, the society will be discrimination and bias free.

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MG-NREGA 2005 - ITS SOCIO- ECONOMIC IMPACT UPON SOCIETY

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Abstract

It is something assumed that the benefits of MG-NREGA, 2005 are only in terms of providing employment to jobless. Nothing could be further from truth. The impact of MG-NREGA goes way beyond; in several cases, it has actually become a major instrument of social change in the area. MG-NREGA has made an overall development in all sphere of a society. It has effected politically as the weaker sections of the society and the village Panchayats have been involved in this scheme. Due to this scheme the Panchayats of villages are actively participating and it has provided a great improvement in the economic conditions. The economic importance of MG-NREGA is that the unemployed, uneducated, unskilled and the most downtrodden people are getting economic benefits from this scheme. There are a number of distinct ways in which MG-NREGA is likely to impact poverty, the most direct and obvious way being by providing extra work opportunities and income to the poorest in the rural areas. But the question is, whether it has resulted in changes in incomes, savings, and expenditures of the people?

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“A man is willing to work and unable to find work, is perhaps the saddest sight that fortune’s inequality exhibits under this sun.”

- Carlyle, Thomas

INTRODUCTION

The Indian economy today is confronted with duality. While on the one hand, there is shining India, on the other hand there is suffering India. Although government claims success for its policies on the basis of high growth rates of the last few years, yet the fact on the ground remains that this growth is skewed, accompanied by rising inequalities. It completely bypasses the agricultural sector on which a majority of Indians are still dependent. The weakness of the current recovery and past approaches to economic development can be traced to the failure to consider employment as the predominant means of promoting growth and alleviating poverty. In policy circle, employment generation has long been an almost ignored priority particularly as unemployment rates sour. In the light of these circumstances, there is a need to re-examining some of the fundamental questions in order to find out what has gone wrong and what kind of remedial measures should be taken to resolve the problems faced by marginalized section of the society particularly in villages.

The Government of India has adopted a multifaceted development strategy that promotes economic growth and also addresses the needs of the poor by ensuring their basic rights. The Ministry of Rural Development has a gamut of programme which aims at providing direct employment, self-employment, social security, housing, building, rural infrastructure and managing land resources to alleviate poverty. But some sections of rural population, especially those unskilled, causal, manual laborers remained unaffected by these measures. Majority of the rural population is engaged in agricultural and allied activities for income and livelihood. Still the fact is that people living in the villages are devoid of basic needs of life namely, food, shelter, medical help, education etc.

Right from Raja Ram Mohan Roy (1772-1833) to Mahatma Gandhi to the present day planners and policy makers in India, all appear to have shown an awareness of the problems of people residing in the rural areas of the country and the need to bring about rural reconstruction which has been receiving considerable attention especially since the era of economic planning commenced in the country. But even today the picture of a typical or representative Indian village is that of an ill-defined assemblage of mud-walled cottages with thatched roofs, with

hardly any roads and source of drinking water and inhabited by men and women illiterate and ill-fed, and surrounded by a crowd of rickety children, all living in the company of or side-by-side an equally emancipated buffalo, or a cow or a goat.¹

After independence, a systematic study of rural social organization's structure, functions, and development become pertinent to understand rural society. The multi-dimensional concept of rural development is based on two fundamental components that have been often neglected. First, the effective management of existing local resources both material and human with the goal of optimum output and, secondly active participation of people irrespective of any sort of discrimination. These two factors have rarely been realized in the State policy of development process particularly in rural development. As a governmental agency, Panchayati Raj Institutions are also lacking those potential though they have a countrywide institutional network. On the other hand, NGOs are efficient and equipped with these two features but they lack in other dimensions. NGOs are diverse in their structure and functions like disproportionate distribution, lack of uniformly or networking, isolate and scattered attempts. These two institutions are considered most important agencies in rural development, though both are isolated in their functioning and interaction or collaboration. There is an urgent need that these two institutions act in collaboration for rural development.²

Gram Panchayats and voluntary organizations are two important agencies in rural society for local development. Together, they can effectively attain the larger goal of people's empowerment for which the country has been struggling for decades. In the wake of 73rd amendment, voluntary organizations should play a supportive and complementary role to the Panchayats and facilitate community participation. Panchayat Raj System has deep roots in the Indian tradition and civilization. Even the term 'Panchayat' can be traced to ancient period, referring to community structure. Before independence, panchayat system was based on social formation whether it is caste panchayat or village panchayat. It was voluntary in resource management but membership was compulsory and determined by social norms. Village administration looked up to these caste panchayats or village panchayats and considered them as 'self-sufficient' units. After independence, Indian state realized their importance and gave them

¹ K. Partap, *Rural Labour in India*, (Deep and Deep Publication, New Delhi), 1992, p.7.

² Pardeep Kumar, "Rural Development a Collaboration of GOs and NGOs," Kurukshetra Administrative Journal on Rural Development, Vol.53, Aug 2005, p.35

legal status and Constitutional validity.³

However with better understanding of the need for rural development in India's programmes of overall socio-economic development, considerable interest has been generated in the last two decades. The long term effects of rural development programmes bring to light some problems and issues. These ought to be considered and understood by the planners and policy makers before they embark upon new rural development programmes and projects. Many programmes and projects undertaken only come to full fruition after five, ten or twenty years. Although these new programmes and projects are taken up with enthusiasm, there should not be any illusion about the inherent difficulties and complexities with regard to rural planning and implementation as a whole nor its short-term and long-term effects.

The manifesto of National Front Government (UPA) starts with the statement, "Appalling poverty, glaring inequality and growing destitution of large numbers have rendered India weak and demoralized." The programme pledged by the government include minimum needs "through a major programme of employment generation and asset creation not less than 50% of the investible resources will be guaranteed to agricultural labour." The manifesto spells about more specifically the right to work.⁴

In India, there is a long tradition of labour intensive rural works programme especially in years of drought. These programmes, however, are not based on the right to work. They are just additional employment opportunities provided by the State, as and when resources and commitment are available. So far, the only serious attempt to make the right to work a reality is Maharashtra's "Employment Guarantee Act 1977". Which was enacted and implemented under extraordinary circumstances of severe drought in the State during 1970-1973 as innovative anti-poverty intervention. This scheme ran until February 2006, when it was converted into Maharashtra Rural Employment Guarantee Act, under the guidelines of the NREGA. The main object of this act is to secure the right to work by guaranteeing employment to all adult persons who volunteer to do unskilled manual work in rural areas in the State of Maharashtra.

The Employment Guarantee Scheme in Maharashtra is the longest ever surviving programme of its kind, and, secondly, it is unique because its designs and execution exhibit an unusual clarity

³ *Ibid* at 37

⁴ Roy Sinha, *Rural Employment Programmes*, Har-Anand Publications, New Delhi, 1990, p.13.

of goals and consistency in approach. One of the important features of this scheme was that the programme was focused on the alleviation of poverty, and guaranteed gainful employment to all adults above 18 years of age in rural areas and “C” class Municipal Council. Selection for employment was based on willingness to undertake unskilled manual work on a piece-rate basis and self-targeting. There were provisions, like unemployment allowances, provision of shelter and first aid, and no discrimination on the basis of gender or caste.⁵

The launch of various ambitious schemes at the Centre was guided by the success of the Maharashtra Employment Guarantee Scheme, which was implemented for over last 38 years in Maharashtra, without decline in the demand for unskilled wage work. The experience gained in implementation of different wage employment programmes like National Rural Employment Programme (NREP 1980), Rural Landless Employment Guarantee Programme (RLEG 1983). Jawahar Rozgar Yojana (JRY 1989), Employment Assurance Scheme (EAS 1993), Jawahar Gram Samridhi Yojana (JGSY 1999), Sampoorn Grammen Rozgar Yojana (SGRY 2001), and National Food for Work Programme (NPEWP 2004), etc. These programmes are as follows:⁶

S.No.	Rural Development Programme	Year of Beginning	Objective/Description
1	Community Development Programme (CDP)	1952	Over-all development of rural areas with people's participation.
2	Rural Electrification Corporation	1969	Electrification in rural areas.
3	Accelerated Rural Water Supply Programme(ARWSP)	1972-73	For providing drinking water in villages.
4	Crash Scheme for Rural Employment	1972-73	For rural employment.

⁵ Aruna Bagchee, *Political and Administrative Realities of Employment Guarantee Scheme*, Economic and Political Weekly, V.40, No.42, 2005, p.4532

⁶ Puran Singh, *National Rural Employment Guarantee Scheme*, Kurukshetra Administrative Journal on Rural Development, V.54, May 2006,p.42

5	National Institution for Rural Development	1977	Training, investigation and advisory organization for rural development.
6	National Rural Employment Programme (NREP)	1980	To provide profitable employment opportunities to the rural poor.
7	Development of Women and Children in Rural Areas. (DWCRA)	1982	To provide suitable opportunities of self-employment to the women belonging to the rural families who are living below the poverty line.
8	Rural Landless Employment Guarantee Programme (RLEGP)	1983	For providing employment to landless farmers and laborers
9	National Fund for Rural Development (NFRD)	1984	To grant 100% tax rebate to donors and also to provide financial assistance for rural development projects.
10	Council for Advancement of People's Actions and Rural Technology (CAPART)	1986	To provide assistance for rural prosperity.
11	Service Area Account (SAA)	1988	A new credit policy for rural areas.
12	Jawahar Rozgar Yojana	1989	For providing employment to rural unemployed.
13	Agriculture and Rural Debt Relief Scheme (ARDRS)	1990	To exempt bank loans up to Rs. 10,000 of rural artisans

			and weavers.
14	Supply of Improved Toolkits to Rural Artisans	1992	To supply modern toolkits to the rural craftsmen except the weavers, tailors, embroiders and tobacco laborers who are living below the poverty line.
15	District Rural Development Agency (DRDA)	1993	To provide financial assistance for rural development.
16	Mahila Samridhi Yojana	1993	To encourage the rural women to deposit in Post Office Saving Account.
17	Swarna Jayanti Gram Swarozgar Yojana	1999	For eliminating rural poverty and unemployment and promoting self-employment.
18	Pradhan Mantri Gramodaya Yojana	2000	To fulfill basic requirements in rural areas.
19	Pradhan Mantri Gram Sadak Yojana (PMGSY)	2000	To line all villages with pakka road
20	Bharat Nirman Programme	2005	Development of Rural Infrastructure including six components: irrigation, Water supply, Housing, Road, Telephone and Electricity.

Prior to the enactment of MG-NREGA, India had no programme in rural areas that promised employment as a legal right, although employment generation through rural works had a long history in India dating back to the 1960s. Since 1960, the Government had been merging old schemes to introduce new ones while retaining the basic objective of providing additional wage employment involving unskilled manual work, creating ‘durable’ assets, and improving food

security in rural areas through public works with special safeguards for the weaker sections and women of the community. The problem areas had also been almost similar like mismanagement, lack of planning and implementation. It took 30 years of Government experimentation to launch major schemes like Jawahar Rozgar Yojana (JRY), Employment Assurance Scheme (EAS), Food for Work Programme (FWP), Jawahar Gram Samridhi Yojana (JGSY) and Sampoorna Grameen Rozgar Yojana (SGRY) that were forerunners to Mahatma Gandhi NREGA. In the process, the Government decentralized implementation by providing financial and functional autonomy to the local self-government institutions or Panchayati Raj Institutions (PRIs) in order to fight corruption⁷.

Though these Yojnas were providing some relief to the rural poor, but their reach had been inadequate in view of the dimension of the unemployment in rural areas. Therefore an urgent need was felt to ensure at least some minimum days of employment in the shape of manual labour to every household in rural areas. Accordingly the government resolved to enact a suitable Act which would provide legal guarantee for at least 100 days of employment every year at minimum wages for at least one able-bodied person in every rural poor household. To achieve this objective the MG-NREGA 2005 has been enacted. The MG-NREGA 2005 is the first tangible commitment to the poor that they can expect to earn a living wage, without loss of dignity and demand it as a right.

Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) is considered as “Silver Bullet”⁸ for eradicating rural poverty and unemployment, by way of generating demand for productive labour force in villages. The Constitution of India refers to the Right to Work under the Directive Principles of State Policy. Article 39 envisages the state to ensure that citizens, men and women equally have the right to an adequate means to livelihood. Further, Article 41 emphasizes that the State within the limits of its economic capacity and development will make effective provision for securing Right to work. In spite of these constitutional provisions there are still incidences of illiteracy, hungry people, malnourished children and anemic pregnant women, and farmer suicides, starvation deaths, and, migration resulting from inadequate employment opportunities in rural areas. In order to make solution of these problems and to provide livelihood security to rural unemployed, Government of India enacted the

⁷ Annual Report of Planning Commission, (2001), pp 12-20

⁸ This word has been taken from, Mohanty, Soumya, MGNREGA, and tribal livelihoods: A case study in Sundergarh District of Odisha, MA Thesis, 2012

National Rural Employment Guarantee Act (NREGA) in 2005. This act is now called as MG-NREGA 2005.

Employment related work programmes, as means of poverty reduction, have a long history. What makes MG-NREGA 2005 different is that it is one of the largest rights-based social protections, which is open to all rural people who are willing and able to undertake work. The MG-NREGA 2005 differs from the previous Employment Assurance Schemes in at least five major ways⁹:

- Whereas other Employment Assurance Schemes owe their origin to an executive order, the MG-NREGA 2005 originated from an Act of Parliament that gives it Legal-Constitutional superiority over the other EASs.
- The MG-NREGA 2005 is irreversible and can be terminated only by another Act of Parliament.
- Its aims more at guaranteeing minimum livelihood security than removing rural poverty or other development objectives.
- Its overall thrust is entitlement and hence, contains provisions like minimum wages, work site facilities, (drinking water, shelter, first aid, crèches for children below the age of six years for female workers) and mandatory participation of female workers.
- It is the first major experiment in at least partially decentralized planning, monitoring and implementation through Panchayati Raj Institution across the States.

OBJECTIVES OF THE MG-NREGA 2005

The main objectives of Mahatma Gandhi National Rural Employment Guarantee Act 2005 is to enhance livelihood security through generating assets, protecting the environment, empowering rural women, reducing migration and fostering social equity. The following are some objectives which this scheme promotes.¹⁰

- Rural connectivity for all weather access including culverts and drainage facilities wherever necessary.
- Flood control and protection works including drainage in water logged areas.

⁹ Sangeeta Chhabra, et.al, Report on Management of National Rural Employment Guarantee Scheme-Issues and Challenges, (Lal Bahadur Shastri Institute of Management, New Delhi), 2009, p.14.

¹⁰ P.C. Sikligar, *Rural Employment Guarantee in Assam: An appraisal, Man and Development*, Vol. XXXII, September 2010, p.2.

- To improve the status of the beneficiaries of the Rural Housing Scheme namely Indira Awaas Yojana.
- Drought proofing including forestation and tree plantation.
- Water conservation and water harvesting.
- Other works notified by the Central Government after due consultations, that promote employment generation and land development works.

NATIONAL RURAL EMPLOYMENT GUARANTEE ACT 2005:

According to the Eleventh Five Year Plan (2007–12), the number of Indians living on less than \$1 a day, called Below Poverty Line (BPL), was 300 million that barely declined over the last three decades ranging from 1973 to 2004, although their proportion in the total population decreased from 36 per cent (1993–94) to 28 percent (2004–05), and the rural working class dependent on agriculture was unemployed for nearly 3 months per year, which was rising due to a downward trend of the agricultural productivity and in turn also aggravating poverty. In large States like Bihar, Madhya Pradesh, Maharashtra, Rajasthan and Uttar Pradesh, the number of poor even increased. The plan targeted poverty through MG-NREGA which promised employment as an entitlement. The law is based on Gandhian principles. Previous Employment Guarantee Schemes (EGS) like ‘Sampoorna Grameen Rozgar Yojana’ (SGRY) or Universal Rural Employment Programme and National Food for Work Programme (NFFWP) - both SGRY and NFFWP were merged with MG-NREGA. This provided short-term unskilled employment to poor, assured food and job security and created durable assets. In contrast to the earlier wage employment programmes, MG-NREGA, as per its definition, is a right-based, demand-driven public employment programme that is principally based on decentralized, participatory planning at the gram panchayat level with adequate transparency and accountability safeguards for effective implementation.

The MG-NREGA is notified on 7 September 2005 with the objective of “enhancing livelihood security in rural areas by providing at least 100 days of guaranteed wage employment in a financial year, to every household whose adult members volunteer to do unskilled manual work”. In addition to this the aim of MG-NREGA is to create durable assets that would augment the basic resources available to the poor. At minimum wage rate and within 5 km radius of the village, the employment under MGNREGA is an entitlement that creates an obligation on the government failing which an unemployment allowance is to be paid within 15 days. Along with community participation, the MG-NREGA is to be implemented mainly by the gram panchayats

(GPs). The involvement of contractors is banned. Labour-intensive tasks like creating infrastructure for water harvesting, drought relief and flood control are preferred. Starting from 200 districts in 2 February 2006, the MG-NREGA covered all the districts of India from 1 April 2008¹¹.

The National Rural Employment Guarantee Bill 2004 was tabled in Parliament on 21 December 2004. The main purpose of an Employment Guarantee bill is to enable people to claim from the state a basic aspect of their right to work. For this to happen, the Act must give them effective and durable entitlements. It should aim at empowering the disadvantaged, and include extensive safeguards against any dereliction of duty from the concerned authorities. This is the spirit in which a draft Act had been prepared by concerned citizens and revised by the National Advisory Council.¹²

Unfortunately, the Bill tabled in Parliament is a travesty of the National Advisory Council draft of August 2004.¹³ It has been extensively reworked from the point of view of a bureaucrat who is anxious to minimize the responsibility of the State. All sorts of safeguards have been put in place to ensure that the government can modify the rules of the game at any time.¹⁴

An essential feature of the National Advisory Council draft is that it was based on the twin principles of universality and self-election. All households were eligible to apply for work, and Act was to be extended to the whole of rural India within five years. Eligibility criteria were deemed unnecessary since the willingness to perform casual manual labor at a minimum wage is itself a strong indicator of need. The effectiveness of self-selection mechanism is borne out by India's long experience with relief works.¹⁵

The National Rural Employment Guarantee Act, 2005 was passed unanimously by the Lok Sabha on August 23, 2005, which was guided by the success of the Maharashtra Employment Guarantee Act (MEGA). MEGA has been functioning in the State of Maharashtra since 1977. National Rural Employment Guarantee Act provides a legal right for 100 days of employment to each rural household whose adult members volunteer to do unskilled manual work. The scheme

¹¹ Report of Comptroller and Auditor General of India, (2013), pp.1-22

¹² Jean Dreze, Promise and Demise Yojana, A Development Monthly, V.49, April 2005, p.4

¹³ Reetika Khera, *Battle For Employment Guarantee*,(Oxford University Press, New Delhi),2011,p.6

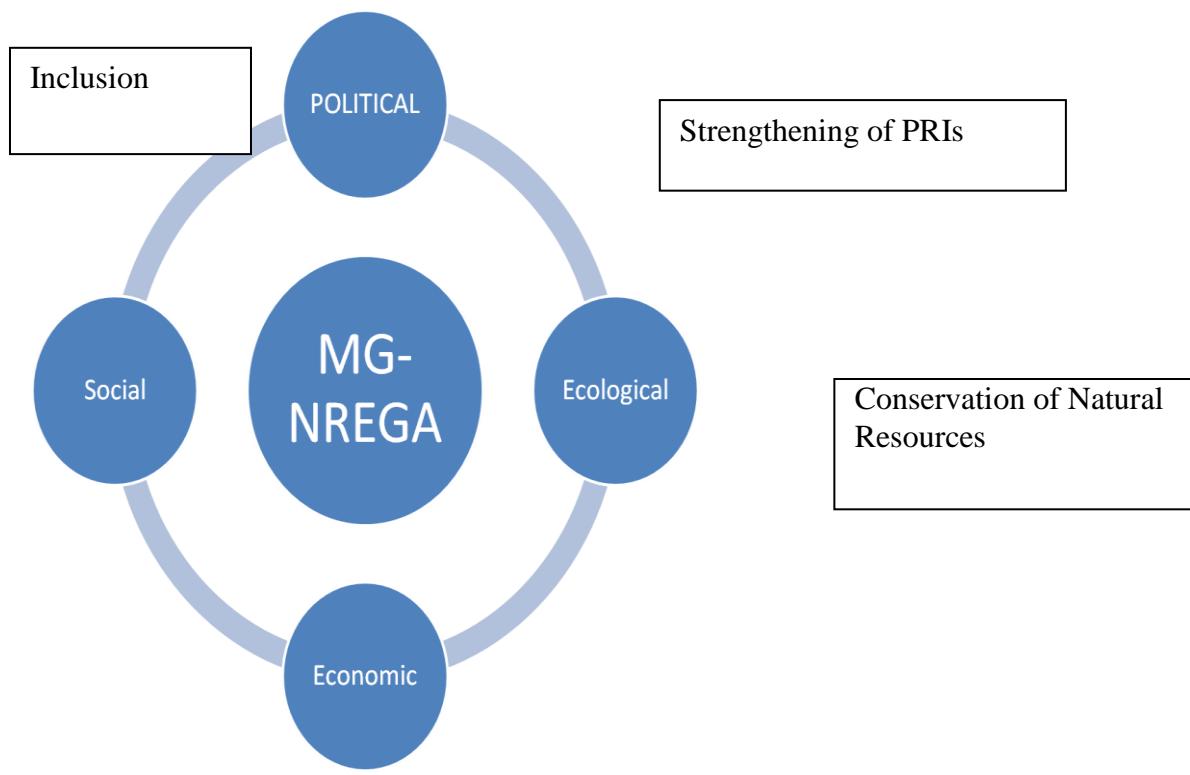
¹⁴ Jean Dreze, "Employment Guarantee Act, Promise and Demise," Kurukshetra Administrative Journal on Rural Development, V.53, May 2005, p.12

¹⁵ Ibid

was first launched at P. Bandlapalli (a tiny village of Narpala Mandal) in the Ananthapur district of Andhra Pradesh on February 16, 2006.¹⁶

This Act was promulgated on 7th September, 2005 based on the ‘Scheme of National Rural Employment Guarantee’ and was ceremoniously launched by the Prime Minister, Dr. Manmohan Singh on February 2, 2006. It has been envisaged under Sec. 3 of the Act that the State Government shall, in such rural areas in the state as may be notified by the Central Government, provide every household whose adult members volunteer to do unskilled manual work, not less than one hundred days to such work in a financial year in accordance with the scheme made under Act. For the purpose of giving effect to the provision of S.3 every State Government shall within 6 months from the date of commencement of this Act by notification make a scheme for providing not less than one hundred days of guaranteed employment in a financial year to every household in the rural areas covered under the scheme and whose adult members volunteer to do unskilled manual work subject to the conditions laid down by or under the Act and in the Scheme.¹⁷

IMPACT OF MG-NREGA UPON SOCIETY: - SOCIAILY, POLITICALLY, ECONOMICALLY AND ECOLOGICALLY



¹⁶ *Supra* note 1

¹⁷ Amrit Patel, *Role of Panchayati Raj Institution in Implementing Rural Employment Guarantee Scheme*, Kurukshetra Administrative Journal on Rural Development, V.54, August 2006, p.31

It is something assumed that the benefits of MG-NREGA, 2005 are only in terms of providing employment to jobless. Nothing could be further from truth. The impact of MG-NREGA goes way beyond; in several cases, it has actually become a major instrument of social change in the area. MG-NREGA has made an overall development in all sphere of a society. It has effected politically as the weaker sections of the society and the village Panchayats have been involved in this scheme. Due to this scheme the Panchayats of villages are actively participating and it has provided a great improvement in the economic conditions. The economic importance of MG-NREGA is that the unemployed, uneducated, unskilled and the most downtrodden people are getting economic benefits from this scheme. There are a number of distinct ways in which MG-NREGA is likely to impact poverty, the most direct and obvious way being by providing extra work opportunities and income to the poorest in the rural areas. But the question is, whether it has resulted in changes in incomes, savings, and expenditures of the people? Has it stopped the long journeys and migrations to other cities that people make in search of jobs or has it remained the same throughout. The answer to this question is that the landless SC, ST and BPL population which earlier worked as bonded labour on farms of rich landlords has become free from their clutches owing to MG-NREGA projects. It is pertinent to note that NREGA provided benefits to the weaker sections of the society; it has resulted in their overall development. It gives them an opportunity to develop socially, politically and psychologically. Thus this scheme leads to an overall development of the poor strata of the society. Social and religious events are held there regularly in which all participate together. This has started breaking the centuries' old walls between castes and classes. Now a days the most important concern of the country is the protection of environment and natural resources and this scheme is also moving towards the fulfillment of this aspect as in this scheme there is the use of manpower and no machinery is used, even our natural resources get conserved and are not exploited.

Measuring an Act's impact can become a difficult task taking into consideration its entire ambit. A lot of parameter and clichés are to be taken into account for a proper statistical study to take place. For example, an Act meant to improve the housing conditions of the poor will have parameters like the quality of houses they live in, number of rooms in each house, basic facilities, and availability of electricity and water that have to be compared with similar parameters of previous accommodations. If there is an improvement of living conditions of the people, then the law should be regarded as successful. But this is only a very arbitrary example in the context of India where programmes are well planned on paper but suffered heavily on implementation, feedback, and miscellaneous aspects.

CONCLUSION

In spite of achieving success in the bigger States, the UPA government's flagship MG-NREGA scheme appears to have failed in fulfilling its objectives in some States. This is all because of poor administration, a vote bank called MGNREGS, misuse of public funds, absence of effective grievance redressal system, long term dependency of the poor on the Government and absence of strong penalty provisions. The bottom line is that the National Rural Employment Guarantee Act 2005 leaves laborers at the mercy of the benevolence of the state. However the state discretionary powers under the Act can also be used at any time to phase out the whole project. Trusting the benevolence of the state in this context would be the triumph of hope over experience.

RIGHT TO FREE AND COMPULSORY EDUCATION AS A MEANS TO ARREST STRATIFICATION IN THE INDIAN SOCIETY: A CRITICAL APPRAISAL

Dr. Ashutosh Hajela*

INTRODUCTION

Indian soil harbours a heterogeneous populace, marked by different castes, different economic statuses, different religions, different cultures and different ethos. These variations in the populace tend to be disruptive directly and indirectly in the overall progress of the nation as well as that of the society. As such there is a dire need of ushering in transformation in the Indian society. It happens to be a bare fact that law alone cannot bring in the requisite change in the society unless and until a volley of other allied features are simultaneously taken care of by the social scientists, the educationalists, the citizens as well as the other stakeholders in the society. It is felt that In India, the dearth of educational facilities and the requisite ambience to make education meaningful and effective is somewhere lacking. This problem needs to be addressed as a pre-cursor to take the society ahead smoothly on the path of progression. The Indian legislature has to be applauded for the strenuous efforts in elevating the educational rights to the level of the fundamental rights. Additionally, the Indian Supreme Court is to be appreciated for its various judgments which had been instrumental in delivering education as a potent tool in the hands of the common populace. It is manifest that all the barriers amongst the masses based on variance in religion, language, culture, etc, can be disfigured by the think tank of educated masses. However, the current state of affairs, as far as educational planning in India is concerned, is far from being satisfactory. A noble start has been introduced by the establishment of the fundamental right to education with the active support of both public and private players in education sector along with the backing of the Supreme Court of India but we are distantly behind the dream to be achieved even after the passage of fifteen long years. It is a wake-up call for the social scientists and jurists along with the other stakeholders to expedite educational planning in the best interests of the society and in transforming the Indian society.

SOCIETAL CONDITIONS IN INDIA

An ideal society is what is required for the well-being of a nation and what constitutes an ideal

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society is the presence of a homogeneous population, a close knit and associated group of people which carries with it a sense of belongingness and is appreciated by the solidarity exhibited by its component members. The Indian society has, however unfortunately, been stratified by the presence of wide spread disparities based on religion, community, caste, class, gender, economic capacity, profession, thus making it a heterogeneous society. The caste system which has all the more plagued¹ the Indian society, has divided² communities into innumerable hereditary groups. Consequently the society here is marked by visible sense of difference and lack of communication amongst the individuals making up the society resulting into an atmosphere of disrespect and even hostility towards each other. Whatever may be the reason behind the high level of social stratification, the harsh fact remains prominent even now when much water has flown since the ancient times and when we have made substantive progress in terms of development in the infrastructure, development of technology, up gradation of vocational skills self-dependence and other allied factors.³ The unfortunate fact remains a constant hurdle and handicap in ensuring unity, fraternity and solidarity amongst the populace which necessarily is the most important goal to be achieved as per the mandates of the Constitution of India.

SOCIAL ENGINEERING

The challenging task, ahead, for the social scientists or the social engineers⁴ is to apply the most appropriate formulae to the peculiar Indian society so as to reduce to a bare minimum the frictions in the society.⁵ The goal ahead is social development, social change and social progress cutting across the most probable hindrances present in the Indian society. It has been aptly

¹ “Classification on the basis of castes in the long run has the tendency of inherently becoming pernicious” per Justice Pasayat and Justice Thakker in *Ashok Kumar Thakur v. Union of India* (2008) 6 SCC 1 at Para 328

² *Ibid* at Para 666 “Caste has divided this country for ages. It has hampered its growth” per Justice Raveendran

³ “On one side we see rising affluence, more prosperity, percentage of people below poverty line declining, improvement in health indicators, increasing rate of literacy and growth in number of educational institutions, world becoming increasingly closer, with rising global interdependence, rising social consciousness and social networking bringing individuals together; but on the other side, we notice rising poverty and wants, increasing hunger and malnutrition, large population suffering from avoidable diseases in want of basic medical facilities and healthcare system, rising assault on human dignity(represented by violence in the name of gender, caste, religion and community), world becoming more uneven and segregated under the influence of forces of global market economy(increasing exploitation of natural and human resource from weak and poor nations), marginalized sections of society amongst and within nations getting further marginalized, education increasingly producing more atomized individuals(self-centred, self-seekers with hardly any major concern for others), increasingly isolated individual (how many are socially networked and even those, they hardly have or refuse to find time for interaction in person with friends or family), rising cult of violence (be it as in the case of terrorism, Maoism or fundamentalism or State of violence).” See Mool Chandra Sharma, *Right to Education: Imperative for Progress* 20 (Universal, New Delhi, 2013).

⁴ Sir Roscoe Pound treated the task of the law maker as being analogous to engineering. See R.M.W. Dias *Jurisprudence* 431 (Aditya Books/Butterworths 5th edn.,)

⁵ *Ibid*: Pound Interpretations of Legal History 156; Pound Social Control through Law 65 as cited: In the words of Sir Roscoe Pound, “The aim of social engineering is to build as efficient a structure of society as possible, which requires the satisfaction of the maximum of wants with the minimum of friction and waste.”

remarked that:

“A Survey and appraisal of dynamics of the law monitored and law linked social changes in a developing multicultural democracy like India is stupendous task looking to vastness of the area and complexities of issues involved. Pluralism in religion, language and ethnicity, multi-layered caste structure and regionalism have posed severe challenges to the change management process.”⁶

The need of the hour, notwithstanding the complexities involved, however, is to make attempts to reconcile all conflicting interests in the society and to bring at par the underprivileged with the defined target of promoting social harmony, social justice and balance in the society which cannot be based on a mere notion of freedom on paper and geometrical equality. The beauty of a society lies in the solidarity⁷ it possesses and such solidarity is exhibited when individual members of the society are united by a sheer force rather than being ostracized on grounds of caste, creed, colour, economic status, etc.,

LAW AS A MEANS FOR SOCIAL METAMORPHOSIS

The prescribed task can be accomplished by various tools of which the medium of law for bringing about social cohesion is one of the most powerful tools, no doubt coupled with a set of handicaps, too. It has been aptly observed by the Supreme Court of India that:

“In a developing society like ours, steeped with unbridgeable and ever widening gaps of inequality in status and opportunity, law is a catalyst, rubicon to the poor, etc., to reach the ladder of social justice.”⁸

Law has a definite potential of co-existing and functioning within the parameters of social dynamics and springing up with solutions to various social conflicts, needs and exigencies. According to Sir Henry Maine, a shift from a static society to a progressive society has to take place and legislation happens to be an effective instrumentality of social reform⁹. Law can articulate and carry forward the goal of social solidarity effectively.

⁶ P Ishwara Bhat, *Law and Social Transformation* 1-2 (Eastern Book Company, 2009).

⁷ See George Whitecross Paton *A text book of Jurisprudence* 94 (The English Language Book Society & Oxford University Press, 1972). Duguit: “Society rests on the need for satisfying common interests (*solidarite par similitude*).”

⁸ *Supra* note 4 at 437, “People have common needs, which require concerted effort; they have also dissimilar needs, which require mutual adjustment and accommodation.”

⁹ *Air India Statutory Corporation v. United Labour Union* (1997) 9 SCC 377 at 419, para 43

⁹ S.N. Dhyani, *Fundamentals of Jurisprudence (The Indian Approach)* 241 (Central Law Agency, 1997).

EDUCATED MASSES: A NECESSARY PRE-REQUISITE FOR SOCIAL CHANGE

However, Law can create wonders only when complimented with education; law can be effective in transforming a society comprising of educated masses. In order to commence the journey towards social transformation, there has to be a group of respondents who are responsible intellectually, who are well aware of their responsibilities towards their neighbors, towards the environment and towards the society, which attribute can be nourished only with education. It has been emphatically remarked in this context that “The expansion of education at various levels is a vital factor for social change as it enables building of pro-welfare public opinion and diffusion of knowledge that arms the people against exploitation and blind beliefs.”¹⁰

Prof. Amaratya Sen has also observed on similar lines that “*Widening the coverage and effectiveness of basic education can have a powerfully preventive role in reducing human insecurity of every kind.*”¹¹

Law and education is, thus, the required power punch in propelling a society towards progression. It is this combination which has the potential of removing the hurdle blocks in the stratified Indian Society towards actual progress. This remains an unchallenged and undisputable fact that any desirable change in the society, any modification in the society, any improvement in the intrinsic or extrinsic facts of the society shall remain a distant reality if the masses remain uneducated¹². The process of development and social transformation has primarily to start with educating the masses in a society so as to make them realize and understand their role in nation building and social cohesion. The Supreme Court of India, too, has emphatically observed that “Education is a great leveler.”¹³ The Kothari Commission¹⁴ report submitted to the government in 1966 in the First volume in Chapter I has also similarly mentioned that:

“If this change, on a grand scale is to be achieved without violent revolution (and even for that it would be necessary) there is one instrument, and one instrument only, that can be used:

¹⁰ *Supra* note 7 at 19. Also See *Ashok Kumar Thakur v Union of India* (2008) 6 SCC 1 “Education stands above other fundamental rights as one’s ability to enforce one’s fundamental rights flows from one’s education.”

¹¹ *Supra* note 4: Prof Amaratya Sen, The Importance of Basic Education, Speech to Common Wealth Education Conference, Edinburgh UK, October 28, 2003 as cited

¹² *Supra* note 4

¹³ *Supra* note 3 per Justice Pasayat and Justice Thakker at para 238

¹⁴ Report of the Education Commission, 1964-66, Chapter I Vol I para 1.14 & 1.15 Available at: http://www.teindia.nic.in/files/reports/ccr/KC /KC_V1.pdf (Accessed on May 12, 2016).

EDUCATION. Other agencies may help, and can indeed sometimes have a more apparent impact. But the national system of education is the only instrument that can reach all the people..... it is a sure and tried instrument, which has served other countries well in their struggle for development. It can, given the will and the skill, do so for India.”¹⁵

ROLE OF STATE IN PROVIDING EDUCATION

Education has been there in the minds of the policy makers since independence and the time of drafting of the Constitution of India. The fact is clearly established by the presence of various provisions in the Constitution of India, itself.

Constitutional Mandates: Article 41¹⁶ of the Constitution of India has clearly imposed an obligation upon the State to make effective provision for securing the right to education coupled with some other obligations within the limits of its economic capacity and development. Similarly, Article 45¹⁷ has dictated the State in more stringent terms to endeavor to provide for free and compulsory education for all children till the age of fourteen years within a prescribed time limit of ten years from the date of the commencement of the Constitution. Article 46¹⁸, also mandates the state to promote the educational interests of the weaker sections of the people, particularly that of the Scheduled Castes and the Scheduled Tribes. The Constitution of India is, now adorned with Article 21A¹⁹ which mandates free and compulsory education to all children from the age of six to fourteen.

The Government has clearly illustrated its willingness to take strenuous efforts to make education in India meaningful and productive which fact is very clear from the Statement of Objects and reasons²⁰ appended to the Constitution (86th Amendment)Act, 2002. The

¹⁵ *Ibid*

¹⁶ Art.41 of the Constitution of India: “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”

¹⁷ Art.45 *Ibid* (prior to the Constitution(86th Amendment Act, 2002) “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.”

¹⁸ Art.46 *Ibid* “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”

¹⁹ Article 21 A *Ibid*: “The State shall provide free and compulsory education to all the Children of the age of six to fourteen years in such manner as the State may, by law, determine.”

²⁰ Statement of objects and reasons appended to the Constitution(86th Amendment Act, 2002)

“The Constitution of India in a Directive Principle contained in article 45, has 'made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was

Amendment Act has further introduced corresponding changes in Article 45²¹ and Article 51 A²² of the Constitution of India so as to bring together the State, the parents²³ and the other stakeholders in the mandate of spreading education amongst the masses. The amendment has been prudently brought about keeping some aspects of education under Part III and some under Part IV of the Constitution and at the same time has imposed duty upon the parents and guardians too to actively assist the state in reaching to the requisite destination.

Legislative Initiatives: The Union Parliament has formulated a comprehensive legislation, The Right of Children to Free and Compulsory Education Act, 2009²⁴ to serve the purpose as laid down under the Constitutional Scheme. The Legislation provides the children between the age of six to fourteen the right to receive elementary education in their neighbourhood schools.²⁵ It also casts a duty upon the parents and guardians of the children to²⁶ facilitate the children in taking admission to the schools. The law restrains charging of any fee²⁷ or any capitation fees²⁸ in the process of admission and imparting of education in the schools. Further the law has

announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfil this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains unfulfilled. In order to fulfil this goal, it is felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution.

2. With a view to making right to free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in Parliament to insert a new article, namely, article 21 A conferring on all children in the age group of 6 to 14 years the right to free and compulsory education. The said Bill was scrutinised by the Parliamentary Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.

3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IVA of the Constitution are being made.....”

²¹ Art.45, Constitution of India: “Provision for early childhood care and education to children below the age of six years:-The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

²²Art 51 A, *Ibid*: Fundamental Duties: “It shall be the duty of every citizen of India-(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years”.

²³ “Article 21 A read with Article 51 A (k) distributes an obligation among the State and parents: the State is concerned with free education, parents with compulsory. Notwithstanding the parental duty, the State also has a role to play in ensuring that compulsory education is feasible.” (2008)6 SCC 1 at Para 450 and 452

²⁴ No 35 of 2009 Available at: <http://ssa.nic.in/rte-docs/free%20and%20compulsory.pdf> (Accessed on May 9, 2016).

²⁵ Section 3, *Ibid* “Right of child to free and compulsory education.- (1) Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education.”

²⁶ Section 10, *Ibid*: “Duty of parents and guardian.- It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school.”

²⁷ Section 3 (2) *Ibid*: “For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education.”

²⁸Section 13(1) *Ibid*: “No school or person shall, while admitting a child, collect any capitation fee” The Act provides penalty of a fine upto ten times the capitation fee charged for the admission.

imposed a responsibility to impart education on all categories of schools whether government²⁹, aided³⁰ or unaided³¹ or even the specified schools³² like the ‘Kendriya Vidyalaya’ or the ‘Navodaya Vidyalaya’. It has been aptly laid down by the Supreme Court of India that:

“The 2009 Act has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunities to all.”³³

Judicial Impetus: The Indian Judiciary, too, has been quite responsive in making the State realize the significance of education for the growth of a society, manifesting itself clearly through several of its pronouncements. Chief Justice S.R. Das in the advisory opinion of the Supreme Court in the *Kerala Education Bill, 1957* had expressed that:

“One of the most cherished objects of our Constitution is to secure to all its citizens the liberty of thought, expression, belief, faith and worship. Nothing provokes and stimulates thought and expression in people more than education. It is education that clarifies our belief and faith and helps to strengthen our spirit of worship”.³⁴

In *Mohini Jain v. State of Karnataka*³⁵ the Supreme Court of India has very categorically stated that the “State is under a constitutional mandate to provide educational institutions at all levels for the benefit of citizens and that the dignity of an individual cannot be assured unless it is accompanied by the right to education. The Educational Institution must function to the best advantage of the citizens.”³⁶

It has emphatically maintained that without making the right to education under Article 41 of the Constitution a reality, the fundamental rights under Part III shall remain beyond the reach of large majority which is illiterate.³⁷ It has further observed that “the fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech

²⁹ Section 2 (n): (i) “a school established, owned or controlled by the appropriate Government or a local authority”

³⁰ *Ibid* (ii) “an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority”

³¹ *Ibid*(iv) “an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority”

³² *Ibid* (iii) “a school belonging to specified category”

³³ Per Justice S. H. Kapadia in *Society for Unaided Private Schools of Rajasthan v Union of India* AIR 2012 SC 3445 at 3455

³⁴ *In re Kerala Education Bill, 1957*

³⁵ AIR1992 SC 1858

³⁶ *Ibid* at 1864 Para 14

³⁷ *Ibid* Para 9

and expression and other rights under Article 19 can't be appreciated and fully enjoyed unless a citizen is educated.”³⁸

Similarly in *Unnikrishnan v. State of A.P.*³⁹, the apex Court has categorically commented upon the fundamental significance of education to the life of an individual and the nation. It has observed that:

“A true democracy is one where education is universal, where people understand what is good for them and the nation and knows how to govern themselves.”⁴⁰

The Apex Court has again observed in *Ashok Kumar Thakur v Union of India*⁴¹ that “We must provide educational opportunity from day one. Only then will the casteless, classless society be within our grasp.”⁴² The Court has emphatically stressed that “the first place where caste can be eradicated is the class room”⁴³. It has maintained that “Education stands above other rights as one’s ability to enforce the fundamental rights flows from one’s education.”⁴⁴

Executive Actions: The law has been provided flesh by different executive policies and schemes from time to time in order to educate the masses and integrate the otherwise segregated and stratified Indian society. The policy makers had been taming the notion that the seeds of integration and cohesion have to be implanted in the early days of individual’s life. In order to encourage the students to learn, to educate themselves and to form a close knit community, various schemes have been launched by the government viz., Sarva Shiksha Abhiyan,⁴⁵ Mid Day Meal⁴⁶, Mahila Samakhya Programme⁴⁷, Scheme to provide Quality Education in

³⁸ *Ibid* Para 13

³⁹ AIR 1993 SC 2178

⁴⁰ *Ibid* Para 145

⁴¹ *Supra* note 2

⁴² *Ibid* at Para 371, 482

⁴³ *Ibid* at Para 369 per Justice Bhandari

⁴⁴ *Ibid* It has also been emphatically stated that “The Central Government should enact legislation that provides low income parents/guardians with financial incentives such that they may afford to send their children to the schools. The said legislation should criminally penalize those who receive financial incentives and despite such payment send their children to work”. Paras 487(a) and (b), 635 (a) and (b), 482 and 488”

⁴⁵ Inputs Available at: <http://mhrd.gov.in/sarva-shiksha-abhiyan> (Accessed on May 12, 2016). The Scheme has been devised to “provide for a variety of interventions for universal access and retention, bridging of gender and social category gaps in elementary education and improving the quality of learning. The Scheme involves “opening of new schools and alternate schooling facilities, construction of schools and additional classrooms, toilets and drinking water, provisioning for teachers, regular teacher in service training and academic resource support, free textbooks& uniforms and support for improving learning achievement levels / outcome”.

⁴⁶ Inputs Available at: <http://mhrd.gov.in/mid-day-meal>

(Accessed on May 12, 2016). The Scheme has been launched to increase “enrolment, retention and attendance and simultaneously improving nutritional levels among children”.

⁴⁷ Inputs Available at: <http://mhrd.gov.in/mahila-samakhya-programme> (Accessed on May 12, 2016). The Scheme undertakes to use Education “as an agent of basic change in the status of woman in order to neutralise the

Madrasas⁴⁸ etc.,

SOCIAL COHESION THROUGH COMMON SCHOOL SYSTEM

The deep rooted problem of stratification in the Indian Society needs to be resolved through a gradual process planned meticulously and cautiously. Starting with the tool of education as a means to bring about social transformation, the first effective policy initiative, in this regard, can be said to have been taken by the Kothari Commission. The commission under the chairmanship of Prof. D.S. Kothari needs to be applauded for articulating the concept of a ‘neighborhood’ school as a common space, where all children cutting across caste, class and gender lines could learn together in the best inclusive manner. The Commission has categorically emphasized the very predictable role of education in bringing about changes in the society on a massive scale. The Commission had recommended a Common School System “to bring the different social classes and groups together and thus promote the emergence of an egalitarian and integrated society”⁴⁹ and to turn the education system into “a powerful instrument of national development in general and social and national integration in particular.”⁵⁰

PRACTICAL PROPOSITION(S)

There is no doubt that the stage has been actively set by a joint venture of the legislature, the executive and the judiciary in delivering education to the masses. However, It is pertinent at this juncture to analyse the goal before the state, the purpose that needs to be achieved through education of the masses and then the success quotient of the state in approaching to the end. A practical insight into the current education system shows an abysmal picture of it being grossly unequal, hierarchical, discriminatory and class based breeding inequality in the long run and running contrary to the constitutional goal of social justice. It had been observed in the Kothari Commission Report that instead of bringing the populace together and promoting the “emergence of an egalitarian and integrated society, educational system, itself, is tending to increase social segregation and perpetuating and widening the class distinctions.”⁵¹ It is, therefore, significantly important to see that a hasty step towards realization of the long

accumulated distortions of the past”. It aims at fostering “the development of new values through redesigned curricula, textbooks, the training and orientation of teachers, decision-makers and administrators, and the active involvement of educational institutions”.

⁴⁸ Inputs Available at: http://mhrd.gov.in/edu_madrassas (Accessed on May 12, 2016).The Scheme seeks to bring about “qualitative improvements in Madrasas to enable Muslim children attain standards of the national education system in formal education subjects”.

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Supra* note 15 at Para 1.36

cherished goal of ‘education for all’ does not turn counter-productive.

PROBLEMS AND ROAD AHEAD

The idea of common school system, with all types of schools adopting a non-negotiable quality education to ensure equitable education for all children needs to be translated into action with honest initiatives. The unfortunate factual situation that exists in India is that instead of prescribing to the desirable common school system, there persist two categories of schools here, the ‘ordinary’ ones and the ‘exclusive’ ones. The first class is meant to accommodate children who depend on the Government for their education, and the second class is meant to cater to those children whose educational expenses are the sole responsibility of their parents. The division in the availability of the educational opportunities to children based primarily on the paying capacity of the parents and the schooling offered by the two diverse systems has actually caused havoc over the years, resulting in widening the rift between people and negating the idea of social cohesion. The schools that are administered privately and those which are run by the government have a totally different type of clientele coming from differentiated social categories and economic strata. The unfortunate segregation amongst the children starts from the age of four or five in the nursery stage and the growth of children does happen in different ‘laboratory’ conditions provided by two distinct service providers, ultimately reflecting a clear disparity between the children from the socio-economically weaker sections of society with those from the better-off strata. This sense of disparity which gets accumulated over the years of being or not being part of a particular system ultimately causes class variation, a sense of inferiority or superiority, leading to discontent and frustration which is definitely counterproductive to the well being and growth of a society. It has been remarked in the context that “The present system is breeding disparity, discontent and disempowerment for a large section of children”⁵²

The current Right to Education Act⁵³ seems to be one attempt at having a common platform for the children to come face to face with each other cutting across the lines of gender, economic disparities and social variations. It encompasses a vision of having in schools a heterogeneous population, comprising children across caste, class and gender biases to provide an enriched learning environment. The ideology of social inclusion appears to be ready to be translated into

⁵² S Seethalakshmi, “Common School System still a mirage”, TNN, October 25, 2005 Available at: <http://timesofindia.indiatimes.com/city/bangalore/Common-school-system-still-a-mirage/articleshow/1273593.cms> (Accessed on May 20, 2014).

