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Lex Revolution

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Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals.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 The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

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

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

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CYBER TERRORISM: A GLOBAL THREAT

Dr. Pooja Malik *

Cyberspace is the virtual world created by mankind using computers and networking through which they interact and exchange information using multiple languages or communication protocols that are created by humans so that one computer can talk to another computer. The cyber space is a fairly recent invention and jurisprudence in cyber law is at a nascent stage which is gradually evolving. Initially, the internet was created to serve military and security concerns and to provide adequate protection against nuclear attacks to governments. But gradually internet started serving not only the military, but all spheres of life. World economy has benefitted immensely from the use of internet for day to day activities. But as internet provides great opportunities on one hand, it poses many challenges on the other. One of the lethal challenges today faced by the legal authorities is use of internet and computers by Terrorists. This article draws the attention of the readers to the emerging danger of Cyber Terrorism. It also deals with the ways and means used by the authorities to prevent and control the menace.

Keywords – Cyberspace, computers, internet, terrorists and Cyber Terrorism

Introduction

Terrorism is said to be the weapon of the weak.¹ It is the use of power against the innocent, the unarmed and the helpless, at the same time challenging the responsibility of the state to protect the life and property of its people. It is always political, even when it evinces other motives, such as the religious, the economic or the social.² Terrorism is "the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological".³ As per Federal Bureau of Investigation (FBI), "*Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives*".⁴ Bruce Hoffman defines terrorism as "the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political

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¹ Clive Walker: *The Prevention of Terrorism in British Law*. Chapter 1. Manchester University Press 1986, at 1.

² Christopher C. Harmon, *Terrorism Today*, Chapter 1, Frank Cass Publishers 2000, at 1, available at www.frankross.com

³ Definition of 'Terrorism' as given by the *Department of Defense Dictionary of Military Terms*, http://www.dtic.mil/doctrine/dod_dictionary/

⁴ <http://www.fbi.gov/publish/terror/terrusa.html>

change.”⁵ As a society we have a vast operational and legal experience and proved techniques to combat terrorism, but are we ready to fight terrorism in the new arena – cyber space.

The length and breadth of cybercrime is vast; it includes dangerous activities like hacking, copyright violations, spreading viruses, email bombing, denial of service attacks, corporate espionage, pornography and inhuman crime such as cyber terrorism. Cyber terrorism is a crime which affects society at large, and is a challenge for the legislators to effectively control and protect the cyberspace. Cyberspaces in the form of chat rooms and social networking sites have become virtual battlefields where people are injured, either intentionally or unintentionally. A cyber war is not limited in its application only to target a specific class or groups or government websites. Electronic communication networks and information systems are becoming integral parts of almost all the developing and developed countries, and this technology can be used to shut down important aspects of a country.

Cyber terrorism is a newly emergent area of criminal law in the information society. The concept of ‘informational warfare’ – that is, states fighting campaigns using informational tools and weapons in addition to traditional ordinance – is well established and dates from at least the early 1990s.⁶ A cyber terrorist attack is designed to cause physical violence or extreme financial harm, unlike a nuisance virus or computer attack that results in denial of service. According to the U.S. Commission of Critical Infrastructure Protection, possible cyber terrorist targets include the banking industry, military installations, power plants, air traffic control centers, and water systems. Justice cannot be served unless and until we have a clear definition of the term. There is a degree of "understanding" of the meanings of cyber-terrorism, either from the popular media, other secondary sources, or personal experience; however, the specialists' use different definitions of the meaning.

Definitions

The famous remark attributed to Vladimir Lenin that ‘the purpose of terror is to terrorize’, is less direct than it sounds: terror is not an end in itself, but a means to political power and a way to hold political power. According to the U.S. Federal Bureau of Investigation, cyber terrorism is any “premeditated, politically motivated attack against information, computer systems, computer programs, and data which results in violence against non-combatant targets by sub-national groups or clandestine agents.”⁷ Barry Collin, a senior research fellow at the Institute for Security and Intelligence in California, who in 1997 was attributed for creation of the term ‘Cyberterrorism’, defined cyber-terrorism as the convergence of cybernetics and terrorism.⁸

⁵ Bruce Hoffman, “*Inside Terrorism*”, New York: Columbia University Press 2006, p. 40

⁶ Kaomea, Hearold and Page, “*Beyond Security: A Data Quality Perspective on Defensive Information Warfare*”, MIT Total Data Quality Management Program Working Papers (1994), <http://web.mit.edu/tdqm/papers/other/kaomea.html>

⁷ National Counterterrorism Centre, “*2007 Report on Terrorism*”, available at http://www.fbi.gov/stats-services/publications/terror_07.pdf

⁸ Barry Collin, “*The Future of CyberTerrorism*”, Proceedings of 11th Annual International Symposium on Criminal Justice Issues, The University of Illinois at Chicago, 1996

Dorothy Denning, a renowned expert and professor of computer science, has put forward an admirably unambiguous definition in numerous articles and in her testimony on the subject before the House Armed Services Committee in May 2000:

“Cyberterrorism is the convergence of cyberspace and terrorism. It refers to unlawful attacks and threats of attacks against computers, networks and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives. Further, to qualify as cyberterrorism, an attack should result in violence against persons or property, or at least cause enough harm to generate fear. Attacks that lead to death or bodily injury, explosions, or severe economic loss would be examples. Serious attacks against critical infrastructures could be acts of cyberterrorism, depending on their impact. Attacks that disrupt non-essential services or that are mainly a costly nuisance would not.”⁹

As per Austrian Cyber Security Strategy, Cyber terrorism is defined as a politically motivated crime of state and/or non-state actors against computers, networks and the information stored therein. Its aim is to provoke a severe or long-term disruption of public life or to cause serious damage to economic activity with the intention of severely intimidating the population, of forcing public authorities or an international organisation to carry out, tolerate or omit an act or of profoundly unsettling or destroying the political, constitutional, economic or social foundations of a state or an international organisation.¹⁰

Thus, cyber-terrorism is the most advanced means of terrorist strategy developed with the advancement in information and communication technologies that enables terrorists to carry out their operations with minimum physical threat to themselves. We have to re-examine our understanding of cyber terrorism as there is lack of understanding and a lot of misinterpretation in the definition of cyber-terrorism. It is very difficult to define and even the U.S. government cannot agree on one single definition. Cyber terrorism is a term esoteric, complex and difficult to circumscribe within the four corners of a definition, which will be universally acceptable.

Instances of Cyber Terrorism

In February 1998, the US Military Systems were attacked electronically. The attackers followed the same attack profile: (a) probing to determine if the vulnerability exists, (b) exploiting the vulnerability, (c) implanting a program to gather data, and (d) returning later to retrieve the collected data. At least eleven attacks followed the same profile on Air Force, Navy, and Marine Corps computers worldwide. Attacks were widespread and appeared to come from sites located in Israel, the United Arab Emirates (UAE), France, Taiwan, and Germany. The attacks targeted key parts of the defense networks and obtained hundreds of

⁹ Dorothy E. Denning, “*Cyberterrorism: The Logic Bomb versus the Truck Bomb*”, Global Dialogue, Volume 2 Number 4, Autumn 2000

¹⁰ [Austrian Cyber Security Strategy, Federal Chancellery of the Republic of Austria, Vienna 2013](http://www.enisa.europa.eu/activities/Resilience-and-CIIP/national-cyber-security-strategies-nesss/AT_NCSS.pdf), available at http://www.enisa.europa.eu/activities/Resilience-and-CIIP/national-cyber-security-strategies-nesss/AT_NCSS.pdf

network passwords. Although all Department of Defence targeted systems were reported as unclassified, many key support systems reside on unclassified networks (Global Transportation System, Defense Finance System, medical, personnel, logistics, and official e-mail). These attacks occurred when the U.S. was preparing for potential military action against Iraq due to UN weapons inspection disputes and could have been aimed at disrupting deployments and operations. So who was behind these attacks - Iraq, terrorists, foreign intelligence services, nation states, or hackers for hire? The attackers were two teenagers from California and one teenager from Israel. This is popularly known as solar sunrise attack.¹¹

Another instance of cyber-attack is the internet Black Tiger Group that attacked in 1998 the email servers of Sri Lanka's diplomatic accounts all over the world. In 1999, when *North Atlantic Treaty Organization (NATO) began war with Serbia, Serbian hacker groups, the "Black Hand" had attacked NATO's internet infrastructure known as Kosovo attack. In December, 2000, a terrorist attack on Delhi's Red Fort took place. As per the investigations, the terrorists were using steganography (art and science of communicating in a way which hides the existence of the communication) as a means for communicating the terrorist designs online.*

However, the incident which proved to be a turning point for the history of Cyber crime happened on 11th September 2001. On the fateful day, the terrorists hijacked four planes in different parts of the United States of America, and the crash in World Trade Center Towers resulted in thousands of causalities, and destruction of buildings, offices, databases, networks and information. Investigations revealed that Internet was extensively used to plan and carry out the terrorists' acts. The anger amongst the netizen community following the September 11, 2001 attacks took the shape of counter offensive hacking attacks.

In January 2002, the Supreme Court of India received an email threatening "we will blow up your court and your Chief Minister". An FIR was registered under Section 506 of Indian Penal Code, 1860 and Security processes around the apex court were thereafter tightened. These kinds of emails threatening terrorist consequences are becoming increasingly common in the country in the context of post September 11, 2001 scenario. In 2007, Estonia experienced Distributed Denial of Service attack damaging the computer systems of Banks and blocking the internet access of the President, Prime Minister, Parliament and government organizations. In 2009, Chinese cyber spies hacked into government systems using Ghostnet in 103 countries, which included the computer network that was used by Indian Embassies abroad and the systems of Dalai Lama. India has witnessed many instances of cyber terrorist attack in the recent past including hacking of Central Bureau of

¹¹ <http://www.globalsecurity.org/military/ops/solar-sunrise.htm>

Investigation's website in December 2010 by Pakistani hackers¹², Chinese hackers allegedly hacked Indian Government websites¹³ which are under investigation.

Cyberterrorism: A lucrative option for terrorists

Modern terrorist nowadays are opting for cyber terrorism due to many reasons:

- (a) **Low cost mechanism-** It is a low cost mechanism than traditional terrorist methods. For cyber terrorist activities, the terrorist just needs a personal computer and an online connection. Terrorists do not need to buy heavy and expensive weapons; instead, they can create and deliver computer viruses through a telephone line, a cable, or a wireless connection. Given the low cost standard, access to the internet is not limited to affluent or well educated people, and internet facilities are equally available to all, including the terrorists, independent of any social class.,
- (b) **Anonymity-** Cyber space is an abstract space, rather than a physical space, and it is not the real person sitting on the internet. It is just the digital copy of the person who is sitting in front of the computer. The digital information about the person creates an image of the person. The real person can change his or her electronic image anytime and make it less similar to the real person present. So, cyber terrorism is more anonymous than traditional terrorist methods. Terrorists use fake online names/screen names or log on to a website as an unidentified “guest user,” making it very hard for security agencies and police forces to track down the terrorists’ real identity. And in cyberspace there are no physical barriers such as checkpoints to navigate, no borders to cross, and no customs agents to outsmart.
- (c) **Enormous potential targets** - Further, the variety and number of targets are enormous. The cyber terrorist could target the computers and computer networks of governments, individuals, public utilities, private airlines, and so forth. The sheer number and complexity of potential targets guarantee that terrorists can find weaknesses and vulnerabilities to exploit. Several studies have shown that critical infrastructures, such as electric power grids and emergency services, are vulnerable to a cyber terrorist attack because the infrastructures and the computer systems that run them are highly complex, making it effectively impossible to eliminate all weaknesses.
- (d) **Remoteness** – The online environment provides access to information and communication across both distance and time. Virtual meeting on the internet is possible even if different persons are sitting at different places at different times. So, cyber terrorism can be conducted remotely, a feature that is especially appealing to terrorists. The terrorists can sit in one corner of a secluded place and has the potential to affect directly a larger number of people, thereby generating greater media coverage, which is ultimately what terrorists want.

¹² “Pakistani Hackers Retaliate – Hacks 270 websites, including CBI”, 10th December 2010, Pro Pakistani, available at <http://propakistani.pk/2010/12/03/pakistani-hackers-retaliate-hacks-270-indian-websites/>

¹³ “Chinese cyber crawlers hack Indian Govt sites”, 6th May 2008, available at <http://ibnlive.in.com/news/chinese-cyber-crawlers-hack-indian-govt-sites/64600-3-1.html>

(e) **Less training and risk involved** – Cyber-terrorism requires less physical training, psychological investment, risk of mortality, and travel than conventional forms of terrorism, making it easier for terrorist organizations to recruit and retain followers.

Legal perspective

Article 51 of the Indian Constitution provides that the state shall endeavour to promote international peace and security and to maintain just and honourable relations between nations, which includes living in a peaceful environment free from terrorist activities including cyber terrorism. To promote international peace and security there are various conventions. The Convention on Cybercrime¹⁴ was opened for signature by the member states of the Council of Europe and by non-member states which have participated in its elaboration at Budapest on November 23, 2001 for signatures.

The Convention is the first ever international treaty on crimes committed with the help of Internet and other computer networks, dealing particularly with infringement of copyright, computer related fraud, child pornography and violations of network security. Its main aim, as set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation. It recognized the need for co-operation between states and private industry in combating cybercrime and the need to protect legitimate interests in the use and development of information technologies.

Cyber terrorism was not covered under the Information Technology Act, 2000 and no specific section provided for punishment for sending threatening emails which may cause anxiety, nuisance and terror or which may seek to promote instability. India had been witnessing increase in the activities that tantamount to terrorism, in which the terrorists were using computer tools for encryption, data masking, proxy server hopping and other related tools. Terrorists were becoming more and more technology savvy and, started using cyber space in a big way. That was the urgent need and requirement for a specific provision criminalizing cyber terrorism. Under the Information Technology (Amendment) Act, 2008, the legislature incorporated Section 66F prescribing punishment for Cyber Terrorism. Section 66F is as follows:

(1) Whoever,-

(A) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by-

(i) denying or cause the denial of access to any person authorized to access computer resource; or

¹⁴*Convention on Cybercrime, Budapest (November 23, 2001),* <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>

(ii) attempting to penetrate or access a computer resource without authorisation or exceeding authorized access; or

(iii) introducing or causing to introduce any Computer Contaminant.

and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under section 70, or

(B) knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorized access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life'.