⁵³ Supra note 25

action through the assistance of the legislation. The Act in Section 12⁵⁴ imposes a duty upon the schools to reserve at least twenty five percent seats for the children belonging to the weaker and disadvantaged sections of the society in their neighborhood in class I. It is, however, submitted that the Government must devise adequate means of offering suitable monetary recompense to such non-aided and private schools for supplementing the state in providing education to all.

The proposition seems to be based on the fact that learning occurs, not merely from the study of text books or from the instructions imparted within the periphery of the classroom, but actual learning takes place when there is developed connectivity and a series of interactions amongst children from different castes, different religions, and different socio-economic backgrounds. The class room atmosphere turns all the more conducive for learning when it witnesses variations and diversity since it can then enable the children to understand and foster respect for others who may be different from them. The classroom culture is bound to remain intellectually moribund if it fails to acknowledge the diversity and plurality in the country. A classroom comprising of only a single segment of the society can't cause effective learning and it can in no way cater to the actual purpose of education. The Indian Judiciary has also approved the constitutionality of the methodology of social inclusion through this method. The Supreme Court has categorically upheld the legislative provision, stating that "The 2009 Act seeks to remove all those barriers including financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission."⁵⁵

However, howsoever noble the task may seem to be, it is indeed a challenging task for all the stake holders⁵⁶ in the education system to come up with fruitful result of bringing about an integrated society, nurturing our constitutional goals of social justice, equality and fraternity. While the provision is egalitarian in outlook and seems to be loaded with several potential benefits, it is prone to various challenges when it comes to actually translating the idea into an action. The task is indeed daunting for the teachers who are accustomed normally to attend a selective, homogeneous classroom environment and now they are required to respond to a totally heterogeneous group of respondents and gradually convert them into a homogeneous lot by shedding off all artificial barriers amongst children based on caste, class, economic status,

⁵⁴ Section 12(1)(c) *Ibid* "A School...shall admit in class I, to the extent of at least twenty-five percent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood."

⁵⁵ *Supra* note 34

⁵⁶ *Ibid* at Para 10: "Right to Education places a burden not only on the State but also on the parent/guardian of every child. The right envisages a reciprocal agreement between the state and the parents and it places an affirmative burden on all the stakeholders in our civil society."

gender, culture, etc., A teacher has to see that the apparent segregation amongst students does not perpetuate, there should not develop classes in the classroom itself rather there should develop a homogeneity between all the respondents.

The dilemma is also to be faced by the children since they have also grown up to an age of eight or nine in a purely homogeneous or crudely speaking in a segregated environment. The children also, irrespective of the strata of the society where they come from, have been socialized into a particular structure of norms, standards and behavior for a substantive period of time and they, too, require time for being transformed. The ‘class’ prejudices might have been imbibed by them in the early years of their upbringing and they might require appropriate time to shed off such prejudices.

A similar confrontation is quite probably to be located in the minds of the parents who may be willing or reluctant to allow their children to associate with children coming from diverse strata of the society, since they too are the victims of the same system which has stratified the Indian society on lines of caste, class, economic means, language, culture, etc., It is submitted that the laws as applicable in India must be modified so as to compel the parents/guardians to send their wards to the schools. The compulsion may be modulated ranging from fear of sanction⁵⁷ as well as the incentive⁵⁸ of certain benefits accruing from the state.

Along with this, the government should also strategise the mode and manner of gradually⁵⁹ eradicating child labour practices so that the formative years of the children are constructively utilized for a better future both of the individual and the nation.

SUMMARISATION

The need of the hour is to realize the opportunity which has been afforded by the Act of 2009 to contribute from our side in the unification and integration of the Indian society. The RTE Act is a modest effort on the part of the State to bring about social integration by causing people from

⁵⁷ Students and parents in the United States face fines in case of the students failing to attend the schools. See *Supra* note 42

⁵⁸ *Ibid* at Para 468/470/479/481: “Financial assistance must be given. If there is no financial incentive programme in place, the government cannot expect the poorest of poor to send their children to the schools.”

It has also been emphatically mentioned that “at least fourteen countries have cash transfer programmes that target poor households with school –age children. The largest population is in Brazil, where 46 million people receive an education transfer of upto 44 USD monthly per household in extreme poverty with children below age sixteen”. See Para 436-439

⁵⁹ A gradual pace has to be picked keeping in mind the extreme conditions of poverty prevailing in India where children ought to earn to keep the family going.

different strata of the society to come together and share their experiences and learn from each other; it is a humble step meant to gradually dilute and ultimately diminish the artificial walls between the individuals so as to come up with a cohesive society. The policy of bringing together on a common platform the children from diverse socio-economic strata has the brightest chance of succeeding if it starts from the formative years of life. The children of a tender age of eight or nine can easily shed off their prejudices and the sooner it is done, the better it is to move towards breaking all such artificial barriers between humans. These children, having remained together as a homogeneous group shall move up with diminished prejudices which shall be further reduced gradually with the passage of time, and a new group of children shall fill the vacuum by entering the school in each successive year. The schools can, thus, be platforms for diverse populations spread across all classes to come together and develop interactivity amongst them. The requirement at this juncture of time is to give a patient observation for the scheme to materialize; the transformation which is desired can't be expected to happen overnight. All the stakeholders in the society have to contribute in their own manner for the success of the scheme and we have to patiently wait and watch for the bright responses to come their way. A gradual progression at this pace, with an active support from the teachers, parents and the community will definitely allow children the opportunity to learn together, to grow up together, to think together, to feel together and to be together. Such an association, if allowed to percolate right from the early years of the age shall definitely create bonds that can survive social walls.

NEED FOR PROTECTION OF TRADITIONAL KNOWLEDGE

Priyanka Bhowmik*

Abstract

Traditional Knowledge [TK] is knowledge held by indigenous community of a region for their sustainability with the environment. Traditional Knowledge reveals their traditional life style which maintains bio diversity in the environment. TK most of the time is misappropriated by third parties without giving benefit sharing to the TK holders. Rampant misappropriation by other parties is a threat to conservation of bio diversity which results into weakening of sustainable development process. TK based products are also in demand throughout the whole world. Hence TK should be protected from getting misappropriation and misuse. TK protection will ultimately give economic benefit to the nation.

Keywords: Traditional Knowledge, bio piracy, benefit sharing, bio diversity, TK protection

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INTRODUCTION

Intellectual Property Rights give protection to creations of the mind such as inventions, designs, literary and artistic works, performances, plant varieties, and names, signs and symbols. In recent years, indigenous peoples, local communities, and governments, mainly in developing countries have demanded IP protection for traditional forms of creativity and innovation, which is known as TK [Traditional Knowledge] though it falls under public domain as it is free for anyone to use. Indigenous peoples, local communities and many countries reject a “public domain” status of TK and argue that this opens them up to unwanted misappropriation and misuse by third parties.

Traditional knowledge is a valuable source of knowledge developed over generation by indigenous and local communities in various parts of the globe. The indigenous and local people who are custodian of TK preserve and conserve the knowledge over thousands of years. However, TK is under current threat of misappropriation by others without accruing any benefits to the original holders of TK which is called bio piracy. Traditional Knowledge is the integral part of indigenous communities around the whole world. Lack of legal protection has led to patenting of many TK based products in foreign countries. These activities adversely affect the livelihoods of TK holding societies and also cause serious threats to the biodiversity. There should be complete protection system to protect TK from misappropriation by third parties. It is necessary to protect TK holder's right which is getting hampered by third parties where benefit sharing method is not following by patent holders of TK based products. Giving proper protection to TK holders will ultimately flourished the TK based industries without hampering sustainable development process. TK plays an important role in the conservation of biodiversity and its traditional uses. The new technological developments clearly demonstrate the usefulness of TK for the development of new product of commercial importance.

NEED TO PROTECT TRADITIONAL KNOWLEDGE

Apart from treaties and emerging international norms, which imply both legal and moral imperatives for protecting traditional knowledge, there are a number of reasons why developing countries may feel motivated to protect TK. These are set out below:

To improve the livelihoods of traditional knowledge holders and communities

Some indigenous and local communities depend on TK for their livelihoods and well-being, as

well as to sustainably manage and exploit their local ecosystems. According to the World Health Organization, up to 80 per cent of the world's population depends on traditional medicine for its primary health needs. For those comprising the poorest segments of developing-country societies, traditional knowledge is indispensable for survival (United Nations Conference on Trade and Development (UNCTAD, 2000). Increasingly, TK is being accepted as an important source of useful information in the achievement of sustainable development and poverty alleviation. Many multilateral and bilateral donor agencies, including the World Bank; United Nations agencies such as the FAO, UNESCO and UNEP; and several of the International Agricultural Research Centre now recognize and actively promote the role of traditional knowledge in sustainable rural development programmes (*Warren, 1995*).¹

To benefit national economies

TK based product boosts national economy. Such TK based products as handicrafts; medicinal plants, agricultural products, and non-wood forest products (NWFPs) are traded in both domestic and international markets and can provide substantial benefits for exporter countries. TK is also used as an input into modern industries such as pharmaceuticals, botanical medicines, cosmetics and toiletries, agriculture and biological pesticides. The contribution of TK, particularly biodiversity-related TK, to modern industry and agriculture is huge.²

To preserve of traditional lifestyles

The preservation of TK is not only a key component of the right to self-identification and a condition for the continuous existence of indigenous and traditional peoples; it is also a central element of the cultural heritage of humanity. The possibility of economic returns for the use of that knowledge by third parties acts as a further incentive for community members to respect their knowledge and continue to engage in practices in which that knowledge is used and generated.³

To conserve the environment

The protection of traditional knowledge can provide significant environmental benefits. For example, in many forest areas, members of traditional societies plant forest gardens and manage

¹ Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, (Earthscan, 2004)

² *Ibid*

³ Available at: <https://blog.ipleaders.in/history-development-intellectual-property-protection-traditional-cultural-expressions/>

the regeneration of bush fallows in ways that take advantage of natural processes and mimic the biodiversity of natural forests. Researchers are increasingly aware of the extent to which traditional natural resource management can enhance biodiversity.⁴

To avoid “bio-piracy”

The protection of TK aims to prevent the unauthorized appropriation by third party that is called bio-piracy of traditional knowledge and to ensure benefit sharing – as provided for under articles 8 (j), 15, 16 and 19 of the CBD.⁵

To protect Cultural Heritage

It is not surprising that intellectual property law is inadequate to protect all forms of traditional knowledge. Although some intangible cultural goods can be protected under intellectual property law, and copyright law in particular, the protection of intangible cultural goods and classical intellectual property have different objectives and serve fundamentally different purposes.⁶ One seeks to protect cultural heritage, while the other seeks to promote creativity, innovation, efficiency and commercialization.⁷ Control over cultural goods, heritage, and expressions is not considered to be the primary objective of intellectual property protection.⁸ Rather, at this time, the predominant rationale for intellectual property rights is to stimulate innovation and creativity.⁹

To promote Value and Respect

⁴ Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, (Earthscan, 2004)

⁵ *Ibid*

⁶ Since copyright protects literary artistic works, it could be said to protect intangible cultural goods to the extent that these creations are considered cultural property. For example, certain cultural songs, paintings, or books may be subject to copyright protection. Geographical indications may be a form of intellectual property that can be used to protect elements of culture.

⁷ Various scholars have observed the inconsistency between the objective of protecting cultural property and the goals of intellectual property policy. See, Susan Scafidi, *Who owns culture?: Appropriation and authenticity in American Law* (2005) 17–19 (stating that the utilitarian policy objective of enriching the public domain is among the greatest barriers to the protection of cultural products); Christine H. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, (1997) 30 CONN. L. REV. 1 (pointing out that, with respect to copyright law, what some traditional knowledge advocates seek is contrary to the goal of disseminating of information that copyright law seeks to encourage, and that it runs the risk of diminishing the public domain).

⁸ Whether intellectual property law has slowly been taking on a new role may be worthy of further consideration. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, (2010) 123 HARV. L. REV. 810, 816–17 (arguing that intellectual property rights are increasingly used as an indication of authenticity).

⁹ J. Janewa OseiTutu ‘An International Instrument to Protect Traditional Knowledge: Is Perpetual Protection a Good Idea?’ (2010) 50 FIULSR 702

Policy objectives for the protection of traditional knowledge include aims such as recognizing the value of traditional knowledge and promoting respect for such knowledge. In addition, traditional knowledge holders aim to repress unfair and inequitable uses, safeguard the knowledge, and promote community development. It is immediately apparent that some of the objectives of traditional knowledge protection are based on a desire to promote respect for the traditional knowledge source communities and the development of such communities. Similar value promoting objectives are found in the 2003 UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage¹⁰ (“UNESCO Convention”)

Other objectives

In addition to the above objectives, there may be other goals for the protection of TK. To preserve TK is a component of a strategy for sustainable human development. There is also a human rights dimension to the protection of TK. The establishment of property or other rights is only a means and the protection of TK does not necessarily require the recognition of property rights. Protection may also have non-economic purposes, such as a moral recognition of the authorship. Authors are entitled to both economic and moral rights under authors' rights systems. The TRIPS Agreement, however, allows Members not to comply with article 6 *bis* of the Berne Convention which provides for the protection of moral rights. Moral rights have been enforced in some common-law countries as well. In the UK, for instance, moral rights were introduced in the 1988 Copyright Act. In the USA, copyright is classified as “personal” property and the authors enjoy personality protection, such as the rights of first publication. Moral rights have been provided in India.¹¹ This kind of protection would provide traditional and indigenous communities with legal means to prevent any acts that distort.¹²

CONCLUSION

Traditional and indigenous knowledge (TK) has been used for centuries by indigenous and local communities under local laws, customs and traditions. It has been transmitted and evolved from generation to generation.¹³ TK plays an important role in the conservation of biodiversity and its traditional uses. The new technological developments clearly demonstrate the usefulness of TK

¹⁰ U.N. EDUC. SCI. & CULTURAL ORG. (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage (2003) Available at: http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹¹ Section 57 of the Copyright Act 1957

¹² Carlos M Correa, “Traditional Knowledge and intellectual property” (QUNO, 2001)

¹³ *Ibid*

for the development of new product of commercial importance. The protection of TK is not an end by itself; it may provide a means to achieve different objectives, the definition of which is essential to determine the need for protection. Recently TK has become a burning topic for discussion under IPRs Law. The commercialization of TK based products by obtaining patent by people other than the original holders of TK, has necessitated adequate protection of TK from such kind of misappropriation. The issues relating to intellectual property protection of TK emerged when multinational companies and foreign entities obtained commercial benefits from knowledge that was predominantly within local control for multiple generations, and was long presumed to be in the public domain of the respective indigenous and local communities. Growing demand for bio products in the current globalised trade regime leads to commercialization of Traditional Knowledge associated with the bio resources unprecedentedly. These activities adversely affect the livelihoods of TK holding societies and also cause serious threats to the biodiversity. There should be complete protection system to protect TK from misappropriation by third parties. It is necessary to protect TK holder's right which is getting hampered by third parties where benefit sharing method is not following by patent holders of TK based products. Giving proper protection to TK holders will ultimately flourished the TK based industries without hampering sustainable development process.

MODE OF EXECUTION OF DEATH SENTENCE IN AMERICA: A JUDICIAL PERSPECTIVE

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Abstract

The inherent disgracefulness of death consciously inflicted upon a person by his fellows, may make the death sentence highly untenable, from a strict humanitarian prospective. It's here where the concerned state authorities come into action and claim that if at all the death sentence is to be retained, its imposition must be with utmost human decency ensuring evolved standards. However, the movement away from brutal and cruel punishment has been a slow yet steady process. With the gradual evolving standards of human decency and dignity, the law needs to be changed with the changing dynamism of the dynamic society. Nonetheless, the American society, being one of the oldest civilizations in the world owes to itself that the agony at the exact point of execution should be kept to the minimum. This becomes more crucial when execution is the outcome of a judicial verdict. Courts play a vital role in major social reform, and that we as a society do have certain expectations from the very independent and impartial organ of the state. Moreover, history is a witness to significant social reforms bought by amendments to the prevalent law, through judicial process. Effective judicial intervention in social controversy requires a consensus on the goals and objectives of social change, at a time in history when as a society it is our failure to agree with the goals and purpose of social change that is one of the principal causes of social unrest. Judges have traditionally been very careful to emphasize that their role is not to make the law, merely to apply it. But it is apparent that judges play a significant role in the development of law through the interpretation of both common law principles and legislative provisions. The phrase "judicial responsibility" means not just the responsibility to uphold the law; it means the overarching responsibility to do justice. Courts should realize that as long as there is life, there is room for reform.

Keywords: Judicial execution, humanitarian prospective, reasonable, judicial process, evolving standards

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INTRODUCTION

With the gradual evolving standards of human decency and dignity, the law needs to be changed with the changing dynamism of the dynamic society. Nonetheless, the American society, being one of the oldest civilizations in the world owes to itself that the agony at the exact point of execution should be kept to the minimum. This is more so when execution is the result of a judicial verdict.¹ Courts play a vital role in major social reform, and that we as a society do have certain expectations from the very independent and impartial organ of the state. Moreover, history is a witness to significant social reforms bought by amendments to the prevalent law, through judicial process.² Effective judicial intervention in social controversy requires a consensus on the goals and objectives of social change, at a time in history when it is our failure as a society to agree on the goals and objectives of social change that is one of the principal causes of social unrest.³ Judges have traditionally been very careful to emphasize that their role is not to make the law, merely to apply it. But it is apparent that judges play a significant role in the development of law through the interpretation of both common law principles and legislative provisions.⁴ The phrase “judicial responsibility” means not just the responsibility to uphold the law; it means the overarching responsibility to do justice. Courts should realize that as long as there is life, there is room for reform.⁵

In this research paper, the scholar would be discussing the role played by Judiciary United States of America in humanizing the judicial modes of execution of death sentence. The author would be examining relevant opinions of the United States Supreme Court to discover and articulate the proper analytical standards for assessing modes of execution. On the basis of these standards the scholar proposes a paradigm of capital punishment that avoids the cruelty of present practices, and argues that the paradigm is constitutionally acceptable under, perhaps even mandated by, the cruel and unusual punishment clause. Finally, contemporary modes of execution are assessed in light of the legal standards and the constitutional paradigm. Nothing in this research paper is intended to justify capital punishment. The ultimate merits of capital punishment should continue to be debated even if more humane methods are substituted for present barbarities.

¹ Daniel R. Mandelker, “The Role of Law in Social Change” 8 *OHLJ* 355-364 (1970).

² *Ibid*

³ *Ibid*

⁴ Do judges make law?, Available at: www.downingcentrecourt.com.au (Accessed on January 20, 2017)

⁵ *Ibid*

UNITED STATES SUPREME COURT PERSPECTIVE TOWARDS MODES OF EXECUTION

For the first time, the United States Supreme Court has recently held that capital punishment as a legislative response to crime is not necessarily cruel and unusual punishment under the eighth amendment to the United States Constitution.⁶ The action of the Court settled, at least for the time being, some of the legal controversy surrounding the death penalty, and after a moratorium of almost ten years, the ultimate legal sanction was again administered in the United States.⁷ These developments in no way signal an end to the controversy surrounding the execution of criminals. The Supreme Court's ruling that capital punishment is not unconstitutional per se raises new issues concerning the administration of the death penalty. One such issue, understandably neglected during the debate over the constitutionality of capital punishment itself, is the constitutionality of the various means used to take the lives of the condemned.

Legislative attempts to provide more humane alternatives to the present modes of execution like hanging, shooting, electrocuting and gassing have already begun.⁸ In addition, a wave of cases examining the legality of the traditional modes of execution cannot be far away.⁹

The elimination of barbarity from the process of administering death is a concern not only of those advocating abolition of capital punishment¹⁰ but of many who favor its retention.¹¹ Apart from shared humanitarian concerns, however, abolitionists may also utilize these methodological challenges to buy time for another direct assault on the institution of capital punishment itself.¹² Moreover, attacks on the modes of capital punishment may well aid the abolitionist cause through media coverage that informs an otherwise uninformed public of the ritualistic horrors of executions.¹³ This article assesses the present administration of the death penalty in light of the requirements of the cruel and unusual punishment clause of the eighth amendment. The Supreme Court has never directly confronted the issue of the cruelty associated with the various methods of imposing capital punishment.¹⁴ Thus, the pronouncements of the Court that have sanctioned a particular means of causing death can be characterized either as

⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976)

⁷ H. Bedau, *The Courts, The Constitution and Capital Punishment*, 121 (1977)

⁸ W. Bowers, *Executions in America* 9-12 (1974).

⁹ Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 Utah L. Rev. 201, 239

¹⁰ Camus, *Reflections on the Guillotine*, The Penalty Is Death 131, 151 (B. Jones ed, 1968)

¹¹ Barzun, In Favor of Capital Punishment, *The Death Penalty in America* 154, 155 (H. Bedau ed. 1968)

¹² Texas Tech L. Rev. 515, 523 (1976)

¹³ M. Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 60-64 (1973)

¹⁴ *Ibid* at 1

dicta or as highly suspect law, given subsequent doctrinal development of the cruel and unusual punishment clause and advances in medical science. It would appear that the courts are now free to strike down as unconstitutionally cruel some, if not all, of the traditional methods of inflicting death.

The discussion first examines relevant opinions of the United States Supreme Court to discover and articulate the proper analytical standards for assessing modes of execution. On the basis of these standards the author proposes a paradigm of capital punishment that avoids the cruelty of present practices, and argues that the paradigm is constitutionally acceptable under, perhaps even mandated by, the cruel and unusual punishment clause. Nothing in this paper is intended to justify capital punishment. This research paper focuses solely upon whether various methods of execution are constitutional if capital punishment is to be employed.

THE EIGHTH AMENDMENT AS A MEASURE OF METHODS OF EXECUTION

The suggestion that methods of execution be scrutinized in terms of the cruel and unusual punishment clause of the eighth amendment is not novel.¹⁵ Indeed, it is widely agreed that the clause was initially intended to apply to the cruelty of particular kinds of punishment,¹⁶ including modes of administering the death penalty.¹⁷ That eighth amendment analysis has recently been used to find cruelty when punishment was excessive in degree¹⁸ in no way indicates that the courts are moving away from the traditional application of the amendment to specific kinds of cruel treatment.¹⁹ Whether their inquiry is directed to cruelty in kind or in degree of punishment, however, the courts find it difficult to interpret and apply the value-laden concepts underlying the cruel and unusual punishment clause.²⁰

THE SUPREME COURT AND METHODS OF EXECUTION

Although capital punishment has existed in America since colonial times,²¹ the first serious Supreme Court challenge to a method of inflicting the death penalty did not occur until 1878. In the case of *Wilkerson v. Utah*²² the defendant had been convicted of first degree murder in the

¹⁵ U.S. Constitution Amendment VIII

¹⁶ L. Berkson, *The Concept of Cruel and Unusual Punishment* 3-5 (1975).

¹⁷ *Ibid* at 2

¹⁸ *Weems v. United States*, 217 U.S. 349 (1910)

¹⁹ *Trop v. Dulles*, 356 U.S. 86 (1958)

²⁰ *Furman v. Georgia*, 408 U.S. 238, 376 (1972)

²¹ N. Ta E as, Hang by the neck 7-12 (1967)

²² *Supra* note 11, at 2

Territory of Utah and sentenced to be “publicly shot until . . . dead.”²³ The territorial statutes provided the death penalty for first degree murder but did not specify the method of execution. Prior statutes had specified shooting, hanging, and beheading as the methods of capital punishment in Utah, but those provisions had inadvertently been repealed in 1876 when the territorial legislature revised the penal code. Wilkerson contended the sentencing judge was without authority to specify the mode of execution. The Supreme Court rejected Wilkerson's argument and upheld the sentence. It reasoned that because the penal statutes obligated the sentencing judge to impose death in cases like Wilkerson's, the statutes also conveyed implicit authority to specify the method of death.²⁴ The Court noted an analogy to the common law tradition of sentencing to death without specifying the means of death.²⁵

Although hanging was the usual mode of execution at common law, other methods were sometimes used, and shooting was a common means of executing those convicted of capital offenses under military law.²⁶ Thus, the specification of shooting as the means of death neither exceeded the power of the sentencing judge nor imposed a totally unusual mode of execution. The issue in Wilkerson was not whether shooting was cruel and unusual punishment, but whether the sentencing court possessed authority to prescribe a particular method of capital punishment.²⁷ The Court noted that Wilkerson did not challenge the constitutionality of shooting.²⁸ In dicta, however, the Court discussed shooting in light of the eighth amendment and concluded that it was a constitutionally acceptable mode of capital punishment because it was the traditional method of carrying out executions under military law and did not inflict torture or unnecessary cruelty.²⁹

The Court referred to the ancient practices of disemboweling while alive, drawing and quartering, public dissecting, and burning alive as the kinds of “terror, pain, or disgrace” proscribed by the eighth amendment.³⁰ Shooting, in the view of the Wilkerson Court, was not unconstitutionally cruel because it was unlike historical execution by torture. Definition of present cruelty by comparison with past practices that were considered cruel and unusual at the time the Bill of Rights was adopted—the so-called “historical interpretation” of the eighth

²³ 99 U.S. 131 (1878)

²⁴ *Ibid* at 137

²⁵ *Ibid*

²⁶ *Ibid* at 134, 137

²⁷ *Furman v. Georgia* 408 U.S. 238, 284 at note 30 (1972)

²⁸ 99 U.S. at 136-37

²⁹ *Ibid*

³⁰ *Ibid* at 135

amendment³¹ was the primary mode of judicial analysis of the cruel and unusual punishment clause well into the twentieth century.³²

Twelve years after Wilkerson, in *In re Kemmler*³³ the Court denied an application for a writ of error that sought reversal of a New York state court decision upholding electrocution as consistent with the state's constitutional proscription of cruel and unusual punishment.³⁴ The Court held that the eighth amendment did not apply to the states and could not be made applicable through either the due process or the privileges and immunities clause of the fourteenth amendment.³⁵ Thus, the only federal constitutional issue was whether the state had acted arbitrarily or applied the law unequally to violate the fourteenth amendment.³⁶ The Court noted that the state's decision to adopt electrocution occurred only after the New York legislature had studied the recommendations of a commission appointed to investigate and report "the most humane and practical method" for carrying out the death penalty.³⁷ Hence, legislation enacting the commission's recommendation of electrocution was not arbitrary, especially because the lower court had considered evidence on the degree of pain involved and had found electrocution painless.³⁸

Even though the issue, whether electrocution violated the eighth amendment was not directly presented in Kemmler, the Court did use the occasion to discuss the cruel and unusual punishment clause. After noting that crucifixion, breaking on the wheel, and other "manifestly cruel" punishments would be unconstitutional,³⁹ the Court in significant dicta further defined cruel and unusual methods of execution:

*"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishing of life."*⁴⁰

The cruelty of electrocution was obliquely called into question in *Louisiana ex rel. Francis v. Resweber*.⁴¹ The issue in that case was whether the State of Louisiana could constitutionally

³¹ *Furman v. Georgia*, 408 U.S. 238, 265 (1972)

³² *Ibid*

³³ 136 U.S. 436 (1890)

³⁴ *Ibid* at 438, 443-44, 449

³⁵ *Ibid* at 446-49

³⁶ 136 U.S. at 448-4

³⁷ 136 U.S. at 444-45

³⁸ *Ibid*, at 443

³⁹ 136 U.S. at 446-47

⁴⁰ 136 U.S. at 447

execute the petitioner, Willie Francis, after the electric chair had accidentally malfunctioned during a previous execution attempt. Francis had been prepared for execution, placed in the chair, and kept there for a period of time after the switch was thrown. The victim, who experienced considerable discomfort,⁴² was removed from the chair when it became apparent that he would not die. A new death warrant was issued. Francis obtained a stay of execution and sought judicial approval for his claim that any further attempt to execute him would be cruel and unusual punishment contrary to the eighth amendment and a violation of his fourteenth amendment due process rights. The Supreme Court denied relief. Although the Court was not willing specifically to overrule Kemmler and hold that the eighth amendment applied to the states,⁴³ a plurality of four Justices took the position that subjecting Francis to the process of execution a second time would not violate the eighth amendment. The cruel and unusual punishment clause was interpreted by the plurality to prohibit only the “wanton infliction of pain” or the “infliction of unnecessary pain,” not the suffering involved in “humane” executions.⁴⁴ Because the pain inflicted upon Francis was accidental and unintentional, the state would not be precluded from making a second attempt to execute him.⁴⁵ Four dissenting Justices would have issued a stay of execution and remanded the case to the Louisiana Supreme Court to determine the extent to which Francis had suffered pain in the bungled execution.⁴⁶

The dissent suggested that a second attempt to execute Francis might constitute a violation of his due process rights under the fourteenth amendment because it would constitute torture culminating in death, a repugnant practice long disclaimed in American law.⁴⁷ The dissent suggested that, taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man and should not be permitted under the constitutional procedure of self-governing people.⁴⁸ Thus, the eight Justices who subscribed to the plurality and dissenting opinions favored an analysis of eighth amendment cruelty in terms of ‘unnecessary’ suffering induced by the state. Significantly, both the plurality and dissenting opinions cited with approval the Kemmler dicta quoted above.⁴⁹

⁴¹ 329 U.S. 459 (1947)

⁴² *Ibid.* at 480-82

⁴³ 329 U.S. at 463-64, 475-77

⁴⁴ 329 U.S. at 463-64

⁴⁵ *Supra* note 11

⁴⁶ 329 U.S. at 472 (Burton, J., dissenting)

⁴⁷ *Ibid* at 473

⁴⁸ *Ibid* at 473-74

⁴⁹ *Ibid* at 463-64, 476

The issue in Resweber was not whether electrocution per se was compatible with the eighth amendment, but whether the aborted initial execution attempt rendered subsequent attempts to take Francis life cruel and unusual. In Resweber the Court assumed that successful electrocutions are not unconstitutionally cruel⁵⁰ because they do not inflict unnecessary cruelty or pain; the Resweber Court, however, did not consider evidence of the actual pain suffered during death by electrocution. In fact, the Court apparently has never reviewed evidence of the actual pain inflicted by any method of execution.⁵¹

OTHER DECISIONS-FLESH ON THE BONES OF ‘CRUEL AND UNUSUAL PUNISHMENT’

Although Wilkerson, Kemmler, and Resweber are the Supreme Court cases that most closely address the constitutionality of various methods of execution, significant doctrinal developments relevant to that issue have occurred in other eighth amendment cases. A consideration of these cases will provide a fuller definition of the meaning of cruel and unusual punishment. A landmark in eighth amendment law is the Court's decision in *Weems v. United States*.⁵²

Weems broke with the earlier historical interpretation of the cruel and unusual punishment clause and introduced a more dynamic analysis that defines cruelty in terms of evolving social mores. Under the Weems analysis the clause should “acquire meaning as public opinion becomes enlightened by a humane justice.”⁵³ Interpretations of the clause should not be based solely on “what has been,” but should take into account “what may be.”⁵⁴ As the Weems Court put it, “time works changes, brings into existence new conditions and purposes.”⁵⁵ Weems is also significant because it reversed, on eighth amendment grounds, a sentence of imprisonment and civil disability that was unnecessarily harsh, as evidenced by the fact that it differed significantly from sentences imposed by other jurisdictions for similar crimes.⁵⁶ Thus, Weems suggests that an important indication of the unconstitutional cruelty of a given punishment or mode of punishment is its failure to be employed elsewhere.

⁵⁰ *Ibid* at 474

⁵¹ *Supra* note 10

⁵² 217 U.S. 349 (1910)

⁵³ *Ibid*, at 378

⁵⁴ *Ibid* at 373

⁵⁵ *Ibid* at 353

⁵⁶ *Ibid* at 380

The relative concept of the eighth amendment that the Court had articulated in Weems was developed further in *Trop v. Dulles*.⁵⁷ Trop struck down expatriation as cruel and unusual punishment for the crime of military desertion. The Court found that “physical torture” was not a necessary element of unconstitutionally cruel punishment and that the psychological pain inflicted on the expatriate, who would be subjected to “a fate of ever-increasing fear and distress,” was sufficient to render the punishment unconstitutional.⁵⁸ The Court perceived the essence of the eighth amendment as “nothing less than the dignity of man.”⁵⁹

The plurality opinion in Trop⁶⁰ gave content to the “evolving standards of decency” by examining, in the tradition of Weems, contemporary punishment practices of other jurisdictions. That expatriation was no longer authorized elsewhere⁶¹ was taken as a significant indication that it had become an outdated anomaly.⁶² The standards articulated by Trop, although technically accepted by only a plurality of four Justices, have subsequently been embraced by the full Court.⁶³ In the 1972 landmark decision of *Furman v. Georgia*,⁶⁴ the Court held that the eighth amendment, now clearly applicable to the states,⁶⁵ prohibited the infliction of capital punishment under virtually all state statutes because unrestrained discretion in imposing the penalty had resulted in its arbitrary infliction.⁶⁶ All nine Justices wrote separate opinions; seven Justices clearly embraced the Trop standards of eighth amendment analysis. Two Justices found capital punishment unconstitutionally cruel per se⁶⁷, and the other three concurring Justices considered its arbitrary application violative of the eighth amendment.⁶⁸

Four Justices, dissenting, would not have interfered with the imposition of capital punishment.⁶⁹ In his concurring opinion, Justice Brennan further refined the idea of “human dignity” that underlies the Trop concept of cruel and unusual punishment. To Justice Brennan, “human dignity” as articulated in Trop entails respect for the “intrinsic worth” of persons.⁷⁰ Punishments are proscribed by the eighth amendment when they are so severe as to be “uncivilized and

⁵⁷ 356 U.S. 86 (1958)

⁵⁸ *Ibid* at 101-02

⁵⁹ *Ibid*, at 100

⁶⁰ 356 U.S. at 105 (Brennan, J., concurring).

⁶¹ *Ibid* at 102

⁶² *Ibid* at 102-03

⁶³ *Gregg v. Georgia*, 408 U.S. 238 (1972)

⁶⁴ 408 U.S. 238 (1972)

⁶⁵ *Robinson v. California*, 370 U.S. 660 (1962)

⁶⁶ 408 U.S. at 411

⁶⁷ 408 U.S. at 257 (Brennan, J., concurring)

⁶⁸ 408 U.S. at 240 (Douglas, J., concurring)

⁶⁹ 408 U.S. at 375 (Burger, CJ., dissenting)

⁷⁰ *Ibid* at 270 (Brennan, J., concurring)

inhuman.” Mental and physical pain, however, is only one indication of inhumane punishment.⁷¹ Human dignity is also affronted by punishments that are arbitrarily inflicted⁷² or unacceptable by contemporary standards. These standards are indicated by historical trends away from the use of a particular punishment, or a high level of contemporary public distaste for its employment.⁷³ Finally, Justice Brennan identified lack of necessity as a characteristic of unconstitutionally cruel punishment:

Other members of the Furman Court also subscribed to this analysis of unnecessary cruelty and compared present punishment with less severe but equally effective alternatives. The four dissenting Justices in Furman joined in the view that “no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.”⁷⁴ Although they refused to find unconstitutional the institution of capital punishment itself, the dissenters left the door open for later attacks on modes of administering the death penalty under the “less cruel alternative” analysis.⁷⁵ In his concurring opinion, Justice Marshall also adopted this approach.⁷⁶ Lower courts, too, have applied an eighth amendment “less cruel alternative” standard.⁷⁷

Furman reemphasized the relative nature of the cruel and unusual punishment clause; the Court indicated that contemporary standards of decency should be used for eighth amendment evaluation of punishment.⁷⁸

SUMMARY OF THE DEFINITION OF CRUEL AND UNUSUAL PUNISHMENT

Punishments are violative of the eighth amendment only if they are “unnecessarily cruel,” as demonstrated by discussion of the cases. Test of undue cruelty according to Kemmler is “something more than the mere extinguishing of life,”⁷⁹ however; Wilkerson focuses exclusively on “unnecessary punishment.”⁸⁰ No doubt unreasonably harsh punishment symbolizes “something more” than the Kemmler Court contemplated. In Resweber, the unnecessary cruelty

⁷¹ *Ibid* at 271-72

⁷² *Ibid* at 274

⁷³ *Ibid* at 277-79

⁷⁴ *Ibid* at 430 (Powell, J., dissenting)

⁷⁵ *Ibid* at 420

⁷⁶ *Ibid* at 342 (Marshall, J., concurring).

⁷⁷ Singer, sending Alen to Prison: Constitutional aspects of the burden of proof and the doctrine of the least drastic alternative as applied to sentencing determinations, 58 Cornell L. Rev. 51 (1972)

⁷⁸ *Ibid* at 32) (Marshall, J., concurring)

⁷⁹ 99 U.S. at 447

⁸⁰ 99 U.S. at 136

analysis was adopted by eight Justices although the plurality suggested that a special indication of eighth amendment violation is the presence of governmental intent to cause unnecessary suffering.

Furthermore, unnecessary cruelty as a feature of the Court's eighth amendment analysis was included by all Weems, Furman, Gregg,⁸¹ and Coker.⁸² Subsequent to the Weems cases all emphasis was on the dynamic nature of the cruel and unusual punishment clause. The progression of societal mores as well as advancement in technology and further development of penology may contribute to invalidation of punishments that were constitutionally permissible in the past. Legislative drift away from a specific mode of punishment constantly signify both its cruelty and its lack of necessity.

CONCLUSION AND SUGGESTIONS

An Execution Paradigm as a Less Cruel Alternative

The foregoing summary of eighth amendment law strongly indicates that constitutional review of modes of execution would benefit from a comparison of present methods with known alternatives, not now in common use, which may be less cruel. To highlight the unnecessary cruelty of present methods, there is posited a paradigm of less cruel capital punishment that appears simultaneously to satisfy constitutional requirements and to further legitimate penal policy.

The Suicide Option

To permit the condemned person the option of taking his own life instead of being killed by agents of the state is a concession to human dignity not practiced in modern times, but not unknown historically nor without its contemporary advocates. The example of Socrates who refused the requests of his friends to postpone his death until the last legally permitted moment, is particularly poignant. Socrates would have considered it an affront to his self-respect to prolong life beyond the moment it lost meaning. "I should only make myself ridiculous in my own eyes if I clung to life and hugged it when it has no more to offer."⁸³ To have hemlock at his disposal infused the whole process of his death with a modicum of dignity and personal respect.

⁸¹ 433 U.S. at 592

⁸² *Ibid*

⁸³ Plato, *The Last Days of Socrates* 181 (H. Tredennick Trans. 1954)

Similar humanitarian considerations could be incorporated into modern execution procedures. An execution date could be set; for a brief, specified period after that date the condemned person would be provided the means to take his life if he chose. He would be told the lethal dosage of an oral sedative⁸⁴ that would be placed at his disposal. Death by drug overdose would be virtually painless⁸⁵ and without many of the other human and economic costs⁸⁶ that attend traditional modes of execution. If the condemned person failed to take his own life before the period for optional suicide had expired, the state would then execute him in the manner discussed below.

To permit capital offenders the right to suicide⁸⁷ does not imply that everyone has a moral right to take his own life.⁸⁸ Nor does it imply that the offender has the right to demand that he be executed.⁸⁹ Moreover, the existence of this limited right to suicide does not imply that each capital offender has this right before his execution becomes inevitable.⁹⁰ Rather, after all legal remedies have been exhausted and execution is virtually inevitable,⁹¹ the condemned person should be allowed to pick the moment of his death. The time period allowed for exercising the suicide option should be short, perhaps one or two days, to reduce the trauma that attends the decision whether to commit suicide, and to limit the possibility of a grant of clemency after the prisoner had committed suicide but before the appointed hour of state execution.

The option of suicide appears to meet the criteria of constitutional capital punishment.⁹¹ Physical and mental suffering would not exceed constitutional bounds because death by drug overdose would be painless, perhaps even somewhat pleasant, and the psychological apprehension that now attends the more violent contemporary methods of execution⁹² would be removed. The dignity of the condemned would be respected if the state allowed him to choose the circumstances of his death. His privacy interests would be preserved if he were permitted to pass quietly from life in his cell, without the violent, circus-like atmosphere of traditional executions.⁹³ His right to bodily integrity would be protected; no disfigurement or mutilation

⁸⁴ L. Jones, Veterinary Pharmacology and Therapeutics, 987-88 (3rd Ed. 1965)

⁸⁵ *Ibid*

⁸⁶ E. Block, And May God Have Mercy 67-68 (1962)

⁸⁷ Corbin, *Legal Analysis and Terminology*, 29 Yale L. J. 163, 167 (1919)

⁸⁸ W. LA Fave & A. Scotr, Handbook on criminal law 568-69 (1972)

⁸⁹ Hart, *Prolegomenon to the Principles of Punishment*, in Punishment and Responsibility 1, 4-5 (1968)

⁹⁰ *Ibid*

⁹¹ *Furman v. Georgia*, 408 U.S 238

⁹² Royal Commission on Capital Punishment

⁹³ *Ibid*

would occur. Finally, the option of suicide would allow the condemned to retain a degree of self-respect, in the manner of Socrates.

The Lethal Gas Mask

If the condemned person chose not to commit suicide the state would take his life at the appointed hour. The interests of decency would require, however, that the violence attending the execution process be minimized. Perhaps the least violent method now available is administration of certain forms of lethal gas.⁹⁴ For example, a concentration of pure and odorless carbon monoxide administered through a mask would cause instantaneous and painless loss of consciousness followed rapidly by death. Although a brief period of physical restraint might be required to secure the mask to the face of a struggling prisoner, the force would be no greater than the force required to administer the methods of execution now in use. Use of a mask instead of the customary gas chamber would avoid intensely negative psychological associations with past practices, often brutal and inhumane.

Further, it is uncertain that death in American gas chambers is painless.⁹⁵ Moreover, the gas mask could be used in surroundings familiar to the prisoner; he would not be required to endure the additional anxiety of moving to a special death room. Administration of the death penalty through lethal gas seems to pose few constitutional problems. Physical pain would be virtually eliminated and psychological suffering greatly lessened because the prisoner would fear neither a painful death nor the terrifying last walk to an unfamiliar death house. No bodily disfigurement would occur, and physical violence would be minimal. The remaining issue, therefore, is whether the paradigm would achieve the legitimate interests of capital punishment as effectively as present execution methods.

The Paradigm and Capital Punishment Policy

A consideration of the relative merits of methods of inflicting capital punishment must focus on two main policy considerations-general deterrence and retribution. To validate the paradigm as a less cruel alternative to present modes of execution it must be shown that the paradigm achieves the deterrent and retributive ends of capital punishment as effectively as the customary methods of execution.

⁹⁴ *Ibid*

⁹⁵ *Ibid*

The Paradigm and Deterrence

One might argue that the humanitarian aspects of the paradigm, particularly its suicide option, render it a less effective deterrent than the more violent forms of execution now practiced. This argument seemingly demands that executions be performed publicly and employ the most painful technique. Because such "torture could not satisfy constitutional requirements,"⁹⁶ the interests of deterrence must be balanced against the interests of decency. Even if it were true that more cruel execution methods deter more effectively than less cruel methods, it by no means follows that the state is invariably justified in inflicting the harsher punishment. Fortunately, the issue need not hinge on a balance between the state's interests in achieving deterrence and the demands of human dignity. There is little reason to believe that the more cruel modes of execution now used serve as better deterrents than the less cruel paradigm. First, the public has very little knowledge of the cruelty of present methods.⁹⁷ Executions are conducted in secret; the public learns of them indirectly through various communications media.⁹⁸ The ordinary person, if he has thought about it at all, probably believes that present modes of execution are decent, i.e., devoid of unnecessary cruelty.

Apparently there have been no empirical studies that test the relative deterrent effects of various modes of execution, but the British Royal Commission on Capital Punishment has considered the issue. The Commission considered whether to continue execution by hanging, historically "a peculiarly grim and degrading form of execution that has retained its "stigma,"" and concluded:

We, . . . like most of our witnesses, are not convinced that a potential murderer in this country is more likely to be deterred by the knowledge that he may have to 'swing for' his victim than he would be by the knowledge that he might have to suffer death in some other way. If there is a difference, it must be so small that we do not think it ought to weigh with us.

The Commission thus rejected the "more horrible the punishment the greater the deterrence" theory⁹⁹ as irrelevant to the consideration whether hanging should be retained. To the extent that capital punishment deters, the deterrent effect is probably produced by the threat of death itself rather than by the method used to accomplish it. The fear of death is universal,¹⁰⁰ whether caused by disease, carbon monoxide, or the gallows. Thus, adoption of the paradigm with its

⁹⁶ *Supra* note 24 and 33

⁹⁷ *A Cruel and Unusual Punishment*, Voights against death 264, 281-82 (P. Mackey ed. 1976)

⁹⁸ A. Koestler, *Reflections on Hanging* 165 (1957)

⁹⁹ *Ibid*

¹⁰⁰ E. Kubler-Ross, *on Death and Dying Declaration* (1969)

suicide option would not reduce the deterrent effect.

The Paradigm and Retribution

The term “retribution” is used in punishment theory to convey a variety of meanings. In the context of administration of capital punishment, retribution can best be understood if its three separate meanings are kept distinct. Retribution is sometimes equated with vengeance to refer to punishment inflicted in a wholly emotional manner.¹⁰¹ It is also used to describe no utilitarian theories of punishment based on justice and desert.¹⁰² In its third sense, the term retribution describes punishment that serves a utilitarian purpose: to vent public disgust toward criminals and, as a consequence, to increase respect for the law and eliminate the likelihood that citizens will “take the law into their own hands.”¹⁰³ Whatever meaning is attached to retribution, the paradigm does not become less desirable than other modes of capital punishment on “retributive” grounds. It is an inappropriate application of the criminal sanction to impose a crueler sanction simply to inflict more suffering upon the offender. Retributive justifications for punishments that are no more than emotional appeals to vengeance against the offender are condemned almost universally.

Hence, to favor hanging or shooting over the paradigm simply because the former inflicts more pain or indignity, is a purposeless and illegitimate invocation of the criminal sanction. Furthermore, retributive theories of desert will not justify the conclusion that a capital offender deserves hanging or shooting rather than the form of capital punishment outlined by the paradigm. Retributive considerations require that the offender suffer according to his deserts as determined by the seriousness of his crime. Principles of desert, however, set only rough boundaries of proportionality between offense and punishment and do virtually nothing to establish the form that the punishment should take.

If the public is particularly outraged by a particular crime, its emotion almost always diminishes significantly between arrest and execution; one would not expect execution according to the paradigm to create public outcry for harsher punishment. The paradigm accomplishes the policy objectives of general deterrence and retribution at least as effectively as other modes of execution. Therefore, if it can be shown to be less cruel than present methods of inflicting death, the paradigm would seem constitutionally preferable as the less drastic alternative.

¹⁰¹ *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring)

¹⁰² Gardner, *The Renaissance of Retribution-An Examination of Doing Justice*, 1976 WISC. L. REV. 781.

¹⁰³ *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)

CORRUPTION IN THE EDUCATION SYSTEM AND ROLE OF REGULATORY BODIES

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Abstract

Higher Education is one of the fastest growing sectors in India. However, the quality of the education is getting worse. Due to the weak institutional framework and pathetic operational mechanism, the national higher education sector is vulnerable to pervasive corruption. A clean system of regulation with responsiveness, accountability and transparency is required to be developed. The present study takes an account of the existing regulatory bodies for the various branches of the higher education, evaluates their performance and proposes the rectification. There ought to be academic, financial and operational autonomy coupled with accountability to the institutes of higher educations. The paper also proposes the tool-kit for the efficacious regulating body which does not leave the space for the corruption in the establishment and maintenance of the higher education institution.

Keywords: Higher Education, Corruption, Regulatory Body, Education System

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INTRODUCTION

Education is the backbone of the economy of the country. The country which spent more on education has to spend less for its defense. Education system of the country, including KG to PG, serves as an assembly line for the production of the human capital for the nation. The prosperity of the country depends on its infrastructural facilities for the education. In India, both forms of the education, i.e. formal and informal, are been supervised and regulated by the government through various statutory bodies. Further the formal education figures from primary to post-secondary i.e. K-12 and higher education. Each of these sections of the formal education differs in their aim, methodology, product and the management. Hence, the parameters of quality, norms and standards as well as the nature of functioning of these educational institutions differ in various aspects. Though each of these sectors suffers from the evil of aberration and corruption, the present study is restricted to the issues of higher education due to the different character of regulations.

The higher education is one of the most fast growing sectors in India. Since independence, the number of higher education institutions (HEI) has been multiplied enormously. From 1951 to 2012, there has been 30 times rise in the number of universities and around 700 times growth in the number of colleges imparting the higher education in India. However, the quality of the higher education is quite deteriorating. The increase in the number i.e. quantity could not pace with the quality of the education. India has apparently failed in producing the value added and value rich human capital along-with the swift of globalization and industrialization. Being the largest populous country with the people of 18 to 25 years age, India could have produced the skilled and trained man-power not only for herself but to cater the need of global labour market. As observed by the National Knowledge Commission¹ there exist the pockets of excellence in higher education, yet the general impression about Indian higher education is one of mediocrity. In order to improve the present scenario of the higher education in India and to enhance the standard of the professional education, one need to understand the existing legal frame-work and the nature of supervision as well as the control prevailing on the institutions of the higher education. The higher education, particularly the professional education may be characterized by its complexity and plurality of the forms of organizations. The management, governance, financing and the property related aspects induce the higher education institutions run as an industry rather than serving to the society and promoting the basic research.

¹ Note on Higher Education, National Knowledge Commission, November 29, 2006

PROLOGUE OF THE STUDY

India with a federal structure, owes the education in the concurrent responsibility of both the state and the center. The school education is the prime responsibility of the state, while the higher and technical educations are under the purview of the central government. The center is liable not only for the co-ordination but also for determining the standards in higher education for a common benchmark throughout the country. To realize this obligation, the center established the University Grant Commission (UGC) in 1951, which received the statutory status in 1956 after the respective enactment through the parliament. Since then the UGC is been regarded as a custodian of the size and standard of the higher education across the country. However, the National Education Policy, 1986 and subsequent policy of 1992, added the role of various regulatory bodies in the higher education institutions. Many of these statutory body existed even prior to this transformation though were not in much interference with the powers of the UGC. Further, the most of the universities are established and supervised by the respective state governments, the regulatory bodies born out of the central parliamentary legislation embark on the powers vested with the state universities as well as the UGC. These regulatory bodies were external organization, empowered by the legislation to oversee and control the education process and its relevant output. The various regulating bodies have their different composition, structure and powers for different professional courses. The emergence, mandate and preliminary functions of some of the regulatory bodies are observed as illustrated under.

In addition to the original power of the University Grant Commission (UGC) regarding the recognition of the university and the colleges, there are several statutory bodies viz. All India Council for Technical Education (AICTE)² mandated for the planning and co-ordination of the technical education including the engineering, management, pharmacy, architect and hotel management. In addition to the approval of the technical institution, it also lay down the service conditions for the faculty and the accreditation through the National Board of Accreditation (NBA). These functions of AICTE overlap with other statutory bodies namely, Council of Architect (COA), Pharmacy Council of India (PCI), UGC as well as the state directorate of the technical education.

² Available at: <http://www.aicte.ernet.in>

In the field of medical education the prime regulator is Medical Council of India³ (MCI) with a mandate to establish the standards in the medical education and define the medical qualification for the entry into the profession in India. Moreover, there exist Central Council of Indian medicines (CCIM) for prescribing the standards of education in Indian medicine viz. Ayurveda, Unani, Siddha, etc. The prime function of the Central Council for Homeopathy (CCH) is to recognize equal qualifications in homeopathy and to maintain the register of Homeopaths. Similarly the Dental Council of India (DCI) and Indian Nursing Council (INC) are mandated for the regulating the education and profession in their respective arena.

Other professional council includes Bar Council of India (BCI) which lay down the standards of the professional conduct of the lawyers and standards of legal education in India.

Further, the National Council for Teacher Education⁴ (NCTE) enjoys the power to recognize the institutes imparting the teacher education. The Rehabilitation Council of India (RCI) is been mandated for the standardization of the training of personnel as well as the professional in the field of rehabilitation and special education. Interestingly the Indian Council for Agriculture Research (ICAR)⁵, though not a statutory body possess the power of accreditation the agriculture university and the co-ordination of agriculture education and research.

Over and above these statutory councils monitoring the professional education in the relevant branch, there exist DEC i.e. Distance Education Council⁶, which is authorized for the promotion, co-ordination and determination of the standard of the open universities as well as the courses offered under the Distance Learning Mode.

In addition to these councils there are some institutions namely, Chartered Accountants of India (ICAI), Institutes of Company Secretary of India (ICSI), Institute of Costs and Works Accounts of India (ICWAI) under the Ministry of the Corporate Affairs to regulate and develop their respective profession in India.

The detail study of all these bodies reveals that they all have their own rules and regulations. However, the policy regarding the promotion and recognition of education institution is not properly defined. There persist ambiguities regarding the jurisdiction of the council in various aspects of imparting education. Multiplicity of the regulating authorities leads to inconsistency

³ Available at: <http://www.mciindia.org>

⁴ Available at: <http://www.ncte-in.org>

⁵ Available at: <http://www.icar.org.in>

⁶ Available at: <http://www.ignou.ac.in/dec/>

and vagueness in the administration of such institutes of higher education which further prop up the corruption in the education sector.

HYPOTHESIS

Existing regulatory system and legal framework are not adequate to curb the corruption in the higher education sector in India.

APPROACH OF THE STUDY

The credibility of all these regulating bodies is a critical issue. Because of the complexity and dysfunctional nature of these regulating bodies the assessment of the performance and integrity is quite cumbersome. There are number of incidence alarming the seriousness of the situation. Few of them have been reported here as a case study of corruption prevailing in the regulatory system. The case study method is followed to judge the hypothesis. The parameters governing the regulatory mechanism are identified and hence the significance of regulatory body in curbing the corruption in higher education is rationalized.

OBSERVATIONS FROM THE STUDY

All India council for technical Education (AICTE) as stated in above para is responsible body for the recognition and approval of the higher technical institution including engineering college. It has its own rules and regulations regarding the approval procedure and the standard norms and criteria for the approval of the establishment of the technical institution. The Central Bureau of Investigation (CBI) received around 200 complaints regarding the corrupt practices of the officials of the AICTE during the approval process of new engineering colleges. The CBI *prima facie* found the substance in the said complaints and filed cases against 42 engineering colleges, which have obtained the permission through the unfair means without having requisite infrastructure and satisfying the conditions laid by the AICTE for the establishment of new college. Of course it was not possible without the support of officials of AICTE. During the investigation CBI revealed the racket of conspiracy and arrested the top brass of AICTE including the Chairman, Member Secretary, Regional Officer, Deputy Director, Advisor, former Regional Director, etc. These officers were charged for the bribery, receiving illegal gratification and other corrupt practices. It was also discovered that many of these officers had tainted history and were not having clean record even before their appointment in AICTE. The most embarrassing fact regarding the whole scandal was it includes many of the professors from IITs,

NITs and universities, who as a member of an expert-committee played dubious role and cooperated in such an immoral and unethical act.

The similar kind of incidence is been recorded with Medical Council of India (MCI), which is an apex body granting the permission and recognition to the medical college in the country. The President of the MCI was caught red-handed receiving the bribe of rupees two Crores for granting the permission to the medical college. This person happen to be the president of All India Medical Association, and-hence representing India at the World Medical Association, ex-officio. Being the President of the medical profession, he used to preach the fellow doctors about the importance of ethics in medical field. The sum of bribery paid by the institution is than recovered from the students, faculty, patients and other stakeholders of the hospital or the college. The unfair practices followed by such medical institution include capitation fee, ghost faculty, fake patients, etc. resulting into further escalation of the corruption.

Other throbbing incidence is regarding the allegations made by the Secretary of the University Grant Commission UGC against the than Chairman for the corruption in a plan to monitor disbursal of funds to institutions through e-governance⁷. Regarding the status of the deemed university awarding the degree, the Tandon Committee has found out of 130 such deemed universities, 44 deemed university required to be derecognized. The committee found these institution with abysmal academic and physical infrastructure, which are ex-facie examples of the corruption during the grant of the deemed status to such institutions.

MAJOR FINDINGS OF THE STUDY

The above study signifies that the corruption is omnipresent and comprehensive phenomenon contained in almost all the regulatory mechanism. Since, there is no proper machinery to identify the suitable officer to be deputed in such regulatory bodies, these officers i.e. bureaucrats are been handpicked by the ministers on their own choice. This leads to the nexus between bureaucracy, politics and criminals. Many of the institutes are established with the commercial point of view. Corrupt people are making safe investment of their black money into education institutions in collaboration with their political god-fathers. Since, they neither have a sacred intention of serving the society by imparting the education; they do not hesitate in appropriation of unfair means for the establishment as well as running of such educational institutions. Due to lack of philanthropic element such management of the colleges allures the

⁷ Available at: http://www.telegraphindia.com/1090823/jsp/nation/story_11397826.jsp

officers inducing them into unethical and immoral practices. Further, many of such officers are deputed on the verge of their retirement, hence, they are not been held guilty for the infringement of their service rule.

Moreover, the strict and stringent parameters and criteria for the approval of such institutes of higher education make the recognition process quite troublesome for the college managers. Certain dimensions of class-room, fixed numbers of books in library, some number of computer sets, etc. create the dodge for the inspecting authorities to pressurize the management of the college for the compliance. There are rigid norms and stern definition for the qualifications of the faculty leaving the actual competency of a teacher on the stake. Hence, either the skeleton teachers possessing the requisite qualifications are hired or a roll is maintained with the ghost teachers.

The most agonizing fact about the corruption in the higher education sector is that, the stakeholders of the system desire to take an advantage of the malevolence situation. Many of the students and parents, who were supposed to resist the malpractice, instead of combating against the corrupt practice, stoop down to any level just for their own selfish motives.

SUGGESTIONS AND RECOMMENDATIONS

The evil of corruption can well be proscribed with the efficacious regulatory mechanism under strong legal framework. There has to be the rule of law i.e. control and sanction in the field of higher education. The criteria granting the approval must be more explicit, quantifiable, transparent and measureable. The public administration system needs to be developed with the information transparency in the process of recognition, funding and disbursement of the grant. The approval should pass through the social audit before the final accent. There could be independent external monitors be identified for auditing and scrutiny of the regulatory system. Separate code of conduct for the all stakeholders of the system should be devised. There ought to be academic, financial and operational autonomy coupled with accountability to the institutes of higher educations.

The regulatory system requires cohesive theoretical framework, synthesis and careful thought out for the policy implications. The institutional mechanism regarding the appointment of the officers in the regulatory body should be free from the political interference. The only person, with high integrity and the impeccable reputation should be delegated the responsibility of the regulator and inspectors. On the other hand any act of immorality and corruption in the

education sector should be made a non-bailable offence and should be tried expeditiously with an exemplary punishment to the offenders. A clean system of regulation with responsiveness, accountability and transparency ought to be developed. The tool-kit for the efficacious regulating body is proposed herewith.

The model regulatory body may possess the following characteristics.

- a) The regulatory body should operate through the Education Management Information System (EMIS) to bring the transparency in its functioning.
- b) The regulatory body should play the role of facilitator instead of the regulator.
- c) A consistent policy must be devised for the growth of the different types of institutions.
- d) The process of recognition and approval should be harmonized with the other regulatory body, if any.
- e) The regulatory body should put equal emphasize on the design of curricula and the examination system. i.e. should focus on the quality of the product of the institution.
- f) The regulatory body should have vigilance cell incorporated within it. The scope of such vigilance cell should not be limited to those institutions which are under the supervision, rather extend to its own members also.
- g) The regulatory body should stress more on the governance of the higher education institution rather than the regulation on the entry level.
- h) The policy should be framed to promote the growth of the competition amongst the institution to enhance their quality.
- i) The regulatory body should educate the management regarding the criteria and formulate the norms, procedure and practice to encourage the management for venturing the establishment of the institute of higher education.
- j) Regulatory body should strive for the improvement of the higher education so as to create groundwork for social and economic progress of the nation.
- k) Regulatory body must accentuate the value education to fight against the corruption. The main stakeholders of the system, i.e. students could be well informed about the probable malpractices and prepare them to raise their voice against any of such incidence.

EPILOGUE

The national higher education sector is vulnerable to pervasive corruption. The foremost mutilation of the corruption is the entire generation of the youth mis-conceives the belief that

personal success does not come through merit and hard-work but could be won through favoritism, bribery and fraud. Since, the corruption is the symptom of an operational flaw and structural weakness; it could be curbed through the strong foundation of the mechanism and transparent operation. It could be reduced by scraping the obsolete laws and rationalizing the regulatory mechanism. However, the government alone cannot eradicate the corruption in the system rather the citizens and civil society can do much better in curbing the corruption from the system.

There is much hope from few of the legislations in pipeline, i.e. The National Commission for Higher Education and Research (NCHER) Bill, 2010; The Educational Tribunal Bill, 2010; The Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and University Bill, 2010; The Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010; The National Accreditation Regulatory Authority for Higher Educational Institutions Bill, 2010. Setting up of the single regulating authority as suggested by the National Knowledge Commission and the Yashpal Committee would certainly refine the regulatory mechanism. With the realization of the legislative effort, the higher education in India shall definitely be revitalized to cater the need at the domestic as well as the international market.

CONSTITUTIONALITY AND LEGALITY OF THE DEMONETIZATION POLICY IN INDIA

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Abstract

Demonetization is a monetary step whereby a currency unit's status as a legal tender is declared invalid. It is usually done to replace the old currency with new one whenever there is a change of national currency. For example, gold was demonetized when it ceased to be used as an everyday currency. Demonetization has earlier happened in India in 1946 and second time in 1978. On the 8th of November, 2016 the same step was taken by the Government of India for the third time whereby the Prime Minister Narendra Modi declared the withdrawal of Rs.500 and Rs.1000 currency notes from circulation. The step was claimed to be aiming at curbing of black money and counterfeit currency used for funding terrorism. Thereafter, the Supreme Court has heard several public interest litigations challenging the constitutional validity of the act of demonetization by the Government. The main objective of this paper is to study the impact of demonetization by the present government on the fundamental rights of the citizens of India. The paper thus, aims to analyze the constitutional validity of the notification of demonetization dated 8th November, 2016 issued by the Government of India.

Keywords: Demonetization, currency, notification, rights, constitutionality

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INTRODUCTION

The Government on 8th November, 2016 by a notification in the Gazette of India declared the demonetization of Rs.500 and Rs.1000 currency notes. The notification by the Department of Economic Affairs, Ministry of Finance published in the Gazette of India¹ read that the bank notes of existing series of denomination of the value of five hundred rupees and one thousand rupees shall cease to be legal tender on and from the 9th November, 2016.

The preamble to the notification stated that its objective was to eliminate fake currency used for financing terrorism and to address the problem of “unaccounted money” in the economy. The notification also imposed limits on ATM and bank withdrawals. Since then, the government has made many changes to the applicable limits. The authority for the same according to the notification is derived from Section 26(2) of the Reserve Bank of India Act, 1934²(hereinafter referred to as the RBI Act).

According to estimates, 86% of the currency was in the form of the demonetized Rs.500 and Rs.1000 notes. Considering the fact that the Indian economy is largely cash based³ with a large percentage of transactions happening in cash, such a drastic step was bound to lead to chaos. The slowdown of trade and commerce and the many deaths of the old & infirmed people who had to stand in queues for long hours, have led to people questioning the merits of this move. Accordingly, various High Courts and the Supreme Court of India have received several petitions challenging the constitutional validity of the act of demonetization by the Government on several grounds.

The demonetization notification can be challenged as illegal since the same is not only *ultra vires* section 26(2) of the RBI Act but it is also not saved by the Banking Regulation Act, 1935

¹ Notification by the Ministry of Finance, Available at: http://www.finmin.nic.in/press_room/2016/press_cancellation_high_denomination_notes.pdf (Accessed on 12/11/2016)

² See, the Reserve Bank of India Act, Section 26(2)

Legal tender character of notes.—

(1) Subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in 1[India] in payment, or on account for the amount expressed therein, and shall be guaranteed by the 2[Central Government].

(2) On recommendation of the Central Board the 2[Central Government] may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender 3[save at such office or agency of the Bank and to such extent as may be specified in the notification]. 4[***]

³ Reserve Bank of India Annual Report, 2015-2016, Available at: <https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR2016CD93589EC2C4467793892C79FD05555D.PDF> (Accessed on 12/11/2016)

or any other Act of Parliament. The notification further violates the right to equality under Article 14, the right of trade and commerce under Article 19 (1) (g) and right to life under Article 21 of the Constitution of India. It also violates the constitutional right to property enshrined under Article 300A of the Constitution of India.

EXCESSIVE DELEGATION

In England, Parliament is regarded as supreme therefore; the courts cannot control Parliament in matters like delegation of legislative power. But the situation in USA is different due to doctrine of separation of power whereby the legislature cannot delegate unlimited power to an administrative body. The legislature should itself perform the essential legislative functions, which include making and laying down the policy of statute, and only the power to lay down details to effectuate that policy may be delegated.

Excessive delegation principle has been laid down in *Panama Refining Co. v. Ryan*⁴, where delegation was held to be invalid because the court found no “standard” in the Act and the power delegated would be “virtually unfettered” due to few restrictions and large discretion. India too, has adopted the same principle.

In India, the Supreme Court’s decision in *In re: Delhi Laws Act case*⁵ is a landmark in the area of delegated legislation in which the Supreme Court gave seven different views. However, it can be concluded that although the legislatures can delegate power, since power of legislation includes delegation, but since legislature derives its authority from the Constitution excessive freedom like in the case of British Constitution cannot be given and limitations are needed. Thus, the legislature cannot delegate unlimited power. The essential legislative functions have to be discharged by the legislature and only the power of laying down of details and effectuating the same may be delegated. Further, the Legislature cannot delegate ‘unrestrained, unanalyzed and unqualified’ legislative power to an administrative body.⁶ It is essential that guidelines for carrying out of the policy or principles have to be laid down by the legislature.

In *Humdard Dawakhana*⁷, the Court had invalidated Section 3(d) of the Drugs and Magical Remedies Act, in which the term “or any other disease or condition which may be specified in

⁴ 293 U.S. 388 (1935)

⁵ *In re The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension) v. The Part C States (Laws) Act, 1950*, 1951 AIR 332

⁶ *Kishan Prakash Sharma v. Union of India*, (2001) 5 SCC 212: AIR 2001 SC 1493

⁷ *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Anr.v. Union of India*, 1960 AIR 554

rules made under this Act” was used on the basis that there was no legislative guidance on how these “diseases” were to be selected.

Issuing of currency or its withdrawal as legal tender is not just a matter of monetary policy. It is something which is bound to have a great impact on the daily lives of all citizens and therefore being an essential legislative function, it should not have been delegated in the first place.

Rule of Law has been held to mean due process and a just, fair and non-arbitrary procedure. This has been given effect through the principle of separation of powers that prevents one organ of the government from over-reaching and acting in an arbitrary manner, by creating a system of checks and balances. Thus, Rule of Law is the antithesis of arbitrariness.⁸ It is embodied in Article 14 of the Constitution and it also forms an integral part of its basic structure.⁹

In the present situation, the Act does not lay down any specific conditions or qualifications as to when and for what purpose can it be used. Thus, too much is left to the discretion of the executive authority and it is violative of Article 14.¹⁰ There are no safeguards to control this discretionary power. The only condition that is laid down by the section is that there should be recommendation from the Central Board of the Reserve bank of India. However, practically the same cannot be free from interference and influence of the Central Government provided that various members of the Board including the Governor and the Deputy Governor are nominated by the Central Government and also their term and salaries are fixed by the Central Government.

Although the Government defends its action on the ground that despite causing temporary inconvenience, it is in public interest in the longer run, there is no assurance that in the absence of proper safeguards against the use of this power, the same will not be repeated in future. There is a high possibility of the fresh notes being afflicted by similar problems as the demonetized notes, especially since the Government has introduced an even higher denomination of Rs.2000.

The Constitution gives the power of legislation to the elected representatives of the people of the country. The purpose is that the power exercised is not only in their name but by the people. Thus, the rule against excessive delegation is an important postulate of sovereignty of the people. Also, the fact that there has been excessive delegation is violative of the doctrine of

⁸ *A.D.M. Jabalpur v. Shiv Kant Shukla*, AIR 1976 SC 1283; *Som Raj v. State of Haryana*, 1990 SCR (1) 535

⁹ *Indira Nehru Gandhi v. Raj Narayan*, 1975 SCC (2) 159

¹⁰ *State of Punjab v. Khan Chand*, AIR 1974 SC 543

separation of power leading to violation of Article 14 and the same can be expected to happen again in future in the absence of proper safeguards.

NOTIFICATION IS *ULTRA VIRES* SECTION 26(2) OF THE RBI ACT

The doctrine of *ultra vires* is the basic doctrine in administrative law. The word ‘ultra’ means beyond and ‘vires’ means powers. Thus the term *ultra vires* means any act performed in excess of the power that is conferred on the person or authority performing the act.¹¹ It envisages the exercise of only as much power as is conferred by law.

The Supreme Court in *Supreme Court Employees Welfare Association v. Union of India*¹² has held that “Power is no less abused even when it is exercised in good faith, but for an unauthorized purpose or on irrelevant grounds”.

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can be vividly used only in the right and proper way which parliament when conferring it presumed to have intended¹³. If it is used for any other purpose¹⁴ or on considerations extraneous to the legislation which conferred the power, it is a case of ‘Abuse of power’.

Section 26(2) of the RBI Act reads that the Government may declare by a notification in the Gazette of India, with effect from such date as may be specified in the notification, **any series** of bank notes of any denomination shall cease to be a legal tender. The above sub section refers to the power of the government to scrap the legal tender of only a particular series of notes of any denomination, not all notes of that denomination as has been done in the present case, which makes the use of the words ‘any series’ entirely redundant.

It is important to understand that RBI is not a tax authority and therefore demonetization cannot be used as tax enforcement or an anti-money laundering measure. Thus, withdrawal of legal tender from bank notes for the purpose of addressing tax evasion or money laundering does not fall within the ambit of Section 26(2) of the RBI Act. Further, the fact that the previous two attempts at demonetization have been made through an ordinance by the Legislature and not on

¹¹ B.C. Sarma, *The Law of Ultra vires*, (New Delhi: Eastern Book Company), 2004, p 1

¹² AIR 1990 SC 434

¹³ *R. v. Tower Hamlet London Borough Council, ex. P v. Chetnik Development Ltd.*, [1988] AC 858; *Porter v. Magill*, [2002] 1 All ER 465

¹⁴ Cf. *Iron & Steel Co. v. Workmen*, AIR 1958 SC 130 (137); *Chartered Bank v. Employees' Union*, AIR 1960 SC 919

the basis of Section 26(2) alone go on to prove that the Legislature never intended the Section to be used in this manner for the removal of black money from the economy. If discretionary power has been exercised for an unauthorized purpose, it is immaterial whether its repository was acting in good faith or bad faith¹⁵. It will be gross abuse of power¹⁶. Therefore, it is immaterial that the power was used to curb black money, the purpose may have been in public interest, yet it is different from what is contemplated by the Legislature.

According to the notification issued by the Ministry of Finance on 8th November, 2016, notes of Rs.500 and 1000 would cease to be legal tender and this was done in the exercise of the powers conferred by sub-section(2) of the RBI Act. Section 26(2) of the RBI Act authorizes the government to declare “any series” of notes as illegal tender. The section does not give the government the authority to impose a withdrawal cap. The money deposited in a bank by an individual is his property and the bank performs the role of his custodian.¹⁷ Since there is no bar or limitation on people as far as keeping their legitimate income in cash is concerned, cash does not *prima facie* equal black money. A notification under Section 26(2) can only make certain currency notes illegal from a particular date; it cannot change the legal status of the personal accounts. However the notification issued under Section 26(2) imposes a cap on withdrawal from banks and ATMs which is a restriction imposed on the right of the citizens to access their own tax paid money and the same is without any authority of law. Therefore, the act of the Government is *ultra vires* Section 26(2) of the RBI Act.

Further, according to Section 26(2), it is not just a consultation with the RBI that is required but also, the central government must give it enough scope to deliberate and give an independent view in the form of a recommendation, initiated by the RBI itself rather than by government prompting. To fulfill its duty as the central bank in the financial system, the RBI is supposed to be free from any sort of influence of the executive and act independently. Keeping this in mind, it is doubtful that the recommendation in the present case came from the RBI independently, although the same was claimed by the government.

Also insofar as the Government has allowed several exemptions as far as the legal tender status of the cancelled bank notes is concerned, in hospitals, petrol pumps etc., the Government has

¹⁵ Collector, Allahabad v. Raja Ram Jaiswal, AIR 1985 SC 1622; Narayan Govind Gavase v. State of Maharashtra, AIR 1977 SC 183; Supreme Court Employees, Welfare Association v. Union of India, AIR 1990 SC 334

¹⁶ S.R. Venketeraman v. Union of India, AIR 1979 SC 49: (1979) 2 SCC 491

¹⁷ See, Section 17(9), Reserve Bank of India Act, 1934

again exceeded the scope of authority under Section 26(2) of the RBI Act. This is because Section 26(2) itself mandates that once any bank notes series has ceased to be a legal tender, such notes can only be exchanged at an agency or office of the RBI as notified. The Government's exemptions permitting the use of these notes in other places are arbitrary and violative of Article 14.

THE NOTIFICATION IS WITHOUT RELEVANT CONSIDERATIONS

'Rule of Law' as defined by Dicey, means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government."¹⁸

In India, we have adopted the British System of Rule of Law under our Constitution. Absence of arbitrary power is the first essential of Rule of Law upon which our whole constitutional system is based.¹⁹

Further, apart from the contents of equal protection the guarantee of equality before the law under Article 14 of the Constitution ensures fairness, reasonableness and non-arbitrariness.²⁰

Non application of mind is a facet of arbitrary exercise of power.²¹ A subordinate legislation may be struck down as arbitrary or contrary to the statute if it fails to take into account the very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or say, by the Constitution.²² Further, non-consideration of public interest also shows non application of mind.²³

The decision of the Government to demonetize has been taken without application of mind to any of the relevant considerations. Given that people have died while standing in queues before banks, clearly points towards the fact the country in terms of its infrastructure and high cash reliance was not ready for demonetization on such a large scale. The government before taking such a huge decision of removing 86% of currency from circulation should have considered facts like whether the number of ATM's and banks would be sufficient to cater to such a large

¹⁸ Dicey, A.V., *The Law Of The Constitution* 198 (8th Ed.)

¹⁹ *S.G. Jaisinghani v. Union of India*, AIR 1967 SC 1427; *Godavarman v. Ashok Khot*, (2006) 5 SCC 1

²⁰ *Maneka Gandhi v. Union of India*, 1978 AIR 597

²¹ *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673

²² *Indian Express Newspapers v. Union of India*, AIR 1986 SC 515; *Union of India v. Dinesh Engineering Corp.*, (2001) 8 SCC 491: AIR 2001 SC 3887

²³ *Bharat Gold Mines Officers'Association v. Union of India*, AIR 2001 Kant 257

population after demonetization and what effects could the decision have on the citizens especially the rural and informal sector of the society. Considering that India is a cash based economy, where most people don't have access to alternate modes of payment and thus depend majorly on cash for most of their transactions, it was quite predictable that such a step would lead to formation of such long queues before banks and ATMs. People were not only prevented from accessing their cash at their will and without any inconvenience but in some cases also completely denied of it as in the case of the people who have died in queues. All this can be attributed to the absolutely unplanned manner in which the decision has been taken. The size of the notes was changed because of which the ATMs throughout the country had to be recalibrated. This further worsened the cash crunch as these ATMs did not work at all for this entire period. The fact that the Government clearly had no idea that a large number of ATM's weren't even functioning since a long time at the time of demonetization, makes the claim of months of preparation by the government extremely difficult to believe.

Further, the fact that the government had imposed a withdrawal cap again shows non application of mind. Since demonetization was implemented at such short notice, people could not have been expected to be prepared especially for emergency situations. The authorized withdrawal cap could not have been reasonably predicted to be sufficient for situations like medical treatments. There were reports of around 33 deaths in just the first week of demonetization across the country which can be directly or indirectly linked to the sudden move.²⁴ Again these were just the official figures, the actual number can be reasonably presumed to have been bigger. There were reports of people committing suicides, getting heart attacks, dying because of their inability to pay in hospitals²⁵, etc.

Since the decision could have reasonably been predicted to lead to such direct consequences, the government's action was clearly without application of mind to relevant considerations.

EXCLUSION OF DISTRICT CENTRAL COOPERATIVE BANKS IS VIOLATIVE OF ARTICLE 14

²⁴ 'Demonetisation: 33 deaths since government scrapped Rs 500, Rs 1000 notes', *The Indian Express*, Available at: <http://indianexpress.com/article/india/india-news-india/demonetisation-suicides-heart-attacks-and-even-a-murder-among-33-deaths-since-decision-4378135/> (Accessed on 20/12/2016)

²⁵ 'Baby dies after doctor 'refuses' treatment for want of cash', *The Times of India*, Available at: <http://timesofindia.indiatimes.com/city/mumbai/Baby-dies-after-doctor-refuses-treatment-for-want-of-cash/articleshow/55389684.cms> (Accessed on 20/12/2016)

Only around 30% of the Indian population has access to the banking system as per data compiled by the banking division of the finance ministry. Further, the distribution of banks is highly skewed with a third of all bank branches in only 60 Tier 1 and Tier 2 cities or towns.²⁶ Consequently, people in rural India are the ones who are bound to suffer the most in such situations like that of demonetization.

Keeping in view the above facts, the notification clearly results in discrimination between holders and non-holders of bank accounts. While the Government defended the action as necessary to curb black money, insofar as it failed to ensure that the entire population had bank accounts before the decision of demonetization was announced, the notification is clearly arbitrary and violative of Article 14.

Further there has also been arbitrariness in excluding the District Cooperative Banks from exchanging or withdrawing currency notes. It is only through these banks that formalized banking services are accessible to rural sections of the country. Rural economies in Punjab, Gujarat, Uttar Pradesh, Maharashtra, Kerala, Odisha and many other states depend heavily on cooperative banks.²⁷ In Kerala, cooperative banks have total business of more than Rs.1 lakh crore.²⁸ Because of their high penetration and easier loan disbursals, the rural population relies largely on these banks and therefore the sudden decision of demonetization led to a large number of farmers being denied completely the access to their money.

Since there is clearly no reasonable nexus behind excluding the district cooperative banks during the entire process of demonetization, the same can be said to be violative of Article 14.

VIOLATION OF ARTICLE 19(1) (G)

Article 19(1) (g), provides for the freedom to practice any profession, occupation or trade. The state cannot seek to place restrictions on the same by directly and immediately curtailing any other freedom of the citizen guaranteed by the Constitution.²⁹

²⁶ Prof Prabhat Patnaik, 'Black Money and India's Demonetisation Project', Global Research, Available at: <http://www.globalresearch.ca/black-money-and-indias-demonetization-project/5557384> (Accessed on 22/12/2016)

²⁷ Kanchan Srivastava, 'Did RBI ban district coop banks on hearsay?', DNA, Available at: <http://www.dnaindia.com/money/report-did-rbi-ban-district-coop-banks-on-hearsay1-2293192> (Accessed on 22/12/2016)

²⁸ *Ibid*

²⁹ *Sakal Papers v. Union of India*, AIR 1962 SC 305, at 314

There are a large number of people who are involved in various economic transactions and undertakings. India is a country where about 90% of the transactions happen in cash and 85% of the workers are paid in cash.³⁰ This does not only include black money holders but also many innocent citizens like daily waged labourers and poor farmers. The government cannot claim that only those with black money, fake currency or the intent to aid terrorism are bound to suffer. By its abrupt notification and imposition of a withdrawal cap, the government had put a restriction on people to access cash which directly led to restricting the trade and commercial pursuits of the people.

The Government's defence could be that reasonable restrictions can be put upon 19(1) (g) by virtue of Article 19(6) since the restrictions are in the interest of general public. However, the grounds cited cannot justify adopting extreme measures like invalidating 86% of printed currency in circulation overnight. These restrictions neither have a reasonable connection nor are proportional to the mischief which they sought to control that is curbing of black money and therefore cannot be said to be reasonable.³¹

The test of reasonableness is whether the measure was necessary to achieve the objective of the government and whether less risky or less harmful alternatives were available, which is clearly not fulfilled in the present case.

In *Saghir Ahmad v. State of UP*³², the Supreme Court held that the reasonableness of a law must be assessed in terms of its “immediate effects” on the affected population. Unlike the 1978 demonetisation that impacted only 1% of currency held, the one in 2016 had an impact on 86% of the currency which led to punitive effects on many sections of the population especially those without bank accounts and those depending upon the informal cash economy for their livelihood and business.³³

³⁰ Wade Shepard, ‘A Cashless Future Is The Real Goal Of India’s Demonetisation Move’, Forbes, Available at: <https://www.forbes.com/sites/wadeshepard/2016/12/14/inside-indias-cashless-revolution/#184a8fc74d12> (Accessed on 1/1/2017)

³¹ ‘Five reasons why the recent Demonetisation may be legally unsound’, The Wire, Available at: <http://thewire.in/81325/demonetisation-legally-unsound/> (Accessed on 2/1/2017)

³² 1954 AIR 728

³³ Namita Wahi, ‘Why Demonetisation notification is illegal and violates the Constitution’, The Economic Times, Available at: http://economictimes.indiatimes.com/articleshow/55916594.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Accessed on 1/1/2017)

Informal sector makes up for 45% of the GDP of the country and 80% of all jobs. These are the people who earn on a day to day or week to week basis like the manual labourers on farms, the construction workers, rickshaw drivers, street vendors, domestic workers, etc. The sector is traditionally financed by what are called non-banking financial institutions including money lenders. However, the fact that the cash crunch rendered their employers and these money lenders incapable of paying them led to losing of their jobs and thus violation of their right to occupation. Standing in the queues for hours to withdraw cash again led to loss of wages for the daily waged laborers.

Agriculture is another sector that was greatly affected especially considering that the decision of demonetization came during the Rabi sowing season. Farmers had difficulty buying seeds and fertilizers, employing agricultural labor and selling crops and perishable produce. Consumer goods sales had dropped. The construction and fishing industry also suffered.

Further there seems no reasonable nexus between the restriction and the objective. Black money is generated through evasion of taxes on income from lawful activities or money generated from illegal activities. In order to actually address the problem of black money there are several steps like improving transparency and accountability in the system, which need to be taken. However, the step taken by the Government does not target any of these. In absence of efforts to curb the very generation of black money, demonetization is a futile exercise as was proved in 1978. Again as far as stopping the use of counterfeit currency is concerned, the step of demonetization only acts as a temporary method of destroying the fake currency and the apparatus used to generate it. The same problem is bound to be faced by the country again.

Thus, since the restrictions imposed by the Government neither correspond to the object sought to be achieved nor are proportional to it, the same cannot be termed as reasonable and are therefore violative of Article 19(1)(g) of the Constitution.

THE NOTIFICATION IS VIOLATIVE OF ARTICLE 21

Right to Life under Article 21 embraces within its sweep not only physical existence but the quality of life. It includes all those aspects of life which go to make a man's life meaningful, complete and worth living.³⁴ It includes the right of food, clothing, decent environment and

³⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Board of Trustee of the Port of Bombay v. Nadkarni Dilip Kumar Raghavendra*, AIR 1983 SC 109

reasonable accommodation to live in³⁵ and if any statutory provision runs counter to such a right, it must be held unconstitutional.³⁶ It is needless to say that in a cash reliant country like India where a large percentage of transactions happen through cash, a denial or restriction on people to access their cash would directly lead to denial of all these facets of Right to Life and therefore a violation of Article 21.

In *Olga Tellis v. Bombay Municipal Corporation*,³⁷ it was held that that alone which makes it possible to live, leave aside what makes it livable must be deemed to be an integral component of Right to Life. The petitioners need to eat to live; they can eat only if they have means to livelihood. Thus, Right to livelihood was held to be a part of Right to Life, since a person cannot live without means of living. Clearly demonetization attacked the livelihood of a large number of people as has been discussed earlier.

Further drawing an analogy from the above case, it can be said that the right of the people to access their money is also an integral part of Right to Life guaranteed under Article 21 of the Constitution of India. India is a country where most of the people rely on cash for meeting their everyday needs since they have no access to other modes of payment. This means that if people are denied access to their cash, they cannot buy food, they cannot pay their rent, buy medicines, etc. Thus, in essence they are deprived of their means to live and thus their Right to life. The formation of long queues before banks and ATM's and the fact that people have died in these queues shows that cash is their necessary means to survive and by demonetization the government has left them with no other alternative to meet their daily needs which form a part of Right to Life.

Therefore, since the Government's action resulted in people not being able to avail the various facets of their Right to Life, the notification is in violation of Article 21 of the Constitution of India.

VIOLATION OF 300A OF THE INDIAN CONSTITUTION

Article 300A lays down that “no person can be deprived of his property except by authority of law”.³⁸ It has already been established by the Court that ‘public debts’ are property and ‘the

³⁵ *Shantisar Builders v. Narayanan Khimalal Totame*, (1990) 1 SCC 520

³⁶ *Confederation of Ex-servicemen Association v. Union of India*, (2006) 8 SCC 399

³⁷ 1986 AIR 180

³⁸ See, Constitution of India, Article 300(A)

extinguishment of such debt amounts to compulsory acquisition of that debt³⁹ which can only be done through authority of law that is, by an ordinance or Act of the Parliament in accordance with Article 300A of the Constitution.

The Supreme Court has also held that temporary deprivation of property also constitutes deprivation under this provision. The same was held by the Supreme Court in *Jayantilal Ratanchand Shah v. Reserve Bank of India & Ors*⁴⁰, in the context of the 1978 demonetization, that insofar as the demonetization wiped out the RBI's debt to the bearer of notes which were declared illegal, it constituted compulsory acquisition of property.

It has been held that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature.⁴¹ Thus legal tender is property in the hands of the citizens which they use to buy goods and services or transact anything else. The same cannot be taken away by an executive order without legislation.

Compulsory acquisition should be for public purpose and should be accompanied with payment of compensation. However, rationing of currency constitutes a form of creeping expropriation for which there has been no compensation⁴² and also the restrictions being unreasonable are not for public purpose. Thus, the government's failure to issue an ordinance to extinguish the RBI's debt to the people violates the constitutional right to property.

THE NOTIFICATION DEFEATS LEGITIMATE EXPECTATION

The doctrine of legitimate expectation is considered to be a part of natural justice.⁴³ At its root is the principle of rule of law, which requires regularity, predictability and certainty in Government's dealings with public.⁴⁴ Failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of legitimate expectation forms part of the principle of non-arbitrariness.⁴⁵ It imposes a duty to act fairly on all public authorities and therefore people can have a legitimate expectation that they will be

³⁹ *Madan Mohan Pathak v. Union of India*, 1978AIR 803

⁴⁰ JT 1996 (7)

⁴¹ *K.T Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1: (2011) 4 SCC (Civ) 414:AIR 2011 SC 3430.

⁴² *Supra* note, 33

⁴³ *Ashoka Smokeless Coal India (P.)Ltd.v. Union of India*, (2007) 2 SCC 640

⁴⁴ *Official Liquidator v. Dyanand*, (2008) 10 SCC 1

⁴⁵ *FCI v. Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601

treated fairly by the State and its instrumentalities.⁴⁶ Courts can interfere with change in policy when denial of legitimate expectation amounts to denial of rights guaranteed⁴⁷ and the same can be questioned on grounds attracting Article 14.⁴⁸

Thus people have a legitimate expectation of being treated fairly and to have access to their money not just because it arises from past continuance but also because it is important for the enjoyment of their fundamental rights. People can thus have a legitimate expectation that they would be able to access their own money without any restrictions especially in times of emergencies.

CONCLUSION

Clearly, despite the fact that the claimed objectives of the Government are good for the country, the ends cannot always justify the means. The step apart from clearly being unconstitutional was badly planned and executed in an even worse manner.

If at all demonetization had to be brought about, it could have been done through an ordinance. Since the parliament was not in session at the time this step was taken, issuing of an ordinance, as was done in 1978, would have been a justified step. Why this was not resorted to is a question. According to the Government, the entire step would lose its very purpose, had it been done through an Act since what was required was an element of surprise. But the same could have been maintained by an ordinance which would have the force of law. The fact that this was not done, points to the reluctance of the Government to have the same replaced by an Act that would require debate in the Parliament.

Taking such a huge decision by an executive action alone especially when it is bound to cause so much disruption in the economy, attacks the confidence of the people placed in the Government that they have themselves elected.

Further, with reports of the new Rs.2000 notes being recovered from terrorists⁴⁹ and politicians being arrested with black money, again, in form of new currency notes⁵⁰, raises questions on

⁴⁶ *Ibid*

⁴⁷ *Punjab Communications Ltd. v. Union of India*, AIR 1999 SC 1801

⁴⁸ *Union of India & Anr. v. International Trading* ,(2003) 5 SCC 437

⁴⁹ ‘New notes found on militants proves currency ban won’t impact terrorism: Congress’, The Hindustan Times, Available at: <http://www.hindustantimes.com/india-news/new-notes-found-on-militants-proves-currency-ban-won-t-impact-terrorism-congress/story-SVgR1pwX2Aw5E6qOZLNccL.html> (Accessed on 2/1/2-17)

how effective the move was to curb black money, counterfeit currency and terrorism which were claimed to be the objectives behind the same.

More importantly, according to reports⁵¹, RBI's own weekly figures on "currency in circulation" suggest that more than 90% of the demonetised currency had returned to banks by December 30th. This could mean that either there was negligible amount of black money in the country, which is hard to believe, or it had been successfully laundered. In both these cases the question that arises is that was the pain that people went through during this entire process worth the gain.

We live in a country governed by the rule of law, and not by the rule of men. Clearly, the goal of withdrawing black money from the economy is something everyone supports, but it must be done under authority of law. The objectives of demonetization may be laudable, but whether they are achieved or not, is debatable. Even if these objectives are achieved to some extent, as it exists, demonetization by the present Government is illegal and violative of the Constitution of India.

⁵⁰ 'Nearly 30 BJP members caught with black money post demonetization?', Narada News, Available at: <http://naradanews.com/2016/12/30-bjp-activists-caught-with-black-money-post-demonetisation/> (Accessed on 3/2/2017)

⁵¹ 'Demonetisation: RBI's own figures indicate return of 15 lakh crore of banned notes', The Economic Times', Available at: <http://economictimes.indiatimes.com/news/economy/finance/demonetisation-rbis-own-figures-indicate-return-of-15-lakh-crore-of-banned-notes/articleshow/56536621.cms> (Accessed on 3/1/2017)

WEAPONS OF WAR: NEW ISSUES AND CHALLENGES UNDER INTERNATIONAL LAW

Harshit Singh Bhatia*

Abstract

The following paper aims towards the usage of war weapons in modern era and how it has affected the present world. The challenges before the international law as to how the world destruction can be stopped by the help of international organizations with the countries and thus peace could prevail worldwide. The exaggerated use of weapons has led to disruption of world peace and the money which could have been used for eradicating poverty, hunger and pollution from the world has been used for manufacturing deadliest weapons which could finish the human existence on the planet earth. The rapidly expanding use of mass-produced cluster munitions, quality-control problems in the highly competitive international arms market and budgetary pressures in the defense industry have increased the likelihood of malfunctioning munitions posing a threat to the civilian population and military personnel long after a conflict has ended. The presence of explosive matters in the hands of various countries has led to wars which mostly affected the civilians who are living at the places of war. The people have lost their lives and being taken away from their families, they have been displaced from their homes which have led to loss to humanitairism. The remnants of war are just unimaginable and the effects are long term. Thus, the paper aims towards discussing all the serious issues relating to war or remnants of war.

Keywords: Weapons, international arms, peace, humanitairism

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INTRODUCTION

There have been significant developments in recent years in the efforts to reduce the death, injury and suffering caused by anti-personnel landmines. These weapons are regarded as one of the major threats to civilians once an armed conflict has ended. Anti-personnel mines have killed and injured large numbers of men, women and children and slowed the rebuilding of war-affected countries. The long-term and indiscriminate effects of these weapons led to the adoption in 1997 of the Convention on the Prohibition of the Use, Stockpiling, production and Transfer of Anti-personnel Mines on their Destruction.

Anti-personnel mines, however, are one part of a broader problem. Modern armed conflict leaves behind a wide array of explosive ordnance which, like anti-personnel mines, causes large numbers of civilian causalities and has severe socio-economic consequences for years, and sometimes for decades, after the hostilities end. Until recently, international humanitarian law contained very few requirements to lessen the impact of these ‘explosive remnants of war’ (ERW).

DEFINING ‘EXPLOSIVE REMNANTS OF WAR’

There are no universal or formally agreed definitions of ‘explosive remnants of war’ or ‘unexploded ordnance’ (UXO). In addition, although often used interchangeably, they are not identical. One of the various drafts of the United Nations International Mine Action Standard (IMAS), for instance, defines UXO as:

Explosive ordnance that has been primed, fused, armed or otherwise prepared for use or used. It may have been fired, dropped, launched or projected yet remains unexploded either through malfunction or design or for any other reason.¹

However, even this definition is not necessarily self-evident, as landmines are excluded in the general understanding of its scope.²

¹ Guide for the Application of International Mine Action Standards (IMAS), (IMAS 01.10), (New York, UN Mine Action Service, First Edition, October 2001), p. 14. A more up to date draft exists (although as of writing it had not been posted publicly), IMAS 04.10 dated 1 January 2003, but this appears to be identical to the version used here.

² United Nations Mine Action Service, Explosive Ordnance Disposal, (IMAS 09.30), (First edition, 2001-10-01), p. iv: ‘Unexploded ordnance (UXO) has many definitions, but for the purposes of IMAS the term applies to all munitions other than landmines which form part of a mine action programme, and which present a significant risk to human life.’ (Authors underline.)

Clarifying terms of reference became pertinent in the course of discussions on ‘explosive remnants of war’ leading up to the Second Review Conference of the Convention on Certain Conventional Weapons (CCW), which was held in Geneva in December 2001. The general view of delegates was that anti-personnel mines were dealt with adequately elsewhere, and thus did not need to be part of the CCW Group of Governmental Experts’ work. Anti-vehicle mines (AVM), euphemistically described in the CCW context as ‘mines other than anti-personnel mines’, were also viewed as distinct from work on ERW and to be considered under a different mandate.