The above definition of Cyber Terrorism is comprehensive and has extremely wide ambit, scope, applicability and nature as also character of the offence. It can be broadly classified into two major categories of activities. The *first category* in sub-section (1) of Section 66F has following essentials-

(a) MENS REA – A person must have intention to threaten the following:

- the unity of India
- integrity of India
- security of India
- sovereignty of India
- to strike terror in the people
- to strike terror in any section of the people

(b) ACTUS REUS – the above intention must be followed by doing the following acts:

- denying or cause the denial of access to any person authorized to access computer resource; or

- attempting to penetrate or access a computer resource without authorisation or exceeding authorized access; or
 - introducing or causing to introduce any Computer Contaminant.
- (c) EFFECTS – By means of the aforesaid acts or conduct, the offender:
- causes or is likely to cause death or injuries to persons or
 - damage to or destruction of property or
 - disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or
 - adversely affect the critical information infrastructure specified under section 70

The aforesaid essentials together would constitute the offence of cyber terrorism. Now let's proceed to the *second category of activities* under sub-section (2) of Section 66F which are classified as cyber terrorism. The second category of activities postulate that any person must knowingly or intentionally penetrate or access a computer resource without authorization or exceeding authorized access. Further, by means of doing such an act, the said person obtains access to information and data or computer data base, which is restricted. The said restrictions can be for any of the reasons including the following:

- security of the State or
- foreign relations; or
- any restricted information, data or computer database

The above acts must be done with reason to believe that such information, data or computer database so obtained may be used to cause or like to cause an injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise. This is the second category of offences which amounts to cyber terrorism.

Thus, the ambit of such offence is very wide and includes within itself, all offences of cyber terrorism committed using computer resources including communication devices, cell phones, smart phones, personal digital assistants and any other device which is used to communicate any text, video, audio or image. Further, because of the application of Section 81 of the amended Information Technology Act, 2000, the provisions of Section 66F related to cyber terrorism shall prevail, notwithstanding anything contrary contained therewith in any other law for the time being in force. The Information Technology Act, 2000 being a special legislation, its provisions pertaining to cyber terrorism prevail over anything inconsistent therewith in any other law including the existing anti-terror laws of India.

This is the legal provision in the IT Act along with other provisions which are meant to deal with cyber terrorism. Again Section 69 of the same Act contains directions to intercept or monitor or decryption of any information transmitted through any computer resource. According to Section 69, Central Government or a State Government or any of its officer specially authorized may direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information transmitted, received or stored through any computer resource, if it is satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence.

Further Section 69A provides that the Central Government or any of its officer specially authorized may direct any agency of the Government or intermediary to block access by the public or cause to be blocked for access by public any information generated, transmitted, received, stored or hosted in any computer resource, if it is satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to above. To provide further, Section 69B confers power on the Central Government to authorize to monitor and collect traffic data or information through any computer resource for Cyber Security.

Another step to combat or contain Cyber terrorism can be taken with the help of Section 70 of the IT Act which aims at special protection of critical infrastructure of the country and important military and scientific installations. As per Section 70, the appropriate Government may, by notification in the Official Gazette, declare any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure, to be a protected system. The appropriate Government may, by order in writing, authorize the persons who are authorized to access protected systems notified. Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

The main purpose behind inclusion of such a provision is to give extra protection to computer systems which are vital to the national security, keeping in view the technological advancements and computer literacy of the present day terrorist. The ten year sentence along with fine as envisaged by the Section reflects the seriousness of the law makers with which they resolve to fight the new technological challenges. This also shows the extra attention government intends to give to such vulnerable installations. However, these provisions though a commendable step in this direction are still insufficient to contain cyber terrorism for more than one reason.

Moreover, when the cyber terrorists' acts endanger national security, the additional law provision which can be applied to him is Section 124A of the Indian Penal Code 1860. According to Section 124A, whoever, by words, either spoken or written, or by signs, or by

visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

A comprehensive Cyber Security Audit in co-ordination with the technical experts and institutions providing critical infrastructures would be a good step to begin with. This should help in identifying our vulnerabilities and thus in plugging the gaps in the same. Cyber terrorism, especially through Distributed Denial of Service, tends to attack critical infrastructures, because of political or ideological motivations, with the aim to cripple or damage them. The more advanced a country is, the more advanced is the networking system and for the same reason, the more it becomes prone to such attacks.

Conclusion

Cyber terrorism is, to be sure, an attractive option for modern terrorists, who value its anonymity, its potential to inflict massive damage, its psychological impact, and its media appeal. The potential threat posed by cyber terrorism has provoked considerable alarm. Numerous security experts, politicians, and others have publicized the danger of cyber terrorists hacking into government and private computer systems and crippling the military, financial, and service sectors of advanced economies. The challenge before the legal authorities is how to combat cyber terrorism. Before combating cyber terrorism, it is very important for the people to understand that every cyber crime does not amount to cyber terrorism. Cyber terrorism consists of mainly two areas – terrorism and technology- that many people does not completely understand and therefore tend to fear. Many times, different groups try to exploit this ignorance. So, there is urgency for the government and people to keep their guards high against cyber terrorism by taking necessary precaution without panicking. The increasing use of Information and Communication Technology by the criminals, insurgents and terrorists has necessitated a re-look at the criminal justice system to tackle the impact of the new technology on the society and the crime patterns.

EVOLUTION OF ENVIRONMENTAL JURISPRUDENCE IN INDIA WITH SPECIAL EMPHASIS ON PRINCIPLES OF SUSTAINABLE DEVELOPMENT

Dr. Neetu Gupta*

The march of human civilization is always accompanied by the process of development. The history is the witness that the process of development has done a huge damage to the physical environment because it has resulted into the environmental pollution. It means that the process of development has not remained compatible with the natural surroundings. The concept of Sustainable development is increasingly promulgated in international and national legal contexts, but there is a long way to go in terms of implementation. The role of the judiciary is thus of the greatest importance. Incrementally, a body of environmental jurisprudence is emerging. The purpose of this article is to provide a general analysis of the term ‘Sustainable Development’ as it has evolved in International as well as national arena. It further outlines the role played by judiciary in India, through its landmark judgments, in promoting the principles of sustainable development.

Key words: environment, development, pollution, sustainable, judiciary.

Introduction

The march of human civilization is always accompanied by the process of development. As the progress of human civilization is a continuous process, so is the case of the process of development. Apart from being a continuous process, the development always has an intimate relationship with its surroundings, which is known as environment. The history is the witness that the process of development has done a huge damage to the physical environment because it has resulted into the environmental pollution and over exploitation of the natural resources, which do not only belong to the present generation but to the future generations as well. It implies that the pace of development has not remained compatible with the natural surroundings and future oriented. This is the context in which the idea of environmental jurisprudence in the form of principles of sustainable development started taking shape.

Sustainable Development: International Scenario

The concept of ‘Sustainable Development’ is not a new concept. The 1972 *UN Conference on Human Environment* in Stockholm, which recognized the “importance of environmental management and the use of environmental assessment as a management tool”, represents a major step forward in development of the concept of sustainable development. The Declaration stated that:

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Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well being and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹

After the 1972 UN Conference on the Human Environment, it gradually became apparent that environment and development could not for long remain in a state of conflict. The first major breakthrough in conceptual insight came from the *International Union for the Conservation of Nature* (hereinafter called IUCN). Working closely with the World Wildlife Fund for Nature and The United Nations Environment Programme, IUCN formulated the World Conservation Strategy, which was launched internationally in 1980. This was a major attempt to integrate the environment and development concerns into an umbrella concept of “conservation”. Although the term “sustainable development” did not appear in the text, the strategy’s subtitle, “Living Resource Conservation for Sustainable Development”, certainly highlighted the concept of sustainability.²

The theme was picked up a few years later by the *World Conference on Environment and Development* (hereinafter called WCED). The report of WCED (also known as the Brundtland Commission), ‘Our Common Future’, holds the key statement of sustainable development, which defined it as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.³ The report was the major political turning point that made the concept a popular catch phrase. Since publication of this report, sustainable development increasingly has become the core element of every environmental debate.

The UN has played a particularly prominent role in stimulating the model of sustainable development. The UN has organized several World Summits, including the *United Nations Conference on Environment and Development* in June 1992 in Rio de Janeiro, otherwise known as *Rio Earth Summit* and the *Johannesburg World Summit on Sustainable Development* held in 2002. The Rio Declaration which arose from the Rio Earth Summit, provides an authoritative set of normative principles, that is principles that deal with moral issues including gender equality, intra generational equity (within a generation), inter generational equity (between generations) and justice.

Indian Scenario

So far as the Indian position is concerned, the Indian judiciary has played a significant role in evolution of environmental jurisprudence, specially the well recognized principles of sustainable development.

¹ Available at

< <http://www.unep.org/Documents.Multilingual/Default.Print.asp?documentid=97&articleid=1503>> (accessed on May 20, 2015)

² Desta Mebratu, “Sustainability and sustainable development: Historical and Conceptual Review”, *Environmental Impact Assessment Review*, 1998, at 501.

³ Available at, <http://en.wikipedia.org/wiki/Brundtland_Commission> (accessed on May 17, 2015).

Right to Pollution Free Environment as Part of Right to Life (Expanding Horizons of Article 21 of the Constitution)

Article 21 of the Constitution guarantees right to life and personal liberty.⁴ It took nearly three decades after the commencement of the Constitution to recognize the fact that the fundamental rights chapter (Chapter III of the Constitution) implicitly acknowledges the right of substantive due process and this was done through a series of cases of which *Maneka Gandhi v. Union of India*⁵ is a landmark wherein Court proceeded to explain the scope and content of the right to life and liberty. The scope of the phrase “procedure established by law” was considerably broadened to interpret that mere prescription of some sort of procedure is not enough. The procedure cannot be arbitrary, unfair or unreasonable. Once the scope of Article 21 was explained, the door was open to its expansive interpretation to include various facets of life. The right to life now encompasses many positive attributes like right to dignity, privacy, livelihood, healthcare, pollution-free environment and numerous other rights.

In *Subhash Kumar v. State of Bihar*⁶, the Supreme Court while recognizing that Right to life under Article 21 of the Constitution includes the right of enjoyment of pollution free water and air held that if anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detriment to the quality of life.

Principle of Proportionality (based on concept of balance)

The concept of “balance” under the principle of proportionality as applicable in the case of sustainable development is lucidly explained by Pasayat, J. in the judgment of Supreme Court in the case of *T.N. Godavarman Thirumalpad v. Union of India and Ors*⁷ in following words:

It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.

The above paragraphs indicate that while applying the concept of “sustainable development” one has to keep in mind the “principle of proportionality” based on the concept of balance. It

⁴ Article 21- No person shall be deprived of his life and personal liberty except according to procedure established by law.

⁵ AIR 1978 SC 597.

⁶ AIR 1991 SC 420.

⁷ (2002) 10 SCC 606

is an exercise in which we have to balance the priorities of development on one hand and environmental protection on the other hand.

In *Research Foundation for Science Technology and Natural Resource Policy v. Union of India*⁸, the Court observed that in an emergent economy like India, the principle of proportionality based on the concept of balance is important. It provides level playing field to different stakeholders. While applying the principle of sustainable development, it is necessary to keep in mind the concept of development on one hand and the concepts like generation of revenue, employment and public interest on the other hand. Ship breaking is an industry. Even in the case of Blue Lady (the ship), the Court observed that the figures indicate that 700 workers would be employed in ship breaking. Further, 41000 MT of steel would be made available. To that extent, there will be less pressure on mining activity elsewhere. But at the same time, there is a need to enforce health safety standards to protect the skilled workers. This is the way the doctrine of proportionality can be achieved. The court observed that as in this case all the conditions laid down for the safety of workers have been compiled by the recycler, the principle of sustainable development based on the concept of “balance” stands satisfied.

Precautionary Principle

The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. The principle has been emphasized by *Principle 15 of Rio Declaration* in following words:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for proposing cost- effective measures to prevent environmental degradation.

In the case of *M.C. Mehta v. Union of India*⁹, the Supreme Court gave a number of directions to 292 industries located nearby Taj Mahal. The Court, in this case, observed that the old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and ecosystem have to be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of our ecosystem. In any case, in view of the precautionary principle, the developmental measures must anticipate, prevent and attack the causes of environmental degradation.

⁸ 2007(9) SCR 906. The question which arises for determination in this interlocutory application is whether this Court should grant permission for dismantling of the ship “Blue Lady” at Alang, Gujarat. Court decided to lay down norms concerning infrastructure, capacity of Alang to handle large volume of ship-breaking activity, safeguards to be provided to the workers who were likely to face health - hazard on account of the incidence of ship-breaking activity, the environmental impact assessment and strict regulation of the said activity.

⁹ 1997(2) SCC 353.

In *M.C. Mehta v. Union of India*¹⁰, the Supreme Court explained the scope of “precautionary principle” observing that it requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment. The concept of “sustainable development” has been explained that it covers the development that meets the needs of the person without compromising the ability of the future generation to meet their own needs. It means the development, that can take place and which can be sustained by nature/ecology with or without mitigation. Therefore, in such matters, the required standard is that the risk of harm to the environment or to human health is to be decided in public interest, according to a “reasonable person's” test. The development of the industries, irrigation resources and power projects are necessary to improve employment opportunities and generations of revenue; therefore, cannot be ignored. In such eventuality, a balance has to be struck, for the reason that if the activity is allowed to go, there may be irreparable damage to the environment and if not, there may be irreparable damage to the economic interest.

In *Justice I.S. Israni (Retd.) v. Union of India*¹¹, the petitioner through public interest litigation prayed for the relief that the Central Government as well as the State Government and their instrumentalities be directed to formulate regulatory body in relation to emission of radio frequency and electromagnetic radiations emitted by or likely to be emitted by mobile towers and for monitoring emission from these towers. Prayer has also been made to direct the respondents to remove the towers from the hospitals, schools and residential areas so as to minimize the environmental and noise pollution. Recognizing the fact that radiation from mobile towers may be dangerous to health/life and its continuous exposure may result in various kind of diseases, a division bench of Rajasthan High Court observed that “precautionary approach” is required to be adopted in such matter. At the same time court directed the State government to remove mobile towers from hospitals and school within two months from the date of the judgment.