Thus, a working term for ‘Explosive Remnants of War’ in the context of the CCW appears to have evolved. The CCW’s mandate to tackle ERW excludes anti-personnel mines and anti-vehicle mines left in operation after a conflict. And, it excludes ‘booby traps’ and ‘other devices’ (such as Improvised Explosive Devices (IED)) as defined by CCW Amended Protocol II and dealt with already by that instrument.³ However, it includes all other ‘unexploded ordnance’, as well as abandoned ordnance.

EXPLOSIVE REMNANTS OF WAR: THE PREDICTABLE REMAINS OF MODERN ARMED CONFLICT⁴

The end of an armed conflict does not bring an end to the suffering of civilians living in areas where fighting has taken place. There is often a wide range of dangers that threaten their lives and well-being. A significant threat is the presence of unexploded ordnance. Modern armed conflict leave behind enormous amounts of ordnance that has failed to detonate as intended or has been left as part of stock-piles near battlefield positions. Ordnance commonly found includes artillery shells, mortars, grenades, cluster bomb and other submunitions, air dropped

³ Two other areas identified by the GICHD that could fit within a broad definition of ERW were not explicitly included in the CCW’s mandate either:

- Explosive ordnance disposal (EOD) clearance of armoured fighting vehicles (AFV), which can involve clearance components such as surrounding mines and UXO, depleted uranium fragments, explosive reactive armour, smoke dischargers, unstable stocks of internally stowed ammunition and access denial devices and booby-traps; and
- Small arms and light weapons (SALW) which in themselves contain a very low risk of causing casualties, but whose interaction with the inhabitants of an area immediately post conflict are dangerous because of their desirability for revenge, criminal activity etc.

For further information see GICHD/ICRC, op cit, pp. 25-27.

⁴ This section draws heavily on the Report of the International Committee of the Red Cross to the First Meeting of the Preparatory Committee for the 2001 Review Conference of the United Nations Convention on Certain Conventional Weapons, UN Doc. CCW/CONF.II/PC.1/WP.1, 11 December 2000.

bombs and other similar explosives. These ‘explosive remnants of war’ continue to kill and injure long after the fighting has ended.⁵

Explosive remnants of war are not a new phenomenon. National authorities and civilian populations in many regions of the world have had to deal with these weapons throughout the Twentieth Century. It is estimated that 84 countries are affected by explosive remnants of war.⁶ Even today, countries across Europe continue to find and clear explosive munitions from the first and second world wars and civilians still fall victim to these weapons.⁷

While detailed information on the scale of the problem is scarce, information from national authorities responsible for the clearance of explosive remnants of war provides some insight. In Poland, for example, its Corps of Engineers have cleared enormous amounts of explosive remnants of war left from World War II. Between 1944 and 2000 they removed and neutralized over 96 million pieces of ordnance. While a large part of these were cleared between 1994 and 1956, nearly 700,000 were cleared in 2000.⁸ The human costs are even more staggering. It is reported that 4,094 civilians have been killed and another 8,774 injured by these weapons.⁹ Laos is another example of a country currently dealing with long-existing explosive remnants of war problem. As a result of the conflicts in Southern Asia during the 1960s and 1970s, it remains severely affected by explosive remnants of war. Information provided by the National UXO Programme in Laos shows that, since the end of the conflict in 1975, close to 12,000 people have been killed or injured by these weapons.¹⁰ Particularly dangerous are cluster bomb submunitions, which were dropped in large numbers during the war. It is estimated that between

⁵ The Phrase ‘explosive remnants of war’ has not been defined but it is generally understood to be synonymous with ‘unexpected ordnance’. Under the International Mine Action Standards (IMAS) published by the United Nations Mine Service, unexploded ordnance is ‘explosive ordnance that has been primed, fused, armed or otherwise prepared for use or used. It may have been fired, dropped, launched or projected yet remains unexploded either through malfunction or design or any other reason’ IMAS, 4.10, 1st Edn. 2001, at p.26

⁶ Landmine Action, ‘Explosive Remnants of War: The Global Problem’, Paper presented to the Group of Governmental Experts to the Convention on Certain Conventional Weapons, December 2002.

⁷ ‘Greek experts defuse bomb from second world war at future olympic site’ <http://ca.news.yahoo.com/021129/6/qjiry.html>; ‘British wartime bomb is defused as city holds its breadth’, http://archives.tcm.ie/irishexaminer/1999/09/23fhead_268.html; ‘Teen killed by World War I Bomb’, http://www.news.com.au/common/story_page/0.4057.5395877%255E401.00html

⁸ Engineering Forces of the Polish Armed Forces, ‘Polish Experiences with Explosive Remnants of War’, Document distributed to the Group of Governmental Experts to the Convention on Certain Conventional Weapons, December 2002.

⁹ B.A. Molaski and J. Pajak, ‘Explosive Remnants of World War II in Poland’, in A.H. Westing, ed., Explosive Remnants of War: Mitigating the Environmental Effects (London, Taylor & Francis 1985) p. 26. Statistics based on information of the Polish Ministry of National Defence, Warsaw, Army Combat Engineer annual reports (unpublished archives)

¹⁰ Lao National Unexploded Ordnance Programme, Annual Report 2000 (Vietnam, UXO Lao 2001) p.4

nine and 27 million of these submunitions failed to explode as intended.¹¹ Unexploded mortars, projectiles, rockets, large bombs and landmines are also present throughout the country.¹²

In addition to the human casualties, explosive remnants of war produce a range of indirect, but nevertheless destructive, consequences. Like anti-personnel mines, these weapons can have a serious socio-economic impact. Their presence prevents people from returning to their homes and hampers the reconstruction of vital infrastructure after the conflict, such as housing, schools, water systems and roads.¹³ This, in turn, can hinder development and the resumption of commercial activities. Particularly damaging is the effect on agriculture. Farmland or pastures contaminated by explosive remnants of war may be abandoned or cannot be farmed to capacity. Families and communities dependent on agriculture can be heavily affected.¹⁴ Yet, in spite of the threat, economic necessity and other factors will often drive people to work their land or collect ordnance for scrap metal content. Such activities can increase the exposure to risk and result in even more casualties. Laos, Kosovo and World War II Europe are just a few examples of countries and regions dealing with the problem of explosive remnants of war. Their experience is by no means unique. Similar scenarios are found in other parts of the world.

THE REASONS WHY ORDNANCE FAILS TO EXPLODE AS INTENDED

The reasons why explosive remnants of war occur are varied. The presence of such weapons after the end of hostilities is generally due to their failure to detonate as intended once they are fired, dropped or otherwise delivered. Such failures are often the result of the design, production and use of the weapon as well as environmental factors that affect its operation.

Experts have identified the following as some of the reasons why explosive ordnance fails to function as intended:¹⁵

¹¹ Presentation of P. Bean, Programme Director Lao National UXO Programme, published in Expert Meeting on Explosive Remnants of War: Summary Report (Geneva, International Committee of the Red Cross, 2000) p.8

¹² UXO Lao <http://www.uxolao.org/clearance.html> See R. Mc Grath, Cluster Bombs: The military effectiveness and impact on civilians of cluster munitions (London, UK Working Group on Landmines 2002) p.30

¹³ Landmine Action, Explosive Remnants of War: Unexploded ordnance and post-conflict communities (London, Landmine Action 2002) pp.23-25

¹⁴ Ibid., pp.33-35

¹⁵ Information collated from Geneva International Centre for Humanitarian Demining (GICHD), Explosive Remnants of War: A threat Analysis (Geneva, Geneva International Centre for Humanitarian Demining 2002) p.7; C. King, Explosive Remnants of War: A study on submunitions and other unexploded ordnance (Geneva, International Committee of the Red Cross 2000) pp. 38-39; Mc Grath op. cit. n.11, at pp.25-27

Poor Design –poorly designed fusing and poor inflight stabilization of air delivered ordnance will often cause it to fail.

Production –related deficiencies –such as poor manufacturing and the use of substandard materials and components in production.

Improper storage and handling –the storage of ordnance in unfavorable conditions (i.e., too hot or too cold) can accelerate deterioration and adversely affect the functioning of mechanisms and explosive composition. Rough handling in storage and transport can also damage munitions and effect reliability.

Improper use of munitions- common errors include the improper setting of fuses and incorrect launch profiles.¹⁶

Unfavorable target environment-as many types of ordnance are designed to explode on impact, soft terrain, dense vegetation and heavy precipitation can prevent detonation.

Interaction with other exploding ordnance –ordnance exploding nearby can cause damage to other munitions and prevent explosion.

It is difficult to accurately establish the extent to which ordnance may fail during a conflict. One indication of its reliability comes from data gathered during testing and in service trials prior to conflict. Militaries appear to accept a five percent failure rate during testing.¹⁷ Conditions on the battlefield, however, often differ greatly from those found at testing sites and in testing procedures. As a result, failure rates during operations are known to be significantly higher¹⁸. In recent years, the data most widely available concerning the amount of explosive remnants of war found after a conflict has been that related to submunitions released from air-dropped cluster bombs or land-based delivery systems.

THE PARTICULAR CONCERNS ABOUT SUBMUNITIONS

Submunitions have been cited as a particular problem within the broader category of explosive

¹⁶ Examples of incorrect launch profiles would be the dropping of air-delivered weapons at too low an altitude, thus preventing them from arming properly.

¹⁷ King, op. cit n.16, at p. 9 indicates that US Army acceptance tests for munitions identify a failure rate of 2.5 percent -5 percent as ‘acceptable’ for new ammunition. See also McGrath op. cit n. 11, at p.27

¹⁸ Mc Grath, op. cit n. 11, at pp.27-28

remnants of war.¹⁹ In recent years, their consequences have been widely reported in the media. Like other explosive ordnance, a certain percentage of submunitions will not explode as they are meant to. Yet submunitions are a special concern because of the very large numbers often used in conflict. During the war in Indochina, for example, perhaps as many as 90 million submunitions were dropped in Laos.²⁰ As stated above, it is believed that nine to 27 million failed to explode as intended; a 10-30 percent rate of failure.²¹ Significant numbers of submunitions also failed to explode as a result of their use in Kosovo. NATO acknowledges dropping 1,392 cluster bombs, containing some 290,000 submunitions. While initial projections placed the number of unexploded submunitions at around 30,000 recent estimates has adjusted that figure to approximately 20,000.²² Predictably, submunitions have caused large numbers of civilian casualties in situations where they have been used and pose serious challenges for organizations involved in the clearance of explosive remnants of war.²³

An additional concern is the risks posed by submunitions during conflict when they are used against targets in or near populated areas. By design, submunitions are area weapons. Once released from the cluster bomb, rocket or other means of delivery, hundreds of them are disposed over an area of up to several thousand square meters. In light of the wide area of dispersal, there is a substantial risk that significant numbers of civilians could be caught in a submunition attack, particularly in situations where civilians and military targets are in close quarter. A report by Human Rights Watch has suggested that in such circumstances civilian casualties may be more extensive than those associated with traditional explosive ordnance.²⁴

¹⁹ Submunitions are often mislabeled as ‘cluster bombs’ in media reports. A Submunition is any munition that, to perform its task, separates from a parent munition. This includes, for example, mines or munitions that form part of a cluster bomb, artillery shell or missile payload. A ‘cluster bomb’ is a bomb containing or dispensing submunitions. Cluster bombs are the dispensers, generally dropped from aircraft, which scatter submunitions over the area where an intended target is located. It is the submunitions that are the main focus of concern. GICHD, op. cit. n. 16, at p.23

²⁰ McGrath, op. cit. n. 11, at p.31

²¹ Lao National Unexploded Ordnance Programme, UXO Lao: Work Plan 2002 (Vientiane, UXO Lao 2002) p.7; ICRC, op. cit. n. 10, at p.8

²² ICBL, op. cit. n.13, at p.824

²³ Submunitions have been cited as one of the principle causes of civilian casualties in conflicts in which they have been used. In Laos they are believed to have been responsible for a large part of the nearly 12,000 UXO related casualties. In Kosovo, submunitions were, along with anti-personnel mines, the leading cause of unexploded ordnance-related death and injury. Together, these weapons accounted for 73 percent (approximately 36 percent each) of the 280 incidents individually recorded by the ICRC between 1 June 1999 and 31 May 2000. A variety of other ordnance accounted for the remaining 27 percent of the casualties. ICRC, op. cit. n. 12, at p.9

²⁴ Human Rights Watch, *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan* (Human Rights Watch, New York 2002) at p.10

In addition, most submunitions cannot be precisely once they are released and fall to the ground unguided. As such, their descent is often affected by environmental factors (wind, air density, etc.). Their small size, braking mechanisms (parachutes and ribbons) and other features mean that submunitions are prone to be affected by weather and land far from the intended target.

Based on these concerns, a number of non-governmental organizations called for a complete prohibition on the use of these weapons or a moratorium on use until the international regulations were strengthened.²⁵ At the Review Conference of State Parties to the Convention on Certain Conventional Weapons held in December 2001, several states, the ICRC and observer organizations participating in the conference called for a prohibition on the use of submunitions against any military target located in concentration of civilians.²⁶

INTERNATIONAL HUMANITARIAN LAW

International Humanitarian law contains a number of principles and rules which seek to limit the impact of weapons on civilians. Perhaps foremost is the principle that civilians enjoy a general protection against the dangers arising from military operations.²⁷ More detailed rules, such as the rules on distinction and the prohibition on indiscriminate attacks, give effect to this protection.²⁸

Specific rules to limit the consequences of certain forms of explosive remnants of war first found expression in the CCWC.²⁹ Protocol II annexed to the convention requires that the parties to the conflict record the location of all mines, minefields and booby traps and take all necessary and appropriate measures to protect civilians from their effects once active hostilities have ended.³⁰ In 1996, states parties adopted amendments to strengthen the Protocol in response to

²⁵ These include Human Rights Watch, ICRC, Landmine Action and the Mennonite Central Committee. On 13 February 2003, the European Parliament adopted a resolution on the harmful effects of unexploded ordnance and depleted uranium ammunition which called on EU member states to implement a moratorium on the further use of these weapons pending the conclusions of a comprehensive study of the requirements of international humanitarian law.

²⁶ See infra section 6.

²⁷ Art. 51 (1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (Hereinafter 1977 Additional Protocol I)

²⁸ Art. 51(2) and 51(4) 1977 Additional Protocol I

²⁹ The full name is the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (hereinafter CCWC). The Convention was adopted on 10 October 1980 and entered into force on 2 December 1983. As of 1 February 2003, there were 90 States Parties to the Convention.

³⁰ Art. 7 Protocols on Prohibition or Restrictions on the Use of Mines, Booby Traps and other Devices

the widespread problems caused by anti-personnel mines.³¹ In addition to further restricting the use of these weapons during conflict and improving the requirement to take all necessary and appropriate measures to protect civilians from their effects, the Protocol mandates the clearance of mines, booby traps and other devices without delay after the cessation of active hostilities.³² The protocol also establishes that parties to a conflict bear some responsibility for the mines, booby traps and other device employed by them.³³

The Convention on the Prohibition of Anti-personnel Mines also requires that specific measures be taken to reduce the impact of anti-personnel mines.³⁴ Under its provisions, all areas containing anti-personnel mines must be cleared of these weapons. Until clearance is completed, the area must be marked, fenced and monitored for the effective exclusion of civilians.³⁵

With the adoption of the amendments to Protocol II and the development of the Convention on the Prohibition of Anti-personnel Mines, the international community has begun to address the problems caused by explosive remnants of war through international humanitarian law. These instruments are important precedents, and their provisions contain important elements to address the problem. Until now, however, most of the developments in the law have focused on anti-personnel mines. Other explosive remnants of war, however, are not covered by the rules of amended Protocol II or the Convention on the Prohibition of Anti-personnel Mines. As has been indicated above, a wide range of other explosive remnants of war are nevertheless a significant part of the problem and cause large numbers of civilian casualties.

It has been suggested that international humanitarian law rules governing the use of weapons during conflict may prohibit or restrict the deployment of weapons likely to become explosive remnants of war. This discussion has generally focused on submunitions in light of the civilian casualties often associated with the large number that fail to explode as intended. One central issue is whether the use of submunitions, and presumably other explosive ordnance that may

³¹ Protocol on Prohibitions or Restrictions on the use of Mines, Booby Traps and other devices as amended on 3 May 1996 (hereinafter amended Protocol II). The Protocol entered into force on 3 December 1997 and as of 1 February 2003 there were 68 states parties.

³² Art. 10 Amended Protocols II under Article 2(5), ‘other devices’ are defined as ‘manually emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually by remote control or automatically after a lapse of time’.

³³ Art 3(2) Amended Protocol II

³⁴ The full name is the convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on their Destruction. It was adopted on 18 September 1997 and entered into force on 1 March 1999. As of 1 February 2003 there were 131 states parties.

³⁵ *Ibid*, Art. 5

similarly fail to explode, would violate the prohibition on indiscriminate attacks found in Article 51 of the 1977 Additional Protocol I to the Geneva Conventions.

While there has not been extensive legal analysis published on this point, several commentators have suggested that the high numbers of submunitions that fail to explode, and the foreseeable civilian casualties likely to follow, may offend Article 51(4) (C). This is because submunitions will have effects that are indiscriminate and would violate key provisions of the Additional Protocol, such as the rule that a distinction between civilians and combatants must be made at all times.³⁶ Another argument is that the use of these weapons may offend the rule of proportionality under Article 51(5)(b).³⁷ the argument here is that the foreseeable civilian casualties caused by submunitions are likely to be excessive in relation to the military advantages gained.³⁸ This argument assumes that the long-term effects of explosive ordnance must be taken into account when making the determinations required by the principle of proportionality.

A more limited view of the role of the foreseeable effects of unexploded submunitions, and explosive remnants of war more generally, under Article 51(5)(b) has been taken by professor Christopher Greenwood. In a paper submitted to the Group of Governmental Experts established by the State Parties to the CCWC, he suggested that the effects of explosive remnants of war do have a role to play in the determination of proportionality.³⁹ In his view, however, only the immediate risks, that is, the threats posed by explosive ordnance during an attack and the threat of explosive remnants of war in the hours following an attack, can be a factor. As the determination of proportionality must be based upon the information reasonably available at the time of an attack, he finds that the long-term risks of explosive remnants of war are too remote to be capable of assessment at that time.

³⁶ Under Art. 51(4) (C) of Additional Protocol I, indiscriminate attack are ‘those which employ a method or means of combat that effects of which cannot be limited as required by this Protocol’. Human Rights Watch, op. cit. n. 25, at p. 14; V. Wiebe, ‘Footprints of Death: Cluster bombs as indiscriminate weapons under international humanitarian law’, 22 Michigan JIL(2000) pp. 113-119.

³⁷ *Ibid*

³⁸ Art. 51(5)(b) of 1977 Additional Protocol I considers an attack as indiscriminate if it ‘may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.

³⁹ C. Greenwood, ‘Legal issues Regarding Explosive Remnants of War’ Working paper submitted to the Group of Governmental Experts of the State parties to the convention on Prohibitions or restrictions on the Use of Certain Conventional Weapons which may be deemed to the excessively injurious or to have indiscriminate effects, UN Doc. CCW/GGE/I/W/P/ 10,22 May 2002.

A NEW PROTOCOL ON EXPLOSIVE REMNANTS OF WAR

Negotiations on post-conflict remedial measures to reduce the risks of explosive remnants of war were held in Geneva from 10-14 March, 16-27 June and 17-24 November 2003. Basing their discussions on a series of papers prepared by the Coordinator of the negotiations, Ambassador Chris Sanders of the Netherlands, the Group made considerable progress. Agreement was reached in a number of important areas. The Protocol on Explosive Remnants of War was subsequently adopted by the Group and formally approved at a meeting of State Parties on 28 November 2003. It is the fifth protocol annexed to the CCWC.

The protocol is an important addition to international humanitarian law. It is the first multilateral international agreement to broadly deal with the problems caused by unexploded and abandoned ordnance. The Protocol's principle obligations require each party to an armed conflict to:

- 1) Clear ERW in territory it controls after the end of active hostilities.
- 2) Provide technical, material and financial assistance to facilitate the removal of unexploded or abandoned ordnance in areas it does not control resulting from its operations. This assistance can be provided directly to the party in control of the territory or through a third party, such as the UN, NGO's or other organizations
- 3) Record information on the explosive ordnance employed by its armed forces and to share that information with organizations engaged in ERW clearance or conducting programs to warn civilians of the dangers of these devices.
- 4) Take all feasible precautions in its territory to protect civilians from the risks and effects of ERW. Such measures may include the marking, fencing and monitoring of ERW affected areas and the provision of warnings and risk education to civilians.

Although these obligations are only required 'where feasible' or 'where practicable', they nevertheless provide an outline of the measures required to address an ERW problem and a framework to support the activities of organizations conducting ERW clearance and risk education programs. The provisions on the recording and sharing of information will facilitate a rapid response to an ERW problem.

These rules also highlight that it is no longer acceptable for the parties to an armed conflict to do nothing when ERW are present. Regardless of whether the ERW are on their territory or resulting from munitions they used, the parties will have an obligation to take specific action to reduce the danger. This is a further strengthening of international humanitarian law, which

parallels developments to remedy the problems caused by landmines. International humanitarian law now has a comprehensive approach towards addressing such problems.

CONCLUSION

The problem of explosive remnants of war (ERW) has become more and more alarming in recent years. The rapidly expanding use of mass-produced cluster munitions, quality-control problems in the highly competitive international arms market and budgetary pressures in the defence industry have increased the likelihood of malfunctioning munitions posing a threat to the civilian population and military personnel long after a conflict has ended. In the 1991 Gulf war and the 2000 Kosovo Conflict, ERW killed and injured more military personnel after the end of the conflict than during the conflict. ERW not only endanger the life of the civilian population, but also impede post-conflict reconstruction efforts, including the repatriation of displaced civilians.

In my concluding remarks I would like to mention that there are several key issues/challenges that should be addressed to ensure that ERW victims and their families receive adequate and appropriate assistance. These include:

- Creating a comprehensive mechanism to record ERW casualties to ensure that resources are used most effectively where the needs are greatest;
- Facilitating access to appropriate healthcare and rehabilitation facilities;
- Affordability of appropriate healthcare and rehabilitation;
- Improving and upgrading facilities for physical rehabilitation;
- Increasing availability of psycho-social support, including peer support groups and opportunities to participate in sport and recreation;
- Creating opportunities for employment and income generation, including special attention for the spouses of ERW victims;
- Capacity-building and ongoing training of health care practitioners, including doctors, trauma surgeons, nurses, physiotherapists and orthopedic technicians;
- Capacity-building of government officials in the relevant ministries;
- Gender balance among healthcare and rehabilitation practitioners to ensure that the specific needs of men, women, boys and girls are met;
- Raising awareness on the rights and needs of persons with disabilities;
- Inclusion of ERW victims in policy-making decisions;

- Establishing an effective social welfare system and legislation to protect the rights of all persons with disabilities, including ERW victims; and
- Mainstreaming ERW victim assistance projects into development programmes as part of poverty reduction strategies but with special attention to the particular needs of ERW survivors and other persons with disabilities.

THE TRANSNATIONAL REFUGEES: ISSUES AND CHALLENGES

N. Edwin*

Abstract

In present era, the refugees issue is a big problem throughout the world. They have been forced to leave their own State to seek asylum to another state for their peace of life. These people are denied at home essential liberties of life. So they leave from there and seeking asylum in another State to live and work in peace. The National and International agencies were designed to several documents to protect and improve the legal status of the refugees. Although the present mass displacement due to civil wars, gross violation of human right, low economic conditions, military occupations, have also been emphasized the urgent need to govern the problem of refugees. The crisis of refugees is International problem because of the involvement of two or more Nations in the sense that they run away from one state to another state .So this kind of problem cannot be resolved without International co-operation. The refugees are human beings, as a result they possess and enjoy some basic and inalienable rights and also they carry human dignity wherever they are and whatever the situations. As further protection, the host state have not returned aliens to their home State where there freedom or lives would be feared by generalized internal violence or gross violation of human rights. Hence the main object and aim of this paper specially analyses the existing legal system how to protect and preserve the legal status of refugees through the International instrument.

Keywords: Displacement, Asylum, International Agencies, Human Rights, Socio-Economic status

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INTRODUCTION

Today, Refugees issues are one of the main challenges of the World. That has been unchangeable and undeniable human rights. “We want to ensure that refugee rights are upheld everywhere and they have access to shelter, food and healthcare. This must continue. But we also want to create opportunities for education and livelihoods. This is what refugees want desperately.”¹ On 4 December 2000, the United Nation General Assembly decided that, from 2001, 20 June would be celebrated as World Refugee Day. In this resolution, the General Assembly noted that 2001 marked the 50th anniversary of the 1951 Convention relating to the status of refugees. In the course of our 67-year history, the massive challenges of forced displacement have led us to move beyond our primary role in protecting and assisting refugees and helping to solve refugee problems, into a broader engagement with people forcibly displaced outside their own countries. This crisis of refugees is International problem because of the involvement of two or more Nations in the sense that they run away from one state to another state .So this kind of problem cannot be resolved without International co-operation. The refugees are human beings, as a result they possess and enjoy some basic and inalienable rights and also they carry human dignity wherever they are and whatever the situations.

NATURE AND SCOPE OF REFUGEE LAWS

A refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.²

As per the article 1(A) (2) of the International Refugee Convention 1951, “the term ‘refugee’ shall apply to any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. This meaning

¹ Filippo Grandi, United Nations High Commissioner for Refugees, February 2016.

² For details see USA for UNCHR the UN Refugee Agency, Available at: <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> (Accessed on January 29, 2018)

is give full boost to the Refugees. The main goal of this convention to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement, then another problem the grant of asylum may place unduly heavy burdens on certain countries, the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation, moreover the all States, resolving the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.

INTERNATIONAL INSTRUMENTS RELATING TO THE STATUS OF REFUGEES

International Refugee Law, International Human Rights Law and International Humanitarian Law are considered complementary bodies of law, which possess a common objective to protection of lives, freedoms and dignity of human beings. International Refugee Law, in turn, arose during the twentieth century and aims to develop and implement mechanisms for the protection of forcibly displaced persons owing to well-founded fear of persecution³.

The refugee must be “outside” his or her country of origin, and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense. However, it is not necessary to have fled by reason of fear of persecution, or even actually to have been persecuted. The fear of persecution looks to the future, and can also emerge during an individual’s absence from their home country, for example, as a result of intervening political change.⁴ At the same time, fear of persecution and lack of protection are themselves interrelated elements. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-founded of any fear. However, there is no necessary linkage between persecution and Government authority.

UNITED NATION HIGH COMMISSIONER FOR REFUGEES

The Convention requires that the persecution feared be for reasons of “race, religion, nationality, membership of a particular social group, or political opinion”. This language, which recalls the language of non-discrimination in the Universal Declaration of Human Rights and subsequent

³ The Universal Declaration of Human Rights, General Assembly resolution, 217 (III) of 10 Dec, 1948, Art.14

⁴ For details see Audio visual Library of International Law, Available at: <http://legal.un.org/avl/ha/prsr/prsr.html> (Accessed on January 31,2018)

human rights instruments, gives an insight into the characteristics of individuals and groups which are considered relevant to refugee protection. Persecution for the stated reasons implies a violation of human rights of particular gravity; it may be the result of cumulative events or systemic mistreatment, but equally it could comprise a single act of torture. Persecution under the Convention is thus a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental human rights. This instrument is give additional powers to the contracting state to implement Refugees legal regimes⁵.

REFUGEE STATUS DETERMINATION

A vital part of being recognized as a refugee is Refugee Status Determination. This is the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional or national law. States have the primary responsibility for determining the status of asylum-seekers, but UNHCR may do so where states are unable or unwilling⁶. In recent years, due to changes in volumes and patterns of forced displacement, the refugee agency has been required to conduct RSD in more countries than before and for a greater number of people.⁷

In 2015, UNHCR registered a record high of 203,200 individual asylum applications compared to 125,500 a year earlier, and this confirmed it as the second largest RSD body in the world. Four-fifths of individual asylum applications received by UNHCR were registered in only eight RSD operations. But because of the dramatic increase in applications in 2015, and despite improvements in its capacity, UNHCR's Refugee Status Determination backlog rose to a historical high of 252,800 applications pending decision. Such backlogs can in some situations have significant implications for the protection and assistance of people of concern. UNHCR continues to explore and implement measures to enhance the fairness, quality and efficiency of its RSD operations, and to identify alternatives to individual RSD for select groups of asylum-seekers. In parallel, UNHCR works with governments and other partners to build and strengthen the capacity of government RSD procedures. Despite such efforts, in 2017, UNHCR remained

⁵ Dr. H.O. Agarwal, International Law & Human Rights, Central Law Publication, 845 (16th Edn. 2009)

⁶ UN Convention Relating to the Status of Refugees, Adopted 28 July 1951, Art.1 (A)(2).

⁷ For details see UNHCR-Refugee Status Determination, Available at: <http://www.unhcr.org/refugee-status-determination.html> (Accessed on 2 February, 2018)

responsible for implementing the RSD procedure in more than 50 countries. In another 20 countries, UNHCR conducted RSD jointly with, or parallel to the government.

REFUGEES LEGAL STATUS IN INDIA

India has signed neither the 1951 United Nations Refugee Convention nor its 1967 Protocol and has not enacted any domestic legislation in relating to Refugees⁸. However, India continues to host a large population of refugees. In the main, they are treated kindly. The refugee crisis arising from the Syrian conflict is only the latest reminder of the fact that India remains one of the few liberal democracies not to have signed, supported or ratified the international convention that governs how nations should treat distressed people who are forced to leave their homes under harrowing conditions.

Refugee crises may be caused by any number of reasons but the most common are war, domestic conflicts, natural disasters (famine), environmental displacement, human trafficking and this one will turn up at all our doorsteps soon climate change. Clearly, India has stood up and been counted when it comes to accepting refugees. It has one of the biggest refugee populations in South Asia. But it is precisely the large numbers that enjoin upon India the duty to enshrine in law how these refugees will be treated. In the absence of any domestic law or regional South Asian framework, India has desisted from taking its rightful regional leadership role in this increasingly critical matter.

Why won't India sign the Convention or the Protocol? The United Nations High Commissioner for Refugees won't officially say why, but the reasons are chiefly security-related. The line of argument is that borders in South Asia are extremely porous and any conflict can result in a mass movement of people. As a result, a strain on local infrastructure and resources in countries that is poorly equipped to deal with sudden spikes in population.

India is home to diverse groups of refugees, ranging from Buddhist Chakmas from the Chittagong Hill Tracts of Bangladesh, to Bhutanese from Nepal, Muslim Rohingyas from Myanmar and small populations from Somalia, Sudan and other sub Saharan African countries. According to the UNHCR, there were 204,600 refugees, asylum seekers and "others of concern" in India in 2011. They were made up of 13,200 people from Afghanistan, 16,300 from Myanmar, 2,100 from various other countries and the two older populations of around 100,000

⁸ Dr. H. O. Agarwal, International Law & Human Rights, Central Law Publication, p. 850 (16th Edn. 2009)

Tibetans and 73,000 Sri Lankan Tamils. The UNHCR financially assisted 31,600 of them. At the time, UNHCR played a stellar role in helping devise India's administrative response to the 9.8 million Hindu refugees who poured in from Bangladesh. It also helped to mobilize huge international finances to pay for Indian bills. And when it came to repatriation of the refugees, then again the UNHCR helped roll out an orderly return journey. But India was upset that the UNHCR began talking about the need for repatriation of refugees something India had emphasized from the very start of the Bangladesh crisis only in June 1971, just around the time Pakistani atrocities were causing millions more to flee to India. New Delhi felt talk of repatriation at that particular point in time gave the wrong signals to the world. Additionally, India was far from pleased by a visit to Bangladesh (then East Pakistan) by the UNHCR high commissioner, Sadruddin Agha Khan, on the invitation of Pakistani president Yahya Khan. This was seen as an endorsement of Pakistani propaganda that its eastern territory was normal. However, back in the late 1980s, and then following the assassination of Prime Minister Rajiv Gandhi in 1991, a large number of Sri Lankan Tamils were repatriated from camps in Tamil Nadu. There has never been any evidence this was forced repatriation, but some academics and refugee workers think it was a blot on India's record. Where problems have arisen in the absence of any policy framework on the treatment of refugees is when vulnerable refugees try to find work or when they are exploited by unscrupulous businessmen because they remain un integrated. In 1985, working as a reporter in India, I helped unearth a settlement of bonded laborers' in Tamil Nadu made up entirely of Sri Lankan Tamil refugees. They had been put to work in a vast rubber plantation located in a forest, around half-a-day's walk from the nearest bus stop in the scenic Western Ghats.⁹

In 2015, amid the biggest refugee crisis in the West since World War II, none of the reasons listed above justifies India's continuing refusal to sign the Refugee Convention. Prime Minister Narendra Modi is fond of quoting ancient Sanskrit sayings one of them is *Atithi Devo Bhava*.¹⁰ Guests are like God.

STATUS OF ROHINGYA REFUGEES IN INDIA

The government told Parliament on 9 August 2017 that more than 14,000 Rohingyas, registered

⁹ Why India won't sign Refugee treaty, Available at:
<http://www.livemint.com/Opinion/bePZQScFIq1wEWv9Tqt4QO/Why-India-wont-sign-Refugee-Treaty.html>
 (Accessed on Feb 3,2018)

¹⁰ English: 'The guest is equivalent to God' is taken from an ancient Hindu scripture which became part of the 'code of conduct' for Hindu society.

with the UNHCR, are at present staying in India. However, activists estimate that around 40,000 Rohingyas are living in India illegally, mostly in Delhi-NCR, Jammu and Hyderabad and parts of Haryana, Uttar Pradesh and Rajasthan. Union minister of state for home Kiren Rijiju had earlier said the Rohingyas were illegal immigrants and stand to be deported.

The Supreme Court will hear a plea challenging the government's decision to deport illegal Rohingya Muslim immigrants back to Myanmar. Their future might well take another decisive turn Monday. The forced migration of Rohingyas from Myanmar has become a new refugee crisis for the international community. In the last two weeks, nearly 3,00,000 of them have fled to Bangladesh from the new surge of violence in Myanmar's Rakhine state. Thousands of desperate civilians are trapped on the border for weeks without food and medicines as Bangladesh is unable to cope with this massive surge. Some of the Rohingyas are even opting to take dangerous boat journey across the Bay of Bengal to Southeast Asian countries. While the world is at loss how to respond to this large refugee flow, Narendra Modi government is planning to deport back a few thousands of Rohingyas, who are living in India and seeking asylum.

The Rohingyas are not only deprived of citizenship and right to vote, the Myanmar government has also imposed on them restrictions on whom and how to marry, number of children they can have and types of jobs they are allowed to. The institutionalized discrimination has led to widespread poverty among this minority population in a poor country like Myanmar. Moreover, this stateless group gets subjected to majoritarian wrath from time to time.

NEW CHALLENGES TO PROTECT THE REFUGEES IN INDIA

In 2012, the Buddhist nationalists had violently attacked and killed nearly 300 Rohingyas after three Rohingya men had allegedly raped and killed a Buddhist woman. Since then attacks have been regular and large number of Rohingyas have forced to leave their home and migrate, which Human Rights Watch has described as 'ethnic cleansing'. This state aided majoritarian oppression has also led some Rohingyas to take up arms. The present refugee crisis has come up after massive retaliation by Myanmar army by brutally killing, torturing, and raping hundreds of civilian Rohingyas when a militant Rohingya organization, Arakan Rohingya Salvation Army launched a few attacks on police and an army post in August 2017.

While the UN Refugee Agency, UNHCR says only 20,000 Rohingyas live in India, the Indian government puts this figure to 40,000. India is not a signatory to the 1951 Refugee Convention, but even under

the customary international law it is obligated to protect these refugees and not to send them back to a place where they face danger. However, India has been selective in taking refugees in the recent era. It is only allowing Tamil refugees from Sri Lanka, Hindus from Bangladesh and Pakistan and Tibetan Buddhists from China.¹¹

According to UNHCR latest report of 2014, India accommodates 2, 03,383 population of concerned refugees including 4,718 pending cases of asylum seekers. Besides this, there is a vast number of people those have been already settled and provided accommodation in India due to various conflicts in neighboring countries. This variety of migrants spreads across as many as 40 odd origins which indeed is an example of India's tradition to welcome all in her heart and allow them to live happily.

India is a country that was born in the midst of one of the largest refugees flows in history and today, still sees mixed migration flows. Refugees, economic migrants and others cross borders every day in thousands. It is a new challenge for Government and UNHCR is to ensure that the rights of refugees and asylum seekers remain protected. Working closely with the Government of India, UNHCR strives to do this effectively.

India has a long tradition of receiving refugees that goes back centuries. In more recent times, the two largest groups of refugees in India, around 200, 000 Sri Lankan Tamils and Tibetans, are directly being assisted by the Government of India. UNHCR's urban operation is based in New Delhi with a smaller presence in Chennai that helps Sri Lankan refugees in Tamil Nadu voluntarily repatriate back to Sri Lanka. In the absence of a national legal framework for refugees, UNHCR conducts refugee status determination under its mandate for asylum seekers who approach the Office. The two largest groups of refugees recognized by UNHCR are Afghans and Myanmar nationals, but people from countries as diverse as Somalia and Iraq have also sought help from the Office. Many refugees can now apply for long term visas issued by the Government of India, based on UNHCR documentation. This includes the right to work in the private sector and access to education facilities in India. The Union Government and UNHCR also works with several NGOs are taking an essential role in the protection of refugees and asylum seekers.

¹¹ For details see Ashok Swain, *Rohingya Refugees: India Should Not Pass the Buck To Muslim World By Adopting A False and Blinkered Narrative*, (Sep.10 2017, 10.30 am), Available at: <https://www.outlookindia.com/website/story/rohingya-refugees-india-should-not-pass-the-buck-to-muslim-world-by-adopting-a-f/301498>. (Accessed on January 29,2018)

Recently, the Union Government said it had evidence of terror links between some India-based Rohingya and extremist groups such as Islamic State. Met with condemnation abroad and embraced by right-wing nationalists at home, the deportation plan is currently being debated in India's Supreme Court. The world's biggest democracy has to "simultaneously contend with challenges in its relations with its two extremely significant and sensitive neighbors, Bangladesh and Myanmar, as well as with international human rights watchdogs," "India should show leadership by protecting the beleaguered community and calling on the Burmese government to end the repression and atrocities causing these people to leave,"¹² noting that New Delhi had a long record of helping vulnerable populations from neighboring countries, including Sri Lankans, Afghans and Tibetans. According to the office of the United Nations High Commissioner for Refugees, India had a refugee population of just over 2 laks by end of 2015. India has given shelter to Tibetans, Chakmas from Bangladesh, and refugees from Afghanistan, Sri Lanka¹³.

ROLE OF INDIAN JUDICIARY TO PROTECT THE REFUGEES

In *Louis De Raedt v. Union of India*¹⁴ the Supreme Court held that Art. 21 of the Constitution protect life and personal liberty to all persons, and therefore, aliens in India territory shall not be deprived of those rights except according to established by law. However, right to life and liberty does not include the right to settle and reside in this Country.

In *National Human Rights Commission v. State of Arunachal Pradesh*¹⁵ the Supreme Court observed that the state is bound to protect the life and liberty of every human being, be he a citizen of India or otherwise, it cannot permit anybody or groups of persons to threaten Refugees to leave the state. A direction was given by the Supreme Court to the State to ensure the safety of 65,000 Chakma refugees in the light of "Quit India" threat notices served upon them by the All Arunachal Pradesh Students Union.

The principle of "non- refoulement", which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as "non-

¹² Meenakshi Ganguly, South Asia director at Human Rights Watch,

¹³ For details see Kanishka Singh ,The refugee crisis gripping Asia is make-or-break for Indian leadership(Sep.14 2017,5.30pm), Available at: <https://www.cnbc.com/2017/09/20/myanmars-refugee-crisis-is-a-test-for-india-and-narendra-modi.html> (Accessed on January 29,2018)

¹⁴ (1991) 3 SCC 554

¹⁵ AIR 1994 SC 1234

refoulement" affects or protects the life and liberty of a human being, irrespective of his nationality. This protection is available to a refugee but it must not be at the expense of national security¹⁶. On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the Constitutional provisions. They also have a right to "Life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.

The Rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of non- citizen also, those Rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. Interest of the Nation and security of the State is supreme. Since 1948 when the Universal Declaration was adopted till this day, there have been many changes - political, social and economic while terrorism has disturbed the global scenario. Primacy of the interest of Nation and the security of State will have to be read into the Universal Declaration as also in every Article dealing with Fundamental Rights, including Article 21 of the Indian Constitution¹⁷. According to the tenor of the language used in Article 21 of the Constitution of India it will be available not only to citizen of this country but also to a person who may not be a citizen of the country.

The Madras High Court held that Article 21 of the Constitution of India and the International Convention or Treaty, as also the doctrine of Legitimate Expectations. The fact that India is not a signatory to the UN Refugee Convention of 1951 and 1967 is stated to make no difference. The prayer made is that Tamil refugees should be entitled to driving licensees, bank accounts, movable articles, educational rights and immovable properties¹⁸. The financial assistance scheme is also extended to the pregnant Sri Lankan Tamil refugee women and they are given Rs.1, 000 per month for six months. Integrated Child Development Scheme is also extended to the Sri Lankan Refugees. Free medical facilities are also given to the camp refugees. It has also been stated in the affidavit that public transport is arranged, opening of bank accounts for self-help group members is permitted, etc. Qua immovable property, the stand is the same as of the Union of India. It is submitted that the Government of India and the Government of Tamil Nadu,

¹⁶ Dongh Lian Kham v. Union Of India WP(CRL) No.1884/2015

¹⁷ Chairman, Railway Board v. Mrs. Chandrima Das (2000) 2 SCC 465.

¹⁸ Gnanaprakasam v. The Government of Tamil Nadu, decided on 8 October, 2014

take care of the Sri Lankan refugee Tamil people who were fled from Sri Lanka and seek asylum in our land. No Tamil Refugee is left deserted in the camps without food and shelter. Government endeavors to provide the refugees, a peaceful life in this country.

The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence¹⁹.

Under international law, refugees are individuals who are outside their country of nationality or habitual residence have a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group or political opinion and are unable or unwilling to avail themselves of the protection of that country, or to return there, for fear of persecution. A refugee is a person who seeks protection, assistance and safeguard of his/her rights. Refugee populations consist of people who are terrified and are away from familiar surroundings. There can be instances of exploitation at the hands of enforcement officials, citizens of the host country, and even United Nations peacekeepers. Instances of human rights violations, child labor, mental and physical trauma or torture, violence-related trauma, and sexual exploitation, especially of children, are not entirely unknown. It is high time that this Bill is see the light of the day and becomes a living document by being enacted. By doing so, lives of thousands of refugees in our country can be affected for their betterment, in as much as valuable rights can be conferred. Our commitment to adherence to international law can be fulfilled if we enact this law. The principle of non-refoulement is a cornerstone of basic human rights. By handing over a person to a nation where he fears persecution, would make us nothing short of abettors in that persecution.

SUSTAINABLE DEVELOPMENT GOALS OF UNHCR

Facilitating long term solutions for refugees is part of UNHCR's global mandate. Solutions include the voluntary repatriation of refugees who wish to return to their country in safety and dignity, or where possible, the local integration of refugees who wish to remain in India and

¹⁹ *Harminder Kaur v. Union of India*, decided on 25 September, 2012

qualify for Indian citizenship under national laws. In addition, UNHCR submits the cases of a few refugees with particularly compelling protection needs for resettlement to a third country²⁰.

Voluntary repatriation may be one solution for refugees who have made the brave decision to return home. Together with the country of origin and international community, UNHCR strives to facilitate their choice through ‘go-and-see’ visits, education, legal aid, and family reunification. Our efforts have helped hundreds of thousands of people to return home to countries like Angola and Somalia. For those who cannot return, either because of continued conflict, wars or persecution, resettlement in another country is one alternative. To aid this process, we provide cultural orientation, language and vocational training, as well as access to education and employment. However, of the 14.4 million refugees of concern to UNHCR around the world, less than one per cent is submitted for resettlement. Another alternative for those who are unable to return home is integration within the host community. This is often a complex process which places considerable demands on both the individual and the receiving society. However, it also has benefits, allowing refugees to contribute socially and economically. Over the past decade, 1.1 million refugees around the world have become citizens in their country of asylum.

The 2030 Agenda and its place emphasis on including marginalized groups in all development plans, “to leave no-one behind”, and provides UNHCR and others with a wider range of opportunities when seeking both durable solutions. UNHCR will engage regularly with refugees, including through focus group discussions, to gain their perspective on possible solutions, such as through voluntary repatriation and re-integration, and to plan accordingly. In 2018, UNHCR will improve its resettlement process to ensure it is efficient, robust and meets today’s protection needs and global resettlement opportunities. The Office will work with States and other partners to test ways of improving the resettlement process as part of its resettlement innovation project. The organization anticipates that the implementation of a new policy on preventing and responding to fraud committed by people of concern will help to improve the integrity of processes, including resettlement.²¹

²⁰ For details see Kigge Hvid, *Addressing the Challenge of Refugees and Migrants*, Available at: <http://designtoimprovelife.dk/new-goal-refugees-and-migrants/html> (Accessed on Jan 27, 2017)

²¹ For details see UNHCR, GlobalAppeal2018-2019, Building Better Futures, 176, Available at: <http://www.unhcr.org/publications/fundraising/5a0c02ab7/unhcr-global-appeal-2018-2019-building-better-futures.html> (Accessed on Jan. 27, 2017)

Advocating for returnees and areas of return to be included in national development planning processes remains a priority for UNHCR in 2018. The organization will work closely with a range of actors, including national authorities, to support returnees participation in conflict resolution mechanisms, transitional justice initiatives, land restitution programmes and their inclusion in any programmes involving education, healthcare, livelihoods, civil registration and infrastructure. Despite a high number of returns in 2016, UNHCR is concerned that returns will not be sustainable given the conditions in some return locations. The Office will therefore establish or maintain mechanisms to observe the challenges returnees may be facing, sharing relevant information with others considering repatriation. By engaging with them from the outset, UNHCR safeguards the element of free choice in refugees' decision-making process, leading to more sustainable re-integration.

The goal is that people of concern secure a durable solution that grants them the same opportunities and rights as those they live among. This process will ideally culminate in the acquisition of nationality. Throughout 2018, UNHCR will continue building relationships with governments, civil society and other concerned parties in order to improve national services and systems and will continue to advocating greater access and inclusion of people of concern in these systems and services. UNHCR will strengthen its collaboration, particularly with UNDP, to better support host country authorities as their populations grow and they need to manage more complex service provision systems. It will help promoting the inclusion of people of concern to UNHCR in national development plans through improved linkages with national and UN development mechanisms using the commitment of the Sustainable Development Goals.

CONCLUSION

The National and International legal regimes are an important role to protecting the refugees. But India doesn't have any law dealing with refugees. An utterly humanitarian matter like the 'refugees' has come to be influenced by considerations of national security or relations between countries. In the past five years, three separate private member bills seeking amendments to the Citizenship law have been introduced in the Parliament but none of them have seen the light of the day. Moreover, the Protection of refugees is a big phenomenon throughout the World. The contracting states are provided many facilities to the Refugees in associated with the UNHCR and also solved many problems regarding their residence, food, and other fundamental requirements. Even though our Constitution guaranteed certain rights under Article 14, 20, 21 and 22 have to protect the Refugees. Further, International Refugee Convention and its protocol

have laid down a number of rights to refugees but they are not sufficient to them. Therefore the International agency should compel to the members state to implement refugee regimes. And it is also desirable that National legislation is enacted to protect human rights of Refugees.