Polluter Pays Principle

Polluter Pays principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environment degradation i.e., the polluter should pay the costs for such measures as are necessary to eliminate the environmental pollution created by him or to reduce its amount so as to comply with the required standards. Remediation of damaged environment is part of the process of sustainable development.

¹⁰ 2004(2) RCR (Civil) 760. The main question to be examined in these matters is whether the mining activity in area upto 5 kilometers from the Delhi-Haryana border on the Haryana side of the ridge and also in the Aravalli hills causes environment degradation and what directions are required to be issued.

¹¹ 2013(2) W.L.C. (Raj.) 602.

In a significant judgment in *Indian Council for Enviro-Legal Action v. Union of India*¹², the Supreme Court determined the liability of the respondents in accordance with ‘Polluter Pays’ principle. In this case, an environmentalist organization filed a writ petition under Article 32 of the Constitution complaining the plight of the people living in the vicinity of chemical industrial plants in India and requesting for appropriate remedial measures. The facts were that in a village Bichhri in Udaipur district of Rajasthan an industrial complex had been developed and respondents established their chemical industries therein. Some of the industries were producing chemicals like Oleum and Sludge Phosphate. The respondents did not install any equipment for treatment of highly toxic effluents discharged by them. Consequently, the water in the wells became unfit for human consumption and it spread diseases, death and disaster in the village and surrounding areas. Due to revolt of villagers, the industries were closed down. But the consequences of their actions remained in existence causing damage to the village.

Supreme Court held the respondents responsible for all the damage to the soil, to the underground water and to the village in general. Regarding the determination of the cost of the remedial measures, the Court held that the principle on which the liability of the respondents to defray the costs of remedial measures will be determined is the ‘Polluter Pays’, that is, the responsibility for repairing damage is that of the offending industry.

In *Vellore Citizen’s Welfare Forum v. Union of India*¹³, the petitioner, Vellore Citizen’s Welfare Forum, filed a writ petition by way of public interest litigation drawing the attention of the court towards the pollution caused by enormous discharge of untreated effluents by the tanneries and the other industries in the State of Tamil Nadu and thus rendering the river water unfit for human consumption.

The Supreme Court held that such industries though are of vital importance for the country’s development but they cannot be allowed to destroy the ecology, degrade the environment and pose a health hazard and cannot be permitted to continue their operation unless they set up pollution control devices. Justice Kuldip Singh, who delivered the judgment on behalf of the Court, held that while such industries are of vital importance for the country’s progress as they generate foreign exchange and provide employment avenues, but having regard to the pollution caused by them, principle of ‘Sustainable Development’ has to be adopted as a balancing concept between ecology and development. His Lordship held that the “precautionary principle” and the “polluter pays principle” are essential features of ‘Sustainable Development’. Remediation of damaged environment is part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

In *M.C Mehta v. Union of India*¹⁴, the Supreme Court of India was concerned with approximately 550 tanneries located in Calcutta. The tanneries were in thickly populated

¹² AIR 1996 SC 1446

¹³ (1996) 5 SCC 650

¹⁴ 1997(2) Scale 8

residential areas. They were being operated in extremely unhygienic conditions and discharged highly toxic effluents over the areas. The Supreme Court relying upon its decision in Indian Council for *Enviro-Legal Action v Union of India* ordered the Calcutta tanneries to relocate and to pay compensation for the loss of ecology/environment of the affected areas and the suffering of the residents.

In *Tirupur Dyeing Factory Owners Assoc. v. Noyyal River Ayacutdars Protection Association*¹⁵, reading the principle of “Polluters Pays” along with the doctrine of “Sustainable Development”, Supreme Court held the polluting industries liable to meet out the expenses of reversing the ecology by removing the sludge of the river and also by cleaning the dam. The Court directed the Association of said industrial units to pay 56.6 crore for cleaning the river and water bodies by Public Works Department.

Inter-generational Equity

Intergenerational equity is an umbrella concept which is based on the premise that “the present generation is required to ensure that the health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations”. Principle 3 of the Rio Declaration states that: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of the present and future generations.”

In *State of Himachal Pradesh v. Ganesh Wood Products*¹⁶, a writ petition was filed seeking issuance of a writ restraining the government of the State of Himachal Pradesh from permitting the establishment of any factory units for the manufacture of Katha in the State. Katha is derived from the Khair tree which is found in considerable numbers in the State. Only the central portion of the trunk of the Khair tree is used for the manufacture of Katha. Hence, the manufacture of Katha requires the cutting of the Khair trees. The ground for seeking the writ was that the establishment of Katha manufacturing units would lead to indiscriminate felling of Khair trees which would have a deep and adverse effect upon the environment and ecology of the State. The Supreme Court of India upheld the appeal and stated that:

The considerations of environment and ecology and preservation of forest wealth are absolutely relevant considerations which the Government must keep in mind while devising its policies and programmes.

The Supreme Court then emphasised the significance of the concepts of sustainable development and intergenerational equity. As to the latter, the Supreme Court said:

¹⁵ AIR 2010 SC 3645. This case relates to wide spread pollution caused by dyeing and bleaching industries by discharging effluents in river Noyyal in Tamil Nadu and thereby causing damage to the farmers who could not cultivate their adjoining lands.

¹⁶ AIR 1996 SC 149.

Intergenerational equity means the concern for the generations to come. The present generation has no right to impede the safety and well being of the next generation or the generations to come thereafter.

*Karnataka Industrial Areas Dev. Board v. C. Kenchappa*¹⁷ is a landmark judgment wherein in consonance with the principle of “Sustainable Development”, a serious endeavour has been made by the Apex Court to strike a golden balance between the industrial development and ecological preservation. The Division Bench of the apex court held that for maintaining ecological equilibrium and pollution free atmosphere of the villages, the Karnataka Industrial Areas Development Board (KIADB) be directed to leave a land of one kilometer as a buffer zone from the outer periphery of the village in order to maintain a ‘green area’ towards preservation of land for grazing of cattle, agricultural operation and for development of social forestry and to develop the area into a green belt. This measure would preserve the ecology without hindering the much needed industrial growth, thus striking a balance between the industrial development and ecological preservation.

The Public Trust Doctrine

The concept of public trusteeship may be accepted as a basic principle for the protection of natural resources of the land and sea. The Public Trust Doctrine primarily rests on the assumption that certain resources like air, sea, water and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature should be made freely available to everyone irrespective of their status in life. The doctrine enjoins upon the government and its instrumentalities to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.

In the case of *M.C. Mehta v. Kamal Nath*¹⁸, the apex court dealt with the Public Trust Doctrine in great detail. The Court observed as under:

..... in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the court find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

Establishment of National Green Tribunal

¹⁷ AIR 2006 SC 2038. The case relates to acquisition of village lands by Karnataka Industrial Areas Development Board for being converted into industrial or other purposes and thereby causing an adverse impact on the environment of the village.

¹⁸ 1997(1) SCC 388.

For effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto, The National Green Tribunal has been established on 18.10.2010 under the National Green Tribunal Act 2010. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal is not bound by the procedure laid down under the Code of Civil Procedure, 1908, but is guided by principles of natural justice. The Tribunal is mandated to make and endeavour for disposal of applications or appeals finally within 6 months of filing of the same.¹⁹

Since its inception, National Green Tribunal has been instrumental in pronouncing landmark orders for protecting and preserving the natural environment, the latest being ban on all vehicles which are more than 15 years old from plying on Delhi roads, an order which has been upheld even by Supreme Court. The tribunal noted that diesel is prime source of air pollution in Delhi and the situation is so alarming that people have been even advised to leave Delhi due to adverse effects on health.²⁰

Conclusion

The contribution of the Supreme Court of India in protecting the environment and ecology, forest and wild life, etc. has been phenomenal. We have enough laws to protect the environment, but its implementation is in the hands of administrative authorities. The words of **Justice Frankfurter** are apt quoting “An onerous obligation We owe to posterity..... clean air, clean water, greenery and open space. They ought to be elevated to the status of birth right of every citizen”²¹ However, it needs to be appreciated that the efforts of the courts can only achieve marginal success unless there is change in the mindset of the government as well as of people towards adhering to a model of sustainable development. Nation’s progress largely depends on development, therefore, the development cannot be stopped, but we need to control it rationally. There is a need to create environmental awareness which may be propagated through formal and informal education.

¹⁹ Available at <<http://www.greentrivalbunal.gov.in/history.aspx>> (accessed on May 16, 2015).

²⁰ Available at <<http://www.financialexpress.com/article/economy/supreme-court-upholds-ngt-order-imposing-ban-on-10-year-old-vehicles-in-delhi/65202/>> (accessed on May 17, 2015).

²¹ Available at <http://highcourtchd.gov.in/right_menu/articles/judicial.htm> (accessed on May 16, 2015).

SUSTAINABLE DEVELOPMENT AND LAW: EXPLORING ENVIRONMENTAL ETHICS

Dr. R. SEYON*

'Man' and 'Environment' are two words that have invaded almost all spheres known to recorded history. These two words ultimately focus the attention on nature and its components – be it land, water, air or the diversity of living forms. Several of man's attempts to conquer natural processes have boomeranged, at times leading to irreversible and irreparable damage to nature. The earth's capacity for absorbing and assimilating most human generated pollutants is large, but limited. As pollutants rates rise due to increased human activity, the natural process that absorb and assimilate pollutants are eventually overwhelmed, leading to rising concentrations and imbalances in the global environment. Hence, Indian judiciary employs a range of legal instruments to preserve and protect the country's natural resources. The judiciary in India has applied the principles of sustainable development. While deciding the cases. The consistent position adopted by the courts in India has been that there can neither be development at the cost of the environment or environment at the cost of development. Nature serves for human interests in more ways than as a pool of raw materials and a dump for wastes. It provides priceless ecological services. And, undefiled nature is a source of aesthetic gratification and religious inspiration. When the interests of future generations (as well as of present) and the ecological services and psycho-spiritual resources afforded by nature are taken into account, respect for human beings is quite enough to support nature protection. The new non anthropocentric environmental ethics reveals growing recognition of intrinsic values of nature, ecological interdependence and the need for a holistic approach. A comprehensive approach to multidimensional nature of sustainable development encompasses environmental sustainability, economic sustainability and socio-cultural sustainability. Sustainable development has been construed as a process of development that emphasizes intergenerational, interspecies and intergroup equity; as an economic development that is complementary to environment and society; and as an improvement in current living standards without jeopardizing future living conditions by ensuring environmental services on a very long term basis. The future of the earth is entirely linked with the sustainable development. There is human threat to air, water and land. Sustainable development also requires that the adverse impact on the quality of air, water and other natural resources are minimized so as to sustain the ecosystem's overall integrity. Some of the salient principles of sustainable development as called out from Brandtland Report are: intergenerational equity, use and conservation of natural resources, the precautionary principle, polluter pays principle, obligation to assist and co-operate, eradication of poverty, and financial assistance to the developing countries.

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NATURE AND MAN

Earth provides enough to satisfy everymen's needs but not every man's greed

- Mahatma Gandhi

Environment has clearly emerged as the biggest contemporary issue. Environment is the outer physical and biological system in which man and other living objects survive. The main identified components of the environment are soil, water and air. These components of the environment keep on interacting with each other to maintain a mutual balance called *ecological balance*. The eco-system as a whole sustains mankind. The ecological balance is being upset by misuse, abuse and extraordinary use of resources of the environment. A ruthless exploitation of natural resources created deserts and droughts.

Man's greed attacks nature, environment and ecology and wounded nature backlashes on the human future. Nature constitutes the environment or the ecology of man. Not only the beauty but the very existence of life depends on nature. Existence of the green cover on the earth is the life sap of human society. It cannot be dispensed with at all because each breath men take is purified by nature. Indiscriminate destruction of nature has brought an environmental crisis in the country.

Issues such as climate change, trends in global warming, ozone depletion, acid rain, deforestation, desertification, droughts, toxic wastes and loss of biological diversity have resulted in increasing global awareness of the problems facing the planet earth. An unprecedented rise in human population has overburdened ecological and social systems.

The ancestors were nature worshippers because worship is a form of the greatest admiration for them in nature. The famous hymn the Rig Veda, portrays the beauty of the morning (*Ushas*) and worships its glory. This healthy approach of man to nature later suffered an eclipse with the growth of population increasing pressure on natural resources. The natural environment of man is thus threatened gravely.

Earth's resources are finite and will sooner or later be exhausted. Environmental crisis involves social, political, economic and also philosophical aspects. The most vital task is to build an environmental ethics that constructs an adequate theory of intrinsic value of nature as a whole. The report on *Our Common Future* by World Commission on Environment and Development (Brundtland Report) in 1987, envisaged that "Human Survival and well-being depends on success in elevating sustainable development to a global ethics" (WCED, *Our Common Future* 308, 1987).

This paper attempts to explore the ethical dimensions of sustainable development and its journey from rhetorical to operational aspects and offer insight as to how environmental ethics can be converged into sustainable development paradigm through the adoption of an ecological consciousness. Environmental ethics in contrast to environmental politics, justifies value in nature. Environmental ethics, by examining questions about how humans ought to think about and act towards nature, provides a link between theory and practice. Since the

late 1980s, sustainable development has become the dominant policy discourse of environmental activism – *greenness strategies*. The core of mainstream sustainability has become multidimensional in nature: environmental, social and economic sustainability (Shown below in Visual Representation).

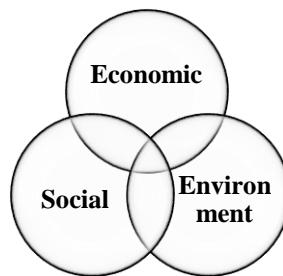


Figure: Overlapping circles of Sustainable development

Environment is a broad spectrum which brings within its hue hygienic atmosphere and ecological balance. It is acknowledged that environmental degradation is seriously threatening the economic and social progress of the country. The future of earth is entirely linked with sustainable development. In its efforts to protect the environment, the Supreme Court and the Indian Judiciary in general have relied on adopting a model of sustainable development as a guiding principle – that is there can neither be development at the cost of the environment or environment at the cost of development.

HUMAN CHAUVINISM AND ENVIRONMENTAL ETHICS

Ecocentrism of Environmentalism rejects the *human chauvinism* of *anthropocentrism*. A central percept of green thinking is the belief that the current ecological crisis is caused by human arrogance towards the natural world which legitimates its exploitation in order to satisfy human interests. Human arrogance towards nature is rooted in *anthropocentrism*: a way of thinking that regards humans as the source of all sources of all value and that human needs and interests are the highest. Humans are placed at the centre of the Universe, independent of nature, and endowed with unique values.

Anthropocentrism regards that only humans have intrinsic value – a claim usually based on their capacity either to experience pleasure and pain or to reason; and furthermore, that only humans have interests. The central theoretical question in environmental ethics is: Does nature (or some parts of nature) also have intrinsic value? The defining problem for environmental ethics is: How to discover intrinsic value in nature. If nature lacks intrinsic value or no intrinsic value can be attributed to nature, biocentric or ecocentric or non-anthropocentric environmental ethics may be ruled out.

Ecocentrism rejects human chauvinism and argues that all of nature has intrinsic value. The biocentric or ecocentric vision of environmentalism objects to human chauvinism, not to humans and wants human and human culture to blossom and flourish. Granting intrinsic value to nature would amount to a revolution in the way the non-human world is treated –i.e.,

something is wrong with the destruction of nature – something valuable is destroyed. The endeavour of environmental ethics is completed with the clarification of the philosophical issue of intrinsic value contained in nature. Holistic arguments attempt to believe that the *whole* of nature is greater than humans and value nature for itself. Successful environmental policies require many things, the most vital being the support of the common masses and that happens only if there is an ethical commitment to environmental values.

The most radical approaches adopt a *holistic analysis* of the human-nature relationship and tend to develop a *non-anthropocentric or ecocentric* ethic that draws the attention to the importance of developing an ecological consciousness which encourages to adopt holistic attitude towards nature. Thus, there is a quest for an ethical code of conduct based on the existence of intrinsic value in nature. Holistic arguments draw attention to the interdependence of ecosystems through a convergence paradigm of *sustainable development* with a set of principles.

ENVIRONMENT AND HERITAGE

Indian culture shows a concern for the environment. Indian scriptures taught to worship nature. Worship means acknowledgement of dependence on the environment. Since the vedic times, the main motto of social life was to live in harmony with nature. The *Rigveda* revealed that “the Universe consisting of the Sky, the Earth and the Space, is like a Family, and any kind of damage done to any one of the Three, throws the Universe out of balance”. The ancient literature preached in one form or the other, a worshipful attitude towards plants, trees, mother earth, sky, air, water and animals and to keep a benevolent attitude towards them. It was regarded the sacred duty of every person to protect them.

In Hindu religion, trees, animals, hills, mountains, rivers are worshipped as symbols of reverence to nature. *Manu Smriti* prescribed various punishments for destroying trees and plants. *Charak Samhita* considered the destruction of forests as the most dangerous act against humanity. Indian way of life recognizes air, fire, atmosphere, earth and water as *panchabhutas* essential for making life meaningful. To keep *panchabhutas* free from detrimental changes is as much essential as protecting the right to life.

The philosophy of peaceful coexistence with nature found its way in Indian Constitution also. The Articles 48-A and 51-A(g) relating to environmental issues were incorporated in the constitution:

“48-A. The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country...”

51-A. It shall be the duty of every citizen of India-

(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures”.

The Forty-second Amendment to the Indian Constitution in 1976 introduced principles of environmental protection in an explicit manner into the Constitution through Articles 48-A and 51-A(g).

The Apex Court in deciding the environmental issues not only based its decision on Part III and Part IV of the Constitution of India but also on Part IV – A thereof.

Judicial activism in the field of environmental law started its journey in the 1970s. The Supreme Court has evolved principles of great importance which provide for deciding environmental issues. The history of environmental law in India shows that it has fallen frequently to the judiciary to protect environmental interests, due to sketchy input from the legislature, and laxity on the part of the administration.

Parliament (India's Central Legislature) has enacted laws to take appropriate steps for the protection and improvement of the human environment. Prior to the phase of 1970s, Indian environmental law mainly consisted of claims made against tortious actions such as nuisance or negligence. The Supreme Court broadened the scope of environment pollution by bringing into its ambit noise pollution and health care of the people.

The penal code 1860, in Chapter 14 (Sections 268 to 294 A) deals with public nuisance i.e., the offences relating to public health, safety, convenience, decency and morals. The Criminal Procedural Code, 1973 in Chapter X in Sections 133 to 146 prescribed the procedure for the abatement of nuisance in ordinary cases and Chapter XI in Section 144 in urgent cases of nuisance. The imperative tone of Section 133, Cr.P.C. read with the punitive temper of Section 188, I.P.C. make the prohibitory act a mandatory duty.

The judgment of the Supreme Court of India in a case of *Municipal Council, Ratlam v. Vardhichand and others*¹ is a landmark in the history of judicial activism in upholding the social justice component of the rule of law by fixing liability on the statutory authorities to discharge their legal obligation to the people in an abating public nuisance and making the environment free from pollution.

Rejecting the plea of the municipality that notwithstanding the public nuisance financial inability exonerates it from statutory liability, the Supreme Court held that such argument has no force in law. Providing drainage systems in working conditions, sufficient to meet the needs of the people cannot be evaded if the municipality is to justify its existence, as rightly observed by the court.

Polluter pays principle means that the polluter should internalize the cost of pollution, control it at its source and pay for its affects, including remedial or cleanup costs rather than enforcing other states or future generations to bear such costs, as per the Provisions of principle 16 of the Rio Declaration.

¹. AIR 1980 SC 1622; (1980) Cr.L.J. 1075

In Indian council for *Enviro-Legal Action v. Union of India*², the Supreme Court held the respondents absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and bound them to take all necessary measures to remove the sludge and other pollutants lying in the affected area and also to defray the cost of the remedial measures required to restore soil and the underground water resources.

The polluter pays principle as interpreted by the court means that the absolute liability for harm to the environment extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation.

In the development of environmental law in India, the Supreme Court and other Courts have accepted and applied certain significant doctrines evolved and used for settling the serious issues relating to environment – eg., public trust doctrines and precautionary and polluter pays principles are some amongst them.

Indian environmental law has seen considerable development in the last two decades. The *Water (Prevention and Control of Pollution) Act* of 1974 gave the statute – book its first real foundation for environmental protection. Other major enactments followed in 1980, the *Forest (Conservation) Act*, 1980, the *Air (Prevention and Control of Pollution) Act* 1981, the *Wild Life (Protection) Act*, 1972, the *Environment (Protection) Act* of 1986 and the *Biodiversity Act*, 2002. Of these the *Environment Protection Act* is the one which is now being implemented and relied upon in an effort to protect the environment. Most of the principles under which environmental law works in India today were assembled over the last twenty years, with a predominant share from judicial thinking in the Supreme Court and the High Courts of the States.

The Supreme Court has successfully identified and isolated specific environmental law principles upon the interpretation of Indian Statutes and the Constitution, combined with a liberal view towards ensuring social justice and the protection of human rights.

In *Indian Council for Enviro Legal Action v. Union of India*³, the Supreme Court has declared the right to wholesome environment as part of right to life as against the pollution caused by chemical companies manufacturing hazardous and dangerous chemicals, letting in toxic effluents into the deep holes of the Earth, thus polluting the sub-terrainian supply of water.

HUMAN RIGHTS AND THE ENVIRONMENT

The fundamental rights part of the Constitution of India does not entail environmental matters within it. Here the Supreme Court played a pivotal role. The Supreme Court, in its interpretation of Article 21, has facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence. There are numerous decisions wherein the right to a clean environment, drinking water, a pollution – free atmosphere etc.,

2. AIR 1996 SC 1446

3. AIR 1996 SC 1446

have been given the status of inalienable human rights and, therefore, fundamental rights of Indian Citizens. Supreme Court has essentially interpreted the right to life under Article 21 to include a right to healthy and pollution free environment – i.e., the Supreme Court recognized a wholesome environment as part of the fundamental right to life. This produced a compulsion to take positive measures to improve the environment. The Supreme Court recognized several unarticulated liberties that were implied by Article 21(http://supremecourtofindia.nic.in/new_links/humanrights.htm).

Defining Article 21 in a high structured way Justice Dharmadhikari expresses his view as: “Article 21 has been one single article which by interpretation has been expanded to progressively deduce a whole lot of human rights from it, such as, right to *means of livelihood; right to dignity and privacy; right to health and pollution – free environment; right to education; right to legal aid and speedy trial; etc.*”

There have also been occasions when the judiciary has prioritized the environment over development, when the situation demanded an immediate and specific policy structure. For example, the Court held in *M.C. Mehta v. Union of India*⁴ “Life, public health and ecology has priority over unemployment and loss of revenue problem”.

Judicial activism has resulted in many innovations and has given important raw material for building up a comprehensive Indian administration of environ justice. It is worthwhile to mention that most of the environmental cases have come before the courts through *Public Interest Litigations* (PIL).

Rivers, lakes and oceans have become so polluted that in many places they can no longer support marine life. The tanneries around Uttar Pradesh, by discharging effluents into River Ganga and other rivers are polluting it, leading to the destruction of fish life on which poor persons downstream live. The River Yamuna when it leaves Delhi, the oxygen content in the little water, which there exists, is zero percent. With reference to pollution caused by tanneries in the Palar River basin, Dindugal Green Bench of Madras High Court directed the polluter tanners to pay compensation and in some cases ordered closure for non-compliance and non-payment. In the Vellore Citizen’s Forum Case, the Full Bench of the Supreme Court directed the Central Government to constitute an Authority under Section 3(3) of the *Environment (Protection) Act 1986*, and to close the tanneries who have been failed to obtain consent and to close the tanneries who have been refused consent of the SPCB, and to constitute a special Bench viz., GREEN BENCH to deal environmental matters.

In *State of TamilNadu v. Hindstone*⁵ the Supreme Court has held that rivers, forests, minerals and such other resources constitute a nation’s natural resources. These resources are not to be frittered away and exhausted by one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. The phrase *Sustainable development* covered “development that meets the

4 . (1987) 4 SCC 463 at 482, para 22

5. AIR. 1981 SC. 711

needs of the present without compromising the ability of future generations to meet their own needs”, as suggested by the report of the Brundtland Commission.

To justify and perhaps extract State initiative to conserve natural resources, the Supreme Court enunciated the *doctrine of public trust*, obligating conservation by the State. In *M.C.Metha v. Kamal Nath*⁶, the court held that the State, as a trustee of all natural resources, was under a legal duty to protect them, and that the resources were meant for public use and could not be transferred to private ownership.

SUSTAINABLE DEVELOPMENT AND JUDICIARY IN INDIA

The judiciary in India has played a very important role in the environmental protection and has applied the principles of sustainable development while deciding the cases. There are number of cases on this point and, therefore, it will be necessary to analyze a few important cases in this area. To ensure sustainable development is also one of the goals of the *Environment (Protection) Act, 1986*. If the Act is not armed with the powers to ensure sustainable development, it will become a barren shell. In other words, sustainable development is one of the means to achieve the object and purpose of the Act as well as the protection of *life* under Article 21. Acknowledgement of this principle will breathe new life into Indian environmental jurisprudence and constitutional resolve⁷.

Some of the salient principles of *sustainable development* as culled out from Brundtland Report and other international documents such as Rio Declaration and Agenda 21, are as under:

1. Inter – Generational Equity,
2. Use and conservation of Natural Resources,
3. Environmental Protection,
4. The Precautionary Principle,
5. The Polluter Pays Principle,
6. Obligation to Assist and Co-operate,
7. Eradication of Poverty, and
8. Financial Assistance to the Developing Countries⁸ The Supreme Court in *Vellore Citizens' Welfare Forum v. Union of India* and also in *Research Foundation for Science Technology National Research Policy v. Union of India*⁹, expressed the view that the

6 . (1997) 1 SCC 388

7. N.D.Jayal v. Union of India, (2004) 9 SCC 362

8. (1996) 5 SCC 647 at 658

9. (2005) 10 SCC 510

precautionary principle and *the polluter pays principle* are essential features of sustainable development and that they have been accepted as part of the law of the land. The court had no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environment law of the country. *Environment Law* is an instrument to protect and improve the environment and to control or prevent any act or omission polluting or likely to pollute the environment¹⁰

Beginning with *Vellore Citizens' Welfare Forum v. Union of India*¹¹, the Supreme Court has explicitly recognized the precautionary principle as a principle of Indian environmental law. Also in *A.P. Pollution Control Board v. Prof.M.V.Nayudu*¹², the court discussed the development of the precautionary principle. Furthermore, in *Narmada Bachao Andolan v. Union of India – the Narmada Case*¹³ that: “When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution”.

The courts have applied the principle of sustainable development to the cases relating to quarrying, mining, stone crushing, tree felling, hazardous industries, etc. For example: *Rural Litigation and Entitlement Kendra v. State of U.P*¹⁴; *M.C.Mehta v. Union of India*¹⁵— popularly known as Oleum Gas Leak Case; *Indian Council of Enviro-Legal Action v. Union of India*¹⁶,— popularly known as H.Acid Case or Bichhri Case; *Vellore Citizens Welfare Forum v. Union of India*¹⁷, – popularly known as T.N.Tanneries Case; *R.L. & E. Kendra, Dehradun v. State of U.P*¹⁸— popularly known as Doon Valley Case; *Bheemagiri Bhaskar v. Revenue Divisional Officier Bhongir*¹⁹; *T.N.Godavarman Thirumulpad v. Union of India*²⁰— popularly known as Forest Conservation Case. Forest sustainability is an integral part of forest management. In *T.N.Godavarman Thirumulpad v. Union of India*, the apex court called for a long term (50 years or longer) commitment to manage forests for future generations. For sustaining forests, a naturally functioning forest ecosystem is essential. This means letting the forests develop and progress without significant human intervention.