EMERGENCE & DEVELOPMENT OF COMPETITION LAW

Diksha Dwivedi & Aarshi Chatterjee

Abstract

The history of modern competition law is generally traced to the United States where the Sherman Act was enacted in 1890 out of the growing concern about the formation of trusts by American companies wherein owners of stocks held in competing companies transferred those stocks to trusts which then controlled the activities of those competitors with the view to coordinate their activities in regard to pricing, output or other areas and thereby to dominate the market. There has been a growing concern, both at an international and domestic level, more particularly among developing nations, about the need to develop a comprehensive legal framework to deal with the anti-competitive practices in order to promote an orderly market growth. Discussions on the “Interaction between Trade and Competition Policy” have been catalysed recently. The year 1991 has an important landmark of economic history where India faced severe economic crisis triggered by serious Balance of Payments situation. This crisis bought some fundamental changes in the economic policy and stabilise economic reform. The New Economic Policy 1991 which brought Liberalisation, Privatisation and Globalisation widened the space of economic market and reduced the role of government sector in business. The Government of India constituted a High Level Committee on competition law and policy held by Mr. SVS Raghavan (popularly known as Raghavan Committee) and advised for new and effective competition law and policy to cope up with international economic developments and to recommend a legislative framework.

Keywords: Competition law, economic development, legislative framework

INTRODUCTION

In economics, competition is the rivalry among sellers trying to achieve such goals as increasing profits, market share, and sales volume by varying the elements of the marketing mix: price, product, distribution and promotion. Merriam-Webster defines competition in business as “the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms.”¹ In his 1776 *The Wealth of Nations*, Adam Smith described it as the exercise of allocating productive resources to their most highly valued uses and encouraging efficiency, an explanation that quickly found support among liberal economists opposing the monopolistic practices of mercantilism, the dominant economic philosophy of the time.² Competition, according to the theory, causes commercial firms to develop new products, services and technologies, which would give consumers greater selection and better products. The greater selection typically causes lower price for the products, compared to prices in a monopoly (single dominant firm in market) or oligopoly (a few dominating firms in economy) market. Competition may also lead to wasted (duplicated) effort and an increase in costs and prices in some circumstances.

Competition does not necessarily have to be between companies. For example, business writers sometimes refer to “internal competition”. This is competition within companies. The idea was first introduced by Alfred Sloan at General Motors in the 1920s. Sloan deliberately created areas of overlaps between divisions of the company so they would be competing with each other. For example, the Chevy division would compete with the Pontiac division for some market segments. Also in 1931, Proctor and Gamble initiated a deliberate system of internal brand versus brand rivalry. Each brand manager was given responsibility for the success or failure of the brand and was compensated accordingly.

It should be noted that business and economic competition in most countries is often limited or restricted. Competition is often subject to legal restrictions. This is where competition law has its inception. For example, competition may be legally prohibited as in the case with a government monopoly or a government-granted monopoly. Tariffs or other protectionist measures may also be instituted by the government in order to prevent or reduce competition. Depending on the respective economic policy, the pure competition is to a greater or lesser

1 Available at: <https://www.merriam-webster.com>

2 Lanny Ebenstein, 2015; Chicagonomics: The Evolution of Chicago Free Market Economics, Macmillan, pp. 13-17,107

extent regulated by competition law or policy. Competition between countries is quite subtle to detect, but it is quite evident in the World Economy, where the countries like US, Japan, China, the European Union and the 4 Asian Tigers (Hong Kong, Singapore, South Korea, and Taiwan) each try to outdo each other in the quest for economic supremacy in the global market, harkening to the concept of Kiasuism.³

The history of modern competition law is generally traced to the United States where the Sherman Act was enacted in 1890 out of the growing concern about the formation of trusts by American companies wherein owners of stocks held in competing companies transferred those stocks to trusts which then controlled the activities of those competitors with the view to coordinate their activities in regard to pricing, output or other areas and thereby to dominate the market. Such trusts were formed, for example, in oil, sugar, whisky and metals. The Sherman Act, 1890 prohibited contracts, combinations or conspiracies in restraint of trade, and also prohibited monopolization or attempts or conspiracies to monopolize.⁴ Thus, the Sherman Act 1890 was the first codified law which recognised common law principles of competition law. With the progress of time, the competition law has attained new dimensions with the enactment of subsequent laws, like the Clayton Act 1914, the Federal Trade Commission Act, 1914 and the Robinson-Patman Act 1936. The United Kingdom on the other hand introduced the considerably less stringent Restrictive Practices Act 1956 but later on enacted more elaborate legislations like the Competition Act, 1998 and the Enterprise Act 2002 were introduced.⁵

AN OVERVIEW OF THE COMPETITION POLICY OF VARIOUS COUNTRIES: EU AND US COMPETITION POLICIES: SIMILAR OBJECTIVES, DIFFERENT APPROACHES

Both the US and EU have well developed competition policies that aim to prevent and penalize anti-competitive behaviour. Although they share similar aims, there are a number of significant differences. The EU has an administrative system for antitrust enforcement, in which companies are penalized with fines. In contrast, US antitrust enforcement is based on criminal law, with financial and custodial penalties against individuals. Private enforcement plays a greater role in the US system, where victims of anti-competitive behaviour are awarded damages treble the amount of the actual damage suffered.

³ Vernacular Chinese phrase whose English equivalent would be ‘Over-Competitiveness’

⁴ Vinod Dhall, Overview: Key concepts in Competition Law in Competition Law Today: Concepts, issues and the law in practice (Vinod Dhall, Edn. 2007)

⁵ *Competition Commission of India v. Steel Authority of India* (2010) 10 SCC 744

Modern competition policy in the US started with the adoption of the Sherman Antitrust Act by the US Congress in 1890. It prohibits contracts and business alliances that restrain interstate commerce and trade. In 1911, the US Supreme Court applied the law to break up the Standard Oil Trust into independent companies. Merger control was introduced by the Clayton Act in 1914. This law also prohibits practices such as price discrimination. In the same year the federal Trade Commission was established to enforce the competition rules. In Europe, competition policy gained momentum after World War II with the break-up of trusts that played a role in wartime production. The Paris Treaty establishing the European Coal and Steel Community (1952) contained provisions regarding cartels, concentrations (mergers) and abuse of dominant position by firms. Competition policy among the member states also formed around this time, for example with the foundation of the German Federal Cartel Office in 1958. The Treaty of Rome laid the foundations of European Community competition policy. It aims at ensuring that competition in the internal market is not obstructed by the anti-competitive behavior of companies or national authorities. The Treaty contains provisions for anti-competitive agreements (Article 85) and abuse of dominant position (Article 86) as well as state aid (Article 90). The European Commission was given the authority to enforce competition rules.

Merger control in the EU is more centralized than the US. In order to ensure fair competition in the internal market, EU competition policy has strict rules on state aid, whereas US legislations has no provisions in this area. EC and US competition authorities cooperate on cases which affect both generations. The question of state aid was raised in the EU-US negotiations for a Transatlantic Trade and Investment Partnership. While the European Parliament is only consulted on matters of competition policy, the US Congress plays a more active role. High-profile merger cases in the US are subject to scrutiny from Congress, including Congressional hearings.⁶

COMPETITION LAWS IN ASEAN: A SOUTH-EAST ASIAN PERSPECTIVE

The ASEAN or the Association of South East Asian countries is an economic group which consist of 10 member nations – Brunel, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam. Most of these countries are developing nations with constantly evolving markets. The last decade has witnessed the introduction of competition law

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Available

at:

[http://www.europarl.europa.eu/RegData/bibliothek/briefing/2014/140779/LDM_BRI\(2014\)140779_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliothek/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf)

legislation in several nations of the ASEAN. The introduction of a nationwide competition policy and law by 2015 was a prerequisite for the member states in the fulfilment of the goals of the 2007 ASEAN Economic Blueprint, to incubate a culture of fair business competition for enhanced regional economic performance.⁷

There has been a growing concern, both at an international and domestic level, more particularly among developing nations, about the need to develop a comprehensive legal framework to deal with the anti-competitive practices in order to promote an orderly market growth. Discussions on the “Interaction between Trade and Competition Policy” have been catalyzed recently. This happened due to the setting up of a Working Group on Trade and Competition under the aegis of the World Trade Organisation following the Singapore Ministerial and the possibility of negotiations following the Doha Ministerial Declaration. This can also be felt in the South Asian region, which is probably of greater intensity than many parts of the world.⁸

The ASEAN countries are diverse in terms of their economic development as well as their institutional and commercial policy environments. Nevertheless most of the ASEAN economies have liberalized and deregulated their economies in order for their economies to be attractive to foreign investment. Despite the variations in the economic, political and legal climate ASEAN nations have welcomed the introduction of competition laws in an attempt to promote cross border cooperation and openness in their economies.

Another factor responsible for the introduction of competition law in ASEAN include the bilateral and regional trade agreements signed that are consistent with the WTO policies which attempt to limit anti-competitive practices. Competition law is also viewed as a means to reduce administrative and regulatory barriers and introduce regulatory predictability, which increase competitiveness in economies and promote economic growth.

Some of the acts the Asian Member States have agreed to be:

1. Endeavour to introduce a competition policy in all ASEAN member countries by 2015;
2. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;
3. Encourage capacity building programs/activities for ASEAN Member countries in

⁷ Available at: <http://www.lexology.com/library/detail.aspx?g=6c532563-816b-4507-ade6-bfbd13a3f4ab>

⁸ Available at: <http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/2000PaperonSAsiaCL.pdf>

developing national competition policy;

4. Develop a regional guideline on competition policy by 2010,based on country experiences best international practices with the view of creating fair competition environment.⁹

Only five member countries have generic competition law legislation:

- Malaysia: The Competition Act 2010 (Malaysian Competition Act) was passed by the Malaysian Parliament in April 2010 and came into force in January 2012. It prohibits anti-competitive activities and abuses of dominance. It however does not govern mergers and acquisitions.
- Thailand: The Trade Competition Act 1999 (Thai Competition Act) is the principle legislation that governs anti-competitive agreement, abuse of dominance, mergers and other unfair trade practices in Thailand. This Act co-exists with several other sectoral laws that regulate competition in certain industries.
- Vietnam: The Law of Competition (Vietnam Competition Act) is the main legislation that governs competition law. The two main regulators in charge are the Vietnam Competition Administration Department (VCAD) which falls under the Ministry of Industry and Trade and the Vietnam Competition Council (VCC).
- Indonesia: Law No. 5 of 1999 on the Prohibition of Monopoly and Unfair Business Competition Practices (Indonesian Competition Act) was introduced in March 1999 and came into force in 2000. The national competition agency known as *Komisi Pengawas Persaingan Usaha (KPPU)* regulates competition law in Indonesia.
- Singapore: The Singapore Competition Act regulates competition law in Singapore. The Competition Commission of Singapore (CSS) is the main regulator in Singapore and has released 13 sets of guidelines which provide useful explanations as to how the CSS interprets, administers and enforces the Singapore Competition Act.¹⁰

The natural progression for the ASEAN countries is to create a cohesive ASEAN market and work towards transformation into a single market that is highly competitive and fully integrated

⁹ Available at: <https://www.lexology.com/library/detail.aspx?g=6c532563-816b-4507-ade6-bfbd13a3f4ab>

¹⁰ Ibid

with the global community.¹¹ Even if there is no unanimity among the nations on the issue of a multilateral competition regime, especially at the WTO, the issue of competition policy is getting increasing importance in all regional trade arrangements, not only in the EU but also other regional arrangements like CARICOM, MERCOSUR, COMESA, SADC and even ASEAN. A similar initiative however was not taken up by SAARC maybe because the association is not making any progress at present.¹²

EMERGENCE OF COMPETITION LAW IN INDIA

The architects of Independent India were deeply influenced by socialism and the same is reflected in the manner in which India followed the Soviet style industrialization and required extensive state intervention along with import substitution.¹³

In recent years India's competitiveness has improved particularly in goods market efficiency, innovation, business etc. World Bank defines "competition" as a situation in the market in which the firms and sellers independently strive for buyer's patronage in order to achieve a particular business objective for example profit, shares or market shares.¹⁴ Competition law is also known as antitrust or trade practices law in some countries is rules and regulations on how a company should operate and compete in the market without harming consumers. The purpose of this law is to promote fair competition and safeguard to consumers.

The year 1991 has an important landmark of economic history where India faced severe economic crisis triggered by serious Balance of Payments situation. This crisis bought some fundamental changes in the economic policy and stabilise economic reform. The New Economic Policy 1991 which brought Liberalisation, Privatisation and Globalisation widened the space of economic market and reduced the role of government sector in business. The existing Monopolies and Restrictive Trade Practices Act, 1969 became obsolete. In India, the competition law was enacted in 1969 i.e. Monopolies and Restrictive Trade Practices Act, 1969. The MRTP Bill was introduced in the parliament in the year 1967. The MRTP ACT, 1967 came into force, with effect from, 1 June, 1970. The Monopolies and Restrictive Trade Practices Act, 1969 was enacted to provide for the control of monopolies and to prohibit monopolistic and restrictive trade practices.

¹¹ *Ibid*

¹² Available at: <http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/2000PaperonSAsiaCL.pdf>

¹³ Abir Roy & Jayant Kumar, *Competition Law in India*; Eastern Law House. 1st Edn. p33

¹⁴ World Bank, The World Bank annual report 1999, Washington DC; World Bank

The Government of India constituted a High Level Committee on competition law and policy held by Mr. SVS Raghavan (popularly known as Raghavan Committee) and advised for new and effective competition law and policy to cope up with international economic developments and to recommend a legislative framework. The Raghavan Committee pointed out the loopholes of MRTP Act, 1969. The MRTP Act would only be beneficial for curbing monopolies and it would not be effective for the fair competition in the market. The Raghavan Committee considered amending existing MRTP Act and enact a new competition law for international economic developments.

The Committee¹⁵ submitted its report to the central government on the 22nd May, 2000, where it discussed in detail and make recommendations on both policy and law of competitions. Major Recommendations of the committee are as follows¹⁶:

1. Completion law should cover all consumers who purchase goods or services, regardless of the purpose for which the purchase is made. State monopolies, Government procurement and foreign companies should be subject to the competition laws.
2. The government enterprises as well as departments should be brought under the preview of competition law, the only exception being sovereign function of the government like defence.
3. The committee noted that the focus for most competition laws today in the world is on three areas:
 - a) Agreement among Enterprises;
 - b) Abuse of Dominance; and
 - c) Mergers, or more generally, combination among enterprises.

The committee found the MRTP Act to be falling short of addressing competition and anti-competitive practices. It stated that the MRTP Act, in comparison with the competition laws of many countries, is inadequate for fostering competition in the market and trade and for reducing, if not eliminating, anti- competitive practice in the country's domestic and international trade. The committee found it expedient to have a new competition law which will focus on preventing anti-competitive practices that adversely affect welfare.¹⁷ The Central Government introduced the competition Amendment Bill, 2001 to achieve the following:

¹⁵ Report of the High Level Committee on Competition Law and Policy, 2000

¹⁶ Krishna Keshav & Divya Verma, *Competition and Investment Laws in India*; Singhal Publication, p. 7-8

¹⁷ *Ibid* at 9-10

1. To ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets.
2. Curbing negative aspect of competition through the medium of Competition Commission in India.
3. To provide for investigation by Director- General for the Commission
4. To confer power upon the CCI to levy penalty.
5. To create a fund to be called the competition Fund.

OBJECTIVES OF THE COMPETITION ACT, 2002

The basic objective of the act is to provide a law relating to competition among enterprises that will ensure that the process of competition is left free without stronger trading enterprises manipulating the market to their advantages and following from that, to the disadvantage of consumers.¹⁸

The objects of the act are stated in the preamble which reads as follows: “to provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried by other participants in markets, in India, and for matters connected therewith and incidental thereto”

CONCLUSION

Competition law has grown at a phenomenal rate in recent year in response to the enormous changes in political thinking and economic behaviour that have taken place around the world.¹⁹ Competition law is now applies to many economic activities that once were regarded as natural monopolies or the preserve of the state: telecommunications, energy, transport, broadcasting, postal services, sports, media etc.²⁰ Thus, competition law touches every sector of the economy.

¹⁸ T. Ramappa, *Competition Law in India: Policy, issues, and Development*, 3rd Edn. p.1

¹⁹ Richard Whish & David Bailey, *Competition Law*, Oxford University Press, 7th Edn, p.1

²⁰ *Ibid*

RIGHT TO PRIVACY AND JUDICIAL TRENDS IN INDIA

Dr. Nabamita Paul Ray*

Abstract

The Supreme Court has recently held in Justice Puttaswamy v. Union of India, delivered on 24th August, 2017 that right to privacy is a fundamental right under the Constitution of India, but like all other fundamental rights it is not absolute. This ruling apart from setting a new benchmark for Indian democracy and clearing all ambiguity on privacy has set the stage for the introduction of a new privacy law by the Government. Delivering the unanimous verdict of the nine judge bench on the penultimate day of his tenure, Chief Justice J.S. Kehar said: “Privacy is intrinsic to the right to life and personal liberty under Article 21 of the Constitution and an inherent part of fundamental freedom under part III of the Constitution”. Any encroachment to privacy will have to subscribe to the “touchstone of permissible restrictions” the bench said. Consequently, invasion of privacy will have to be justified against the standard of a fair, just and reasonable procedure. The paper will try to analyse the following questions: 1) What was the position of right to privacy before this landmark judgment? 2) What are the specific facets of privacy that have been referred to by the court? 3) What is the impact of declaring privacy as a fundamental right? 4) What are the reasonable restrictions on the fundamental right to privacy that have been recognised by the court? The conclusion will deal with the impact Puttaswamy will have upon legal and constitutional landscape for years to come and how it will impact the interplay between privacy and free speech.

Keywords: Privacy, Fundamental Rights, Constitution, Article 21, Supreme Court

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INTRODUCTION

The quest for privacy is inherent in human behaviour. It is a natural need of man to establish individual boundaries and to restrict the entry of others into that area. There are few moments in the life of everyone where he does not want interference of others and desires to be alone¹. The autonomy is an essential element for the development of one's personality. These areas may, in relation to a person, be the family, marriage, sex or other matters which require closed chamber treatment. In such areas an individual requires to be at liberty to do as he likes. An intrusion on privacy threatens liberty. For the happiness of a man it becomes necessary to protect intrusion in one's secret, which is basic to a free society and more particularly in a democratic world².

There are no express words in the Constitution of India about the right to privacy and it is not to be found in any other statutes, though interest similar to that were protected both under the civil law, i.e., under the Indian Penal Code or the Indian Evidence Act, and under the Indian Constitution. Different names were given to it at different times, viz., privileged communications, withholding of documents, domestic affairs, matrimonial rights, etc³.

In 2012, Justice K.S. Puttaswamy (retired) filed a petition in the Supreme Court of India challenging the constitutionality of Aadhar on the grounds that it violates the right to privacy. During the hearings, the Central government opposed the classification of privacy as a fundamental right. The government's opposition to the right relied on two earlier decisions- *M.P. Sharma v. Satish Chandra* in 1954, and *Kharak Singh v. State of Uttar Pradesh* in 1962- which had held that right to privacy was not a fundamental right.

In *M.P. Sharma*, the bench held that the drafters of the Constitution did not intend to subject the power of search and seizure to a fundamental right to privacy. They argued that the Indian Constitution does not include any language similar to the Fourth Amendment of the US Constitution, and therefore, questioned the existence of a protected right to privacy. The Supreme Court made clear that M.P.Sharma did not decide other questions, such as "whether a constitutional right to privacy is protected by other provisions contained in the fundamental rights including among them, the right to life and personal liberty under Article 21."

¹ Justice Polok Basu : "Law Relating To Protection of Human Rights" Modern Law Publications , First Edition 2002 p503

² Wolf V. Colorado, (1948) 338 US 25, refereed in AIR 1991 Journal Section 113 at p. 113

³ See AIR 1991 Journal Section 113 at p 116

In Kharak Singh, the decision invalidated a Police Regulation that provided for nightly domiciliary visits, calling them an “unauthorised into a person’s home and a violation of ordered liberty”. However, it also upheld other clauses of the Regulation on the ground that right to privacy was not guaranteed under the Constitution, and hence Article 21 of the Indian Constitution (the right to life and personal liberty) had no application. Justice Subbarao’s dissenting opinion clarified that, although the right to privacy was not expressly recognised as a fundamental right, it as an essential ingredient of personal liberty under Article 21.

The Supreme Court has recently held in *Justice Puttaswamy v. Union of India*, delivered on 24th August, 2017 that right to privacy is a fundamental right under the Constitution of India, but like all other fundamental rights it is not absolute. This ruling apart from setting a new benchmark for Indian democracy and clearing all ambiguity on privacy has set the stage for the introduction of a new privacy law by the Government.

Delivering the unanimous verdict of the nine judge bench on the penultimate day of his tenure, Chief justice J.S. Kehar said: “*Privacy is intrinsic to the right to life and personal liberty under Article 21 of the Constitution and an inherent part of fundamental freedom under part III of the Constitution*”.

Any encroachment to privacy will have to subscribe to the “touchstone of permissible restrictions” the bench said. Consequently, invasion of privacy will have to be justified against the standard of a fair, just and reasonable procedure.

Reading out the common conclusion, arrived at by the nine – judge bench, Chief justice of India J.S. Khehar said the court had overruled its own eight – judge bench and six-judge bench judgements of M.P.Sharma and Kharak Singh cases delivered in 1954 and 1961, respectively , that privacy is not protected under the Constitution.

POSITION OF RIGHT TO PRIVACY BEFORE PUTTASWAMY

Right to privacy is not enumerated as a fundamental right in our Constitution but has been culled out of the provisions of Article 21 of the Constitution and other provisions of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy.

For the first time , as early as 1963, in Kharak Singh⁴, a question was raised whether the right to

⁴ *Kharak Singh v. State of U.P.* AIR 1963 SC 1295

privacy could be implied from the existing fundamental rights such as Article 19(1)(d), 19(1)(e) and 21. The majority of the judges participating in the decision said of the right to privacy that our Constitution does not in terms confer like constitutional guarantee⁵. On the other hand, the minority opinion (Subba Rao, J) was in favour of inferring the right to privacy from the expression ‘personal liberty’ in Article 21⁶.

In *Govind v. State of Madhya Pradesh*⁷, the Supreme Court undertook a more elaborate appraisal of the right to privacy. In Govind, the Court considered the constitutional validity of a resolution which provided for surveillance by way of several measures indicated in the said regulation. The Court upheld the validity of the regulation by ruling that Article 21 was not violated as the regulation in question was “procedure established by law” in terms of Article 21. The right to privacy is not however, absolute; reasonable restrictions can be placed thereon in public interest under Article 19(5).

Again in *R. Rajgopal v. State of Tamil Nadu*⁸, the Supreme Court has asserted that in recent times the right to privacy has acquired constitutional status; it is “implicit in the right to life and liberty guaranteed to the citizens” by Article 21. It is “a right to be let alone”. A citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.

In *Peoples Union for Civil Liberties v. Union of India*⁹, the Supreme Court observed:

“We have, therefore, no hesitation in holding that right to privacy is a part of the right to “life” and “personal liberty” enshrined under Article 21 of the Constitution. Once the facts in the given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed ‘except according to procedure established law.’”

In *State of Maharashtra v. Madhukar Narayan Mardikar*¹⁰, the Supreme Court protected the right to privacy of a prostitute. The Court held that even a woman of easy virtue is entitled to her privacy and no one can invade her privacy as and when he likes.

POSITION OF RIGHT TO PRIVACY AFTER PUTTASWAMY

⁵ *Ibid* at 1302

⁶ *Ibid* at 1306

⁷ AIR 1975 SC 1378

⁸ AIR 1995 SC 264

⁹ AIR 1991, SC 207, 211

¹⁰ AIR 1999 SC 495

The privacy bench unanimously held that the right to privacy is a fundamental right protected under the Constitution. A Consolidated order holds that:

- The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.
- The earlier judgements of the Supreme Court in Kharak Singh and M.P.Sharma to the extent they held otherwise are overruled.

The judgements in total run into 547 pages. The judgement trace the history of Indian Constitution, development of jurisprudence with respect to fundamental rights through various Supreme Court cases; examine scholastic articles, foreign jurisprudence and case laws and course of international treaties.

The judgement has not created a new right to privacy as a fundamental right but has clarified the status of right to privacy as a fundamental right under the Constitution. It traced its recognition in the right to life and personal liberty under Article 21 of the Constitution of India but found that it was rooted in some other rights, such as Article 19.

The judgements clarify that a constitutional right to privacy can be defined in both negative and positive terms, i. e.

- To protect the individual from unwarranted intrusion into their private life, including sexuality, religion, political affiliation etc. (negative freedom)
- To oblige the State to adopt suitable measures to protect an individual's privacy, by removing obstacles to it.(positive freedom)

The Supreme Court's ruling is rooted, *inter alia*, in the following reasoning:

1. Privacy as an inalienable right : Privacy is a natural right, inherent to a human being. It is thus a pre-Constitutional right which vests in humans by virtue of the fact that are human. The right has been preserved and recognised by the Constitution, not created by it. Privacy is not bestowed upon an individual by the State, nor capable of being taken away by it.
2. Relationship with Dignity: It was argued by the State that the recognition of privacy

would require a Constitutional Amendment, and could not be ‘interpreted’ into the Constitution. The judgement has recognised that privacy was intrinsic to other liberties guaranteed as fundamental rights under the Constitution. Privacy is an element of human dignity by and ensure that a human being can live a life of dignity by, among other things, exercising a right to make essential choices, to express oneself, dissent etc,. Dignity was consequently, an intrinsic part of the right to life and liberty enshrined under Article 21 of the Constitution, as life was not limited to mere existence, but was made worth living because of the attendant freedom of dignity. It was only when life could be lived with dignity that liberty could be of any substance.

3. Commitment to International Obligations: The recognition of privacy as fundamental constitutional value was a part of India’s commitment to safeguard human rights under international law under the International Covenant on Civil and Political Rights [ICCPR] which found reference in domestic law under the Protection of Human Rights Act 1993. The ICCPR recognises a right to privacy. The judgement has held that constitutional provisions had to be read and interpreted in a manner such that they were in conformity with international commitments made by India.

SPECIFIC FACETS OF PRIVACY THAT HAVE BEEN REFERRED TO BY THE COURT

The submission of the government was that the Supreme Court cannot recognize a juristic concept that is so vague and uncertain that it fails to withstand constitutional scrutiny. The judgement rejected this argument. In the simplest form, the judgement recognizes ‘the right to be let alone’. Justice Nariman categorises the right having three aspects: personal privacy, informational privacy and the privacy of choice.

The Supreme Court has traced the history of recognition of various facets of privacy by calling various scholastic writings, Indian and foreign judgements and provides description of privacy rights. However, the lead judgement concludes,

“The Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given to concerns which were not present seven decades ago and

rapid growth of technology may render obsolescent many notions of the present. Hence, the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or intrinsic features.”

Justice Bobde, has stated that the scope and ambit of constitutional protection of privacy can only be revealed on a case by case basis.

In this context the lead judgement relies on an article that represents privacy through a diagrammatic structure that identifies nine types of privacy¹¹:

- Bodily privacy: Privacy of the physical body against violations and restraints of bodily movements
- Special Privacy: Privacy of a space, such as family life and intimate relations
- Communicational Privacy: Right against access to communication, or control over it
- Proprietary Privacy: Right to use property as a means to shield facts or information
- Intellectual Privacy: Privacy of thought, mind, opinions and beliefs
- Decisional Privacy: The ability to make intimate decisions
- Associational Privacy: Privacy of choice of who to interact with
- Behavioural Privacy: The ability to control the extent of access even while conducting publicly visible activities
- Informational Privacy: An interest in preventing information about the self from being dissemination and controlling the extent of access to the information.

However, it is important to examine each judgement to have an illustrative list of rights enumerated by the Supreme Court so that while framing any law or taking any action, the government has enough guidance on whether such law or action is likely to violate the right to privacy.

IMPACT OF PUTTASWAMY

¹¹ Paragraph 141, Part L of the Lead Judgement

The operative part of the order of the Court in Puttaswamy lays down the unanimous verdict of the nine judges, which is unquestionably the law of the land now. This operative part of the order lays down four simple propositions of law:

Proposition 1: The decision in M.P. Sharma which holds that the right to privacy is not protected by the Constitution stands overruled.

The Supreme Court in M.P. Sharma (8judges) and in Kharak Singh (6judges) has held that there was no fundamental right to privacy under the Indian Constitution, and all subsequent judgements to the contrary had been decided by smaller benches. In Puttaswamy four out of the six opinions examined the issue in detail and entirely accepted the petitioner's arguments. On M.P. Sharma, Justice Nariman (para 7), Bobde (para5), and Chandrachurd (para26) all agreed that M.P. Sharma only held that the American Fourth Amendment, which was limited to protecting the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures “ was not and never have been , exhaustive of the concept of privacy, even in the United States. Consequently, even if M.P. Sharma was correct in find an analogue to the Fourth Amendment in Article 20(3) of the Indian Constitution, that was no warrant for holding that there was no fundamental right to privacy- a much broader and more compendious concept. In the words of Justice Bobde, “ M.P. Sharma is unconvincing not only because it arrived at its conclusion without enquiry into whether a privacy right could exist in our Constitution n an independent footing or not, but because it wrongly took the United States Fourth Amendment- which in itself is no more than a limited protection against unlawful surveillance- to be a comprehensive constitutional guarantee of privacy in that jurisdiction.”

Proposition 2: The decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the Constitution stands over-ruled.

In Kharak Singh, the Supreme Court, had considered the constitutionality of various forms of police surveillance upon an “history- sheet”. It had held reporting requirements, travel restrictions, shadowing and so on (by arguing, in part, that there was no fundamental right to privacy) but had struck down nightly domiciliary visits as a violation of “ordered liberty”.

The Court’s rejection of Kharak Singh was based on two prongs. First, t held that the judgement was internally contradictory, because the Court could not have struck down domiciliary visits on any other ground but that of privacy; indeed, in doing so, the Court had itself quoted American judgements affirming a right to privacy. As Justice Nariman noted, “If the passage in the

judgement dealing with domiciliary visits at night and striking it down is contrasted with the later passage upholding the other clauses of regulation 236 extracted above, it becomes clear that it cannot be said with any degree of clarity that the majority judgement contradicts itself on this vital aspect, it would be correct to say that it cannot be given much value as a binding precedent.”(paragraph 42)

Justices Bobde (para6), Chelameshwar (para9) and Chandrachud (para27) agreed that there existed a “logical inconsistency” with Kharak Singh in that the Court could not have struck down one facet of police surveillance without invoking the right to privacy. Furthermore, the Justices also agreed that in any event, Kharak Singh’s finding that there was no right to privacy under Article 21 of The Constitution was based on a narrow reading of the phrase “personal liberty” which in turn was a relic of the judgement in A.K. Gopalan. In A.K. Gopalan, the Supreme Court had adopted what Justice Chandrachud called the “silos” approach to part III of the Constitution holding that each separate clause dealt with a separate right, and each clause was hermetically sealed from all other clauses. On this reading, “personal liberty” under Article 21 contained only what remained after subtracting the various freedoms guaranteed under Article 19(1). The “silos” approach has however, been comprehensively rejected by the Supreme Court in R.C. Cooper, and, in fact in Maneka Gandhi, the majority judgement in Kharak Singh had been held to be overruled in view of this development . Consequently, as Justice Chandrachud observed,

“The jurisprudential foundation which held the field sixty three years ago on M.P. Sharma, and fifty five years ago in Kharak Singh, has given way now to what is a settled position in constitutional law. Firstly, the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Article 19 does not denude Article 21 of its expansive ambit. Secondly, the validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action but on the basis of its effect on the guarantees of freedom. Thirdly, the requirement of Article 14 that state action must not be arbitrary and must fulfil the requirement of reasonableness, imparts meaning to the constitutional guarantees in Part III.” (para24).

Proposition 3: The right to privacy is protected as an intrinsic part of the right to life and personal liberty under article21 and as a part of freedoms guaranteed by Part III of the Constitution.

At the bar, privacy was argued to be latent with liberty, autonomy, and human dignity, apart from being foundational towards ensuring that the freedom of speech , expression, association, and religion, remained meaningful. All these arguments figure, in different ways, in each of the six opinions.

Justice Chelameswar, for example, grounded his opinion in the concept of liberty. Defining ‘privacy’ as comprising of three aspects- “repose”, “sanctuary” and “intimate decision” , he held that each of three aspects were central to the idea if liberty guaranteed by both Articles 21 and 19 (paragraph 36) . He then took a series of examples of privacy violations (forced feeding, abortion, telephone tapping and intimate association, to name a few), and grounded them within the broader rights to freedom of the body and freedom of the mind (paras 38-40).

Justice Bobde, founded his judgement on “two values....The innate dignity and autonomy of man” (para12) which he located in the overarching structure of the Constitution. in addition, he held that privacy was a” necessary and unavoidable logical entailment of rights guaranteed in the text of Constitution” (para 35). In Justice Bobde’s opinion, we find the important insights that to be effectively exercised, the liberties in Article 19(1) (speech, expression, association, assembly, movement) and 21(personal liberty) require, on occasion, to be exercised in seclusion. Privacy, Therefore, was, “an enabler of guaranteed freedoms” (para29) and “an inarticulate major premise in Part III of the Constitution” (para25).

Justice Nariman made an overarching argument, linking the three aspects of privacy (bodily integrity, informational privacy and privacy of choice) (para 81) with the Preamble of the Constitution, which guaranteed democracy, dignity, and fraternity. (para 82). It was here that the Constitutional foundations of privacy could be found. The connection was drawn by him in this manner:

“The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information which may be infringed through an unauthorised use of such information.”(para 85).

In other words, individual self- development- which lay at the heart of democracy , dignity, and fraternity- was simply meaningless without a right to privacy that guaranteed, at the minimum, security of intimate choices.

Very similar reasoning- based on dignity and individual self- determination- was employed by justice Sare, who noted that dignity imposes “an obligation on the part of the Union to respect the personality of every citizen and create the conditions in which every citizen would be left free to find himself/herself and attain self- fulfilment.”(para8). It was also employed by Justice Kaul, who brought dignity and liberty together, noting that “privacy...is nothing but a form of dignity, which itself is a subset of liberty” (para40) and key to the freedom of thought” (para 52).

These complementary strands of reasoning were brought together by Justice Chandrachud in his judgement. He grounded privacy in dignity (paras 32,107 and 113), “inviolate personality... the core of liberty and freedom’ (para 34), autonomy (paras 106 and 168), liberty (para 138), bodily and mental integrity (para 168), and across spectrum of protected freedoms (paras 169). Therefore, “The freedoms under Article 19 can be fulfilled where the individual s entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of mind. The Constitutional right to the freedom of religion under Article25 has implicit within t the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling s that right to privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right to privacy: this is not an act of judicial redrafting. . Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination”. (para169).

There is something of tremendous significance here. Even as it agreed with the petitioners that privacy was a fundamental right, the Court could have chosen to give it a narrow cast and frame. The Court may have limit it to an aspect of dignity or restricted it to a derivative right under Article 21. This would have thrown up difficult initial barriers in future cases, compelling petitioners to shoehorn their claims within the shifting and largely symbolic concept of dignity (and jurisdictions such as Canada provides salutary warnings about how easy it is to constrict

rights by pegging them to dignity), or the(diluted) umbrella of Article 21. The Court, however, did the exact opposite. Starting with the basic idea that privacy encompassed body (and bodily integrity), the mind (and informational self-determination), an intimate choices, all nine judges agreed that privacy was at the heart of individual self-determination, of dignity, autonomy and liberty, and concretely, inseparable from the meaningful exercise of guaranteed freedoms such as speech, association, movement, personal liberty, and freedom of conscience. Privacy, therefore, was both an overarching, foundational value of the Constitution and incorporated into the text of Part III's specific, enforceable rights.

The verdict locates privacy in the grand sweep of democracy and within the core human values of autonomy, dignity, and freedom, while also placing it within the realm of the concrete, the flesh-and-blood relationship between the State and individual. In its attention to the abstract and to the world of concepts, it does not ignore the world in which individual struggle against coercive power; and in its care to outline how privacy is concretely meaningful, it does not forget to include it within that constellation of ideas that frame this reality and give its meaning. This is a difficult path to travel. However, all nine judges have demonstrated the intellectual courage required traveling it, and the result is a ringing endorsement of central place of privacy in a modern, constitutional, democratic republic.

Proposition 4: Decisions subsequent to Kharak Singh which have enunciated the position in proposition 3 lay down the correct position in law:

As the Petitioners had repeatedly argued before the Court, there was no need to reinvent the wheel. After *Govind v. State of M.P.*¹², there was an unbroken line of Supreme Court Judgements, spanning forty years that had repeatedly affirmed the status of privacy as a fundamental right (Justice Chandrachud's judgement examines all the precedent on the point). Petitioners asked the Court to affirm the line of judgments. The Court agreed.

REASONABLE RESTRICTIONS ON THE FUNDAMENTAL RIGHT TO PRIVACY THAT HAVE BEEN RECOGNISED BY THE COURT

Since the fundamental rights are not to be read in a silo, any infringement of fundamental rights will therefore have to pass the basic tests of Article 21 and 14 of the Constitution. These tests

¹² *Supra* note 7

are¹³:

- The need for existence of a law.
- The law should not be arbitrary
- The infringement of the right by such law should be proportional for achieving a legitimate state aim.

The judgments have recognised the below mentioned restrictions on the right to privacy.

- The lead judgement notes that the tests for the reasonable restrictions on the right to privacy in paragraph 3(H) of the conclusion. It holds that a law which "encroaches upon the right to privacy will have to withstand the touchstone of permissible restrictions on fundamental rights". Any infringement of privacy must be by a law which is "just, fair and reasonable". The three fold requirement for such infringement would be: (i) legality which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim and (iii) proportionality which ensure a rational nexus between the objects and means adopted to achieve them.
- Justice Bobde, in paragraph 45 of his judgement held that any infringement of fundamental right to privacy must pass the same standard required for the infringement of personal liberty, i.e. in terms of the judgement in the case of *Maneka Gandhi V. Union of India*¹⁴, such law must be "fair, just and reasonable, not fanciful, oppressive or arbitrary".
- Justice Nariman has held in paragraph 60 of his judgement that statutory restrictions on privacy would prevail if it is found that 'social and public interest and reasonableness of the restrictions outweigh the particular aspect of privacy claimed.'
- Justice Sapre in paragraph 72 of his judgement said that right to privacy would prevail if it is found that the 'social, moral and compelling public interest that the state is entitled to impose by law'
- Justice Kaul has held in paragraph 72 of his judgement that right to privacy would be

¹³ Paragraph 120 of the Lead judgement and Paragraph 3(H) of the Lead Judgement's conclusion

¹⁴ 1978 SCR (2) 621

subject to reasonable restrictions on the grounds of national security, public interest and the grounds enumerated in the Provisos to Article 19 of the Constitution

CONCLUSION

The Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present in seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence, the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features.

Like other rights which form part of the fundamental freedoms protected by Part III of the Constitution, including the right to life and personal liberty under article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand with stand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invention of life and or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law (ii) need, defined in terms of legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

The lead judgement recommended to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interest and legitimate concerns of the State. The legitimate concerns of the State would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data.

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN INDIA

Sonam Jain Bajpai*

Abstract

Due to gigantic development in e-governance all through the Public and Private Sector, Electronic Evidence have included into a central mainstay of correspondence, handling and documentation. These different types of electronic confirmation are progressively being utilized as a part of both Civil and Criminal Litigations. Amid trials, Judges are regularly solicited to lead on the acceptability from electronic proof and it generously impacts the result of common claim or conviction/vindication of the accused. The Court keep on grappling with this new electronic outskirts as the exceptional idea of e-confirm, and in addition the straightforwardness with which it can be manufactured or misrepresented, makes obstacle to acceptability not looked with alternate confirmations. The different classifications of electronic confirmation, for example, site information, interpersonal organization correspondence, email, SMS/MMS and PC created reports postures one of a kind issue and difficulties for appropriate validation and subject to an alternate arrangement of perspectives.

Cybercrimes are submitted in a virtual space where the proof would be in impalpable and doesn't exist in changeless shape. Gathering any confirmation with no making harm it is a major assignment and requires great aptitude. The second trouble in this procedure is getting the proof allowable in official courtroom. Evidence act manages a wide range of substantial evidence and it isn't of much importance of cybercrimes. To meet the requirement some amendments are made in evidence Act.

Keywords: Evidence, Admissibility, Electronic Evidence, Indian Law perspective

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INTRODUCTION

Certain inquiries which are imperative from the point of view of confirmation in the disconnected world are similarly critical for electronic confirmation purposes., including the base necessity for suitability of proof of an electronic Evidence, the onus of verification, the procedural prerequisite to be satisfied identifying with the examination of electronic confirmation, the principles to be received while storing, protecting and recovering electronic evidence. The legislative framework of any jurisdiction needs to analyze these issues in detail and set down sensible criteria for legal recognition of electronic evidence.

Are electronic documents permitted to be produced in a court of law as proof of a fact? The answer is in the affirmative. Presumption in law will only apply if electronic records and signatures are admissible or in other words secure electronic record invoke presumptions and are admissible because they meet the minimum criteria of authencity. This does not mean that only secure electronic records are admissible. The authencity of an electronic document indicates that the document is what it appears to be. A document that is proved authentic is admissible as evidence in court proceedings. To achieve this, two parameters need to be satisfied, that is, the document originated from the actual sender and the integrity of the information contained therein is maintained. In electronic records, the person who may sign an electronic document could be a representative of a person, and for electronic records attribution is to the person who has sole and exclusive control over the information system irrespective of whether he has in fact sent the message.¹

PRESUMPTION OF LAWS

The law likewise presumes that in any procedures including secure advanced mark, the court might assume, unless the opposite is demonstrated, that the protected computerized mark is attached by the supporter with the expectation of marking of affirming the electronic record.²

By Virtue of arrangement of Section 65A, the substance of electronic records might be demonstrated in confirm by parties as per section of 65B.

Sub section (1) of section 65B makes acceptable as an document, to paper print out of electronic records put away in optical or magnetic media created by a PC subject to satisfaction of

¹ McCormick, C., Handbook of the Law of evidence, 3rd Edition, E Cleary, 1984, 99. 684-686

² Societe Des products Nestle SA case 2006 (33) PTC 469 & State v Mohd Afzal, 2003 (7) AD (Delhi) 1

conditions determined in subsection 2 of section 65B.

DIFFERING APPROACHES TO THE ADMISSIBILITY OF ELECTRONIC EVIDENCE

Different jurisdictions may have different laws to determine the admissibility of electronic evidence in legal proceedings. According to civil law approach, the principles of ‘free introduction’ and ‘free evaluation’ of evidence applies. All types of evidence are considered by the courts and the weight age to be given to each kind of evidence is analyzed. In the legal system based on civil law, computer records are commonly accepted as evidence. The statements made by the witness are verified through cross examination .any information derived from other persons or records are considered hearsay evidence which is inadmissible as evidence. According to the best evidence rule, the originals are required to be produced as evidence instead of copies which are more credible and reliable and constitute primary evidence.

THE ONUS OF PROOF

The burden of proving that the computer from which an electronic record is produced was not working properly or malfunctioned generally lies with the defense. In case a computer system malfunctions, it needs to be proved that’s such malfunction had affected the data or electronic record which was being produced as electronic evidence. In case the defense is able to prove that the computer did in fact malfunction, the burden to prove that the malfunctioning did not affect the electronic evidence sought to be adduced should be with the prosecution. It is well settled in many jurisdictions that electronic evidence ought not to be denied legal validity only because it is electronic in form.³

POSITION UNDER INDIAN LAW

Under IT⁴ Act, 2000, section 4 grants legal acceptance to electronic records. Wherever any law require information to be hand written or in type written or in printed form, then such requirement is deemed to be satisfied if such information is made available in electronic form and accessible for use for a subsequent reference. Section 3 of the evidence Act, 1872 defines ‘evidence’ and includes ‘all document including electronic records produced or inspection of the court. Such documents are called documentary evidence’. The provisions of section 65A

³ UNICTRAL model law, Article 9

⁴ Information Technology Act, 2000

elucidate that the electronic records can be proved in evidence by the parties in accordance with the provisions of section 65B (which will be considered as secondary evidence).

Section 65B of the Indian Evidence Act, 1872 gives that any data' contained in an electronic record which is imprinted on a paper, put away, recorded or duplicated in optical or magnetic media delivered by a PC might be regarded to be additionally a report'. On the off chance that it meets the conditions said in section 65B might be acceptable in any procedure without additionally demonstrating the first as confirmation or any substance of the first or truth expressed in it for which direct evidence would be allowable. Section 65B (2) gives the conditions required to be fulfilled for suitability of electronic record.

The IT Act, 2000 read with sections 65A and 65B of the Indian Evidence Act, 1872 provides the procedure for proving electronic evidence.⁵

The Computer from which the record is produced was consistently used to store or process data in regard of movement frequently carried on by individual having legal control over the period, and identifies with the period over which the PC was routinely utilized,

- a) Information framework was encouraged in the PC in the normal course of the exercises of the individual having legal control over the PC.
- b) The PC was working legitimately, and if not, was, for example, to influence the electronic record or its precision.
- c) Information reproduced is such as is fed into computer in the ordinary course of activity.

Sec 65B of Indian Evidence Act represents the status of acceptability of electronic evidence, which was revised through IT act. In any case, electronic evidence is delicate and one can undoubtedly control it. Henceforth courts in India are reluctant to join significant weight age to electronic evidence. Courts for the most part demand validating confirmation before arriving at a conclusion. Police division isn't prepared legitimately to deal with cyber evidence. Because of their ignorance valuable information is lost and as consequence of which despite the fact that numerous crimes are being committed each day, not very many cases just are going to courts for trial.

Section 65B (4) provides the method to prove electronic evidence. Whenever a statement is to

⁵ Section 65A and 65B, Indian Evidence Act, 1872. The second schedule of IT Act, 2000 provided amendments to the Indian Evidence Act, 1872

be produced in evidence, a certificate identifying the electronic record that contains the statement and explaining the manner in which it was produced is required to be submitted to the court. The certificate should also contain details of any device used for production of electronic record. That indicates that the electronic record was produced by computer. The certificate should also contain the statements required by section 65B (2) and signed by person occupying position for the operation of the computer concerned or management of the relevant activity. It further provides that it shall be sufficient for a matter to be explained to the ‘best of knowledge and belief’ of the person who makes the statements.

JUDICIAL RESPONSES

Section 61 to 65 Indian Evidence Act, the word “Document or content of documents” have not been replaced by the word “Electronic documents or content of electronic documents”. Accordingly, the oversight of, “Electronic Records” in the plan of Section 61 to 65 connotes the reasonable and unequivocal administrative expectation, i.e. not to broaden the pertinence of Section 61 to 65 to the electronic record in perspective of superseding arrangement of Section 65-B Indian Evidence Act overseeing just with the admissibility of the electronic record which in context of the persuading inventive reasons can be surrendered just in the path demonstrated under Section 65-B Indian Evidence Act.

*Union of India & Anr v. G.M. Kokil & Ors*⁶ observed “It is outstanding that a non obstante proviso is an legislative device which is typically utilized to give abrogating impact to specific arrangements over some opposite arrangements that might be discovered either in a similar enactment or some other enactment, in other words, to maintain a strategic distance from the activity and impact of every single contrary provision..”

*Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*⁷ explained the extent of non-obstante proviso as “... It is comparable to stating that regardless of the provisions of the Act or some other Act specified in the non obstante condition or any agreement or document said the enactment following it will have its full activity...”

*Anvar P.V. v. P.K. Basheer & Ors.*⁸ In this critical judgment, the Supreme Court has settled the discussions emerging from the different clashing judgments and also the works on being

⁶ (1984) SCR 196

⁷ (1986) 3 SCR 866

⁸ MANU/SC/0834/2014

followed in the different High Courts and the Trial Courts with regards to the admissibility of the Electronic Evidences. The Court has deciphered the Section 22A, 45A, 59, 65A and 65B of the Evidence Act and held that auxiliary information in CD/DVD/Pen Drive are not allowable without an endorsement U/s 65 B(4) of Evidence Act. It has been explained that electronic evidence without declaration U/s 65B can't be demonstrated by oral confirmation and furthermore the conclusion of the master U/s 45A Evidence Act can't be depended on make such electronic evidence acceptable.

The judgment would have genuine ramifications in every one of the situations where the prosecution depends on the electronic information and especially in the instances of anticorruption where the dependence is being set on the audio video accounts which are being sent as CD/DVD to the Court. In every single such case, where the CD/DVD are being sent without a certificate U/s 65B Evidence Act, such CD/DVD are not allowable in evidence and further expert opinion as to their validity can't be investigated by the Court as clear from the Supreme Court Judgment. It was additionally watched that every one of these shields are taken to guarantee the source and validness, which are the two trademarks relating to electronic records looked to be utilized as evidence. Electronic records being more powerless to altering, modification, transposition, extraction, and so forth without such shields, the entire trial in light of verification of electronic records can travesty of justice.

In the anticorruption cases propelled by the CBI and anticorruption/Vigilance offices of the State, even the first recording which are recorded either in Digital Voice Recorders/cell phones are not been safeguarded and consequently, once the first account is crushed, there can't be any inquiry of issuing the endorsement under Section 65B(4) of the Evidence Act. In this way in such cases, neither CD/DVD containing such accounts are acceptable and can't be shown into prove nor the oral declaration or master supposition is permissible and all things considered, the recording/information in the CD/DVD's can't turn into a sole reason for the conviction.

In the previously mentioned Judgment, the Court has held that Section 65B of the Evidence Act being a 'not obstante proviso' would supersede the general law on optional proof under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the auxiliary proof of the electronic confirmation and same might be completely administered by the Section 65A and 65B of the Evidence Act

The Constitution Bench of the Supreme Court overruled the judgment laid down in the *State*

(*NCT of Delhi*) v. *Navjot Sandhu @ Afsan Guru*⁹ by the two judges Bench of the Supreme Court. The court particularly watched that the Judgment of Navjot Sandhu , to the degree, the announcement of the law on suitability of electronic confirmation relating to electronic record of this Court, does not set down right position and required to be overruled.

The main alternatives to demonstrate the electronic record/confirm are by delivering the first electronic media as Primary Evidence court or it's duplicate by way auxiliary proof U/s 65A/65B of Evidence Act. In this manner, on account of CD, DVD, Memory Card and so on containing auxiliary confirmation, the same might be joined by the declaration regarding Section 65B got at the season of taking the report, without which, the optional proof relating to that electronic record, is unacceptable.

*Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*¹⁰, Depending upon the judgment of Anvar P.V.¹¹, while considering the admissibility of interpretation of recorded discussion for a situation where the recording has been translated, the Supreme Court held that as the voice recorder had itself not subjected to examination, there is no reason for putting dependence on the translated version. Without source, there is no validness for the interpretation. Source and validness are the two key components for electronic confirmation.

*Ankur Chawla v. CBI*¹², The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case watched that since sound and video CDs being referred to are obviously forbidden in confirm, consequently trial court has wrongly depended upon them to reason that a solid doubt emerges in regards to petitioner criminally contriving with co-accused to perpetrate the offense being referred to. Hence, there is no material based on which, it can be sensibly said that there is solid doubt of the complicity of the petitioner in commission of the offense being referred to.

*Abdul Rahaman Kunji v. The State of West Bengal*¹³, The Hon'ble High Court of Calcutta while choosing the admissibility of email held that an email downloaded and printed from the email record of the individual can be demonstrated by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to complete such system to download and print the

⁹ (2005) 11 SCC 600

¹⁰ MANU/SC/0040/2015

¹¹ *Supra* note 8

¹² MANU/DE/2923/2014

¹³ MANU/WB/0828/2014

same is adequate to prove the electronic evidence.

*Jagdeo Singh v. State (NCT of Delhi) & Ors.*¹⁴ In the current judgment articulated by Hon'ble High Court of Delhi, while managing the suitability of captured phone bring in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court watched that the auxiliary electronic proof without certificate u/s 65B Evidence Act is unacceptable and can't be investigated by the court for any reason at all

CONCLUSION

The law of evidence relating to computer evidence has evolved with the passage of time. The conventional principles of admissibility of evidence, namely, integrity, traceability of source and its weightage principles and presumptions in law for secure electronic records continue to play a vital role in proving electronic evidence in a court of law. Different legal systems have laid down minimum requirements to be satisfied to prove an electronic record is reliable. The admissibility of the auxiliary electronic proof must be pronounced inside the parameters of Section 65B of Evidence Act and the recommendation of the law settled in the current judgment of the Apex Court and different other High Courts as talked about above. The suggestion is clear and unequivocal that if the optional electronic confirmation is without a certificate u/s 65B of Evidence Act, it isn't acceptable and any assessment of the legal master and the statement of the observer in the courtroom can't be investigated by the court.

Nonetheless, there are few holes which are as yet uncertain as what might be the destiny of the secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act can't be taken and the charged can't be made witness against himself as it would be violative of the Article 19 of the Constitution of India. In a nutshell, a technology develops, collection, preservation a retrieval of electronic evidence will become more scientific and adapt to withstand the test of admissibility will itself require changes with the dynamic of information Technology.

¹⁴ MANU/DE/0376/2015

CHALLENGES OF GOOD GOVERNANCE AND EXECUTIVE

Shalbha Singh*

The term ‘Governance’ is gotten from a Latin expression which etymologically implies steering. It alludes to the procedures and frameworks by which government or society works; the procedures by which choices are made that characterize desires, give control, or confirm execution.¹

The Oxford Dictionary defines the word governance as, “The action or manner of governing a state, organization, etc.” The Cambridge Dictionary defines the word, “Good Governance” as, ‘the effective and responsible management of an organization, a country, etc. which includes considering society’s needs in the decisions it makes’.

The word ‘God’ is the root word for ‘Good’ which means an ability to distinguish between right and wrong, just and unjust. A judgment is good if it is just, right, and moral. In the context of Good Governance it is taken in public interest and service the public interest. While in India we believe ‘Sarva Jana Hitaih Sarva Jana Sukaiah’ which implies welfare of all and happiness of all. Good Governance is supposed to exist if the following three objectives are achieved.

- There should be quality of law and effective implementation of laws.
- There should be opportunity for every individual to realize his full human potential
- There should be effective productivity and no waste in every sector².

DEFINITIONS OF GOOD GOVERNANCE

Definition of governance by leading institutions and studies converge on the term as referring to a process by which power is exercised.

United Nations Development Programme (UNDP, 1997): Governance is seen as an activity of economic, political and authoritative specialist to deal with a nation’s issues at all levels. It includes systems, procedures and establishments through which citizens and associations

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¹ Law Commission of India, “Reforms in the Judiciary - Some Suggestions”, (Law Com No. 230, 2009), Available at <http://lawcommissionofindia.nic.in/reports/report230.pdf>; (Accessed on Feb.15, 2013)

² S.S. Chauhan, Mamta Mokta, Sanjeev K. Mahajan&SimmiAgnihotri; *Challenges in Governance*, Anamika Publishers & Distributors (P) Ltd.(1st ed. 2011), p. 89

express their interests, practices their lawful rights, meet their commitments and reconcile their disparities.

World Bank (1997): Governance is characterized as the way in which control is practiced in the administration of a nation's economical and social assets. The world bank has distinguished three different facets of governance:(1) the type of political regime; (2) the process practiced by the authority in the administration of a nation's economical and social assets for advancement; and (3) the capacity of government to configure, plan and execute strategies and perform functions.

Asian Development Bank: The ADB regards good governance as synonymous with sound development management. It includes both people in general and the private sectors. It is identified with the effectiveness with which assistance by authority is utilized, the effect of advancement programmes and tasks (counting those financed by the bank).Thus, independent of the exact arrangement of financial strategies that induces support to governance, decent administration is required to guarantee that those approaches have their coveted impact. Fundamentally, it concerns standards of conduct that assistance guarantee that administration really convey to their nationals what they say they will convey.

USAID (United States Agency for International Development): Governance incorporates the different dimensions of the state, the sense of duty regarding people in general, the rule of law, the level of transparency and responsibility, the level of participation of the people, and the stock of social capital. Without great administration, it is difficult to foster improvement. No measure of plan of action exchanged or framework manufactured can adjust for or survive awful administration.

UNESCO (United Nations Educational, Scientific and Cultural Organization): Good governance is an idea which is playing a pivotal role in political science, public administration and more particularly, development management. It has become synonymous to such terms such as democracy, civil society, joining in participative process, human rights and sustainable development. The public sector reform has also found strong association with the aforesaid term.

Constitution of India: The word Governance is not used per se anywhere in the Constitution of India but it can be interpreted by analyzing various provisions of Constitution of India which assigns powers and functions to the executive to attain Good Governance. While the entire of

the Constitution has an impact, straightforwardly or in a roundabout way, on the Civil Service and government employees in India, Part XIV of the Constitution identifies more specifically. Dissimilar to numerous different organizations, similar to the Planning Commission, the Central Bureau of Investigation (CBI), the Central Vigilance Commission (CVC), the civil services are the foundation mandated by the Constitution. No doubt it is a successor of the previous Indian Civil Service (ICS) of British India, imbuing not just its method, the common and criminal codes (IPC, CrPC, CPC, and so on), chain of command, rationality, however even the work force, the Civil Service of free India is lawfully a making of our Constitution. This is done by means of Part XIV of the Constitution, which makes the All India Services (AIS), the Central (civil) Services, and the States Civil Services, among others, and furthermore makes the Union Public Service Commission, the State Public Service Commissions and Joint Public Service Commissions, to enroll them. The Part XIV, consequently bears, every government worker in India.

CHALLENGE OF GOVERNANCE

The success of public administration depends on the quality of civil service and its accountability. The initial capacity of Indian Civil Services is among the highest in the world, with meritocratic and fair recruitment. Yet India's civil services, the principal face of the government to the public and responsible for implementing government programmes, must shoulder some of the responsibility for dissatisfaction with government's performance in providing a sound business environment, curbing corruption and providing public services. The problem is not initial capability but institutional deficiencies. Non-transparency, limited accountability, poor incentive structure and inadequate performance appraisal weaken the civil service's administration as do the standard problems of political interference in specific situation and government's widespread and intricate interventions that delay actions, create unwarranted power and provide opportunities for corruption.³

THE CHALLENGES TO GOOD GOVERNANCE

Leadership: The most essential element for the success of any organization is its Leadership-political and administrative that is why it is said, "put a good man in a bad set up he will push through. Put a bad man in a good set up: he will make a mess of the situation. No technique can help those administrators who have no faith in their work and its best performance. Walter R.

³ *Ibid* at 17

Sharp says; "Even poorly devised machinery may be made work if it is manned with trained, intelligent, imaginative and devoted staff. On the other hand the best planned organization may produce unsatisfactory result if it is operated by mediocre or disgruntled people."

Size and Structure of Government: Since freedom, the government has expanded its function and made it multidimensional. To some degree, this development has been animated by political contemplation; it obliged increasingly intra-party groups by offering more ministerial positions. It likewise made posts for senior civil servants, alongside different employments at different levels that augmented the support abilities of various political and bureaucratic pioneers. Be that as it may, this development has not been counterbalanced by an associative shedding of lower need duties or different endeavors to wipe out excess. Aside from its budgetary perspective, this sort of extension has extended usage limit, and intensified coordination issues. Civil servants are investing increasingly energy in keeping up as well as elucidating their jurisdictional rights and limits, clearing their choices through progressively complex internal procedures, and planning their exercises through an expanding number of organizations.⁴

Performance & Promotion: The Annual Confidential Report Process has its effect on compensation, profession prospects and choices on untimely retirement; the system for execution evaluation has essential outcomes for the inspiration of workers. The Annual Confidential Report process is likewise intended to be utilized as a part of training and personality enhancement, confirmation, and going beyond productivity bars. The subject of how employee's contribution ought to be efficiently assessed in a reasonable and solid manner, without producing unnecessary conflict, is a muddled one. In spite of the fact that the supervisors have the privilege to give persistent feedback and direction to representatives, Annual Confidential Reports (or ACRs) are the chief methods for intermittent formal evaluation. The opaque, subjective and one-sided character of ACRs is a task. Discourses between the evaluator and worker being assessed are occasional and commonly just occur if a dispute arises.

Genuine endeavors to change the arrangement of execution evaluation are desperately required. The present system of promotion in civil services depends on time-scale and is coupled by its security of tenure. These components in our civil services are making our dynamic government employees self-satisfied and a large number of the advancements depend upon patronage system. The lack of motivating forces or disincentives for execution is a noteworthy

⁴ M. Satish, "Civil Service Reforms", Available at , <http://www.cgg.gov.in/workingpapers/CivilServicesReform.pdf>; (Accessed on 4th April 2013)

disadvantage for civil services and is making All India Services to a great extent unaccountable to the state. Government employees are selected through competitive examination, as well as specific authorities from the state governments are additionally being advanced. The entire thought of All India Civil Services gets lost when other state officers are elevated to civil services and work in the state itself. This is in reality a retrograde advance. It ought to be required for the officers who are elevated to civil services to serve in different states to keep making All India Civil Service working. These promotions should be justifiable and the respective authorities must set a landmark for the best practices and asses the performance of the civil servants both qualitatively and quantitatively with a variety of criterion. The execution examination of government employees must accord to these benchmarks and the vital arrangement reward and disciplines can be taken up by the supervisors.⁵

Lack of Responsiveness and Accountability to people: It is widely agreed that manipulation and lack of integrity produce negative side effect and reduced organizational effectiveness. V.S Jafa in an article, challenges for the police in the 21st century, “In IJPA Jan-March 2001 clearly said that the people have great expectations from the police, as it is a ubiquitous grievance redressal machinery of the government, having the most frequent contact with the daily life of the people. Majority of policemen treat people with contempt or apathy and are not averse to abusing their lawful authority from sadism or arrogance, from over enthusiastic, ham handed or sheer thoughtless performance of duty; or for illegal gain.” Trigger-happy brutality is not uncommon while quelling disorder. Custodial torture and death are frequent occurrences.⁶ A major challenge over the police has been to:

- i. Achieve openness and transparency in its functioning
- ii. Show greater professionalism in its conduct and operations
- iii. Eschew rude and abusive behaviour
- iv. Exercise restraint in the use of force
- v. Be impartial and fair in their daily conduct

Relationship between Ministers and Civil Servants: Mr. S. Subramanyan in his Article on Minister-civil servant relations -- Mutual dependence, striking a balance has narrated that it is

⁵ Ibid

⁶ S.L. Goel, *Good Governance- An Integral Approach*; Deep and Deep Publications, (1st ed. 2007), p 147

not uncommon for any government to face policy failures. Onion crisis and the situation of rotting food grains in the country's god owns are some examples. Western democratic governments regard policies catastrophes as normal end products of administration. Irregularity in the policies declarations would normally give rise to undesired consequences. Government workers have no enchantment wand to actualize changes with such outlandish policy implementations. 'Continuity' has not been given due significance either. The whirling of government workers obstructs advance the best possible execution of policies. Occasions, like these have a tendency to dismantle the minister and civil employees' relations, and further demoralisation of the civil servants may likewise set in.

Prof. B.S. Narula in his paper "Relationship between Ministers and Civil Servants in a development democracy" has mentioned that the stresses and strains which have developed in recent years in Minister and Secretariat and related to the following inter-connected issues:

- a) Increasing tendency on the part of ministers to interfere in day to day administration to allow accommodation to individuals and groups for parochial and political consideration.
- b) Lack of clear and adequate perception by ministers of their administrative responsibilities and their inabilities to do full justice to them.
- c) Lack of fuller appreciation by the civil servants of the political side of the ministers role
- d) Differences in the social background, intellectual ability, professional commitments, temperament and outlook of ministers and senior civil servants.⁷

Accountability: Those who are holding position of power in our government should not be given unscrupulous, unchecked power. The police are accountable only to the political executive at the district or state level there is absolutely no departmental accountability whatsoever, had the police been accountable to law there had been no terrorism in Punjab or in Jammu & Kashmir.⁸ For the police the party in power is the final arbiter today. The ground reality is that transfer is the biggest punishment. The accountability mechanisms in any country are broadly categorized as those that are located within the State and those outside. Accountability of the executive arm of government to Parliament and to the citizens of the country is of course the fundamental feature of a democracy.

⁷ *Ibid* at 139

⁸ P.C. Dogra, *Where the politicians call the states*, THE TRIBUNE, dated 15.10.06.

Corruption: Corruption has a variety of meanings. According to David H. Bailey: Corruption is a general term covering misuse of authority as a result of considerations of personal gain, which need not be monetary, in the view of Jacob Van Kalveren: Corruption means that a civil servant abuses his authority in order to obtain an extra income from the public.

Harmful effects of corruption⁹: Bad Governance:-

- a) Within the bureaucracy, corruption may cause widespread cynicism and social disunity and thus reduce the willingness to make sacrifices for the Society's economic development
- b) Bureaucratic corruption undercuts popular faith in government
- c) Corruption, especially in the form of bribery, causes decisions to be weighed in terms of money, not in terms of human need. In other words, the wheels of the bureaucratic machine must be oiled with money
- d) Corruption causes rise in the price of administration. People who have already paid the tax are forced to bribe in order to get government service. All these factors indicate that soil for good governance is non-existence.

Most of the problems in public administration are emanating from political corruption and interference. The credibility gap between the political and administrative relationship is on the increase causing decline of good governance.

Corruption in the Indian society has prevailed from time immemorial in one form or the other. The basic inception of corruption started with our opportunistic leaders who have already done greater damage to our nation. People who work on right principles are unrecognized and considered to be foolish in the modern society. Corruption in India is a result of the connection between bureaucrats, politicians and criminals. Earlier, bribes were paid for getting wrong things done, but now bribe is paid for getting right things done at right time. Further, corruption has become something respectable in India, because respectable people are involved in it. Social corruption like less weighing of products, adulteration in edible items, and bribery of various kind have incessantly prevailed in the society.

S.R. Maheshwari¹⁰ in his article wrote, "Public service in India is among the most corrupt one in

⁹ S.L. Goel, *Good Governance- An Integral Approach*; Deep and Deep Publications, (1st Edn. 2007), p 202

the world is the most corrupt one in the world; a clean administration is a pre-requisite of an efficient allocation and utilization of resources. When the machinery of government is notoriously slow moving and procedures of work care cumbersome a certain amount of delay and vexation become inevitable and members of bureaucracy, when properly humoured are pleased to flex their muscles and expedite decision making under proper inducements.

Lack of Ethics: The country is passing through a terrible crisis in today's time. The aggravation of material greed has as a reaction set ablaze the fire of corruption at all levels. Through the dominant influence of the present material civilization and the ideal of enjoyment fostered by it, even the basic framework and moral fibre of the country has been affected by an internal demoralisation. There is no limit to fraud and hypocrisy that is being practiced in the name of politics.

Transparency: Access to data can enable poor people and the weaker segments of society to request and get data about public policies and activities, consequently prompting their welfare. Without great administration, no measure of formative plans can get enhancements in the personal satisfaction of the citizens. Good governance has four components transparency, responsibility, consistency, predictability and participation. Transparency alludes to accessibility of data to the overall population and clearness about working of administrative establishments. Right to information opens up government's records to open scrutiny in public domain, in this manner equipping citizens with a fundamental instrument to make them aware about what the administration does and how viably, hence making the administration more responsible. In a basic sense, right to information is an essential need of good administration. In recognition of the need for transparency in public affairs, the Indian Parliament enacted the Right to Information Act (hereinafter referred to as the RTI Act or the Act) in 2005. While right to information is certainly ensured by the Constitution, the Act sets out the handy administration for citizens to secure access to data on all issues of administration.

Based on the case studies conducted by the Commission, responses of various Ministries to a questionnaire, and interactions with the stakeholders, a number of difficulties/impediments were noted, 1) Complicated system of accepting requests, 2) Insistence on demand drafts, 3)Difficulties in filing applications by post, 4) Varying and often higher rates of application fee,

¹⁰ *Ibid* at 195

5) Large number of PIOs¹¹

Globalisation: The advent of globalisation presents a new series of challenges to the administration. The various technological advancements, new cross border relationships of our interests across issues and boundaries have brought forth. The cross border trade and economical developments have stiffened to mesh of financial linkages across different countries irrespective of preferences. Government cannot run away from its responsibility to produce an impact on international events and conditions to our benefits. Without the capacity to handle this new situation, we would be working in vain and consequently loose the race of globalisation.

Administrative Responses: The Indian administrative scene is marked by few successful innovations and practices in public service delivery and a large number of pathetic performances. The general weakness of accountability mechanisms is an impediment to improving services across the board. Bureaucratic complexities and procedures make it difficult for a citizen as well as the civil society to navigate the system for timely and quality delivery of services. The lack of transparency and secrecy that have been associated with the administrative system from colonial times, besides generating corruption, has also led to injustice and favoritism. The frequent transfer of key civil servants has enormously contributed to failures in delivery of services. In some states, the average tenure of a District Magistrate is less than one year. Development projects have also suffered as a result of frequent changes in project directors.

CONCLUSION

The bureaucrats assume a vital part in guaranteeing Good Governance. Great administration as an idea has relentlessly dug in itself in the political and development talk. It has pervaded all divisions and turn out to be a piece of the basic shared standards and excellences of various nations on the planet. We have an excessive number of civil services and yet too less governance. We have bigger labor without resolve and shy of skill power.

¹¹ Second Administrative Reforms Commission , "RIGHT TO INFORMATION: Master Key to Good Governances", (No. 1, June 2006), Available at: <http://www.arc.gov.in/rtifinalreport.pdf> ; (Accessed on 15th 2013)

INTERMEDIARIES UNDER IT ACT 2008

Jahnavi Singh*

Abstract

The Information Technology Bill, 2008 has been passed by both the houses of Parliament in the month of December, 2008 and was signed by the President of India on February 5, 2009. The Amendment Act aims to make many changes in the existing Indian cyber law framework, which includes incorporation of Electronic Signature i.e. enable authentication of electronic records by any electronic signature technique. There were also insertions of new express provisions to bring more cyber offences within the purview of the Information Technology Act, 2000. There are various provisions in the new amendment which were relating to data protection and privacy as well a provision to curb terrorism using the electronic and digital medium. The original Act is basically the legislation which provide legal status for e-commerce and e-transactions so as to facilitate e-governance and to prevent computer based crimes and ensure security practices and procedures with the context of widest possible use of information technology worldwide. The amendment has defined “intermediary”. Now, Intermediaries are required to remove unlawful data or content on receiving information about it. In today’s world, technology has its own importance. But it’s really a matter of concern that India does not have any legislation to basically deal with the matter related to privacy but some or the other way IT Act provides protection only in the form of damages and nothing else. The other important section in this act is the importance of intermediaries and at what extend they can provide information or can keep any data with them only. The main aim of writing this paper is to give society a basic idea with regard to protection of data and what is the importance of intermediaries under information technology act and what are their liabilities under this act. With regard to internet, the IT Act 2000 says that the intermediaries should protect the data they collect and handle, and should impose conditional liability on intermediaries for their hosted content if such content infringes the privacy of an individual. However, these laws are inadequate to deal with the new concerns that have arisen as a result of the rapid advances in technology and re-shaping of the internet.

Keywords: *Intermediaries, Liability of intermediaries, Protection of data.*

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INTRODUCTION

In today's world, technology is playing a very important role. Now a day's, people are so busy in their social life that they don't get time to spend some time with their loved once. We can say that technology is controlling the whole society or world. Technology is good for the society as well as evil for the society. If we talk about technology in good sense then the first reason why technology is good for the society is that it connects us throughout the world.¹ We basically share our past, enrich our present and secure our future through the use of social media. Skype and Google are the best way to connect with our friends, family. Texting, calling, and e-mailing have made a great chance as by which we keep in touch and these forms of communication only continue to advance.

The second reason why Technology is good for the society is that it conserves energy and produces more goods. HOW? Basically technology allows us to find different alternatives of using non Renewables and costly resources. From hybrid vehicles to energy efficient light bulbs, there are ways to save everywhere. One machine can do today in minutes what in years past would have taken days to accomplish. The third reason why technology is good for the society is that it helps in doing online payments, and for business purpose technology is playing a very important role. For example: there are many social websites which are doing their business in a very good way and is also expanding their business with the help of technology. Some of the best websites are Flipkart, Amazon, Jabong, etc. As we are being saying that technology is good for society but it is also evil for the society. HOW? Basically the first reason is that Cyber bullying and sexual predator activity is reaching new lengths. As technology grows, so does the means by which predators and bullies can target their victim? The second reason is the depravation of privacy and security. We know that world is experiencing many advances in the technology but they are also facing problems with regard to privacy and security. Privacy issues are basically connected with tracking location and spying on information.² It is correctly said that it is very easy for the professionals to trace and keep an eye on any of the electronic devices that connects to a network by simple tracking the IP location. Now a days some advertising websites can track location, watch what users do and see what the users like and dislike by doing a survey of which products are more preferred, while some countries usually focus on another countries to maintain its internal security and check on extremely important information

¹ Apar Gupta on information technology Act, p.9

² *Ibid* at 11

which would be necessary for them. The third reason why technology is not good for the society is the social issues. For the benefit purpose enormous websites are being established and games are one of them. Some of the games make it more similarities to the real life. Games are so realistic that they are killing and other disgusting scenes are included in games. These serious effects are basically divided into two main categories which are tempering fluctuating and lack of social skills. The forth reason is that people use to thread the victims by making amigos videos which may lead to suicide of the victims.

Initially technology was made to serve the world but people have used it in a wrong way which have basically caused serious problems that are health problems, privacy problems and social problems. Health problems are considered as critical issues which affects mental and physical health of the user. Moreover, privacy is negatively affected due to spying and stealing of information of users. One of the important points is that the socializing is getting affected by rapid change of temper and lack of social skills. People should spend less time and communicate with each other and use technology in rates that it doesn't hurt people to avoid getting any problems in the future.

So to protect the technology activities from all frauds government has enacted Information Technology Act 2000 and it was amended in the year 2008 and was named as Information Technology Act (Amendment) 2008.

INFORMATON TECHNOLOGY ACT, 2008

Information Technology act 2000 was passed in the month of October 2000 by the Parliament. This act basically dealt with cybercrime and electronic commerce. It also establishes a Cyber Appellate Tribunals and penalties are also imposed under this act. So before doing any crime related to technology people use to think 100 times as now a day's it's not easy to do any types of crime related to technology. After few years in the year 2008 the amendments were taken place where a new section was introduced i.e. Section 66A which penalised sending of offensive messages. Section 69 also came into existence which gave power to the authorities for the interception or monitoring of any information through any computer resource. The original act was developed to promote e-commerce and also to prevent cybercrimes.³

Information Technology Act 2008 amendments were done as the original bill has failed to

³ Section 69 of IT Act, 2008

improve further development of IT sector and related security concerns. Many changes were taken place and some of them were a new definition were given to the word “communication device”.⁴ This act has focused on implementing the electronic signature by making the owner of the given IP address responsible for content accessed and have also focused on making corporation responsible for implementing effective data security practices and liable for the breaches.

These Amendments have been criticized for decreasing the penalties for cybercrimes and also for the government to monitor, lacking sufficient safeguards to protect the civil rights of the individuals. Section 69 of this act authorizes intercept, and block data at its discretion. Pavan Duggal a law consultant says that ‘The act has provided the government with the power of surveillance block data traffic. This new power has given the government a texture and colour of being a surveillance state.

OBJECTIVES OF THE ACT

- To provide legal recognition of electronic records and digital signature.
- To establish a regulatory authority to supervise the activities of cyber crimes.
- To provide civil and criminal liability for contravention of this act as to prevent misuse of e- business transaction.
- To amend Reserve Bank of India Act 1934 to facilitate electronic fund transfer between the financial institutions.
- To provide legal recognition to business contacts and creation of rights and obligations through electronic media.
- To suitably amend existing laws in India to facilitate e- commerce.

Till now we came to know many things about the technology and The Information Technology Act, 2008.

INTERMEDIARIES UNDER INFORMATION TECHNOLOGY ACT, 2008

Intermediaries have been defined under section 2 (1) (w) of Information Technology Act, 2008.

⁴ Section 2(1) of IT Act, 2008

Intermediaries are the person who on behalf of any other person stores or transmits that message or provides any services with respect to that message.⁵ This act has clarified the definition of Intermediaries including the telecom service provider, web-hosting service provider, online payment sites, internet service provider, and many more. Intermediaries are entitled that provide services enabling the delivery of online content to the end user. Some of the players involved in this are as follows:

- *Internet Service Provider:* ISPs like Airtel basically help users to connect to the internet by means of wired or wireless connections.
- *Web Hosts:* These are service providers like godaddy.com that provide space on server computers to place files for various web sites so that these sites can be accessed by users.
- *Interactive Websites:* These include social sites such as Facebook, Twitter, snapchat etc, which act as a platform to store the blogging platform such as BlogSpot or word press. There are auction sites such as EBay etc.
- *Cyber Cafes:* All information as being given from here and basically are used by the society.

An intermediary may held to be liable for infringing content hosted on its platform only when it has specific or actual knowledge or a reason to believe that such information may be infringing. Insertion of advertisements and modification of content formats by an intermediary via an automated process and without manual intervention does not result in the intermediary being deemed to have actual knowledge of the content hosted.

Once an intermediary has been informed by a complainant of potentially infringing content hosted on its platform, it is not obligated to proactively verify and remove content subsequently hosted on its platform that may infringe the intellectual property rights of the complainant.

Before the Information Technology Amendment Act 2008 came into force, the scenario in India was worse for intermediaries. Intermediaries were liable for their users content. This led to the arrest of Bazee.com chief Avinash Bajaj in connection with the sale of the infamous DPS Noida MMS clip CD on the website. Post the Bazee.com fiasco the Information Technology Laws have been amended The Information Technology (Amendment) Act 2008 makes a genuine

⁵ Ibid

effort to provide immunity to the intermediaries but needs to plug in some gaps so as to enable the intermediaries to operate without fear and inhibitions.

SECTION 79 OF INFORMATION TECHNOLOGY ACT, 2008

Section 79 of information technology regulates the liability of a wide range of intermediaries in India. So as per section 79 intermediaries are also expected to adhere to several sets of fairly detailed rules that have been issued under this provision.⁶

According to section 79(1) of Information technology act, 2008 the intermediaries are not liable for any third party information, data as made available by him. Section 79(2) of information technology act says that the provision of sub section (1) will apply only:

- a) if the function of intermediaries is limited as to providing excess to communication system over which the information has been made available basically by the third parties which is being transmitted or temporarily stored or
- b) The second thing is that if the intermediaries does not initiate the transmission or does not select the receiver of the transmission, or does not select or modify the information contained in the transmission
- c) The intermediaries observes that as due diligence led to discharging of his duties and also to observe such other guidelines as the central government have applied.

As the second provisions deals with where the sub section (1) of this act will apply same is the sub section (3) of this act says where the first provision will not apply. It says that sub section (1) of this act will not apply:

- a) If the intermediaries have agreed together or abetted whether by threads or promise or
- b) upon receiving or getting any actual knowledge or has been notified by the appropriate Government or any agency that any information, data or communication link residing in or has been connected to a computer resource which is being controlled by the intermediary and has been used to commit the unlawful act, the intermediary basically fails to expeditiously remove or disconnect the access to that material on that resource without going through the evidence in any manner.

⁶ Section 79 of IT Act,2008

HOW DOES INTERMEDIARIES RULE OPERATE?

The new rule is mandatory for the intermediaries as to impose a set of rules and regulations on users. The rules further tell about the terms that would include a broad list of categories of content which should not be posted or used by the users. Some of the list of unlawful content involves information that is greatly harmful, harassing the person,⁷ defamatory, obscene, pornographic, hateful, or racially, ethnically objectionable, , relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever it may contain. These words are too bad and may result in broad interpretation and may content to imprisonment.

Now the second important factor is that if any person aggrieved by any content on the internet can ask the intermediaries to take down such content. Intermediaries are in liability to remove access to such content within a period of 36 hours from the time of receipt of the complaint. The rules do not provide for the creator of the content to respond to this complaint. In fact, the rules do not even provide for the intermediaries to inform the user who posted the content regarding the complaint. The intermediaries that do not comply with take-down notice lose the protection from any legal liability that could arise over user content.

This rule basically also deal with the government's power to access user information from the intermediary and the power of the intermediary to disconnect user access. The Rules mandate that intermediaries have to co-operate with government agencies and provide information to them for the purpose of verification of identity, or for prevention, detection, investigation, prosecution etc. when a request has been made by the agency in writing. The Intermediary also has to inform the user that if in future if there might be a case of violation of any rules and regulations the user agreement or privacy policy and the intermediary shall terminate the access to its service.

CONCLUSION

The Act says that however, under Section 79 no directions are given to intermediary to install any appropriate software so as to prevent transmission of obscene or pornographic material or any infringed material. Therefore, intermediary must be given effective directions for ensuring installation of appropriate software for preventing pornographic or obscene material being transmitted over their networks and protection against viruses.

⁷ Available at: www.inflibnet.com

CASE STUDY: ONGC v. SAW PIPES LTD.

Anish Ghosh*

INTRODUCTION

ONGC v. Saw Pipes¹ is one of the most debated cases in recent Indian history. The debate in the case is centred on the Supreme Court's interpretation of the term 'public policy of India'. S. 34 of the Indian Arbitration and Conciliation Act, 1996 allows an arbitral award to be set aside, *inter alia*, on the ground of it being against the public policy of India.² In Saw Pipes the Supreme Court expanded the scope of the term by incorporating patent illegality within the ambit of 'public policy of India'.³

Many scholars have disagreed with the Supreme Court's decision. The critics argue that the Saw Pipes decision threatens the basis of arbitration as a dispute resolution process among private parties.⁴ This is because of the enhanced scope for judicial intervention provided by the Saw Pipes decision. Further, arguments against the judgment include the ambiguity of the terms 'public policy of India' and 'patent illegality'.⁵

However, the Saw Pipes decision has its proponents as well. They argue that the quality of arbitral awards should not be neglected in the interest of a quick dispute resolution framework.⁶ Further, they argue that the ambiguity in the terms should not be an embargo on their application as otherwise sound legal principles.⁷

This project aims to summarise the law relating to patent illegality being a ground for setting aside of arbitral awards as introduced by Saw Pipes. This is done through a survey of the literature on the subject.

The project tries to answer whether the position espoused by Saw Pipes is justifiable keeping in view the underlying principles of arbitration. The hypothesis suggested is that the decision is

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¹ Hereinafter, Saw Pipes

² S. 34 (2), Indian Arbitration and Conciliation Act, 1996

³ *ONGC v. Saw Pipes Ltd.*, [2003] 3 SCR 691

⁴ Daniel Matthew, *Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance*, 3 Journal of National Law University, Delhi 105 (2015-16)

⁵ *Ibid*

⁶ Sidharth Sharma, *Public Policy Under the Indian Arbitration Act: In Defence of the Indian Supreme Court's Judgment in ONGC v. Saw Pipes*, 26 Journal of International Arbitration 133 (2009)

⁷ *Ibid*

indeed justifiable being based on sound legal reasoning.

CHANGE IN LEGAL POSITION BROUGHT BY SAW PIPES

Prior to Saw Pipes, the case of Renusagar Power Co. Ltd. v. General Electric Co.⁸ held the field. Renusagar laid down three criteria for restricting the enforcement of foreign awards on the ground of public policy. These criteria were (i) fundamental policy of Indian law (ii) interests of India, and (iii) justice and morality.⁹ The position laid down in Renusagar is widely referred to as the narrow view to the interpretation of public policy.

Saw Pipes took a broader view to the interpretation of public policy. Along with the three heads of the Renusagar case, Saw Pipes added a fourth head of ‘patent illegality’.¹⁰ The Supreme Court reasoned that Renusagar was decided with regard to execution of a foreign award while Saw Pipes dealt with setting aside of a domestic arbitral award.¹¹ Therefore, the broadening of the scope of public policy was justified.

In Saw Pipes the Supreme Court tried to clarify what ‘patent illegality’ means. The court said that an award can be set aside on grounds of patent illegality when (i) arbitral award was contrary to Indian substantive law, and (ii) tribunal did not record proper reasons for its decision.¹²

CRITICISMS OF SAW PIPES

Many legal scholars have condemned the Saw Pipes decision as being contrary to the objects of the Indian Arbitration and Conciliation Act, 1996. Fali S. Nariman went so far as to say that the decision “virtually set at naught the entire Arbitration and Conciliation Act of 1996”.¹³ The grievances of the critics are based mainly on the assumption that Indian arbitration law should be aimed at promoting the interest of foreign investors.¹⁴ These critics claim that Saw Pipes adversely affects India’s reputation as an attractive investment destination by allowing greater judicial interference in arbitration.

⁸ 1994 AIR 860

⁹ Ibid

¹⁰ Supra note 3

¹¹ Ibid

¹² Ibid

¹³ Fali S. Nariman, Speech delivered in New Delhi on Legal Reforms in Infrastructure (May 2,2003) (as cited in Pierre Tercier and Dilber Di Vitre, *The Public Policy Exception – A Comparison of the Indian and Swiss Perspectives*, 5 Indian Journal of Arbitration Law 7)

¹⁴ Amelia C. Rendeiro, *Indian Arbitration and Public Policy*, 89 Texas Law Review 699 (2010-2011)

Perhaps the most prominent of the criticisms of Saw Pipes is that it goes against the provisions of the Arbitration and Conciliation Act, 1996.¹⁵ These critics claim that S. 5 of the Indian Arbitration and Conciliation Act, 1996 stipulates that judicial authorities should restrict their interference in arbitral matters. They claim that Saw Pipes by broadening the scope of judicial interference is contrary to S.5 of the Act.

Another pervasive criticism of the Saw Pipes decision is that “public policy” and “patently illegal” are vague terms incapable of definition.¹⁶ The advocates of this argument claim that since these terms are incapable of precise decision, they open the doors for judicial misuse of S. 34.

Other criticisms include that the broad interpretation of public policy in Saw Pipes would open the possibility for delay.¹⁷ These critics claim that parties might challenge arbitral awards on frivolous grounds under public policy as a means to delay the enforcement of arbitral awards. A similar criticism is that Saw Pipes hinders the finality of arbitral awards by opening the doors for greater judicial intervention in such awards.¹⁸

Another interesting criticism is that the courts themselves cannot guarantee that justice is delivered in every single decision.¹⁹ Therefore, the supervisory jurisdiction of the courts in itself is of little value. As a whole most of the critics of Saw Pipes see it as a retrograde judgment promoting a paternalistic role of Indian courts in arbitral matters.

IN DEFENCE OF SAW PIPES

Even though the majority opinion in the judicial community is against Saw Pipes, some strong arguments in support of it have been made as well. For example, the claim that the decision is against S. 5 of the Arbitration and Conciliation Act has been rejected. The scholars in support of the decision note that S. 5 provides no blanket ban on judicial intervention.²⁰ But on the contrary expressly allows for intervention wherever the Act permits for the same. They argue that S. 34 being one such ground, Saw Pipes is in line with S. 5 of the Act.

Similarly, the supporters of Saw Pipes claim that just because ‘public policy’ and ‘patent

¹⁵ *Ibid*

¹⁶ *Supra* note 6

¹⁷ *Supra* note 13

¹⁸ *Ibid*

¹⁹ *Supra* note 4

²⁰ *Supra* note 13

illegally' are not concretely defined does not mean that they cannot be applied.²¹ These proponents argue that mere difficulty in interpretation should not mean that a principle is not implemented. They argue that even constitutional principles like pith and substance and basic structure are indefinable but are still applied.²² Even apart from this argument, the Supreme Court itself has clarified the meaning of 'patent illegality' in the later case of *Associate Builders v. DDA*²³ has clarified on the meaning of 'patent illegality'. The court in that case held that patent illegality means (i) contravention of India substantive law (ii) contravention of the Arbitration and Conciliation Act, and (iii) ignoring terms of the contract or failure to take into account usages of trade applicable to the transaction.²⁴

As to the arguments against Saw Pipes on delay and finality, the proponents of the decision claim that ensuring justice is more important than either of these considerations. They claim that mere possibility of abuse is not a determining factor for the validity of a provision.²⁵ Further, they argue that finality of a decision is not as important as its legality.²⁶

Proponents of Saw Pipes also claim that supervisory authority of courts should exist regardless of probability of mistake.²⁷ They claim that mere uncertainty in the decision-making process should not hinder the process of proper legal adjudication of disputes.

Even apart from the above defences of Saw Pipes, the basic premise of the criticisms of the Saw Pipes judgment can be challenged as well. The critics of Saw Pipes complain that Saw Pipes opens the door for judicial intervention. The evidence from court records since the enactment of the Indian Arbitration and Conciliation Act, 1996 provide no indication of such intervention. Since 1996 to 2007 only 151 arbitral awards have been challenged on the ground of public policy, this amount to 26.72% of total challenges to arbitral awards.²⁸ Even more interestingly only 14 of the challenged awards, amounting to a mere 2.47% of total awards challenged, were modified by the courts.²⁹ Such evidence clearly indicates that courts only rarely use public policy to alter arbitration awards and that fears of judicial intervention are misplaced.

²¹ *Supra* note 6

²² *Ibid*

²³ 2014(4) ARBLR 307 (SC)

²⁴ *Ibid*

²⁵ *Supra* note 6

²⁶ *Ibid*

²⁷ *Supra* note 4

²⁸ Sumeet Kachwala, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 International Arbitration Law Review 13 (2007) (as cited in *supra* 14)

²⁹ *Ibid*

CONCLUSION

The Supreme Court decision in ONGC v. Saw Pipes has been controversial. The judgment broadened the scope of public policy as a ground for setting aside an arbitral award by including patent illegality as a head under public policy. The judgment has received a lot of criticism since it was delivered. Most critics claim that the judgment is against the principle of party autonomy based on which the Arbitration and Conciliation Act, 1996 was enacted. However, proponents of the decision claim that ensuring the legality of arbitral awards is more important than providing a regulation-free framework for foreign investors.

This project suggests that the Saw Pipes decision is based on good legal reasoning. The decision is not violative of any section of the Arbitration and Conciliation Act, 1996. Further, Saw Pipes only expands on the concept of public policy which has been held to be a dynamic concept which needs to adapt to the times. This project suggests that in view of the correctness of the legal principles in Saw Pipes, the legal community should accept its reasoning instead of rejecting it.

PARENTS DUTY TO SEND THEIR WARDS TO EDUCATIONAL INSTITUTIONS: A CRITICAL ANALYSIS

Neha Goswami*

Abstract

The basic Duties are the establishments of human pride and national character. There could be no two feelings that each man has Duties towards his 'Master', his folks, his country and universe. The idea of Duties is an extremely old one to Indian human progress. At present, there are five articles in the constitution of India which have Children as their special focus. These articles are Article 21A, 24, 39 & 45 and 51A (k). Thus special provisions for children find place in our constitution in Fundamental Rights, Directive Principles as well as Fundamental Duties. Fundamental Duties in India are ensured by the Constitution of India in Part IVA in Article 51A. Analysis of various provisions contained in our national charter makes it abundantly crystal clear that it is the duty of state central as well as the parents also to promote the welfare of children and help them grow into good citizens of the country.

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INTRODUCTION

Originally, the constitution of India did not contain any list of fundamental duties. At the end of the day, pleasure in central rights was not contingent on the execution of crucial Duty's. The communists guarantee that, *he who does not work, neither might he eat.* The constitution of the world's first communist nation that of Soviet Union contains a rundown of essential rights quickly took after by a rundown of basic Duty's. It is plainly affirmed that the delight in key rights is restrictive on the acceptable execution of essential Duty's. It was on this Soviet model that Fundamental Duty was added to the Indian Constitution by 42nd change of the constitution in 1976.

The basic Duties are the establishments of human pride and national character. Each man, regardless of in what nation he stays, what religion he declares, what dialect he talks or what race or standing he has a place with, has been playing out his Duties since time immemorial. There could be no two feelings that each man has Duties towards his 'Master', his folks, his country and universe. The idea of Duties is an extremely old one to Indian human progress. In the event that one tries to investigate the religious and social history of India, including the Edicts of Ashoka, the lessons of the Bhagwat-Geeta, the Bible and the Quran, one would be persuaded about his commitments as Duties towards his religion, towards the country and towards mankind.

Fundamental Duties in India are ensured by the Constitution of India in Part IVA in Article 51A. These major Duties are perceived as the ethical commitments that really help in maintaining the soul of patriotism and also to help the congruity of the country, and in addition of the subjects. The worldwide instruments, for example, the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights incorporate reference of such central Duties. Article 51-A of the Constitution gives Ten Fundamental Duties to the citizens.

With the passing of the 93rd Constitutional Amendment Bill by the Lok Sabha, the lower place of the Parliament, on 27th November 2001, and after that by the upper house, the Rajya Sabha, on fourteenth of May 2002, a noteworthy walk was seen in the development of the 93rd Constitution Amendment charge into the 86th Amendment Constitution Act 2002. So as indicated by 86th sacred revision act 2002 the eleventh Fundamental Duties of the nation expresses that each subject who is a parent or guardian, to offer open doors for training to his kid or, all things considered, ward between the age of 6 and 14 years.

DUTIES CONCERNING JURISPRUDENCE

A Duty is generally a demonstration which one should do; a demonstration the opposite would be an off-base. The duties and the demonstration are however are not entirely indistinguishable. To attribute duties to a man is to guarantee that he should play out a specific demonstration yet not every one of the demonstrations which a man should do constitute duties. His duties he owes to others by the goodness of his position or station. The worker has duties to serve his lord, the child to comply with his folks et cetera. In addition duties comprises in positive acts, not in negligible declining acting: duties not to accomplish something, with the exception of so far as this is a way of portraying duties to accomplish something different duties not to uncover something is a negative method for depicting a positive duties to keep it mystery is a duty of uncommon and abnormal sort. Legal counselors, be that as it may, have a tendency to talk freely of anything which one should, or should not, to do as Duties, and it is in this wide sense we might utilize the term.

Duty's, similar to wrongs, are of two sorts, being either moral or legitimate. These two classes are halfway incidental and somewhat particular. At the point when the law perceives a go about duties, it generally upholds its execution or rebuffs its dismissal. In any case, this authorize of lawful power is in remarkable cases missing. A Duty is lawful in light of the fact that it is legitimately perceived, not really on the grounds that it is legitimately endorsed or upheld. There are lawful duties of defective commitment, as they are called, which will be considered by us at a later phase of our request.