In *A.P.Pollution Control Board – II v. Prof. M.V.Nayudu*²¹ the Supreme Court held that no doubt section 19 of the Water Act 1974 permits the State to restrict the application of the Water Act to a particular area, if need be, but it did not enable the State to grant exemption to

10. *T.N.Godavarman Thirumalpad v. Union of India*, (2002) 10 SCC 606

11. (1996) 5 SCC 647

12. (1999) 2 SCC 718

13. (2000) 10 SCC 664, p.727, para 123

14. AIR 1985 SC 352

15. AIR 1987 SC 982

16. AIR 1986 SC 1446

17. AIR 1986 SC 2718

18. AIR 1985 SC 652

19. AIR 2001 A.P. 492

20. (1997) 2 SCC 267

21. (2001) 2 SCC 62

a particular industry within the area prohibited for location of polluting industries. Exercise of such a power in favour of a particular industry must be treated as contrary to public interest and in violation of the right to clean water under Article 21 of the Constitution of India. This approach of the Supreme Court is in consonance with the principles of sustainable development – i.e., the industrial development must continue but not at the cost of environment.

In *Ishwar Singh v. State of Haryana*²², the High Court issued the directions for closing down the stone crushing business of those which were not situated within the identified zone. The Court further directed that those who wanted to carry on their business of stone – crushing, should shift to the identified zones.

One of the most important directions given by the High Court was regarding the claim of compensation for those persons who had suffered due to the pollution caused by stone-crusher owners. The court directed that stone-crusher owners were liable to pay compensation to citizens of the area, who have suffered, within the period of two months failing which their license to carry the business of stone-crushing was to be cancelled. It is submitted here that the approach of the court in this case aimed at promoting sustainable development, besides protecting environment.

In *Kinkri Devi v. State*²³ a Public Interest Litigation was filed in which it was alleged that the unscientific and uncontrolled quarrying of the limestone has caused damage to the Shivalik Hills and was imposing danger to the ecology, environment and inhabitants of the area. The Himachal Pradesh High Court relied on Doon Valley Case and pointed out that if a just balance is not struck between development and environment by proper tapping of natural resources, there will be violation of Articles 14, 21, 48-A and 51-A(g) of the Constitution.

The Court rightly observed that natural resources have got to be tapped for the purpose of social development but the tapping has to be done with care so that ecology and environment may not be affected in any serious way. The natural resources are permanent assets of mankind and are not be affected in any serious way. The natural resources are permanent assets of mankind and are not intended to be exhausted in one generation. In this case the concern of the High Court for *sustainable development* is self evident.

INDUSTRIAL POLLUTION AND SUSTAINABLE DEVELOPMENT

In *Bombay Dyeing & Mfg. Co. Ltd (3) v. Bombay Environment Action Group*²⁴, the apex court laid stress that sustainable development demands delicate balance between environmental values and development needs. In doing so it is not possible to ignore intergenerational equity, nor is it possible to disregard the dire need which society urgently requires.

22 . AIR 1996 P&H. 30

23. AIR 1988 H.P. 4

24. AIR 2006 SC 1489

The central theme of the principle of inter-generational equity is the right of each generation of human beings to benefit from the cultural and natural inheritance of the past generation as well as the *obligation* to preserve such heritage for future generations. Inter – generational equity conserving the diversity and quality of biological resources, and of renewable resources such as forests, water and soils. As per the provisions of the Stockholm Declaration 1972, man bears a solemn responsibility to protect and improve the environment “for the present and future generations”; and the natural resources of the earth – the air, water, lands, flora and fauna – must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate.

In *State of H.P. v. Ganesh Wood Products*²⁵ the Supreme Court invalidated forest-based industry, recognizing the principle of intergenerational equity as being central to the conservation of forest resources and sustainable development. The court also noted in *Indian Council for Enviro-Legal Action v. Union of India* –CRZ Notification Case²⁶, that the principle of intergenerational equity would be violated if there were a substantial adverse ecological effect caused by industry.

A monument judgment by the Supreme Court was delivered in *M.C.Mehta v. Union of India* –popularly known as Oleum Gas Leakage Case²⁷, when a major leakage of oleum gas took place from one of the units of Shriram Chemicals in Delhi and this leakage affected a large number of persons both amongst the workmen and the public. The court also gave priority to the important consequences because of the closure of the plant causing throwing workman out of employment, the short supply of chlorine produced by the plant affecting many activities in Delhi, including the production of downstream products. It is submitted that in this case, the approach of the Supreme Court was in consonance with environment protection and sustainable development.

The Supreme Court rightly rejected the century old principle of *strict liability* and evolved a new principle of *absolute liability* which is not subject to any exceptions. On the question of the measure of the Compensation the Court pointed out that it “must be correlated to the magnitude and capacity of the enterprise because such Compensation must have a deterrent effect”. In cases of *mass tort* action arising out of hazardous enterprise like *Bhopal disaster case – Union Carbide Corp. v. Union of India*²⁸, quantification of damages can be had without attaching much importance to individual injuries. It was further observed that if settlement fund is exhausted, the Union of India should make good the deficiency.

Being a developing country, economic progress is essential; at the same time, care has to be taken of the environment. Poverty may be an obstacle towards clean environment and it is in such a situation that the principle of sustainable development has to be applied. The question that squarely arises is: how can sustainable development, with economic progress and

25. (1995) 6 SCC 363

26. (1996) 5 SCC 281

27. AIR 1987 SC 965

28. (1991) 4 SCC 584

without environmental regression, be ensured within the Indian legal framework? This can be achieved through the effective implementation of legislative mandates. The courts in India have attempted to provide a balanced view of priorities while deciding environmental matters.

As India is a developing country, certain ecological sacrifices are deemed necessary. This is in order that future generations may benefit from policies and laws that further environmental as well as developmental goals. This *ethical mix* is termed sustainable development, and has also been recognized by the Supreme Court in *Taj Trapezium Case – M.C.Mehta v. Union of India*²⁹. The Supreme Court took note of the air pollution being caused by brick kilns operating in the Taj Trapezium. In order to protect Taj Mahal and other monuments, human health and vegetation, the Supreme Court issued directions to re-enforce *precautionary principle* in consonance with the concept of sustainable development: Licensed brick kilns within 20kms. Radial distance of Taj Mahal and other significant monuments in Taj Trapezium and Bharatpur Bird Sanctuary to be closed and no new license to be issued for establishment of brick kilns within the said area.

The court followed the path of sustainable development and applied the *precautionary principle* by holding that the environmental measures must *anticipate, prevent and attack* the causes of environmental degradation. Thus, the court directed that all the industries operating in TTZ must use natural gas as a substitute for coke/coal, as an industrial fuel, the industries which are not in a position to obtain the natural gas connections for any reason, they must stop functioning with the aid of coke/coal in the TTZ and they may relocate themselves as per the directions of the court. The shifting industries on the relocation in the new industrial estates were to be given the incentives³⁰. The precautionary principle was directly applied by the Supreme Court in *M.C.Mehta v. Union of India* for protecting the Taj Mahal from air pollution.

WHAT IS THE REMEDY?

Earth's natural resources must be conserved and enhanced to meet the needs of growing populations. For the benefit of future generations should be modest in their exploitation of natural resources. The use and conservation of natural resources is an essential principle of sustainable development. The protection of the environment is an essential part of sustainable development.

In *M.C.Mehta v. Union of India*³¹, the directives of the Supreme Court went to the extent of spreading environmental awareness and literacy as well as imparting environmental education. Awakening the public towards their right to live in a pollution –free environment is more essential. Public awareness alone can achieve desired results.

To-day is the time to act; Tomorrow may be late.

29. (1997) 2 SCC 353

30. (1997) 2 SCC at 384-85

31. AIR 1999 SC 2468

Policy Recommendations

A package of policy recommendation for sustainable development is presented below:

1. Nature shall be respected in all its diversity and its essential process shall not be impaired.
2. The genetic viability on the earth shall not be compromised and to this end necessary habitat of all life forms shall be safeguarded.
3. All areas of earth, both land and sea, shall be subject to the principles of conservation – special protection shall be given to unique areas and endangered species.
4. Earth's bounty and beauty for present and future generations shall be secured against degradation caused by warfare or other hostile activities.
5. An important area where policy change needed is accounting system – i.e., devising sustainability indicators such as: *GDP growth rate, population stability, human resource development index, clean air index, energy intensity – energy/GDP ratio, renewable energy proportions, material intensity of output, recycled proportions, transport intensity, water use, soil degradation, forest coverage ratio* and other indicators like *housing conditions, crime rates, cultural stability, social tension*, etc.

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AN ANALYSIS OF THE CONCEPT OF TAX AVOIDANCE AND ODYSSEY OF GAAR IN INDIA

Saket Dang*

There has been extensive debate about the implementation of General Anti-Avoidance Rules (GAAR) in India. The need for GAAR is felt because it is believed that such provisions will not only improve the integrity of the taxation system of the economy as a whole but also reinforce the system of controlling illegal avoidance of tax by parties taking advantage of Foreign Taxation Avoidance Agreements. Discussing concepts like tax evasion, avoidance and planning, and the differences inter se, this research article goes further and dissects the provisions of General Anti Avoidance Rules in detail as also chronologically narrating the events connected with their origin, development and deferral. It analyses the odyssey of GAAR right from its inception till its recent deferment by current Finance Minister of India, Mr. Arun Jaitley till 2017.

Introduction

“Every government has a right to levy taxes. But no government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made a victim of palpable injustice.”¹

Indian Tax Authorities have always felt the need to tap revenue from all the sources that show enough potential to help improve the ever-prevalent and chronic fiscal deficit of the economy, that go untapped. For a long time, the Revenue has fought tooth and nail to keep a check over the rising instances of tax avoidance despite having numerous tools at its disposal. Adding another similar tool to its arsenal, the Indian Government chose to introduce General Anti Avoidance Rules (GAAR) as a part of the draft Direct Taxes Code Bill released on 12 August, 2009 to control and tap revenue from rising instances of agreements lacking commercial substance. The aspect of whether these provisions came into force has been dealt with later in this article. Nonetheless, it is important to be clear why GAAR is necessary. Not all countries have them, and not all GAARs are the same. There is no international norm for GAAR or the need for one. However, it is said that necessity is the mother of invention. The need to control rising number of tax avoidance cases made way for the rising importance of GAAR in India.

Tax Avoidance and Implication of GAAR

The recent verdict by the Hon’ble Supreme Court on Vodafone case² generates fresh debates on whether India needs a review of her existing legal framework particularly with respect to

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¹ Kanga & Palkhivala, The Law And Practice Of Income Tax, IX (Dinesh Vyas ed., 2004).

offshore transactions and introduction of GAAR. Before delving into what GAAR is and how it would impact the taxpayer, serious discussions are essential for a clear distinction between tax evasion, tax avoidance and tax planning.

a) Tax Evasion

Tax evasion is an *illegal* practice where the assessee escapes paying taxes to the government through deliberate concealment or misrepresentation of its tax liability by suppressing the income or inflating the expenditure showing the income lower than it actually is and resorting to various types of deliberate manipulations. “Tax avoidance and tax evasion are two expressions which find no definition either in the Indian Companies Act, 1956 or the Income Tax Act, 1961. But the expressions are being used in different contexts by our Courts as well as the Courts in England and various other countries, when a subject is sought to be taxed.”³

b) Tax Avoidance

Tax avoidance is the “minimization of one's tax liability by taking advantage of legally available tax planning opportunities”.⁴ When a taxpayer escapes his/her tax liability by exploiting legal ambiguities or in other words resorts to non-compliance of tax payments, such an act *prima facie* being entirely within the framework of the law, i.e., not violating any law, it amounts to tax avoidance. Another way to make a distinction between tax evasion and avoidance is that in the case of tax avoidance, details are not hidden by tax payers, i.e., transactions are usually on record, whereas in case of evasion, transactions are mostly unreported due to the natural tendency of avoiding punitive actions.

c) Tax Planning

Tax planning can be defined as an arrangement of one's financial and business affairs by taking legitimately, in full, benefit of all deductions, exemptions, allowances and rebates so that tax liability reduces to minimum. In other words, all those arrangements by which tax is saved by ways and means which comply with the legal obligations and requirements and are not colourable devices or tactics to meet the letters of law would constitute tax planning.

d) Judicial Trend Regarding Tax Evasion, Tax Avoidance And Tax Planning

The Hon'ble Supreme Court in *McDowell & Co. Ltd. v. Commercial Tax Officer*⁵ observed that, “tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be a part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting

² *Vodafone International Holdings B.V. v. Union of India & Anr.* [S.L.P. (C) No. 26529 of 2010, Dated 20 January 2012].

³ *Supra* note 2, para 76

⁴ Black's Law Dictionary, 9th ed. (2009).

⁵ (1985) 154 ITR 148.

to subterfuges.” According to the *Westminster principle*⁶, which originated in Britain and which has been applied in the context of India in a number of cases, every man is entitled if he can to order his affairs so as to diminish the burden of tax. However, Justice Chinnappa Reddy, in the McDowell case held that, “the principle of Westminster had been given a decent burial and in that very country where the phrase ‘tax avoidance’ originated, the judicial attitude towards tax avoidance had changed and the smile, cynical or even affectionate though it might have been at one time, had now frozen into a deep frown. No one could now get away with a tax avoidance project with the mere statement that there was nothing illegal about it”, he had said.

According to the *Ramsay principle*⁷, “the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole. It is not to be ascertained by dissecting the scheme and considering each individual transaction separately.”

In *Union of India v. Azadi Bachao Andolan*⁸, it was argued that any tax planning which results in avoidance must be struck down in the light of McDowell case⁹. Rejecting this argument, the court upheld the legitimacy of tax planning. The Apex court referred to the Privy Council judgment in *Bank of Chettinad Ltd v. CIT*¹⁰ which accepted the principle laid down in Duke of Westminster case¹¹. The judgment was the law when the Constitution came into force. The legal position continues by virtue of Article 372 by which all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority. Maintaining the applicability of the Westminster principle, unless reversed by a Supreme Court Judgment or an Act of the Parliament, the Court observed as follows: "We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents."

In the landmark judgment of *Gregory v. Helvering*¹², the United States Supreme Court held that “any one may arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.”