ESSENTIAL DUTIES WITH RESPECT TO GANDHIAN PRINCIPLES

Mahatma Gandhi says, on the off chance that I may welcome your thoughtfulness regarding article 51A which is the thing that accommodates key Duties in our constitution, I ought to advise you that it is in the idea of an extremely expansive sanction, demonstrative and illustrative of what we the general population anticipate from ourselves. At the point when that article of the constitution was proposed by the Swaran Singh Board of Trustees, there was an arrangement for punishments. That arrangement was, in any case, dropped. Central Duties are planned in the broadest terms in article 51A. Some of them call upon the resident to instill certain esteems or to develop a specific sort of demeanor. Indeed, even these Duties which manage indicated zones and standards of conduct are not all that characterized as to offer ascent to triable and prosecutable offenses. It would have been indistinguishable and irregular to

establish Article 51A as a sort of a reference section to the Indian Penal Code, which is made and drafted in exact terms with unmistakably identifiable fixings.

The approach of Article 51A of our constitution, the way things are today, isn't to criminalize or to threaten the native yet to help him to remember his fundamental duty, to offer him a charm and touchstone and to hold a sacred mirror to him. It is to some degree like a supplication and a promise in the discussion of still, small voice. Its quality falsehoods not in its enforceability by the police and the official courtrooms yet in its interest to the idea of man in regard of his lead as an Indian resident. It is a far reaching citizenship code. It helps him to remember the duties he owes to the general public and of the individual community he owes to himself. It is a protected IOU of a national, a resident's promissory note. Its recognition might be profoundly individualistic and similarly communitarian. It gives him an exemplified motivation or a check list, so he may manage and canalize his considerations and deeds with a measure of edified and intentional intelligibility. It likewise relates the established sanction of Fundamental Duties to Fundamental rights and Directive Principles of State Policy. Central rights are in the idea of legitimately enforceable certifications and the Directive Principles are in the idea of rules and confirmations, the two by the state to the subjects. Then again, Fundamental Duty's are epitomized in Article 51A are moral affirmations of nationals to natives. They are not enforceable in courtrooms without the guide of pertinent and particular enactment yet they are similarly essential and basic in their own specific manner.

Article 51A may likewise be to do a social review of the commissions and oversights of the official and to give locus standi to a concerned subject in issues associated with or having a course on Fundamental Duties. Sincere Marker in his well-known work 'The governmental issues of Aristotle' watched and quote: "A subject is one who for all time partakes in the organization of equity and the holding of office" and that "natives in the presence of mind of that term are all who share in the community life of decision and being ruled thus".

ARTICLE 51A IS A PIECE OF ARTICLE 21A OF THE INDIAN CONSTITUTION

Training is the truly necessary impetus which directs the rate of development and advancement of a nation. The indispensable part of instruction in our general public can't be denied as it can change the fortune of many. In India, there had been dependably an interest for obligatorily giving of instruction to all. In the underlying years of post-freedom period, the economy was not fit as a fiddle in order to give instruction to every last offspring of the nation.

Throughout the years, after the economy was changed, the India changed radically for better. What's more, inside 20 years of time, we have adapted to attempt this Duty's so not a solitary kid is left ignorant. This choice of government couldn't have come at a superior time, when it is normal that India will have most extreme number of youth populace by 2020. On the off chance that that populace will be left unexplored, it will rather turn into a colossal weight on our nation.

Appropriate to Education has been a piece of the Directive Principles of the State Policy under Article 45 of the Constitution, which is a piece of Chapter IV of the Constitution. Be that as it may, rights in Chapter IV are not enforceable. Without precedent for the historical backdrop of India we have made this privilege enforceable by placing it in Chapter III of the Constitution as Article 21. This qualifies youngsters for have the privilege to training implemented as a key right.

The 86th Constitutional correction of December, 2002 was prodded by the Unnikrishnan judgment and an open request to implement the privilege to instruction, progressive governments from 1993 worked towards conveying an established revision to make training a crucial right. The alteration embedded the accompanying articles in the Constitution:

- 1) Addition of new article 21A-After article 21 of the Constitution, the accompanying article should be embedded, to be specific:-

Appropriate to instruction; Article 21A-”The State should give free and obligatory training to all offspring of the age of six to fourteen years in such way as the State may, by law, decide.”

- 2) Substitution of new article for article 45-For article 45 of the Constitution, the accompanying article should be substituted, to be specific:-

Arrangement for early youth care and instruction to youngsters underneath the age of six years ; Article 45-”The State might try to give early youth administer to all kids until the point when they finish the age of six years.”

- 3) Alteration of article 51A-In article 51A of the Constitution, after proviso (J), the accompanying statement should be included, to be specific:-

(k) Who is a parent or guardian to give chances to training to his child or, all things considered, ward between the age of six and fourteen years.

THE INDIAN CONSTITUTION AND YOUTH

The Indian Constitution has certain articles with the essential goal of shielding the fundamental privileges of youth. Some of these protections are incorporated with the Fundamental Rights and are enforceable in an official courtroom. Different certifications are a piece of the Directive standards of State Policy which can't be authorized yet underlie government strategies and projects.

The following are a portion of the arrangements of the Constitution that have exceptional importance to youth:

Part III Fundamental Rights - Right to Education

- Article 21 A

Opportunity of instruction joins the privilege of any individual to shape a school and the privilege of guardians, their kids, or understudies to be taught at their preferred school. In a few nations enlistment in an open or government oversaw educational system is obligatory and people are hindered from establishing schools without a permit. On a basic level, anybody could found a school; opportunity of training is intended to wipe out any imposing business model on instruction.

- Article 24

This Article gives that no kid underneath the age of fourteen years should be utilized to work in any industrial facility or mine or occupied with some other unsafe business.

Part IV Directive Principle of State Policy

- Article 39(f)

Adolescence and youth are made preparations for misuse and good and material surrender.

- Article 45

The State might attempt to give, inside a time of ten years from the beginning of this Constitution, for nothing and necessary training for all kids until the point when they finish the age of fourteen years.

➤ Article 46

The State might advance with unique care the instructive and financial interests of the weaker segments of the general population, and specifically, of the Scheduled Castes and the Scheduled Tribes, and should shield them from social treachery and all types of abuse.

Part V Fundamental Duties

➤ Article 51 (A) (k)

It should be the Duty's of each national of India who is a parent or a gatekeeper to give chances to instruction to his youngster or as the case might be ward, between the ages of 6 and 14.

Although, Part IV of the constitution alludes to key Duty; it makes exceptional reference to appropriate instruction and socialization of youth. The National Charter of 2004 of the Government of India accentuates the administration's sense of duty regarding youngsters' rights to survival, advancement and insurance.

WELFARE LAWS AND REGULATIONS

The administrations at the middle and the states have authorized laws that support welfare and advancement of kids and youth in the regions of wellbeing, instruction and work.

86th Constitutional change [Statement of Objects and Reasons]

The Constitution of India in a Directive Principle contained in article 45, has 'made an arrangement for nothing and mandatory training for all youngsters up to the age of fourteen years inside ten years of declaration of the Constitution. We couldn't accomplish this objective even following 50 years of appropriation of this arrangement. The undertaking of giving training to all youngsters in this age assembles picked up force after the National Policy of Education (NPE) was reported in 1986. The Government of India, in association with the State Governments, has attempted strenuous endeavors to satisfy this command and, however huge upgrades were seen in different instructive pointers, a definitive objective of giving all inclusive and quality training still stays unfulfilled. Keeping in mind the end goal to satisfy this objective, it is felt that an unequivocal arrangement ought to be made in the Part identifying with Fundamental Rights of the Constitution.

With a view to making appropriate to free and necessary instruction an essential right, the

Constitution (Eighty-third Amendment) Bill, 1997 was acquainted in Parliament with embed another article, to be specific, article 21 A giving on all youngsters in the age gathering of 6 to 14 years the privilege to free and obligatory training. The said Bill was examined by the Parliamentary Standing Committee on Human Resource Development and the subject was additionally managed in its 165th Report by the Law Commission of India.

In the wake of mulling over the report of the Law Commission of India and the proposals of the Standing Committee of Parliament, the proposed alterations in Part III, Part IV and Part IVA of the Constitution are being made which are as per the following:-

- (a) To accommodate free and necessary training to youngsters in the age gathering of 6 to 14 years and for this reason, enactment would be presented in Parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is ordered
- (b) To give in article 45 of the Constitution that the State might attempt to give early youth care and training to youngsters beneath the age of six years; and
- (c) To revise article 51A of the Constitution with a view to giving that it should be the commitment of the guardians to give chances to instruction to their youngsters

The Bill looks to accomplish the above items.

Guardians and Wards Act, 1890

Duty's of guardian of the individual

A guardian of the individual of a ward is accused of the authority of the ward and should look to his help, wellbeing and instruction, and such different issues as the law to which the ward is subject requires.

Right to Free and Compulsory Education Act, 2009

Free and Compulsory Education to all youngsters between the age of 6-14 years covering the rudimentary cycle of instruction in an area school. Assist it ensures training of a predetermined standard, buying in to standards of school framework, hours of instructional time and days of school working, understudy instructor proportions and educator quality.

The law influences it to clear that the impulse is on the state and not on the guardians to

guarantee fulfillment of the rudimentary cycle of tutoring. It says that it is the Duty of each parent to concede their kids in an area school, however the duty of the legislature to guarantee quality instruction and the maintenance and fulfillment of basic training by kid in school. There are punishments on guardians for not sending their youngsters to class.

- **Role of Central Government**

The Central Government part is 3-overlay:

1. Developing a National Curriculum Framework with the assistance of a selected Academic Authority [section 6(a)]
2. Developing and upholding norms of instructor capability and preparing [section 6(b)]
3. Providing specialized and monetary help and assets to the State governments for advancement, research, arranging and limit building [section 6(c)]

- **Role of State Education Department**

1. Provide free and obligatory basic instruction to all youngsters
2. Ensure accessibility of an area school with imperative framework, educators, and learning hardware as indicated in the Act.
3. Ensure affirmation, participation and fruition of basic instruction for each youngster
4. Prevent victimization any youngster on any grounds

The Act ensures the finishing of rudimentary instruction. It implies in this manner that the tyke can keep on studying till she has finished class 8, independent of her age around then. The Act requires that a School Management Committee be set up comprising of no less than three-fourth parent-individuals, with sufficient portrayal of guardians of kids from hindered groups and no less than 50 percent individuals to be ladies.

GRIEVANCE REDRESSAL

Grievances can be held up at the Gram Panchayat or Block Education Office. Or then again even at the SCPCR or NCPCR. At long last grievances can likewise be taken to the courts, as training is presently a justiciable key right of all kids in the age aggregate 6-14 years.

NCPCR is setting up a concentrated helpline, on which grievances can be gotten. This helpline will at the same time enroll the objection at the fitting training office too, with the goal that follow up can be proficiently checked.

CASE: Society for Private Schools of Rajasthan v. Union of India & Others

The Act encourages various segments which by all appearances are by all accounts for the advantage for youngsters from weaker area of society. In any case, there has been a noteworthy commotion over the protected legitimacy of the Act. In the above case, which is probably going to have far-extending results in the field of instruction, the Supreme Court maintained the established legitimacy of the Right of Children to Free and Compulsory Education Act, 2009. The RTE Act is material to kids between the age of six and fourteen.

Then again, the Petitioners, containing a few tuition based schools had tested the Constitutionality of the Act on two grounds: That area 12(1)(c) which puts a commitment on unaided schools to give free and obligatory training to the youngsters from weaker and burdened areas by holding 25 for each penny of the class quality for them and different arrangements of the Act that forced infrastructural and administrative prerequisites on the schools, disregarded Article 19(1)(g) of the Constitution that ensures appropriate to opportunity of occupation. Second, the minority schools contended that the Act damaged their extraordinary Constitutional rights under Article 30(1) to set up and oversee instructive foundations. The issue saw a veritable battery of senior advocate's advice showing up including Harish Salve, Rajeev Dhavan, T.R. Andhyarujina, Vikas Singh, K. Parasaran, Shekhar Naphade, Arvind Dattar, Ashok Desai and Chander Uday Singh speaking to an assortment of instructive establishments. This demonstrates the non-public schools investigated every possibility to hand the tables over their support.

The decision has, be that as it may, raised a few issues on down to earth usage identifying with reconciliation of poor understudies, nature of training and monetary effect on schools. Different noted educationists of India have raised a few noteworthy issues, which have brought up an issue stamp over the fruitful usage of the Act. The flood of understudies from brings down financial classes in tip top schools would surely hurl new concerns and issues. Sentiments of mediocrity in any youngster are not really helpful for emotional well-being. Tuition based schools have a colossal duty to take restorative measures the extent that mentalities of educators and staff towards the poor is concerned.

The expectation of the judgment is to expand the welfare of the kids in India; however we can't manage the cost of it by making encroachments to the privileges of private gatherings. The "mainstream" schools which are not taking any guide from the administration will be constrained by this demonstration to hold up under the weight, by conceding understudies with certain proportion, as well as by upgrading the foundation and scholastics of the establishment which numerous schools in the nation would not have the capacity to manage. The ones which will swallow the cash of the guardians and running as cash creating foundations won't think that it's extremely hard to stick to the standards and standards under the new judgment. Yet, the schools which have been running on not-revenue driven premise will be constrained to consider different methods for creating income in order to keep themselves above water which is in sheer infringement of Article 19(1)(g) of the Constitution that ensures ideal to opportunity of occupation. Or then again the other cure accessible just in this judgment for them is to change over from "common" to "minority" foundations conferring training with inordinate accentuation on religion, which too would not be in the long haul enthusiasm of the country.

CONCLUSION AND SUGGESTIONS

The expanded wrongdoing rate against the kids, even subsequent to authorizing such a significant number of laws and executing them, has raised a disturbing concern everywhere throughout the world as youngsters are being abused for satisfying a few people's illicit purposes. So alongside different laws, it is additionally the social duty of state and local government to deal with the youngsters and to secure their rights.

To import equity to youngsters the state has enabled to make unique arrangements to their welfare in order to bring them at standard with other society. There are different arrangements in the constitution which put the state, Local and in addition the guardians under the Duty to guarantee that the youthful age of the kids isn't manhandled and they are not presented to financial need to enter diversion unsuited to their age and quality.

For sure our Constitution-producers our sufficiently shrewd as they were certain that the fantasy of India's of their vision improvement would not work out as expected if the offspring of the nation are not sustained and instructed.

A right exists when somebody is under a duty. For example if the courts do not perform their duties in imparting justice to the citizens of the country than how citizens can exercise their rights.

DISSOLUTION OF MARRIAGE UNDER ISLAM WITH REFERENCE TO TALAQ-UL-BIDDAT

Ridhima Verma*

Abstract

"The Islam of Mohammed contains nothing which in itself bars progress or the intellectual development of humanity"

- Syed Ameer Ali in his *The spirit of Islam*

He further added, "The Prophet inculcated the use of reason: his followers have made its exercise a sin...He impressed on them to gain quest of knowledge to the land of the heathens. They do not take it even when it is offered to them in their own homes." An understanding of the above highlights that the religion never professes the wrong, nor does it even tangentially abrogate on the rights of persons. It is us, the people, whose incorrect interpretations and convenience based mind mechanisms which create obstacles in the smooth flow of religion, law, and politics. Through this paper the author has tried to focus on the forms of dissolution of marriage prevalent and accepted by Islam with focus on Talaq-ul-biddat, commonly referred to as "Triple Talaq" and the change in scenario post the recent judgment by the Apex court of India.

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INTRODUCTION

If there is white there is black, if there is good there is evil, if there is marriage there is Divorce. Divorce is a practice been carried on since ages in most civilizations and is an essential part of most cultures and religions. It's a common practice amongst the Arabs, Hebrews, Israelis' etc. Under the Hindus however it got recognised and accepted as an essential ingredient only after the passing of the Hindu Marriage Act, 1955. However, it has been a common prolonged practice amongst the Arabs much before it got recognised by the Hindus.

Death of either of the spouses is an accepted form of dissolution of marriage in most personal laws and one that requires the least amount of formalities to be complied with. On the other hand, when the marriage is terminated by the act of parties either by mutual consent or at the discretion of one of the spouses it falls in the other category, i.e., Divorce.

According to Ameer Ali¹, the reforms of Prophet Mohammad marked a new departure in the history of eastern legislations. The prophet of Islam is reported to have said “with Allah”, the most detestable of all things permitted is divorce”, and towards the end of his life he practically forbade its exercise by men without intervention of an arbiter or a judge.

The Prophet declared that among other things which have been permitted by law, divorce is the worst.² However when it becomes impossible to maintain a congenial atmosphere and all that remains is hate and suffering, Divorce is the only preferred option that lies.

Prophet Mohammad stated that, “if a woman be prejudiced by a marriage, let it be broken off”, basis which he has granted the right to women to obtain divorce on certain reasonable grounds.

MODES OF DISSOLUTION OF A MUSLIM MARRIAGE

In Islamic law, there are two *prima facie* instances when the holy union of marriage gets dissolved; a) By the death of the husband or wife, i.e. by act of God b) Divorce, i.e. by act of parties.

The first category as mentioned above is the simplest form of dissolution and demands no explanation, it is the inevitable consequence of death of the spouse. The second category forms a class which entails certain kinds as follows:

¹ Mohammedan Law, p.472

² Tyabji: Muslim Law, Ed. IV, p. 143

- a) Judicial divorce (By wife under the Dissolution of Muslim Marriage act, 1939)
- b) Extra judicial divorce

By Husband:

TALAQ

In ordinary parlance the term means to repudiate or reject however in the context stated herein it refers to ending the marriage ties. In *Moonshee Buzloor Rahim v. Laleefutoon nisa*³ it was said that under Muslim law Talaq is the mere arbitrary act of a Muslim husband who may repudiate his wife at his own pleasure with or without cause. He can pronounce the Talaq at any time. It is not necessary for him to obtain the prior approval of his wife for the dissolution of his marriage.

Verse 4:35 of the Quran reads as:

"If ye fear a breach between them twain appoint two arbiters, one from his family,

One from hers, If they seek to set things right, Allah will cause their reconciliation."

The above verse tries to pitch that the most apt way for settling family disputes is by appointing arbiters who are aware of the idiosyncrasies of the parties to help reconcile the situation rather than jittering horrible comments at each other and throwing mud at each other's faces in the open. If there lays a scope for reconciliation, then it will definitely happen and Allah will be the facilitator for the same.

This clearly sketches out the vociferous, unfettered, uncontrolled, unconstrained nature of Talaq which unfortunately exemplifies the patriarchal nature of society giving arbitrary power to the husband and therefore creating an illusionary hierarchy between the sexes.

There exists a rigid observance of a set etiquette or formalities to be complied with by both the sects of Shia and Sunni. Such as for both the sects its necessary that the person is of a sane mind while pronouncing the Talaq. In case of Shia's the husband shall have attained the age of puberty and there shall be two competent witnesses present at the time of pronouncement. In case of Sunni's the person shall be an Adult which would apply that he shall have attained the age of 18 in accordance with the Indian Majority Act. The Talaq could be in writing (Talaqnama) or oral

³ 8 MIA 397

but shall nevertheless be a clear manifestation of the intent. Astonishingly Sunni law does not give weight to a Talaq pronounced under compulsion or intoxication, unlike the shia's who consider it null and void.

There are namely two kinds of talaq's at the discretion of the husband;

TALAQ-UL-SUNNAT

As performed as per the traditions of the Prophet, it is of two kinds;

Ahsan: Considered as the best kind of Talaq or the very proper way. The husband must pronounce the formula of divorce in a single sentence. It is revocable in the Iddat period. It must be however pronounced in the state of purity (*tuhr*) i.e. when the wife is not undergoing her menstruation cycle. However, if the marriage has not been consummated or if the wife is beyond the age of mensuration or the couple has lived far away for a while, this restriction doesn't imply.

Hasan: In Arabic Hasan means "Good". It could be referred to the proper way. It however is of lesser worth as compared to Talaq pronounced under Ahsan. There must be three successive pronouncements of the formula of Divorce. Such form of Talaq is irrevocable after the third pronouncement.

TALAQ-UL-BIDDAT (TRIPLE TALAQ)

The most sinful mode of Talaq, introduced by the Omeyyads to ease the process of giving divorce by escaping the clutches of law. Not accepted by the Shia's and Malikis. Three pronouncements made during a period of *tuhr* either in one sentence or in separate sentences. It becomes irrevocable immediately when it is pronounced irrespective of Iddat. This Talaq is also known as Talaq-ul-bain. When in writing it becomes irrevocable immediately.

ILA

When the sole purpose of marriage which is procreation as justified by mostly all sects and societies, gets defeated, there lies a standing question mark to such a marriage. If a husband declares to his wife that he does not want to have any sexual relations with her and maintains his word for 4 months pending which he does not indulge in any sexual intercourse with her, it falls within this category and is referred to as Ila and the marriage gets dissolved after months. Unless

there is sexual intercourse in the span of those 4 months, basis which the marriage would be resumed.

ZIHAR

Although an outdated method of divorce but interestingly grants certain rights to the wife. In this form of divorce the husband compares the wife to a woman from his prohibited relationship such as mother or sister post which there is no cohabitation or sexual relation for 4 months. On the completion of these 4 months the marriage does not dissolve but Zihar gets completed. The wife has the right to approach the court for a judicial divorce or restitution of conjugal rights, in which case the husband goes through a penance (such as feeding 60 poor persons, fasting etc) for having done such a sin, of comparing the wife to a woman from his prohibited relation.

By Wife

TALAQ-E-TAFWEEZ

The husband possesses such an absolute right to divorce that he has the power to delegate it further to anyone whom he likes just as in the concept of agency, he appoints someone to exercise his right on his behalf. In this manner, he can delegate his right to his wife as well. Such a Talaq can be unconditional or subject to some condition. A pertinent factor about such form of Talaq however is that the wife essentially does not have a right to divorce, hence she divorces herself by exercising this right and does not divorce the husband.

LIAN

Just as one can sue for defamation, a Muslim wife holds the right to divorce her husband on false and vexatious charges of unchastity and infidelity. However, it is mandatory that the wife is not guilty and her behaviour has in no manner been unchaste resulting in adultery.

DIVORCE UNDER DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939

This act came as an effulgent move on behalf of our government to ensure that the right the Muslim women were being deprived of, the right to divorce, is granted to them. Section 2 of the acts enumerates the instances when a woman can divorce her husband.

By Mutual Consent

KHULA

The Quran, on Khula states- “and if you fear that they(husband and wife) may not be able to keep within the limits of Allah, in that case it is no sin for either of them if the woman releases herself by giving something (to the husband).⁴ The literal meaning of Khula is “to take off the clothes”. Herein it refers to the fact that the husband releases the wife (as he puts his clothes off), in exchange for some compensation.

MUBARAT

In this method, both the husband and wife are desirous of separation and thus no party is legally required to compensate the other by giving some consideration. Unlike in Khula where only the wife is interested in separating and thus takes the initiative first, here either of the parties could take the initiative.

EVOLUTION AND PAST OF TALAQ-UL BIDDAT

Talaq-ul-biddat or as referred to as in popular parlance “Triple Talaq” traces its existence to the caliphate under caliph Hazrat Umar. It was created as a weapon to fight the indecencies of the Arab husbands but unfortunately became a barbaric weapon with the passing of time.

Arab men after conquering Syria, Egypt wanted to marry the women in those countries irrespective of already being married. However, these women demanded that they first give a divorce to their existing wives at once by pronouncing talaq at one sitting, consequential to which they would get married to them. The Arab men however knew that the pronouncement has to be over a period of two tuhr's and such an impromptu pronouncement at one sitting would be void. This pledged a way for them to get the best of both worlds, they would still retain their first wives and yet be able to marry the Syrian and Egyptian women. The situation became vicious and religion was being misused by unscrupulous husbands. As a remedial measure Caliph Umar as an administrative order declared that Talaq pronounced thrice at one sitting would dissolve the marriage irrevocably.

Further, as lamentable as it may seem the Hanafi jurists approved this method as a valid way of granting Divorce and paved way for its religious sanction.

At present, until the current judgment by the Apex court, severe hardship was being faced by the

⁴ Quran: Sura II, Ayat 229

women of the Muslim community. The view of the Prophet as mentioned in the Quran and the Opinions' in the Hadith on the same matter could be analysed as;

Holy Quran: The holy Quran, paramount source of Islamic jurisprudence has not ordained that the three divorces pronounced in a single breath would have the effect of three separate divorces.⁵

The relevant verse from the Quran corroborating the above statement is- “A divorce is only permissible twice; after that the parties should either hold together on equitable terms or separate with kindness.”⁶

Ahadith: The view that mere repetition of divorce without an intention to give a Mughallazah or final divorce or simply by way of emphasis or in momentary excitement does not amount to a Mughallaza or final divorce finds full support from traditions.⁷

“Mahmud-b, Labeed reported that the messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said; Are you playing with the Book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; shall I not kill him?”⁸

The practice of triple divorce, during caliph Hadrat Omar's time was being greatly misused and the purpose that Caliph Umar had introduced it for under his rein was no more the only purpose of indulgence in this facility in the modern times. Hadrat Omar used to punish people who would pronounce triple divorce. He used this as a method to discourage them from adapting this practice.

Analysing the juristic view, as per Abu Hanifa and various other Hanafi jurists, although Triple Divorce might be considered bad in religion but stands good in law and is a binding Mughallazah or final divorce.

JUDICIAL OVERVIEW

Being bad in Theology does not make it bad in law. Following this method of interpretation, the

⁵ Aqil Ahmad, Mohammedan Law, 23rd Edn., p.175

⁶ I-II : 229 Trans. By. A. Yusuf Ali

⁷ Supra note 5

⁸ *Mishkat-ul-Masabih* : An English Translation & commentary by AL Maulana Fazlul Karim p.693, Islamic book service, New Delhi

Indian courts have been declaring Triple pronouncements as lawful and effective.

The Bombay High Court in *Sara Bai v. Rabia Bai*,⁹ recognised Triple divorce on irrevocable footing.

Further in *Ahmad Giri v. Mst. Megh*¹⁰ observed, "The Talaq-ul-biddat is the most prevalent form of obtaining divorce in India. Any change in this respect cannot be brought about by judicial interpretation. If there is a general desire among Muslims to revert to pristine purity of Islam, how such changes in the present state of Muslim Law can be brought out, in the words of late Syed Amir Ali, "whether by general synod of Muslim doctors or by the direct action of the legislatures, it is impossible to say."

Further in, *Jiauddin Ahmed v. Anwara Begum*¹¹, the High Court stated that, - "A perusal of the Quranic verses and the commentaries thereon by well-recognized Scholars of great eminence like Muhammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J. (ILR 30 Bom. 537) that the whimsical and capricious divorce by the husband is good in law, though bad in theology. These observations have been based on the concept that women were chattel belonging to men, which the Holy Quran does not brook.

The Supreme court in a landmark judgment in *Shamim Ara v. State of U.P.*¹² clarified the Islamic law of divorce as applied in India. The court observed that the correct law of divorce as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the Husband and the wife by two arbiters, one from the wife's family and the other from the husband; if the attempt fails talaq may be affected.

In *Iqbal Bano v. State of U.P.*¹³ the apex court held that the conclusion that in view of the statement in the written statement about an alleged divorce 30 years back by utterance of the words "talaq" "talaq" "talaq" three times is sufficient in law, is not sustainable.

The position of Triple Talaq however changed by leaps and bounds after the judgment of 2017

⁹ ILR (1905) 30 Bombay 537

¹⁰ AIR 1955 J & K 1

¹¹ (1981) 1 Gau. LR 358

¹² JY 2002 (7) SC 520

¹³ (2007) 6 SCC 785

which questioned the constitutionality of the same and brushing aside the sentiments of the concerned community, the Apex Court took a stand for the women of the Muslim Community and gave a powerful verdict as analysed further.

PERUSAL OF THE 2017 JUDGMENT

Justice Joseph Kurien stated that what cannot be true in theology cannot be accepted in law either. Union Women and Child Welfare minister Maneka Gandhi declared- “*Yeh ek accha nирnay hai, ling nyaya and ling samanta ki or ek aur kadam* (This is good decision, another step towards gender equality and gender justice).

Whether a political Stint or a step forward towards progress, this decision has impacted many victims of an unscrupulous and whimsical custom named Triple Talaq. Although a 2002 judgment¹⁴ which also held Triple Talaq invalid was being followed by several High courts, however the 2017 judgment by the Apex court completely changed the scenario and bought relief too many hegemonized women.

In *Re: Muslim Women's Quest For Equality v. Jamiat Ulma-I-Hind & Ors*¹⁵ Supreme Court by a 3:2 majority declared Triple Talaq invalid and ended the misery of many Muslim women. Critically examining the same, it is pertinent to establish the background of the case *Shayara Bano v. Union of India & Others*¹⁶ in which the following was ascertained;

Muslim Personal Law (Shariat) versus Customs/ Usages

For a long time in the Pre-independence British Periods the Muslim women battled with the oppressive nature of customs and usages and protested against the same. They were governed by the Muslim personal law- Shariat as well as the customs and usages which were harsh towards them displaying a patriarchal monopoly. Basis this, in 1937 the Muslim Personal Law (Shariat) Application Act was passed to amend the situation.

Section 2 of the act read as; “*Application of personal law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land)*

¹⁴ *Shamim Ara v. State of U.P.* (2002) 7 SCC 518

¹⁵ Suo Motu Writ (Civil) No. 2 of 2015 With, Writ Petition (Civil) No. 118 of 2016, Writ Petition (Civil) No. 288 of 2016, Writ Petition (Civil) No. 327 of 2016 Writ Petition (Civil) No. 665 of 2016, Writ Petition (Civil) No. 43 of 2017

¹⁶ Writ Petition (C) No. 118 of 2016, with, Suo Motu Writ (C) No. 2 of 2015, Writ Petition(C) No. 288 of 2016, Writ Petition(C) No. 327 of 2016, Writ Petition(C) No. 665 of 2016, Writ Petition(C) No. 43 of 2017

regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat). ”

Therefore, leaving no room whatsoever for the customs or usages to prevail if they acted contrary to the act, which would include matters of Divorce.

Also, It is relevant to highlight herein, that under Section 5 of the Shariat Act provided, that a Muslim woman could seek dissolution of her marriage, on the grounds recognized under the Muslim ‘personal law’. It would also be relevant to highlight, that Section 5 of the Shariat Act was deleted, and replaced by the Dissolution of Muslim Marriages Act, 1939.¹⁷

As there was no right for Hanafi women to seek a decree of divorce from their husbands, The Hanafi jurists had laid that in cases where the Hanafi law acts as an obstacle or causes any form of destitution, the Maliki, Shafii or Hanbali law could be applied on. Therefore, the Dissolution of Marriage by a Muslim woman act, 2019 applies to them as well.

Sinful in theology, yet sanctioned by Law?

The plea put forth by the petitioners in the inherent case was that if something is considered sinful in theology it shall not be accepted in law. Placing reliance on Hindu customs such as Devdasi system, Sati, Polygamy which have also been abolished now, the petitioners sought an invalidity of the Triple Talaq system as well. However, examining these three practices the court stated that they were abolished by legislative enactments and not judicial orders and thus cannot be used for comparison. The court also stated that this practice had been in force since the last 1400 years from the time of Caliph Umar. Commenting on this issue, finally they declared that this ground of the petitioner did not hold strong that just because it was bad in theology it shall be declared bad in law as well. It was also asserted that Talaq-ul- Biddat forms an integral part of the Muslim Personal law and is a matter of faith for the Sunni Muslims belonging to the Hanafi school.

¹⁷ Writ Petition (C) No. 118 of 2016, with, Suo Motu Writ (C) No. 2 of 2015, Writ Petition(C) No. 288 of 2016, Writ Petition(C) No. 327 of 2016, Writ Petition(C) No. 665 of 2016, Writ Petition(C) No. 43 of 2017

Constitutional morality and violation of Article 25 of the Constitution of India

One of the main points which were used for determining the validity of Triple Talaq was if it was if it violated the provisions of part III of the constitution containing the fundamental rights.

With regards to article 14, it was rightly put by the petitioner that Muslim women were being discriminated in comparison to other women of different religions, be it Hindus, Sikhs etc as there was an arbitrary and uncontrollable right to end the matrimonial alliance granted to their husbands who lead to severe hardship for them. It was also contended by the petitioners that the women had a right to human dignity as granted under article 21 of the constitution and as a fundamental duty enshrine under article 51A(e) it was the duty to ensure that women were not subjected to any derogatory practices. Nevertheless, this contention that it is violative of constitutional morality relying on various precedents was also set aside.

Based on the above on the matter of being violative of article 25 and relying on judgment rendered by the Bombay High Court in the Narasu Appa Mali case¹⁸ and several others was also rejected.

However, in *In Re: Muslim Women's Quest For Equality v. Jamiat Ulma-I-Hind & Ors*¹⁹ it was held that “*Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of Talaq. We have noticed how in Fyzee's book (supra), the Hanafi school of Shariat law, which itself recognizes this form of Talaq, specifically states that though lawful it is sinful in that it incurs the wrath of God. Indeed, in Shamim Ara v. State of U.P.²⁰, this Court after referring to a number of authorities including certain recent High Court judgments held as under:*

“*13...The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation. In Rukia Khatun²¹ the Division Bench stated that the correct law of talaq, as ordained by the*

Holy Quran, is: (i) that “talaq” must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one

¹⁸ AIR 1952 Bom 84

¹⁹ *Supra* note 15

²⁰ *Supra* note 14

²¹ (1981) 1 Gau LR 375

chosen by the wife from her family and the other by the husband from his. If their attempts fail, “talaq” may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law. 14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Courts.”

Therefore, the court declared Triple Talaq void under the shadow of article 14 of the constitution as being a capricious, whimsical and unbridled right granted to the husbands to break matrimonial tie irrevocably and without any scope of reconciliation and thereby leaving the wives in a misery.

Further it was held, *Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.*²²

CONCLUSION

In the words of Hillary Clinton, Human rights are women’s rights and women’s rights are human rights. We live in a century of gender equality and gender justice, a time has come where it is a recognised fact that we cannot succeed in totality and nor can there be full progress of any nation in be it in any field, science, art, politics, law unless there is respect for the both the sexes and progress amongst both. Social welfare of women is on the top agenda of most nations and with the coming of several conventions, many of which even India is a part of (eq. CEDAW) it is quintessential to manifest equality in all spheres.

Many nations which are theocratic or those who have declared Islam as their religion have also taken a step forward and abolished Triple Talaq, such as Egypt, Algeria, Iraq, Lebanon etc.

In such an atmosphere where rights of women are proliferating vehemently, it was indeed one of the best decisions of the Apex Court to have declared Triple Talaq void.

²² *Supra* note 15

TERRORISM FINANCING- A DYNAMIC CHALLENGE FOR INDIAN LEGAL SYSTEM

Mayura Sabne-Botungale*

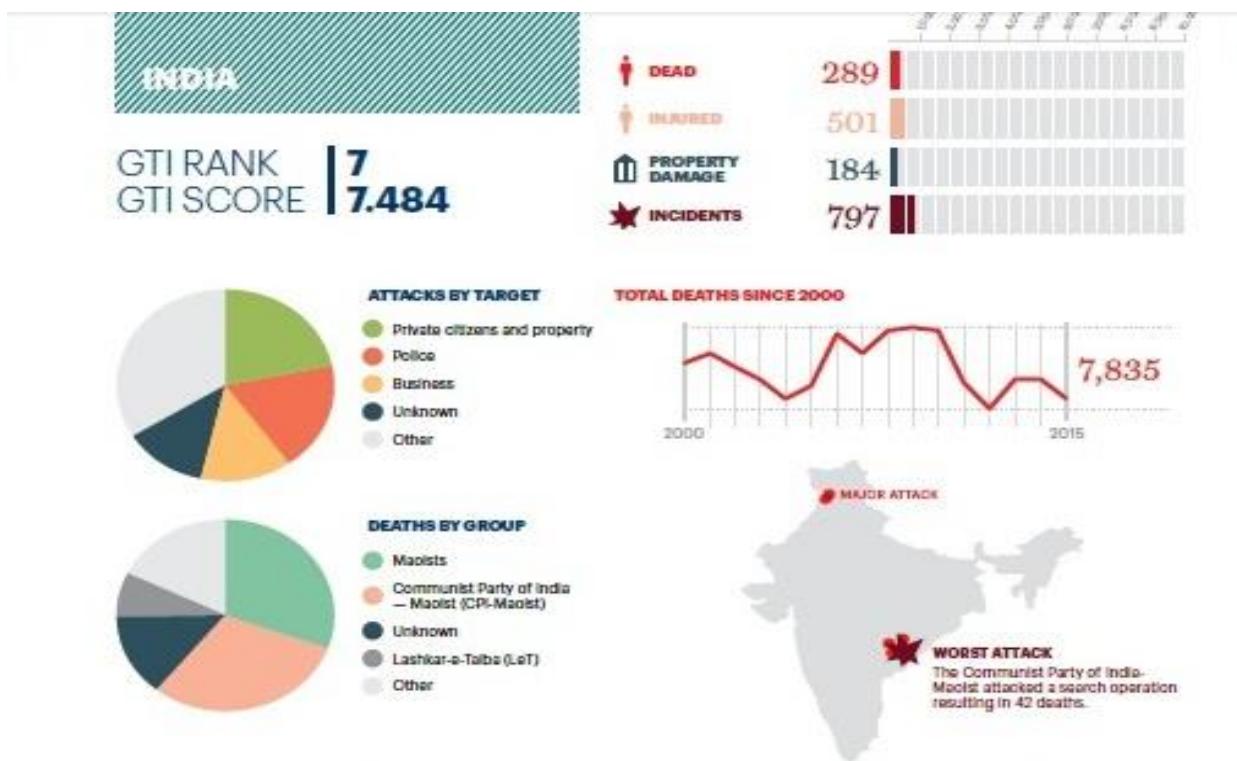
Abstract

Today, no state in the world is immune from the threat of terrorism and India is no exception to it. India has been combating terrorism since its birth as “independent nation”. It has built a strong legislative foundation along with operational mechanism to deal with menace of terrorism. Time and again, India has stressed on the fact that terrorism financing is the soul of terrorism and in order to eliminate terrorism, its financing must be thwarted with immediate effect. In the light of this background, the researcher has initially traced the conceptual development of the term “terrorism financing” in the present research paper. Further, the journey of present research paper continues with the basic understanding of various sources through which terror funds are obtained and channels of funding though which money is mobilized in the hands of terrorists. After having understood the nature of terrorism financing, the researcher has tried to assess the Indian legal framework dealing with terrorism financing. This evaluation is carried out from the perspective of dealing with the dynamic challenge posed by terrorism financing. After the analysis of Indian legislative initiatives, the researcher has tried to put forth some valuable practical recommendations based upon the conclusions.

Keywords- Terrorism Financing, UAPA, FEMA, Hawala, Demonetization

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INTRODUCTION



This discrepancy between the number of attacks and deaths reflects that the nature of terrorism in India is different than in other countries. Many of the groups are seeking political recognition, with attacks not aimed at killing people. As a consequence, the majority of terrorist attacks in India have low casualties.

In 2015 deaths from terrorism in India decreased to the second lowest level since 2000. There were 289 deaths in 2015, a reduction of 45 per cent from the previous year. However, there were four per cent more attacks, totalling 800 and representing the highest number since 2000.

In 2015 around 80 per cent of attacks were non-lethal. Reflecting this, there were many groups which committed terrorist acts that didn't kill anyone at all. Of the 49 different terrorist groups that engaged in a terrorist act in 2015, 31 groups did not kill anyone. There were 18 groups that had a fatal attack, down from 27 groups in 2014. Four groups that accounted for 72 per cent of all deaths in 2015. In contrast, in 2014 these same groups accounted for only 60 per cent of all deaths.

Terrorism in India is characterised by communist, Islamists and separatist groups. Communist terrorist groups are by far the most frequent perpetrators and the main cause of terrorism deaths in India. Two Maoist communist groups claimed responsibility for 176 deaths in 2015, which constitutes 61 per

cent of all deaths. Police are overwhelmingly the largest target group of Maoists, accounting for a third of deaths, followed by private citizens who are targeted in around 20 per cent of deaths with other categories including the government and businesses. The majority of Maoist attacks occurred in the provinces of Bihar, Chhattisgarh, Jharkhand and Odisha.

The dispute with Pakistan over Jammu and Kashmir is the main source of Islamist terrorism. The two deadliest Islamist terrorist groups in 2015 in India were Lashkar-e-Taiba (LeT) and Hizbul Mujahideen, which are also operating in Pakistan, Afghanistan and Bangladesh. Lashkar-e-Taiba mainly operates in Pakistan and was responsible for 22 deaths in 2015. Hizbul Mujahideen, an Islamist group allegedly based in Pakistan, has been responsible for fewer deaths since its peak in 2013. The group was responsible for 30 deaths in 2013, which fell to 11 the following year and to seven deaths in 2015.

India's north east region has for the last three decades seen continual ethno-political unrest from ethnic secessionist movements. The deadliest of these groups in 2015 were the Garo National Liberation Army which killed ten people and the United Liberation Front of Assam (ULFA) which killed five.

Source- The Global Terrorism Index, 2016

The above piece of information¹ depicts the nature of terrorism in India.

Since the birth as free independent nation, India has faced the threat of terrorism in various

¹ Global Terrorism Index,2016, Available at: <http://www.economicandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>, (Accessed on 01/02/2018)

forms from several factions of the society. Time and again, India has adopted various strategies and has enacted several legislations to tackle the menace of terrorism. India has also stressed upon the fact that the soul of terrorism is finances. Without funds, terrorism is crippled to death. The financing of terrorism is best described as octopus with tentacles spreading across vast territories as well as across a wide range of religious, social, economic and political realities².

In the light of this background, the present research makes an attempt to understand the conceptual development of term “terrorism financing”. In order to appreciate the minutiae of the research topic, the Researcher has tried to take a concise overview of the various sources which funds for terrorism are obtained and channels through which they are either placed and integrated into the financial system and then used or directly mobilized in the hands of terrorists.

After understanding the basic concepts related with terrorism financing, the major deliberation of the Researcher is the Indian legal structure dealing with the offence of terrorism financing. Therefore, the Researcher has critically examined the counter - terrorism financing regime developed by India from legal perspective.

Thus, by doing all the above mentioned detailed exploration through legal lens, the Researcher has tried to analyze the measures and find out lacunas, existing if any. After arriving at conclusion, the Researcher has provided some useful practical recommendations.

OBJECTIVES OF RESEARCH

The present research is carried out with a view:

- 1) To understand the concept of terrorism financing and study its sources and channels;
- 2) To critically evaluate the Indian legal provisions dealing with suppression of terrorism financing;
- 3) To provide practical recommendations for converting failures into successes;

RESEARCH METHODOLOGY

The present research is doctrinal research. It employs descriptive, analytical, evaluative and interactive legal research models. The present paper has utilized primary data available from various statute books and secondary data which are available from various books written by

² Nimrod Rapheli, *Financing of Terrorism: Sources, Methods and Channels*, 15:4 Terrorism and Political Violence 59, 59 (2010), Available at <http://dx.doi.org/10.1080/09546550390449881>, (Accessed on 17/01/2018)

authors of international and national acclaim, various online journals available on the website of jstor, oxford and online resources of websites of Finance Ministry of India etc. The Researcher has used SILC Rules for citation methodology.

ANALYSIS

A) CONCEPTUAL DEVELOPMENT OF TERM “TERRORISM FINANCING”, SOURCES AND CHANNELS

Terrorism financing is generally understood as an activity which deals with collecting and accumulating funds in order to sustain terrorism or donating to the terrorist organizations or networks, sometimes with complete knowledge regarding the intentions of the receiver of the funds and sometimes with complete ignorance about the misuse of funds.

The World Bank and International Monetary Fund have defined financing of terrorism as “the financial support, in any form, of terrorism or of those who encourage, plan or engage in it.”³ The fund raising methods of wide range of groups are most often lumped together under the general rubric of terrorism financing.⁴

Thus, it is made clear that terrorism financing covers within its ambit all those actions which provide funding to terrorist activities of individual terrorists, terrorist organizations and networks. The terrorist activities include operation, training, propaganda, recruitment, compensation, social support mechanisms in one form or another. Therefore, it can be said that terrorism financing is the crux and driving force behind any terrorist activity.

Terrorist acts require very less funds⁵, however sustainability of terrorist organization demands continuous and stable funding in required considerable amount. Thus, without flow of funds, sustenance and operations are impossible. Terrorism is an expensive preposition and without a system of financers and financial institutions, it cannot be sustained.⁶ The decisions regarding terrorism financing affect the behavior of the terrorist organization to a large extent. Therefore, terrorism financing assumes significance.

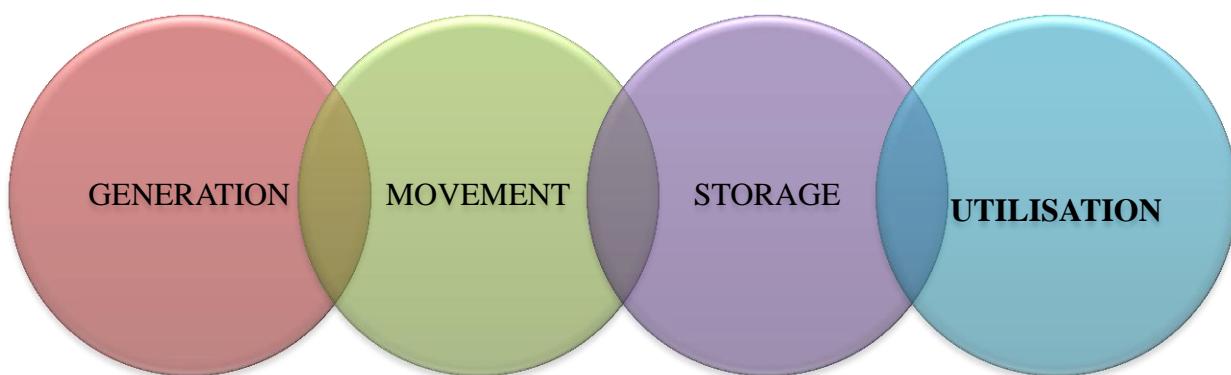
³ Thomas J. Biersteker & Sue E. Eckert, *The Challenge of Terrorist Financing*, 1,6 in *Countering the Financing of Terrorism* (Thomas J. Biersteker& Sue E. Eckert, 2008)

⁴ Jeanne K. Giraldo& Harold A. Trinkunas, *The Political Economy of Terrorist Financing*, 7,8 in *Terrorism Financing and State responses: A Comparative Perspective*(Jeanne K. Giraldo& Harold A. Trinkunas, 2007)

⁵ *Supra* note 3 at 6

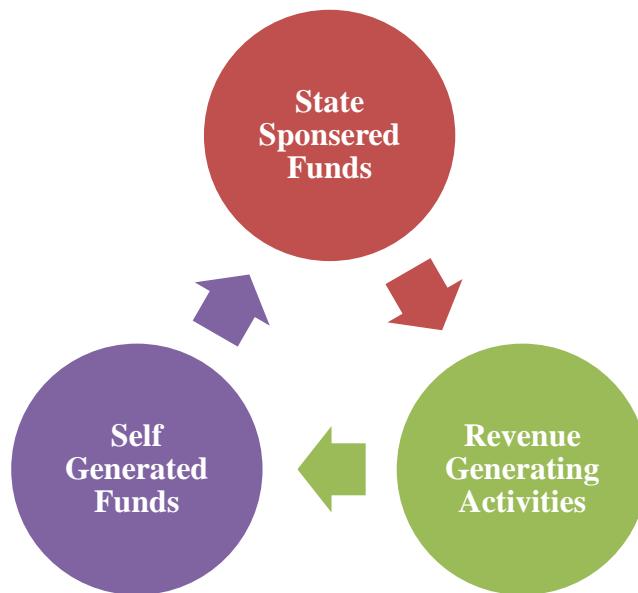
⁶ Air Marshal S.C. Mukul, *Key note Address*,7,10 in *War Against Global Terror* (Col.S.K.Sharma,2009)

Terrorism financing does not envisage one single activity or stage; but it comprises of following multiple stages:



The sources of terrorism financing can be categorized according to the activities and persons or entities involved in it.