It should thus be noted that tax planning should not be done with the intent to defraud the revenue. There could be an instance where although all transactions entered into by the assessee could be legally correct, yet on the whole, these transactions may be devised to defraud the revenue. All such devices where statute is followed in strict sense but actually, the spirit behind the statute is defeated would be termed as colourable devices and they do not form part of tax planning. All transactions in respect of tax planning must

⁶ Laid down in *Inland Revenue Commissioners v. Duke of Westminster* [1935] All ER 259 (H.L.).

⁷ Laid down in *Ramsay v. IRC* [1982] A.C. 300; *IRC v. Burmah Oil Co. Ltd.* [1982] S.T.C. 30, H.L.(Sc.).

⁸ [2003] 263 ITR 706 (SC).

⁹ *Supra* note 5.

¹⁰ (1941) 43 BOMLR 132.

¹¹ *Supra* note 6.

¹² 293 U.S. 465 (1935)

be in accordance with the true spirit of statute and should be correct in form and substance.

Various judicial pronouncements have laid down the principle that substance and form of the transactions shall be seen in totality to determine the net effect of a particular transaction. The Hon'ble Supreme Court has held, "The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship."¹³ The form and substance of the transaction is the real test of any tax- planning device. The form of transaction refers to transaction as it appears superficially and the real intention behind such transaction may remain concealed. Substance of a transaction refers to lifting the veil of legal documents and ascertaining the true intention of parties behind the transaction.

e) Difference Between Tax Planning And Tax Avoidance

The line of demarcation between tax planning and tax avoidance is very thin and blurred. There could be elements of malafide motive involved in tax avoidance also. Any planning which, though done strictly according to legal requirements, defeats the basic intention of the Legislature behind the statute could be termed as instance of tax avoidance. It is usually done by adjusting the affairs in such a manner that there is no infringement of taxation laws as well as by taking full advantage of the loopholes therein so as to attract the least incidence of tax. Most of the amendments to law are now aimed at curbing the practice of tax avoidance.

The distinction between tax avoidance and tax planning is often difficult to make. The ambiguity arises since both the concepts are related with the activity of non-payment of tax liability being within the framework of the law. For instance, a person may adopt different accounting methods for different sources of income or invest in tax saving securities or adopt other tax-planning schemes which may all may reduce his/her tax liability without violating any law (tax planning). However, some strategies for reducing tax liability (for instance transfer mispricing) are often intended for the sole purpose of non-payment of taxes and hence, are controversial (tax avoidance). Therefore, tax avoidance is controversial and often treated as unacceptable whereas tax planning is not. But the distinction between the two in practice is extremely difficult since both are legal (though now the trend with respect to tax avoidance is changing). Therefore if a person/company is accused of tax avoidance in a negative sense, that person/company may claim that the intention is only that of 'tax planning' and not of 'tax avoidance'. The debate then ultimately boils down to identifying what transactions should be treated as legal and what should not. Given the exploitation of sophisticated devices by companies for non-compliance of legitimate tax payments, tinkering with the existing legal provisions has become essential. Most people would want to pay taxes as less as possible. However, the approach towards reduction of the incidence of tax is crucial for understanding what is legitimate and what is not. For instance, an economic entity in

¹³ CIT v. B. M. Kharwar [1968] 72 ITR 603(SC)

India may engage in ‘tax planning’ by investing in a judicious portfolio of tax saving instruments (e.g. National Savings Certificates, Equity Linked Savings Schemes, etc.) to minimize its overall annual tax payments. On the other hand, a practice of circulating back same amount of money via the route of tax haven countries (or the so called ‘round tripping’) to the origin country or parking higher profits in lower tax jurisdictions and lower profits in higher tax jurisdictions via ‘transfer mispricing’ may be ‘tax avoidance’. Another way of looking into the difference between tax planning and tax avoidance is that while an economic entity tries to minimise the overall tax burden by utilizing the available options in case of tax planning (and does not try to escape from tax payments), in case of tax avoidance an entity tries to escape from tax burden by creating sophisticated methods for non-compliance of legitimate tax payments. However, it is difficult to treat the latter practice as blatantly illegal since it is done within the framework of the law, even in cases where the sole purpose is noncompliance of taxes and nothing else.

f) Implication of Implementing GAAR

Qui sentit commodum sentire debet et onus- He who receives the advantage ought also to suffer the burden- It is a perfect maxim that applies in case of such international transactions that lack commercial substance and the aim of which is usually only to avoid payment of tax by taking advantage of one or more Tax Avoidance Treaties between India and any other country. The implication of GAAR is that the Income-tax department will have powers to deny tax benefit if a transaction was carried out exclusively for the purpose of avoiding tax. For example, if an entity is set up in Mauritius with the sole intention of claiming exemption from capital gains tax arising out of a transaction of transfer of capital assets of an entity connected with the territory of India(similar to what happened in the Vodafone Case), the tax authorities shall have the right to deny the claim for exemption provided under the India-Mauritius tax treaty. It simply means that GAAR shall have an overriding effect over any Tax Avoidance treaty that India might have with any other nation and the transaction whose sole purpose would be to skip payment of tax to Indian Tax Authorities shall be taxed by implementing GAAR provisions.

Brief Background and Present Status of GAAR

The Government of India chose to introduce General Anti Avoidance Rules (GAAR) as a part of the draft Direct Taxes Code Bill (DTC 2009) released on 12 August, 2009 with discussion paper for public debate. Subsequently, a Revised Discussion Paper was released in June 2010. As a result, a bill known as the Direct Taxes Code Bill, 2010 (the Code) was tabled in the Parliament on 30 August, 2010. Sections 123 to 125 of the Code contained provisions pertaining to GAAR. The Code was meant to replace the current Income-tax Act, 1961. The Code had been pending consideration before the Standing Committee of Finance. However, in the meantime, GAAR provisions were included in Chapter X-A(Sections 95 to 102) of the Finance Act, 2012 which came into force on 1 April, 2012. Due to uproar over the controversial GAAR provisions that the new Act contained, The Parthasarathy Shome panel was formed by previous Prime Minister Manmohan Singh in July 2012, for drawing up the

final guidelines on GAAR and mainly to bring about tax clarity and address the concerns of foreign investors. The panel, headed by tax expert Parthasarathi Shome, Director and Chief Executive, Indian Council for Research on International Economic Relation provided various recommendations to revive the inflow of foreign capital and advocated postponement of the controversial tax provision by three years till 2016-17 *inter alia*. Therefore, implementation of Chapter X-A of the Finance Act, 2010 containing GAAR provisions was deferred till 1 April, 2016 by the then Finance Minister Mr. P. Chidambaram.

Currently, as conveyed by present Finance Minister of the NDA Government, Mr. Arun Jaitley, the Direct Taxes Code Bill, 2010 shall be considered as lapsed with the dissolution of the 15th Lok Sabha and it shall no longer be considered for implementation. This does not mean that GAAR is out of the picture now. Presenting his first full budget in March, 2015, Mr Jaitley deferred implementation of GAAR by 2 further years taking it to the year 2017.

Conclusion

The GAAR provisions are similar to a double-edged sword and need to be judicially invoked by the revenue authorities. In my opinion, introduction of GAAR would have a deep, much needed impact on the economy of India if seen in a positive light. Some might say that a concept like GAAR is a little premature for the Indian Economy and the tax payers of India despite there being a need for such provisions in the country but just the way time keeps moving forward, so does the need to evolve the law with it, thus giving that dynamic quality to it as a body of rules governing our actions. Presently in India, the tax payers are given an option to avoid the incidence of tax by way of tax planning provided it is within the four corners of the taxing statute. The implementation of GAAR would be a hindrance to the unauthorized tax avoidance activity which has always been in existence and followed to minimize one's incidence of tax thus bringing in more revenue to the economy.

On comparing the provisions of GAAR with similar provisions prevailing in other countries, it can be said that the Indian provisions are more stringent than those of other nations. Leaving less scope for tax avoidance, where on one hand would benefit the economy financially would on the other hand, create an unnecessary burden of tax on the shoulders of the investors and further discourage the much needed investment from Foreign Investors.

The recent report of the Expert Committee on General Anti Avoidance Rules (GAAR) headed by Mr. Parthasarathi Shome suggested that income from sale of listed securities should be fully exempt from tax *inter alia*. Investors from Mauritius and Singapore may also look forward to more certainty on entitlement to tax treaty benefits.

The GAAR Committee has recognized the right of taxpayers to mitigate taxes through arrangements that are not abusive, contrived or artificial. GAAR should therefore be used as a last resort and not a first recourse. As a measure of fairness, it has been proposed that existing investments should be grandfathered. The Committee has recommended that GAAR should only apply to abusive, artificial and contrived arrangements. This qualitative threshold helps

in preserving the taxpayer's right to plan his affairs and mitigate taxes. The recommendation to issue a negative list of arrangements where the provision of GAAR cannot be invoked will be positively help a bona fide person in not getting trapped into the stringent provisions of GAAR. Being deferred till 2017, GAAR needs more time to be implemented as the present status of the economy doesn't demand such a stringent legal action to be taken so soon, especially, when the Modi Government is striving to attract foreign investors and openly promoting his 'Make in India' campaign to revive the Indian economy desperately.

ANALYSIS OF COASTAL REGULATION IN INDIA

Richa Sharma*

The basic idea behind the CRZ notifications issued in 1991 under the Environment Protection Act and rules of 1986, has been to protect and improve the costal environment of India, by restricting and regulating in the human activities in such areas and aimed at permitting only those activities which entirely depend for their existence on the costal environment. The restrictions put up are extended up to 500 m from the High Tide Line and the land lying between the Low Tide Line and the High Tide Line. Further the costal stretches within 500 meters of the High Tide Line on the Landward side are further classified into four categories, namely, CRZ-I, CRZ-II, CRZ -III, CRZ –IV with reference to activities which can be allowed within the geographical area. The implementation of the notification of 1991 was under the purview of State Government and the respective government has to identify, classify and record all the CRZ areas within their territory in the State Coastal Zone Management Plans (SCZMP) and have them approved by the environmental ministry.

The present paper deals with the various aspects of the 1991 and the 2011 CRZ Notifications, a further analysis of landmark judgments with reference to the aforementioned regulations has also been done.

Introduction

CRZ notifications issued in year 1991 under the Environment Protection Act and rules of 1986, had been specifically enacted to protect and improve the costal zone environment of India, by restricting and regulating in the human activities in such areas and aimed at permitting only those activities which entirely depend for their existence on the costal environment.¹ The original notifications of 1991 were amended number of times by issuance of amendment, and finally in the year a new set of notifications were issued by the Movement of India.²

The restrictions put up are extended up to 500 m from the High Tide Line and the land lying between the Low Tide Line and the High Tide Line. Further the costal stretches within 500 meters of the High Tide Line on the Landward side are further classified into four categories, namely, CRZ-I, CRZ-II, CRZ -III, CRZ –IV with reference to activities which can be allowed within the geographical area. The implementation of the notification of 1991 was under the purview of State Government and the respective government has to identify, classify and

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¹ A. Sridhar, 'CRZ 1991-2010: Anti-people? Anti- environment? Or Anti- climax?' *Infochange News & Features*, January 2011, available at [http:// infochangeindia.org/Environment/Coastal-commons/ CRZ-Notification-1991-2010-Anti-people-Anti- environment-Or-anti-climax.html](http://infochangeindia.org/Environment/Coastal-commons/ CRZ-Notification-1991-2010-Anti-people-Anti- environment-Or-anti-climax.html)

² Coastal Regulation Zone Notification (Amendment) 1991, 1994 and 1997; the CRZ Amendment Notification of 21/10/1997; the CRZ Amendment Notification of 20/ 04/ 1998; the CRZ Amendment Notification of 30/09/ 1998; the CRZ Amendment Notification of 29/ 12/1998; and the CRZ Amendment Notification of 5/ 2/ 1999, 12/02/1999, 28/ 05/ 1999, 30/06/1999, 13/07/1999, 03/08/1999 and 05/08/1999.

record all the CRZ areas within their territory in the State Coastal Zone Management Plans (SCZMP) and have them approved by the environmental ministry.

Deficiencies in the 1991 notification:³

1. Being a uniform regulation, it failed to take into consideration the biologically diverse coastline
2. No procedure for obtaining CRZ clearance including the time lines or the applications to be submitted.
3. Did not provide for any post clearance monitoring mechanism
4. No concrete steps were indicated in the 1991 Notification with regard to the pollution emanating from land-based activities.
5. Further, it even failed to take into consideration the interests of the traditional coastal communities.
6. There were constant demand for changes to be brought in the 1991, all of which were subsequently incorporated in the 2011 notification.

In 2009, MoEF set up an Expert committee to carry out an extensive and comprehensive review of the CRZ notification and formulate new set of notifications based on solid scientific principles.⁴ The report advocated that the regulations should now be changed into an Integrated Coastal Zone Management (ICZM) system. After public consultation and deliberations with the stakeholders on the subject, the MoEF, brought in the new 2011 notification with the following new features:

- I. The scope of the notification was extended to include the territorial waters.
- II. Separate Island Protection Zone Notification was formulated keeping in mind the ecologically unique and sensitive areas like the Lakshwadeep and Andaman and Nicobar Islands
- III. A demarcation of the hazard line, to indicate the threatened areas and thus to protect the life and property located at the coastlines.
- IV. A detailed procedure has been laid down for obtaining clearance for the developmental activities in the CRZ regions.
- V. The CRZ AREAS OF Greater Mumbai, Goa, Kerala and the Coastal Areas of Sunderbans have been listed as ‘areas requiring special consideration’
- VI. Provisions have been made in the notification for industrial pollution from land-based activities in order to prevent erosion and other forms of environmental degradation.

A three-step approach for regulation has been established under the notification, which has been given as under:

³ Coastal Regulation in India, why do we need a new notification?; available at: http://equitabletourism.org/stage/files/fileDocuments814_uid13.pdf Lat accessed : 14th May, 2015

⁴ REVIEW OF THE SWAMINATHAN COMMITTEE REPORT ON THE CRZ NOTIFICATION; available at: http://seaturtlesofindia.org/wp-content/uploads/2014/02/Sridhar-et-al_Swaminathan-report.pdf ; Last access 14th May, 2015.

- a) Certain specific activities have been permitted and prohibited in the entire CRZ area.
- b) The demarcation into CRZ has been continued with the formulation of two new zones and the notification further very well defines the kinds of activities permitted and prohibited under these specific zones.
- c) Further a well-defined procedure for the clearance of activities has been laid down under the notification.

Costal Zones as classified under the 2011 notification:⁵

- **CRZ-I:** Ecologically Sensitive area; which includes mangroves, coral and coral reefs, marine parks and other such areas which are likely to be inundated by global warming, as under the notification no new development project will be allowed in this region except for projects relating to the department of atomic energy or other such major infrastructure projects, e.g. The Green Field Airport at Navi Mumbai.
- **CRZ-II:** Built- up area; these include areas that have been developed up to or close to the shoreline, these areas that have been provided with drainage and approach roads and other infrastructural facilities, construction and reconstruction of buildings, facilities, notified ports are allowed in this zone.
- **CRZ-III:** Rural Area; these are relatively undisturbed areas and have been declared to be a '*no development zone*' within a region of 200 m from the HTL on the landward side. For seafront and 100 m along the tidal water bodies or the creek, whichever is less. No construction will be allowed in this area apart from the repair or reconstruction of the existing structures. There are certain exceptions to this like, small-scale projects including, agriculture, horticulture, salt manufacture from seawater, projects relating to the Department of Atomic Energy, the mining of rare minerals, and facilities for generating power by non-conventional energy sources, bridges, and roads.
- **CRZ-IV:** Water area; this is the water area from the Low Tide Line to 12 nautical miles on the seaward side, including also the water area of the tidal influenced water bodies. It has been notified that in the CRZ IV areas, no untreated sewage, effluents, ballast water, or solid waste from any activity shall be dumped. Further, the coastal cities are as under the notification required to formulate a sewage treatment plan and implement it within a year.

There has been a further classification to include, a) any CRZ area within municipal limits of Greater Mumbai; b) the CRZ areas of Kerala including the backwaters and backwater islands and c) the CRZ areas of Goa and the critically vulnerable coastal areas such as the Sunderbans region of West Bengal. But there are certain defects with the 2011 notification, which have been listed below:

⁵ Frequently Asked Questions on the Coastal Regulation Zone Notification, 2011 and Island Protection Zone Notification, 2011; available at: <http://www.moef.nic.in/downloads/public-information/FAQ-CRZ.pdf>

- Even though the no-development zone has been reduced to 100 metres from the HTL, the provision has been made applicable only to “traditional coastal communities, including fisher-folk”, thereby giving the chance for increased construction on the coast and higher pressure on coastal resources.⁶
- No restrictions have been put forth on the expansion of housing for the rural communities in CRZ III
- Further according to some the 2011 notification has in violation of various Supreme Court Judgments, reduced the powers on the National Coastal Regulating authority, with about 480 complaints of CRZ violations been filed in a span of 2 years from the coming into force of the notification.⁷

Analysis of Cases in relation to Costal Regulation Zone:

➤ **Dahanu Taluka Environment Protection Group v. Bombay Suburban Electricity Supply Company Ltd.**⁸

Dahanu is situated 120 km. north of Mumbai, in the Thane district of Maharashtra, and among the last green belts along the country's western coast. In 1989 Maharashtra Government approved a proposal of the Bombay Suburban Electricity Supply Company (BSESC), to set up a coal-based thermal power plant in the Dahanu On 29 March 1989, two local environmental activists: Nergis Irani and Kityam Rustom along with Bombay Environmental Action Group filed writ petitions first in the Bombay High Court and then in the Supreme Court challenging the decision of the Central Government to build the power plant. The court ruling in favor of the government held that there was a necessity for the establishment of the power project in order to power the city of Mumbai and hence a sanction to the project was granted. Keeping in mind the apprehensions of the petitioner's the court ordered that a Flue Gas desulphurization plant be established.

What has to be noted here is that Dahanu has been ‘notified’ and has been declared “eco fragile” under the Indian Costal Regulation Zone by the Ministry of environment in 1991 and as according to CRZ any new development activity within 500 meters of the high tide line. The keeping in mind the interests of the related parties both political industrial and economical the government kept bringing forward various development projects in the area. This led to environmentalist Bittu Sehgal to file a petition in the Supreme Court of India, for a declaration for the implementation of the CRZ notification in the area.⁹

The Supreme Court, now appointed the National Environmental Engineering Research Institute (NEERI) to investigate the issue raised in the petition, based on the report of the aforementioned institution, the court ordered that the Dhanau notification, prohibiting change

⁶ Critical Analysis of the Coastal Regulation Zone (CRZ) Notification, 2011; available at: <http://mowingthelaw.blogspot.in/2012/05/critical-analysis-of-coastal-regulation.html>

⁷ 480 ‘CRZ violations’ reported from April 2012 to June 2014; available at: <http://www.heraldgoa.in/Goa/480-%E2%80%98CRZ-violations%E2%80%99-reported-from-April-2012-to-June-2014/76732.html>

⁸ 1991 (2) SCC 539

⁹ (2001)9SCC181

in the district be upheld and ordered for the formation of a committee of experts u/s. 3 of the Environment Protection Act to protect and ensure the application of the environmental laws in the area. In pursuance of the said order, Maharashtra Government along with the MoEF appointed the Dahanu Taluka Environmental Protection Authority in 1996 under the chairmanship of retired Mumbai High Court judge Justice C. S. Dharmadhikari, the committee has been empowered to not only ensure the implementation of the Courts order but also of the eco fragile notification in the year 1991.

➤ **S Jagannath v. Union of India¹⁰**

Also known as the Shrimp Culture case, the petitioner in the present case was the chairman of the Gram Sawaraj Movement and sought the enforcement of the Costal Zone Regulation Notification 1991, by prohibiting intensive and semi-intensive types of prawn farming in the ecologically fragile coastal areas and by prohibiting the use of wet lands for prawn farming. The petitioner in the present case also demanded that the court order the constitution of National Coastal Management Authority to safeguard the marine and the coastal areas.

The court passing various interim injunctions prohibiting the setting up of new shrimp farms or conversion of agricultural land to aquacultural farms not just in Andhra Pradesh and Tamil Nadu, but also in all the costal states, till the final disposal of the case.

The court here noted that a more intensified shrimp farming in certain parts of the country without much control of feeds, seeds and other inputs and water management practices- has brought to the fore a serious threat to the environment and ecology. Further the court was of the view that before any shrimp industry or shrimp pond is permitted to be installed in the ecology fragile coastal area it must pass through a strict environmental test. There has to be a high-powered “Authority” under the Act to scrutinize each and every case from the environmental point of view. There must be an environmental impact assessment before permission is granted to install commercial shrimp farms. The conceptual framework of the assessment must be broadbased primarily concerning environmental degradation linked with shrimp farming. The assessment must also include the social impact on different population strata in the area. The quality of the assessment must be analytically based on superior technology. It must take into consideration the inter-generational equity and the compensation for those who are affected and prejudiced.

The court further issued various directions some of which have been listed below, namely

- The Central Government shall constitute an authority under section 8(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to protect the ecologically fragile coastal areas, sea shore, water front and other coastal areas and specially to deal with the situation created by the shrimp culture industry in the coastal states/Union Territories.

¹⁰ (1997) 2 SCC 87

- The authority so constituted by the Central Government shall implement “the Precautionary Principle” and “the Polluter Pays” principles.
- All aquaculture industries/shrimp culture industries/shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before March 31, 1997.
- The farmers who are operating traditional and improved traditional systems of aquaculture may adopt improved technology for increased production, productivity and return with prior approval of the “authority” constituted by this order.
- The agricultural lands, salt pan lands, mangroves, wetlands, forest lands, land for village common purpose and the land meant for public purposes shall not be used/converted for construction of shrimp culture ponds.
- No aquaculture industry/shrimp culture industry/shrimp culture ponds shall be constructed/set up within 1000 meter of Chilk Lake, Pulicat Lake (including Bird Sanctuaries namely Uadurapattu and Nelapattu)

For the implementation of the order of the court, a National Coastal Zone Authority (NCZMA) and a State Coastal Zone Authority (SCZMA) were set up to implement the CRZ notification.

➤ **Indian Council for Enviro-Legal Action v. Union of India¹¹**

The main grievance in the petition filed before the Court by the petitioners was the non-implementation or enforcement of the 1991 CRZ regulations, further as according to the petitioner, the notifications were again relaxed in the year 1994, which defeated the entire intent of the notification of 1991. Also, due to the non-implementation the developmental activities in the area remained unregulated, causing further environmental degradation.

The union of India, as the respondents' contended that, the reason for the non-implementation of the notification was the practical difficulties so involved, to this the Court held that, there has to be a proper and detailed implementation of the notification which till now has been “tardy”, with the authorities showing no concern for the proper implementation of the act and the development being taking place for the personal gains with the environment at stake.

Conclusion

As noted by many the regulatory approaches undertaken in the 2011 notification are either not fully developed, failing to set certain standards of how the government wants the Indian Coasts to be, the changes in the 2011 notification are merely cosmetic. There needs to be a clear reference and setting up of judicially reviewable objectives set up, if the authorities want a proper implementation of the environment legislations. There is at this juncture an requirement that various departments of the central and the state government decide and lay down guidelines, which are taking into consideration the interest the environmentalist lobby, and that of the fishermen. The interest of the two along with the commercial interests of

¹¹ [1996] Supp1 SCR 507

various industries has to be taken care of simultaneously. The approach needs to be that of preservation and protection.

Apart from formulation of more meaningful and stringent notifications for the protection of CRZ regions, the most important is the enforcement of such notifications, for which there is a requirement for the establishment of an independent body, with powers to issue penal orders against the infringers. Further, such independent body should also have the power to release new guidelines from time to time, keeping in mind the specific requirements of such Costal zone.

ANALYSIS OF THE 108TH CONSTITUTIONAL AMENDMENT BILL AND THE CHALLENGES

Ms. Shalini Goyal* & Mr. Siddharth Bapna **

The Constitution (One Hundred and Eighth Amendment) Bill, 2008 seeks to reserve one-third of the total number of seats for women in the Lower House of the Parliament, i.e., Lok Sabha as well as the State legislatures. The proposed amendment also seeks to reserve one-third of the total number of seats from the seats reserved for the Scheduled Castes/Scheduled Tribes (SC/ST) in the Lok Sabha and the State Legislatures for the women belonging to the same category.

The proponents of the bill argue that it will go a long way in helping the social status of women to grow in the country. On the other hand, the opponents contend that the bill will restrict the choice of voters in particular constituencies only to women candidates. Some of the stakeholders are also demanding reservation within reservation. Another argument is that the reservation would only further perpetuate the unequal status of women in the society.

This seminar paper will try to understand the object and purpose of the proposed constitutional amendment bill along with the current status of the bill. Further, arguments of the proponents and opponents of the bill will be studied and suggestions as to necessary changes will be accorded with due reference to the status of reservation for women in legislatures across the globe.

Keywords: Constitutional Amendment, Women's reservation, Parliament, representation, status of women.

Objectives

1. To understand the object and purpose of the proposed amendment to the Constitution.
2. To find out the progress being made in the passing of the proposed amendment.
3. To find out the rationale of the objection being faced by the proposed amendment.

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Research Questions

1. What are the objects and purpose of the 108th Constitutional Amendment Bill?
2. What is the current status of the proposed amendment to the Constitution?
3. What are the objections being faced by the proposed amendment and the rationale behind the same?

Research Methodology

The research methodology used for the project is doctrinal. Doctrinal research is the method of research through analysis of articles, texts, and writings by applying logic and reasoning power. This type of research methodology is generally non-empirical. The data collection for the project is depended on secondary sources. Secondary sources include writings, articles, texts, etc. which are related to the topic of research.

Introduction

Object of the Amendment

The issue of empowerment of women has been raised in different fora in the country from time to time. Political empowerment of women is rightly perceived as a powerful and indispensable tool for eliminating gender inequality and discrimination. The Government in its National Common Minimum Programme has stated it will take lead to introduce legislation for one-third reservation of seats for women in Vidhan Sabhas and in the Lok Sabha. The aforesaid idea followed by debate amongst the political parties and in intellectuals has paved way in getting insight in the matter.¹

Need And Requirement

Women's reservation in the Lok Sabha and the legislative assemblies has been a debate for long in the Indian political system. The need and requirement of the same has been elucidated by different bodies and experts on different occasions.

“Reservation for women is needed to compensate for the social barriers that have prevented women from participating in politics and thus making their voices heard. It is of the opinion that this Bill is a crucial affirmative step in the right direction of enhancing the participation of women in the State legislatures and Parliament and increasing the role of women in democratization of the country”.²

“Achieving the goal of equal participation of women and men in decision making will provide a balance that more accurately reflects the composition of society and is needed in order to strengthen democracy and promote its proper functioning. Without the active

¹ Statement of objects and Reasons, Constitutional (108th Amendment) Bill, 2008.

² Parliamentary Standing Committee Report on the Constitutional (108th Amendment) Bill.

participation of women and the incorporation of women's perspectives at all levels of decision-making, the goals of equality, development and peace cannot be achieved.”³

The Bill seeks⁴ to achieve and fulfil the following:

1. *Reserve, as nearly as may be, one third seats of the present strength of the House of People and Legislative Assembly of every State for women⁵;*
2. *Provide, as nearly as may be, one-third reservation for women including one-third the number of seats reserved for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assembly of every State to be reserved for women of that category⁶;*
3. *Provide for reservation for women in respect of nominations of members of Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States⁷;*
4. *Provide for reservation for women in the Legislative Assembly of the National Capital Territory of Delhi⁸; and*
5. *Provide that reservation of seats for women should cease to have effect on the expiration of a period of fifteen years from the enactment of the Bill.⁹*

Rationale

The proponents of the policy of reservation argue that even though gender equality is enshrined in the Constitution of India, it is far from the reality. It requires vigorous affirmative action to ensure improvement in the condition of women. There is also evidence that political reservation has increased redistribution of resources in favour of the groups which benefit from reservation. A study¹⁰ about the effect of reservation for women in panchayats shows that women elected under the reservation policy invest more in the public goods closely linked to women's concerns. A 2008 study¹¹ conducted by the Ministry of

³ Beijing Declaration and Platform for Action, Fourth World Conference on Women (September 15, 1995) Available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> (last visited February 13, 2015).