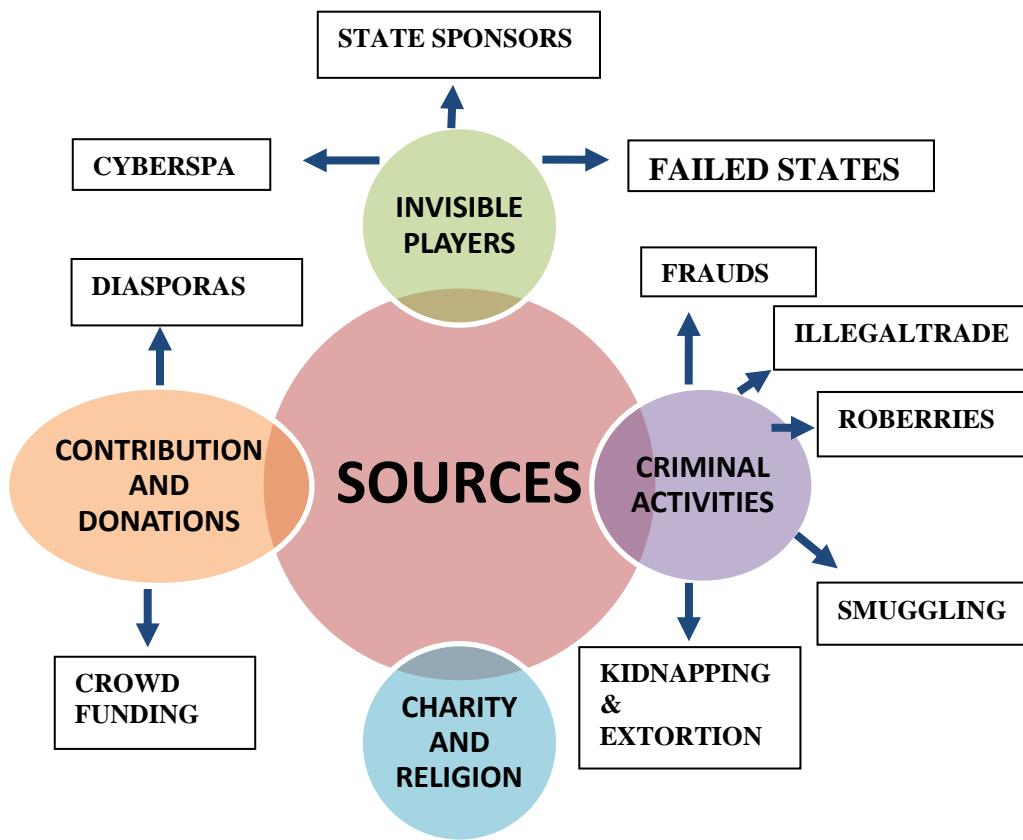
Following are the types of sources-



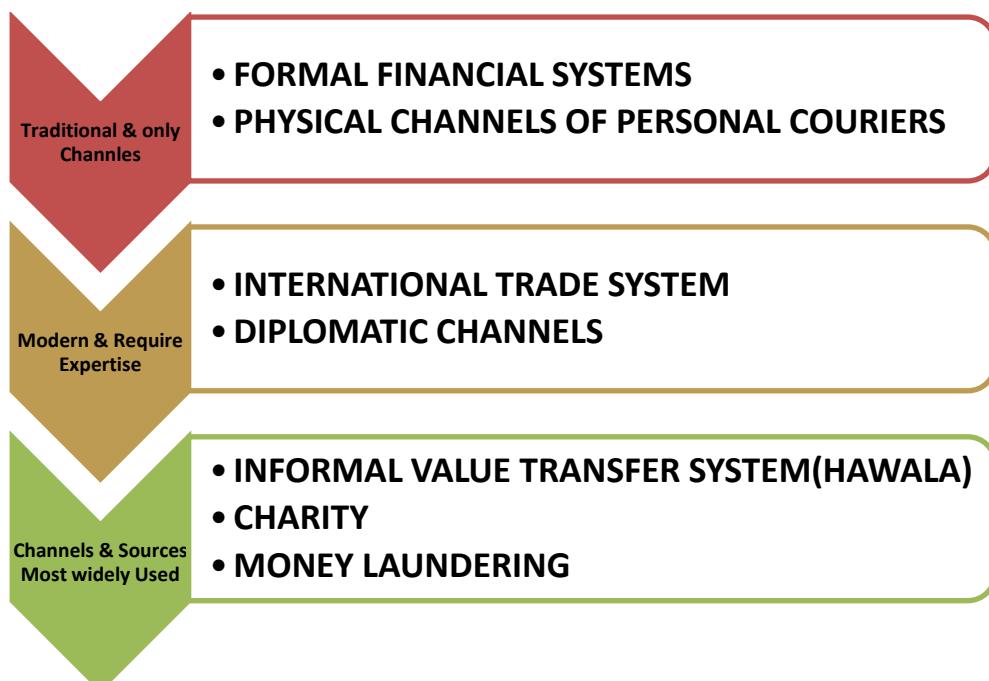
In the Indian context, it has been found that India has and is suffering from state sponsored terrorism funding by its neighborly country of Pakistan. Pakistan⁷ is one of those states which are known to have been aggressively occupied in financing cross-border terrorism directly as well as indirectly and knowingly since decades.

⁷ PTI, *Sushma slams Pakistan over Terror funding*, The Hindu,(23/09/2017), Available at: <http://www.thehindu.com/news/national/sushma-slams-pakistan-over-terror-funding/article19730782.ece>, (Accessed on 07/01/2018)

Following are the various sources through which funds are raised by terrorists:



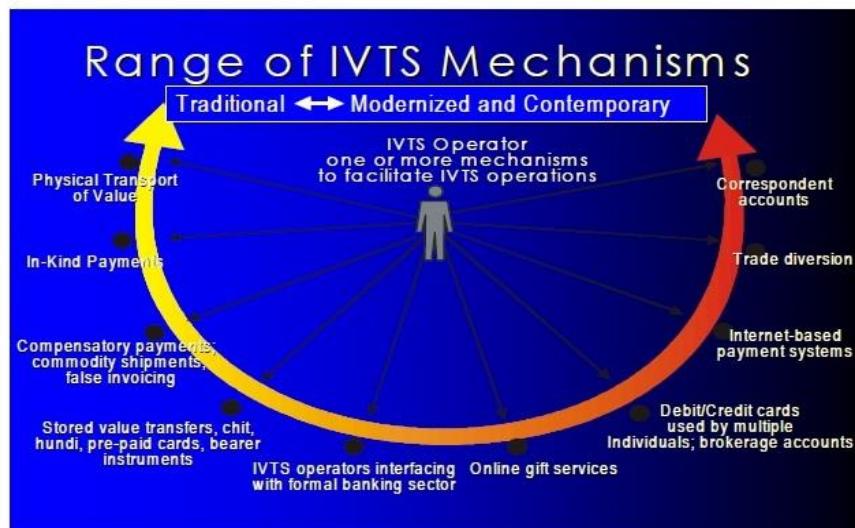
Money generated through above mentioned sources assumes importance only when it is channeled safely through suitable path to reach its objective. Following are the various channels employed by terrorists to move their funds-



It has been found that cross-border trade of various supplies, smuggling of precious resources like gold and other criminal activities like bank robberies are some of the key sources of terror funding on Indian soil. If we have to consider the channels of terrorism financing, hawala is the most widely used to channelize terror funds in India. Some ways of hawala transfers are shown in the following picture-

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B) INDIA AT INTERNATIONAL & REGIONAL LEVELS

India has always contributed significantly in the development of international law dealing with combating terrorism and for countering its financing. India is signatory to The International Convention for the Suppression of the Financing of Terrorism, 2001. India has keenly and progressively implementing the Security Council Resolutions bearing number 1373 of 2001 and 2253 of 2015 pertaining to terrorism financing.

India is the architect of the Comprehensive Convention on International Terrorism which has been submitted to United Nations in the year 1996 and is still under consultation in the UN Committee. After the terrorist attacks anywhere in the world, India has made an appeal to the international community to set aside their differences on various issues arising out of interpretation of the Convention and adopt the Convention collectively.

⁸ *Informal Value Transfer Systems, Terrorism and Money laundering*, Nikos Passes, The National Institute of Justice, 8(November 2003), Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/208301.pdf>, Accessed on 08/01/2018

In regional context, it has been found that India is one of the lively members of SAARC and BRICS. India has ratified and is signatory to the SAARC Regional Convention on Suppression of Terrorism (1987) and its Additional Protocol (2004). Recently, India along with the ASEAN nations has committed itself to deepen cooperation in combating terrorism financing⁹. In the year 2017, India has pushed through its counter-terrorism agenda on the BRICS platform and has been successful in persuading the BRICS countries to adopt BRICS- Xiamen Declaration¹⁰ which is a significant step in the development of regional counter-terrorism strategy. India is also working closely with European Union to cut the flow of funds and economic resources to individuals and to other entities involved in terrorism.¹¹ Thus, it is evident that India is committed to accord regional co-operation with full strength and vigor on multiple fores in the fight against terrorism financing.

Financial Action Task Force is one of the most important regional organizations committed to tackle the menace of terrorism financing. To enhance the functionality of the FATF in India, government agencies have launched a National Risk Assessment exercise on January 2016 so as to identify the sectors that are most susceptible to money laundering and terror funding and thereby plug deficiencies, if any. This conforms to the FATF recommendations. The World Bank has also assisted the Indian authorities by providing all the necessary functional utilities.¹²

C) INDIAN LEGAL FRAMEWORK DEALING WITH TERRORISM FINANCING

The offence of terrorism financing is criminalized in India, pursuant to various International Conventions and Resolutions. The Indian statutes dealing with the crime of terrorism contains provisions which are aimed at curbing menace of terrorism financing.

One of the leading legislations dealing with the problem of terrorism and its financing is *The Unlawful Activities Prevention Act* which was passed and enacted in the year 1967 and amended in the years 2008 and 2013. The said Act deals with terror funding on two lines- funds for

⁹ Press Information Bureau, *Delhi Declaration of the ASEAN-India Commemorative Summit to mark the 25th Anniversary of ASEAN-India Dialogue Relations*, Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=175908>, (Accessed on 03/02/2018)

¹⁰ PTI, *Pak based Terror Groups named in BRICS declaration for first time*, The Times of India,(04/09/2017), Available at: <https://timesofindia.indiatimes.com/india/pak-based-terror-groups-named-in-brics-declaration-for-first-time/articleshow/60361371.cms>, (Accessed on 12/01/2018)

¹¹ TNN, India, *EU for Joint Effort to Fight Terrorism*, The Times of India,(07/10/2017), Available at: <https://timesofindia.indiatimes.com/india/india-eu-for-joint-effort-to-fight-terrorism/articleshow/60978627.cms>, (Accessed on 12/01/2018)

¹² Dr. Sanghamitra Sarma, *Financial Action Task Force-An Indian Perspective*, 09/08/2016, Available at www.icwa.in/pdfs/IB/2014/FinancialActionTaskForceIB09082016.pdf, (Accessed on 12/01/2018)

unlawful association and funds for terrorism and its allied activities. Apart from providing direct punishment for raising funds for terrorist organizations and acts, the Act also imposes punishment for holding proceeds of terrorism. The newly added Section 51A¹³ reflects the international obligation of freezing assets instantly in order to prevent the financing of terrorism.

The amendment made in the year 2008 has rightly acknowledged the dynamic and changing nature of terrorist organizations and networks. 2013 amendment has precisely targeted counterfeiting currency¹⁴ which is one of the extensively used channels of funding terrorism on Indian soil. They have widened the range of definition of “terrorist act” by inserting a new schedule¹⁵ which lists international treaties which contain a range of acts that can be termed as “terrorist act.” However, the scrutiny of the Schedule points out that unfortunately, the International Convention dealing with terrorism financing is not included in the said Schedule.

Since inception, the said Act has undergone relevant amendments to cope with changing needs of time but still it lags behind in encompassing the changes and developments taken place in the typologies and nature of terrorism financing. Procedural aspect is aptly drafted, but there is doubt how much of it is practically implemented.

Another relevant Enactment is *The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1976* which is the follower of The Maintenance of Internal Security Act, 1971 (26 of 1971). The Act tries to conserve the foreign exchange, which is highly vulnerable component for the crime of terrorism financing .It also makes an attempt to remedy the menace of smuggling.

The said Act envisages the policy of providing preventive detention which is in compliance with the constitutional mandate given under Article 22 of the Constitution of India. However, the said Act nowhere explains the main terms such as “foreign exchange” or “its conservation” and “augmentation.” The Act grants discretionary powers & uses value loaded and ambiguous words like “satisfaction of the officer”. The roughly worded grounds for passing the detention order weaken the force of law and make it prone to the abuse by corrupt officials. The fate of execution of the detention order has been left in the hands of traditional criminal justice system, which is already crippled with its own limitations. Thus, the Act lacks crisp provisions and becomes a puppet in the hands of Bureaucracy.

¹³ Section 51A, The Unlawful Activities (Prevention) Act, 1967

¹⁴ Section 4(iv) (b) , Ibid

¹⁵ Section 4(v) and Schedule 2, The Unlawful Activities (Prevention) Amendment Act,2012

Another applicable legislation is *The Foreign Exchange Management Act [FEMA], 1999*. Foreign exchange is one of the significant components in the crime of terrorism financing because it facilitates transnational movement of money and hence this Enactment assumes importance.

With far-reaching applicability¹⁶, the said Act covers within its sphere all types of financial instruments and mixture of financial transactions. It endows legality to various transactions and dealings of foreign exchange and punishes illegality as “civil contravention”. Section 36¹⁷ of the said Act establishes Directorate of Enforcement for the purpose of investigation into contraventions. However, the critical analysis of the functioning of Enforcement Directorate points out that it has failed to translate the law into reality. The Reserve Bank of India, which is rule making and regulatory body under this Act, has devised electronic reporting system¹⁸ which facilitates realization of the provisions.

Though the Act encompasses an all-inclusive and clearly worded framework dealing with management of foreign exchange, the inclusion of the vague ground of “public interest” for revocation of orders or for suspension of operation of the Act weakens the strength of law. Further, in the view of globalization of economy in today’s age, the limited reach of execution authorities in case of civil detention orders passed against extra-territorial entities proves to be an important obstacle in its effective implementation.

One of the principal channels of terrorism financing is money laundering. Being synonymous with terrorism financing, the countering mechanism aimed at both of them envisages identical measures. In the light of this background, *The Prevention of Money Laundering Act, 2002 (Amended Up to Date)* becomes the major Indian Counter Terrorism Financing measure. The said Act was enacted with a view to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering.

The said Act covers within its purview some of the essential sources and channels of terrorism financing. It has criminalized the act of money laundering and has laid down a detailed mechanism for attachment, adjudication and confiscation of proceeds of crime. Along with

¹⁶ Subsection (3), Section 1, The Foreign Exchange Management Act, 1999

¹⁷ Section 36, Ibid

¹⁸ Electronic Reporting System, Available at <https://www.rbi.org.in/Scripts/ElectronicReporingSystem.aspx>, (Accessed on 12/01/2018)

enlisting the obligations of reporting entities¹⁹, it imposes monetary punishment for their non-compliance. The said Act also sets up a mechanism of special courts for speedy trial along with Appellate mechanism. The procedure for attachment and confiscation of property and provisions for reciprocal arrangement for assistance in certain matters aim to give effect to international legislations which are of similar nature dealing with the identical offence and empower the Indian authorities to carry out effective transnational investigations.

The Scheduled offences under the said Act cover wide variety of offences ranging from offences under UAPA to environmental protection related statutes. The Enforcement Directorate is charged with the responsibility of investigations initiated under the provisions of this Act. The details of the parent Act are enumerated and explained by enacting Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (Amended up to date).

There is no doubt that the said Act is detailed and consolidated piece of legislation dedicated exclusively to the offence of money laundering. However, since its birth, its strict provisions were debated as being “draconian” and political community has made every attempt to dilute the provisions for their personal political interests. Further, it can be seen that the low quantum of punishment provided for commission of offence of money laundering and lack of stringent actions against reporting entities weakens the vitality of the law. Moreover, the recent judgment of the Supreme Court of India striking down provisions under Section 45(2) of the said Act concerned with denying bail to the accused²⁰ are bound to have negative impact on severity of law.

Due to globalization, acceptance and utilization of foreign contribution for funding terror under the garb of charity became widespread agenda. Therefore, in order to consolidate the law regulating the acceptance and utilization of foreign contribution and to prohibit its misuse for any activities detrimental to the national interest, *The Foreign Contribution (Regulation) Act, 2010 [FCRA]* was enacted.

The Act is armed with extra-territorial competency and contains elaborate definitions. The acceptance of any foreign contribution from foreign source and its delivery is well regulated to pinch the state sponsored terror funding and to restrain malicious use of charities. Along with

¹⁹ Section 2(wa), The Prevention of Money Laundering Act,2002

²⁰ *Beyond the News: How Supreme Court eased bail in money laundering charge*', The Indian Express (29/11/2017), Available at: <http://indianexpress.com/article/explained/how-supreme-court-eased-bail-in-money-laundering-charge/>, (Accessed on 10/01/2018)

supervision and regulation of the transfer of foreign contribution, the said Act lays down exhaustive provisions with regard to the registration of non-governmental organizations for the purpose of acceptance of foreign contribution. The Act provides punishment for civil contraventions and also lays down penal provisions for non-compliance.

One of the grave lacunas in the said Act is that it excludes certain sources of foreign contribution like business payments, legal remittances, and help from relatives which have been proven to be vital sources of terrorism financing. Unfortunately, the disqualification grounds and grounds for cancellation of certificate of registration nowhere include “terrorism financing”. The investigations into Zakir Naik’s alleged misuse of charity²¹ for funding terror are exposing failures of the said Act.

The exploitation of cyberspace for spreading terrorist propaganda and for recruiting and raising funds has been increased leaps and bounds with the revolution in information and technology. India is also victim of the said disease. ***The Information Technology Act, 2000*** which was amended in the year 2008 laid down new provisions dealing with cyber terrorism and national cyber security²². The scrutiny of newly added provisions reveals that it nowhere includes the offence of terrorism financing committed through electronic medium.

The misuse of digital currency for raising funds is budding threat to Indian financial security. However, current Indian IT Act has still not taken this warning into consideration. The European nations are taking lead in combating the menace of terrorism financing through digital currencies. In this era of digital globalization, India cannot remain unaffected by this unwanted current and therefore, now the time has come that India must follow the suit and implement stringent legal provisions targeted at preventing the abuse of digital currency for funding terror. The terrorist organizations are abusing opportunities on the internet and social media platforms for spreading their malicious propaganda and ideology and for radicalizing Indian youth. In spite of having knowledge of this widespread exploitation, Indian cyber law fails to punish hate speech made by using these platforms.

The above discussed substantial provisions of law are implemented through following operational, investigative and enforcement agencies-

²¹ Varinder Bhatia, *NIA moves to revoke Zakir Naik's passport, probe his money trail*, The Indian Express (09/06/2017), Available at: www.indianexpress.com/article/india/nia-moves-to-revoke-zakir-naiks-money-trail-probe-his-trail-4695667/, (Accessed on 10/01/2018)

²² sections 66 F, section 70 A and section 70 B ,The Information Technology Act,2000 (Amended Up to Date)



The FIU-IND is armed with various powers and rights under the new Amendments made in the PMLA and its Rules. It has been robustly active in detection and reporting of suspected cases of financing of terrorism. Along with adopting of new technologies, it has widened its co-operative network at state, national & international level²³. However, in reality, only 75 personnel are overburdened with so many responsibilities to perform at multiple levels. Moreover, the recruitment of these personnel from different regulatory organizations casts a doubt about their training for the purpose of intelligence gathering and sharing of information.

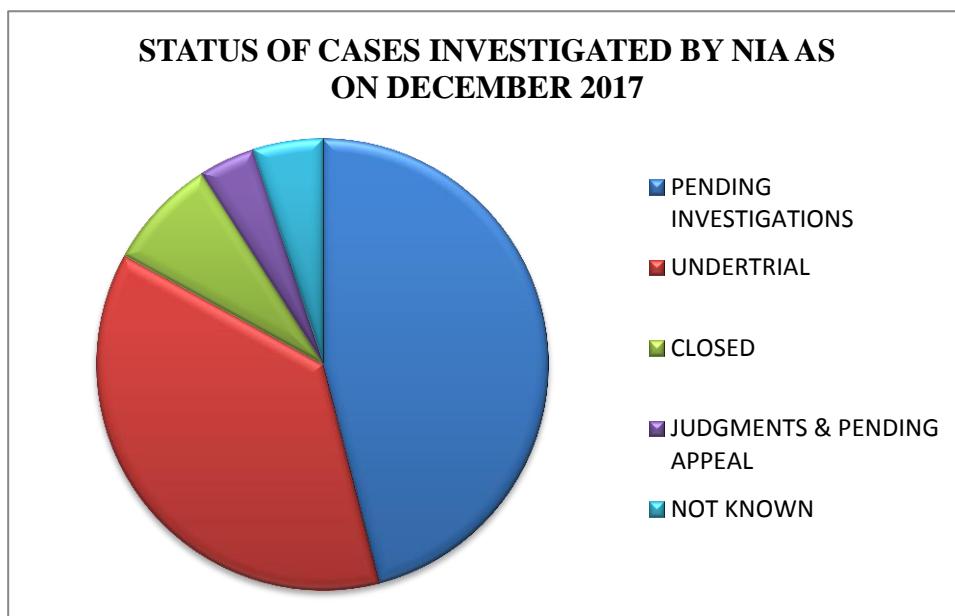
The statistical analysis of the performance of Enforcement Directorate from the year 2012 to 2015 shows that during the period of three years, only 111 cases were investigated. Only 52 persons were arrested and only 173 prosecutions complaints were filed for the purpose of implementation of PMLA. Under the Foreign Exchange Management Act, the number of investigations initiated, as on 13/02/2012, were 5823 and as on 31/03/2015, 4776 investigations were still pending. Out of 1560 show cause notices issued in the year 2012, 1304 were still pending for adjudication in the year 2015.

These figures showing the pendency of cases expose the inefficiency of the Enforcement

²³ Financial Intelligence Unit-India ,Annual Report (2015-2016), Available at: <http://fiuindia.gov.in/pdfs/downloads/annualreport2015-16.pdf>, (Accessed on 1/02/2018)

DIRECTORATE. The scarcity of capable human resource is hampering its efficiency and obstructing timely investigations and prosecutions. It can also be seen that it nowhere deals with the offence of terrorism financing independently and exclusively. Though the legal and executive fraternity is aware that the offences of money laundering and terrorism financing are very similar in nature and one aids another, still the premier investigative agency has not taking serious note of the offence of terrorism financing.

NIA has been established under the NIA Act, 2008 but said Act is not updated according to emerging trends. NIA is carrying on investigations into range of terrorist acts performed by ISIL, Jaish-e-Mohamid, FICN Smuggling Gangs, Harkat-ul-Mujahidin and various terrorist organizations. Since 2009, NIA has registered and is investigating 172 cases.



NIA has investigated only 11 cases related to terror funding out of all the above cases.²⁴ Prominent among them include cases against Babar Khalsa International operatives in Canada transferring funds to their counterparts in Punjab through front organizations for distribution to sleeper cells, jailed terrorists and the families of the terrorists, Assam based Dima Haleem Daogah (Jewel) for procurement of arms and ammunition with cash involving Rs 1 crore, Ningthoujam Tomba alias N Rajen Singh, the self-styled Finance Secretary and Commander in chief of Manipur based Kanglei Yaol Kanba Lup (KYKL). ``We were able to trace the funding in these cases directly with the leaders and members of the banned terrorist groups. Our

²⁴ Sweta Desai, *Terror activity hit by currency ban, but only a matter of time before it returns, warn experts*, DNA, Mumbai (03/12/2016), Available at: <http://www.dnaindia.com/india/report-demonetization-is-a-body-blow-not-a-death-knell-for-terror-funding-2279160>, (Accessed on 03/02/2018)

investigations led us to evidence in the form of banking transactions, suspicious bank accounts, purchase of property, tax rate sheets for extortion," an NIA official who worked in the financial intelligence unit said.²⁵

The critical analysis of the legal framework which is the base of the NIA points out towards the fact that the Agency has been given sound backing of the law. However, the applicability of regular criminal procedure to the trials has crippled the law enforcement and it is natural that the trial under the said act has to undergo the same peril of lengthy, tedious criminal procedures. The perusal of the list of Scheduled offences makes it clear that the law is restricted in nature and it has not been updated according to the changing needs of time. All the powers have been given to Central Government. This concentration of power may result into corrupt practices and it can harm national interests.

The critical analysis of the operational aspect of the agency reveals the huge number of under trial and pending investigations which negates the very notion of remedy of effective and speedy trial, embodied in its legal framework. The further analysis reveals that it lacks widespread institutional and territorial reach. There is no branch office located nearby the Rajasthan border which touches Pakistan, which is hotbed of allied terrorist activities. NIA is carrying on investigations into various terrorist acts performed by ISIL, Jaish-e-Mohamad, FICN Smuggling Gangs, Harkat-ul-Mujahidin. It investigates the offences of abduction by terrorists, counterfeiting of Indian currency, connections with international terrorist organizations like ISIL, criminal conspiracy for planning and executing terrorist attacks, terrorism financing and many other. It is also riddled with scarcity of expertise manpower.

Terrorism financing is financial crime and therefore, the financial guardians like the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI) are also charged with the responsibility to devise counter terrorism financing measures in order to protect stability and integrity of Indian financial system.

Securities and Exchange Board of India (SEBI) has issued Guidelines for Anti-Money Laundering Measures. These Guidelines obligate senior management of a registered intermediary²⁶ to establish appropriate policies and procedures for the prevention of money laundering and terrorist financing and ensure their effectiveness and compliance with all

²⁵ Ibid

²⁶ Section 12, The Securities and Exchange Board of India Act,1992 (Amended Up To Date)

relevant legal and regulatory requirements. However, application of these Guidelines only to the Registered intermediaries and their non-enforceable nature being “Guidelines” make them less effective. In order to fulfill its protective function, every year the Reserve Bank of India issues Master Circular with regard to Know Your Customer (KYC) norms / Anti-Money Laundering (AML) standards/Combating of Financing of Terrorism (CFT)/Obligation of banks under PMLA, 2002. Apart from these Master Circulars, RBI has issued Master Direction - Know Your Customer (KYC) Direction, 2016 to strengthen the mechanism of AML/CTF.

RBI has also issued warning in respect of use of virtual currencies including bitcoins.²⁷ However, now time has come that mere warning is not sufficient to tackle. A concrete step must be taken to nip the threat in the bud.

In the year 2016, the Government of India announced Demonetization Policy²⁸. It maintained that it announced the demonetization policy in the month of November 2016 with a view to tackle the menace of black money/parallel economy/shadow economy & to prevent the cash being used for terrorist activities/terror funding.²⁹ The counterfeiting of currency is one of vital channels of terrorism funds. In the Indian context, as per the statements given in RS by Arjun Ram Meghawal (Minister of State for Finance), the total FICN is to the tune of Rs 400 Cr. As per the Lok Sabha Website between 2011 and 2015, the RBI has seized around 26 lakh counterfeit notes of denomination Rs 500 and Rs 1000 amounting to Rs 167 Cr. Amongst the two, FICN of Rs 500 currency notes were higher (both in numbers and in value) .As per a study done by ISI (Indian Statistical Institute), at any given point of time, the FICN is to the tune of Rs400 Cr and annually the FICN pumped into the economy is Rs 70 Cr.³⁰ In the light of this background, the move of demonetization implemented by the Government assumes significance.

The demonetization policy initially hit the roots of terrorism financing to some extent.³¹ In his statement to the Lok Sabha, Minister of State for Home Affairs Kiren Rijiju said that insurgent groups in North East, Maoists and terror groups in Kashmir have suffered loses of around Rs 800 crore. The money amassed by the armed groups mostly in cash through extortion, taxation

²⁷ PTI, *Use of Bitcoin, other virtual currencies not authorized by RBI, says govt.*, The Hindu(28/03/2017), Available at: www.thehindu.com/business/Economy/use-of-bitcoin-illegal-says-govt/article17702483.ece, (Accessed on 12/01/2018)

²⁸ Understanding Demonetization: A critical Analysis, Available at: <http://byjus.com/free-ias-prep/demonetization-of-rs-500-and-rs-1000/>, (Accessed on 12/01/2018)

²⁹ Ibid

³⁰ Ibid

³¹ Supra note 24

and illicit hawala transfers to sustain their operations, logistics and support their manpower, is now as good as scrap paper.³²

However, it has also shown impact upon the changing nature of sources of terrorism financing.³³ Demonetization is not the permanent solution to the menace of terror funding.³⁴ The dynamic strategy and adaptive nature of terrorist networks is neutralizing the impact of the said policy. Hence, only the upcoming time will assist to calculate its long term impact.

CONCLUSION AND RECOMMENDATIONS

Terrorism financing is the most dynamic element in the realm of terrorism. It sustains and survives terrorism by adapting to circumstances and transforming itself from one form to another as per the requirements of time and situation. Therefore, it is impossible to uproot it from the bottom but it is always achievable to contain its spread and restrain it within certain limits. Law is one of the instruments which assist the society and State to secure itself from existing and emerging trends in crime and hence Law can carve out ways and means by which the crime of terrorism financing can be controlled.

With this view, the Researcher has carried out an assessment of Indian legal framework dealing with terrorism financing and the Researcher has come to the conclusion that India has well-built establishment of legislative enactments. It has made an appreciable attempt to translate its international commitments into national efforts. However, the said legal framework dealing with terrorism financing is deficient and riddled with many lacunas. It still carries on the old traditional outlook of looking towards the offence of terrorism financing. This very crucial subject is dealt by adopting piecemeal approach and that too scantily by fragmented legislations. The offence of money laundering is targeted precisely with detail legal provisions but the researcher has found that though both the diseases of money laundering and terrorism financing exhibit identical symptoms, both of them require exclusive and independent cure. Indian law lacks dynamism and it is far lagging behind the advancements in the information and technology. Indian cyber law is still in embryonic stage and it needs immediate initiatives for its development. Unfortunately, India still has not enacted any legislation which exclusively and

³² *Ibid*

³³ Bharti Jain, *Rise in Number of locals joining J& K Militancy causing cash crunch*, Times of India, Available at: <http://www.timeofindia.indiatimes.com/india/rise-in-number-of-locals-joining-kj-militancy-causing-cash-crunch/articleshow/58584233.cms>, (Accessed on 12/01/2018)

³⁴ *Supra* note 25

independently deals with the offence of terrorism financing.

The enforcement of law is entrusted to multiple agencies who themselves suffer from severe defects and deficiencies like insufficient funding, lack of advanced and adequate infrastructural facilities, expertise human resource. They are the victims of bureaucratic rivalries, fierce competition and uncooperative attitude of all the participant entities. These negative currents are impeding the effective implementation of law and obstructing their adaptation to demands of new times. The temporary policies like demonetization are not going to thwart the spread of clandestine monster of terrorism financing. The operational and financial measures must be supported with vibrant and supportive co-operation from national CTF agencies.

Law takes birth out of womb of policy and it is very part of it. Therefore, the absence of an all-inclusive Indian Counter-Terrorism Financing Policy has further amplified the legal loopholes. There is an insistent need of encoding all CTF mechanisms under the roof of distinct, dynamic, adaptive, flexible and proficient policy which shall encompass both social and legal avenues for countering financing of terror. The policy must lay down the boarder outlines for enacting legislation which is dedicated solely to all the perspectives of offence of terrorism financing. The Policy must adopt an all-inclusive social and legal approach envisaging involvement of all actors engaged in various arena of terrorism.

In order to tackle the dynamic and emerging challenge of terrorism financing, law must understand the dynamic undercurrents of terror funding. Indian Law must adopt a comprehensive approach and engulf the extra-legal influences to achieve its aim. It must submit itself to dynamism and make itself a transformative guardian of society and State, if it really wants to embark upon the forceful challenge of terrorism financing.

BONDED LABOUR: A SLUR ON INDIAN DEMOCRACY

Sujeet Kumar*

The existence of bonded labour is not a slur on the administration; rather it is the failure to take note of and to make an effort to put an end to the bonded labour system.

Bhagwati Bandhua J. in Mukti Morcha case¹

Abstract

Labour is considered as one of the important pillars of economic development. A large majority of Indian population is earning their sustenance by working as labourers. However these labourers are exploited. One such group of labourers are bonded labours who are susceptible to numerous vulnerabilities. Bonded labour problem is a serious threat to human dignity. Inspite of national laws and international conventions bonded labourers are not protected. In view of this the researcher in the present paper intends to examine the situation of bonded labour and the circumstances which force them to be a bonded labour. The paper attempts to analyze different international treaties, convention and the domestic laws which have been adopted by the government to curb the evil of bonded labour in India. Through this paper the author has also endeavoured to put forward certain solutions to control the problem of bonded labour in India.

Keywords: *Bonded Labour, Debt Bondage, Exploitation, Fundamental Right, Rehabilitate, Natural Right*

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¹ AIR 1984 SC 802

INTRODUCTION

Ever since the independence , the condition of labourers in India has not changed much, even though the country has switched from the decades old socialist policy to the liberalisation of the economy for the betterment of the people with more exposure to the world market. The liberalised laws resulted as nothing which the policy makers had intended – economic development and social welfare. The liberalisation of economy on the contrary, increased the gap between the haves and the have not's. As a result of this disparity, the industrialists and employers are exploiting the employees and workers. Rapid increase in population has led to abundant labour supply, giving the employers a dominant position to force labourers to work on their conditions. This has led to the emergence of the problem of bonded labour or debt bondage.²

Bonded labour or ‘Bandhua Majdoori’ which is still in practice in India in one or the other is not an issue emerging out of recent developments, but has its roots deep into history. It is characterized by a long-term relationship between the employer and employee, usually solidified through a loan, and is embedded intricately in India’s socio-economic culture - a culture that is a product of class relations, a colonial history, and persistent poverty among citizens.³ It stems out of caste-based discrimination, vast poverty and inequality, inadequate education system, unjust social relations, and the government’s unwillingness to alter the status quo, exemplify few such causes.⁴ Bonded labour or ‘debt bondage’ can probably be said as the least form of slavery today the most widely used way to ‘enslave’ people. A person becomes ‘slave’ when his/ her labour is demanded as a means for repayment of loans taken by them. The person is trapped to work for meagre or no wages. The value of work so done by the labourers tend to exceed invariably than the principal amount they are to be paid .To put it in simpler words, bonded labourers are nothing more than a ‘slave’ or a machine, requiring nothing else once you have ‘purchased’ them.

Bonded labour is not an issue centred to India, but exists worldwide, especially in countries

² Debt Bondage: (Section I, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery), “the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and the nature of those services are not respectively limited and defined”.

³ Devin Finn, *Bonded Labour in India*, Available at: <http://www.du.edu/korbel/hrhw/researchdigest/india.pdf> (Accessed on February 22, 2016, 9:56pm)

⁴ *Ibid*

which were once under colonial rule. In South Asia, its inception can be associated with caste system, in existence from centuries, and continues to flourish in feudal agricultural relationships. Bonded labour was also used as a tool for colonial labour recruitment for plantations in Caribbean, Africa, and South East Asia.⁵ In India too, the reason can be traced to the caste discrimination and the work which they performed in the society. Bonded labour exists in countries like Nepal, Bangladesh, Pakistan, Bolivia, Paraguay, and Peru. When we talk of the percentage, then in India itself, two million bonded labourers which includes Dalits or tribal people or in way untouchables. Its existence can be seen in logging industry, works on ranches, domestic work, agriculture, food processing, etc.⁶

When we analyse the legislative provision with regard to protection and prevention of bonded labour, after the independence, it can be reflected in Articles 21, 23 (1) and 24 of the Constitution of India, which guarantees free and dignified existence to all the citizens.⁷ But, the provisions in black and white lacked proper implementation and could not tackle the issue efficiently as it was expected to and the problem in existence till today. In past Britishers were taking advantage of this situation as there were no laws which protect the interest of labourer, all existing laws were anti labourers. After the independence the big Zamindars started taking advantage of this situation as there was no independent Act or law which support or supplement the above mentioned Constitutional article. Even before India's independence a number of international conventions such as the Forced Labour Convention, 1930 and the Abolition of Forced Labour were held all over the globe to prohibit the slavery or Bonded Labour but India does not ratify any of these conventions.

Forced Labour Convention, 1930 prohibited all forms of forced or compulsory labour, which, as defined under the convention, refers to "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself

⁵ Anti-Slavery, Today fights for tomorrow, Available at: <http://www.antislavery.org> (Accessed on: February 21, 2016, 6:00pm)

⁶ *Ibid*

⁷ Article 21; Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 23; Prohibition of traffic in human beings and forced labour: (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Article 24; Prohibition of employment of children in factories, etc: No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

voluntarily.⁸ Abolition of Forced Labour Convention, 1957 prohibits forced or compulsory labour as means of political coercion or education, or as a discipline for holding or communicating political perspectives or perspectives ideologically contradictory to the set up political, social or financial framework; as a technique for activating and utilizing work for purposes of monetary improvement; as a method for work discipline; as a discipline for having taken an interest in strikes; and as a method for racial, social, national or religious segregation.⁹

These were some of the important conventions which were conducted across the globe to abolish the issue of bonded labour, but India was neither a part of those conventions nor did she ratify any of them. When the problem of Bonded Labour reached to its peak or when the situation get worsed, then Indian Government ratified the above convention? in the year 1954 to control the problem. But its implementation on the ground level was not good, situation remain as it is. It was only after 1976, the government came up with a specific Act to abolish bonded labour, the Bonded Labour System (Abolition) Act, 1976, the legislation was supplemented by various other legislations like the Contract Labour (Regulation and Abolition) Act, 1970; the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; the Minimum Wages Act, 1948. Prior to this, every state had its own independent laws to control the issue of bonded labour, to name some, Kabadi System Regulation in Bastar, Madhya Pradesh in 1943, Bihar Kamianti Act, 1920, Hyderabad Bhagela Agreement Regulation, 1943, Madras Agency Debt Bondage Regulation, 1940, Rajasthan Sagri System Abolition Act, 1961 (later amended in 1975), Orissa Debt Bonded Abolition Regulation, 1948 and Bonded Labour System (Abolition) Act, Kerala, 1975. But, these laws were full of ambiguities, the government favouring the elites and the rights of the poor at stake.¹⁰ This led to the enactment of the Unified Act of 1976, which aimed at preventing the physical and economic exploitation of weaker section who got engaged in as labourers. It was the first unified Act in the country to curb the issue of bondage labour, deriving its force from the Constitution of India. Further, the judiciary, too, started playing active role for the protection and prevention of slavery (bonded labour) in India.

⁸ International Labor Organization (ILO) Convention, Available at: <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/forced-labour/lang--en/index.html> (Accessed on February 10, 2016, 7:00pm)

⁹ *Ibid*

¹⁰ Puja Mondal, *Bonded Labour: Concept, Causes and Other Details*, Available at: <http://www.yourarticlerepository.com/society/inian-society/bonded-labour-concept-causes-and-other-details/39314/> (Accessed on February 20, 2016, 10:00 PM)

In the case *Bandhua Mukti Morcha v. Union of India*,¹¹ and in People's Union for Democratic Right v. Union of India and Others(Asiad Worker's Case),¹² the Apex court made clear that the scope and power of 1976 Act is derived from Article 23(1) of the Constitution whose ambit is much higher than Article 4 of Universal Declaration Of Human Right(UDHR), since “the Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values”.

Further, in *Bandhua Mukti Morcha* case, Justice Bhagwati explained the difficulties faced by bonded labourers or the poor in getting their grievances solved. He stated,

*“It would be cruel to require bonded labourers to utilise a formal judicial procedure and to provide proof. This would be a totally useless process because it is clear that a bonded labourer could never take legal action and the State may as well abolish the law from our legal system.”*¹³

He also argued that no individual try to put them in the position of bonded labour or live the life of slavery except for the fact that advance that had been given to them and against which work is required to be done give presumption that person will be living the life of Bonded Labour.

*“Consequently, as soon as a person is subject to forced labour, the Court will presume that that person has ended in that situation because of a debt or another economic reason and that he is, thus, a bonded labourer. The employer and the state may refute that presumption if they wish but to the extent that satisfactory elements are not provided, the Court will consider the workers as bonded labourers falling under the provisions of the Bonded Labour System Abolition Act.”*¹⁴

Justice Bhagwati had the view that if a country wants to get free from the problem of bonded labour, then, the associations truly dedicated to the cause of SC/STs, agriculture workers or informal sector workers, must become involve in the identification of bonded labour and work for their liberation.

It is important to note that even if after identification, if they are not rehabilitated at proper place then situation will be more serious and cases of Bonded Labour or slavery would increase in a higher rate as they will left with no work, resulting in borrowing of money from elite classes,

¹¹ *Supra* note 1

¹² AIR 1982 SC 1473

¹³ *Supra* note 1

¹⁴ *Supra* note 1

result of that it opens the way for slavery. Traces of this can be seen long back, when industrialization had started in India in 20th century which resulted migration of people from rural to urban areas in search of job resulted in exploitation or even the wages paid were lower than the minimum wages. As industries were less and people aspiring for the work had increased hugely. So it is primary duty of the State to rehabilitate them in a better manner so that their condition and financial status of labourer get improved in the society.¹⁵ From time to time government had tried to come up with different legislation, with the motive that individual rights of Labourer are protected in the society. Unfortunately it lacks in implementation and all efforts goes in vain.

In regard to bonded labourer, Judiciary has played a pro-active role, so that the enforcement mechanism are properly followed by the States and Union territories and National Human Right Commission (NHRC) have been given full power to visit different States and make survey about the problem of the labourer and to observe whether the orders of the court are being followed properly or not.¹⁶

An important thing which is required to be considered here is that, whether Labourer right can be equated with Human Rights after understanding the situation and circumstances in which Labourer's are performing their work? Can we say that Labourer's too having some human rights. Theoretically, human rights and natural rights are equated, but they are not the same in practice. As modern idea of human right is equated with the idea of natural right and of the belief that human being should be accorded with some fundamental right by virtue of being human being. Being a worker in an economy, they must enjoy certain rights, which are to be respected by all. Applying the positivist approach to understand whether human and labour rights are comparable, the answer can be found in certain international law literatures. In the Universal Declaration of Human Rights (UDHR) 1948, which is not binding on any state, but an influential document, the positivists consider several labour rights as human rights. Article 4 of the UDHR prohibits slavery and servitude; Article 23 provides that everyone has right to work and work in a job freely chosen,¹⁷ everyone should get equal pay for equal work and everyone is entitled for decent remuneration for the work done, etc., Article 24, in turn, guarantees a right to rest and leisure, including reasonable limitations of working hours, as well as holidays with

¹⁵ *Neerja Choudhary v. State of MP*, AIR 1984 SC 1099

¹⁶ *Public Union for Civil Liberties v. State Of Tamil Nadu & Ors*; 2012(10) SCALE 256

¹⁷ Virginia Montauvalou, *All Labour Rights Human Rights?*, 3 EUROPEAN LABOUR L. J. 152,153 (2012)

pay.¹⁸ It shows that from positivistic point of view labour rights can be attributed to the stage of human rights. But still it is highly debated, as many scholars and academician do not regard this theory. The author believes that labour rights must be regarded as human rights because of the work they perform and the exploitation which is done on them. Even, the judiciary, in the case *Kharak Singh v. State of Uttar Pradesh*,¹⁹ had observed that right to release and rehabilitation of bonded labour as a fundamental right. In the case *Golak Nath v. State of Punjab*,²⁰ the Court held that fundamental right is the modern name of natural right. So it can be said that every provisions that has been made in our Constitution is nothing but natural rights embodied in human being which should not get violated by any one.

CONCLUSION

Even after the presence of legislations, international conventions and treaties on bonded labour for the protection of labourer's from getting exploited in this competitive world, still we are unable to eliminate the problem of slavery or bonded labour in the country and situation prevails as it was before independence. Legislations have been made in all aspects of the labour field to control the problem but with regard to the implementation, it has been failure especially on the part of some States and Union Territory especially in Uttar Pradesh, Bihar, Orissa, Andhra Pradesh etc. Because of the existing problem especially the woman and children suffer a lot. The problems of bonded labour at times lead to human trafficking, and some are even forced into prostitution. It shows how on one side our country is developing rapidly but on other side problem of bonded labour remains as it is. According to the latest official public figures available, there are at least 14 million children living under slavery, the number is expected to rise up to 30 million, if proper survey is conducted. It has also been found that children below the age of five fourteen continue to work in dangerous occupation such as bangle industry or fireworks as a bonded labour. In the context of International Labour Organisation (ILO) Convention No. 182 India topped the list when it comes to number of children living in slavery or as bondages. It is also the matter of shame that India has not been able to deal with the problem of child labour but also with the problem of slavery or bonded labour. Even in some cases parents are forced to sell their children into slavery. It seems that the government has closed its eyes in this regard. It can be clearly seen from different instances, for example, India ratified ILO Conventions, 138 and 182, which says that the minimum age for employment

¹⁸ Ibid

¹⁹ AIR 1963 SC1295

²⁰ AIR 1967 SC1643

should not be less than the age of completion of compulsory schooling (14 years of age in India's case) and calls for elimination of the worst forms of child labour, respectively, still we find that lots of children are engaged child labour hotels on different state and national highways. Even though the Central government had enacted a new law - Child labour (Prohibition and Prevention) amendment Act, 2016 – banning employment of child labour below 14 years of age in all occupations and processes. It further prohibits employment of adolescents (14-18 years of age) in hazardous occupations. The new law linked the age of employment for children to the age of compulsory education under Right to Education Act (RTE), 2009 even then also we find the problem of child labour is increasing. Delhi alone accounts for one million of these child labourers who work as bonded labourers in small factories and construction sites. Apart from this, the condition of child labour in states like Bihar, Rajasthan, Madhya Pradesh, Maharashtra and Uttar Pradesh is deplorable, and UP has seen a 13% growth in child labour in the last one decade. Why the government has squandered almost seven decades of independence and still not able to tackle the problem of bonded labour or slavery. Why Lok Sabha or Rajya Sabha are still silent over this issue, even the state legislatures are silent over the issue of bonded labour to whom the sole responsibilities lies to tackle the problem.

The noted social worker and Bandhua Mukti Morcha's national president Swami Agnivesh state that the problem of bonded labour is still in practice and require Special Task Force (STF) to end the problem of slavery. Even the author would like to suggest that Special task force should be appointed in every district which should work independently and should be under direct control of central government and they should submit quarterly report to the concerned departments. The people who are engaged in exploiting bonded labour should be given harsh punishment including imprisonment and heavy penalty should be imposed on them, even if they take the defence that they are doing a favour to the destitute who will starve, and no moral consideration should be shown to those people as this type of crime are crime against the society, and of serious in nature and should not be taken in light manner, as this will affect the development of a country and will create disparity in the society.