⁴ Thirty Sixth Report on The Constitution (One Hundred and Eighth Amendment) Bill, 2008, Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law And Justice, Rajya Sabha, Parliament Of India (Rajya Sabha Secretariat, New Delhi 2009), ¶2.

⁵ *Id.* ¶2 (i).

⁶ *Id.* ¶2 (ii).

⁷ *Id.* ¶2 (iii).

⁸ *Id.* ¶2 (iv).

⁹ *Id.* ¶2 (v).

¹⁰ Raghabendra Chattopadhyay and Esther Duflo, *Women as Policy Makers: Evidence from a Randomised Policy Experiment in India*, 72 ECONOMETRICA, No. 5, (September 2004); Lori Beaman, Esther Duflo, Rohini Pande and Petia Topalova, *Women Politicians, Gender Bias, and Policy-making in Rural India*, Background Paper for UNICEF (December 2006).

¹¹ Study on Elected Women Representatives in Panchayati Raj Institutions, Ministry of Panchayati Raj, Govt of India, April 2008.

Panchayati Raj, revealed that a sizeable proportion of women representatives perceive an enhancement in their self esteem, confidence and decision-making ability.

It is undeniable that there is inadequate representation of women in the social, economic and political life of the nation even after more than 65 years of attaining independence. Although women have been able to make their presence felt in many of the male dominated professions, however, their representation in the decision making bodies is a lot less than that of men.

Further, it is known to all that there has been a historical social exclusion of women from the political class due to various social and cultural reasons apart from the already existing patriarchal traditions. As the Parliamentary Standing Committee on Women's Reservation Bill observes: "meaningful empowerment of women can be achieved only with adequate participation by women in legislative bodies or Parliamentary machinery, as inadequate representation of women in Parliament and State legislature is a primary factor behind the general backwardness of women at all levels."¹² Reservation of seats for women is a necessary strategy to improve women's participation in the decision making process.

One of the landmark events in the history during the women's reservation movement was the vision of former Prime Minister Shri Rajiv Gandhi. Rajiv Gandhi led Congress Government incorporated the 73rd and 74th Amendment in the Constitution of India providing reservation of not less than one-third seats in the Panchayats and Nagarpalikas for women.

Such reservation ensured participation of women at the grassroot level as they occupied prominent positions in the Panchayats and Nagarpalikas and took decisions for their own life along with decisions for their rural/urban communities on many issues.

Earlier notions of women being mere proxies for male relatives have gradually ceded space to the recognition that given the opportunity to participate in the political system, women are as capable as their male counterparts. As a matter of fact, representation of women in policy making machineries is critical to the nation building process. In all walks of life, women who acquired the necessary skills and education have proved themselves capable of holding of their own. But unfortunately they have failed to gain the requisite ground in the field of politics. All these trends indicate that women's representation in politics requires special attention and positive action. This Bill is a crucial affirmative step in the right direction of enhancing the participation of women in the State legislatures and Parliament and increasing the role of women in democratization of the country. In the true democratic spirit, no class/community should be excluded from the decision making due to the social and economic barriers placed upon that gender as a whole, and merely hypothetical tokenism or symbolic participation should be avoided. 'Reservation' is a sociological concept evolved to bring about social reengineering and that reservation for women is therefore needed to make the democratic process inclusive. Incidentally, India, the largest democracy, lags much

¹² Available at <http://www.prsindia.org/uploads/media/scr%20Women%20Reservation%20Bill%202009.pdf> (last visited February 13, 2015).

behind other countries including its neighbours Pakistan and Afghanistan, when it comes to the participation of the fair sex in politics. With only 10.8 per cent of women representation in the Lok Sabha and 9 per cent in the Rajya Sabha currently, India ranks 99th among 187 countries, according to the comparative data by the Inter-Parliamentary Union. At present, India has only 62 women representatives out of 543 members in the Lok Sabha, while there are 31 female MPs in the 243- member Rajya Sabha.¹³

Background

The proposed amendment to the Constitution of India to ensure reservation for women in the lower house of the parliament and the various legislative assemblies was introduced in the year 1996 for the first time by the then H.D. Deve Gowda government as the 81st Constitutional Amendment Bill.¹⁴ However, it lapsed with the dissolution of the eleventh Lok Sabha.¹⁵

The Bill was then re-introduced in the Parliament in the year 1998 after being re-numbered as 84th Constitutional Amendment Bill. The Bill was re-introduced by the then Prime Minister Atal Bihari Vajpayee's government formed by the National Democratic Alliance (NDA).¹⁶ However, the Bill lapsed on the dissolution of the twelfth lok Sabha.¹⁷

The Bill was then again reintroduced in the year 1999 by the NDA government itself. Successive attempts were made in the years 1999, 2002 and 2003 to get the Bill passed.¹⁸ However, due to lack of consensus among the various political parties the government of the day failed to get the Bill passed by both the houses of the Parliament.¹⁹

The United Progressive Alliance (UPA) led government then tabled the Bill in the year 2008 in the Rajya Sabha to save the bill from getting lapsed in the wake of fast approaching General elections.²⁰ In the year 2010, the cabinet cleared the Bill in the final form and the Bill was then passed by the Rajya Sabha as well.²¹

It is pertinent to note that the socio-economic status of the women in the country has not been something to be proud of. They are hampered by low levels of education, lack of employment, lack of access to health care and low social status which is evident by the increase in the crimes against females such as dowry deaths, female foeticide and domestic

¹³ Women in National Parliaments, available at <http://www.ipu.org/wmn-e/classif.htm> (last visited February 12, 2015).

¹⁴ Statement of objects and Reasons, Constitutional (108th Amendment) Bill, 2008, ¶2.

¹⁵ *Id.*

¹⁶ *Id.* ¶3.

¹⁷ *Id.*

¹⁸ Dr. Rakesh K. Singh, Women's Reservation (108th Constitutional Amendment) Bill, 16 Women's link No. 2, 25, at 25 available at <http://www.isideli.org.in/wl/article/rakesh1602.pdf> (last visited February 12, 2015) [hereinafter "*Rakesh on Women's Representation*".]

¹⁹ Statement of objects and Reasons, Constitutional (108th Amendment) Bill, 2008, ¶3.

²⁰ *Rakesh on Women's Representation*, at 25.

²¹ *Rakesh on Women's Representation*, at 25.

violence. It is pertinent to highlight some socio-economic and political indicators related to women in our country in the following graphs.

Census 2011 reveals that 65.46% women are literate in our country.²² In the study of census 2001, the percentage of literate women in India was only 53.7%.²³ The NSSO data shows huge disparity between urban and rural population. About 70.7% of rural males and 46.1% rural females were literate. The literacy rates among their urban counterparts were much higher at 86.3% and 72.9% respectively.²⁴

Women constitute 11% of the newly elected House. Of the larger states Madhya Pradesh has the highest percentage of women MPs (21%), followed by West Bengal (17%) and Uttar Pradesh (15%). Bias against women and girls is also reflected in the demographic ratio of 940 females for every 1,000 males.²⁵ Also, 1 in 5 women dies during childbirth, and such deaths account for more than 20 percent of the global maternal deaths. In India the legal age for marriage is 18 years for females and 21 years for males. However, about 44 percent of females, and 37 percent of males are married before the legal age.²⁶ There are areas in Madhya Pradesh, Chhattisgarh, Rajasthan, Uttar Pradesh and Bihar where the average female age at marriage continues to be below 16 years.²⁷

Contentions

The women reservation bill is not bereft of any criticism in the present draft. There are different points and contentions raised by different groups suggesting some or the other sort of amendment to the bill or entirely being against the bill itself. Some opponents contend that separate constituencies for women would only contribute in narrowing their outlook. It will further lead to perpetuation of unequal status as they will not be seen as competing on merit. For instance, in the Constituent Assembly, Mrs Renuka Ray argued against reserving seats for women: “*When there is reservation of seats for women, the question of their consideration for general seats, however competent they may be, does not usually arise. We feel that women will get more chances if the consideration is of ability alone.*”²⁸

People also contend that reservation for women will not lead to their political empowerment because (a) larger issues of electoral reforms like, measures to check criminalisation of

²² Available at http://www.censusindia.gov.in/2011-prov-results/data_files/india/table_1.pdf (last visited February 12, 2015).

²³ Available at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/literates1.aspx (last visited February 12, 2015).

²⁴ *Id.*

²⁵ Available at http://www.censusindia.gov.in/2011-prov-results/data_files/india/table_1.pdf. (last visited February 12, 2015).

²⁶ *Rakesh on Women's Representation*, at 26.

²⁷ *Rakesh on Women's Representation*, at 26.

²⁸ July 18, 1947, Constituent Assembly Debates (Proceedings), Volume IV.

politics, influence of black money, internal democracy in political parties, etc. have yet to be addressed²⁹, and (b) it can lead to election of ‘proxies’ or relatives of male candidates.³⁰

The opponents of the bill suggest some alternate ways such as reservation in the political parties itself or dual member constituencies to enhance women’s representation in the legislative body. Three alternative methods have been suggested by some experts, viz., reservation for women candidates within the different political parties, dual member constituencies having two candidates, one being a woman and increasing the number of seats in Assemblies and Parliament to accommodate sufficient women candidates.³¹

The idea of reserving seats was sought to be made a mandate by the Election Commission. However, it could not succeed as being unacceptable to the majority of parties and women’s groups in the country. It was thought that it might lead to political parties giving seats to women, which they perceive are not winning seats, thereby negating actual representation of women.³²

An argument put forth against rotation of seats is that it may lead to lack of accountability and that it will prevent the incumbent from developing her constituency. However, in a democracy irrespective of rotation, it is the duty of the incumbent to work for the welfare and development of the people and the constituency.

In any particular democratic form of governance, the State and national interest should be of prime importance. As all the seats are a part of the mechanism, it should be understood that every seat will be affected at some point or the other in equal measure. The reservation of seats should be done in such a manner that the policy for reservation is known beforehand for the next three elections in order to reduce uncertainty and allow for planning and policies that should be having priority over the interest of the constituency.

One of the main issues facing the bill is the issue of quota within quota which means sub-reservation for SCs, STs, OBCs and Minority communities within the 33 percent quota. However, the Bill in the present form does not include because of lack of political consensus among the parties around this issue. There are already 429 seats excluding reserved seats for SC/ST category in the Parliament. There is no reservation for the OBC category in the abovementioned existing unreserved seats. However, still there is a number good of representation for OBC category in the Parliament currently. Similar is the situation in the State Assemblies as well. Out of the 543 seats in the lower house of the Parliament, 84 seats are reserved for Scheduled Castes and 47 are reserved for Scheduled Tribes.³³ Thus, the Bill in its present form seeks that the sub quota within this quota is that of these 131 seats, i.e., 44

²⁹ Dr. Jayaprakash Narayan et. al., *Enhancing Women’s Representation in Legislatures: An Alternative to the Government Bill for Women’s Representation*, FORUM FOR DEMOCRATIC REFORMS, Issue No. 116.

³⁰ Madhu Kishwar and Manushi, *The Logic of Quotas: Women’s Movement Splits on the Reservation Bill*, FORUM FOR DEMOCRATIC REFORMS, Issue No. 107.

³¹ Rakesh on Women’s Representation, at 29.

³² Rakesh on Women’s Representation, at 29.

³³ Election Commission of India, Available at http://eci.nic.in/eci_main1/seats_of_loksabha.aspx (last visited February 13, 2015).

will have to be reserved for women belonging to SC/ST category. And these 44 seats will be a part of 181 seats reserved for women.³⁴

The following table represents a picture of representation of women in the leading countries of the world and the GDP they hold globally:

Country	Women representation in Parliament ³⁵	GDP Rank in world ³⁶	HDI Ranking in world ³⁷
Sweden	44.7%	22	12
Finland	42.5%	41	24
South Africa	41.5%	34	118
Spain	39.7%	13	27
Norway	39.6%	26	1
Denmark	39.1%	35	10
Netherlands	38.7%	17	4
Germany	36.5%	4	6
Italy	31.4%	8	26
Switzerland	31.0%	20	3
New Zealand	29.8%	54	7
Luxembourg	28.3%	73	21
France	26.2%	5	20

³⁴ Rakesh on Women's Representation, at 32.

³⁵ Women in National Parliaments, available at <http://www.ipu.org/wmn-e/classif.htm> (last visited February 12, 2015).

³⁶ World Bank Data, Available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (last visited February 12, 2015).

³⁷ United Nations Development Programme, Human Development Reports, Human Development Report 2014, Available at <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (last visited February 12, 2015).

Australia	26.0%	12	2
China	23.4%	2	91
United Kingdom	22.6%	6	14
Pakistan	20.7%	44	146
United States of America	19.3%	1	5
India	11.4%	10	135
Brazil	9.9%	7	79
Japan	8.1%	3	17

Conclusion and Suggestion

After having studied the relevant material on women's reservation bill, as the Constitutional (108th Amendment) Bill is ordinarily termed, the researcher has come to the conclusion that object and purpose of the amendment is to ensure adequate representation of women in the legislative bodies across the country. Inadequate representation of one of the two sexes results into inequality and causes injustice to their cause.

Also, currently the bill is pending with the Lower House of the Parliament of India (Lok Sabha) after having been passed by the Upper House of the Parliament (Rajya Sabha). The researcher is hopeful that the bill will get the nod of the lower house as well considering the party having majority in the house supports the bill in the present form and also forms the government of the day.

The researcher has also gone through the various contentions put forth against the reservation altogether and also against some aspects of the bill. However, after having understood the rationale sought to be achieved, the contentions seem to be irrelevant and provide no merit for any amendment.

When we see various countries of the world with respect to women's representation in the national parliaments and their respective GDP rankings and HDI rankings, it is ascertainable that better representation of women in the parliaments contributes to the overall socio-economic development of the nation. Only with the exception of Japan, having low representation of women in Parliament and having a good HDI and GDP ranking, rest other countries show that better women representation helps in improving HDI of the country.

The researcher thus, would suggest that women's reservation in the legislative bodies is of utmost importance to uplift their status and standards. The bill in its present must be passed and made into a law as expeditiously as possible.

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SELF – DETERMINATION: A CONFLICT BETWEEN TERRITORIAL INTEGRITY AND SECESSION

Rahul Agarwal* & Siddhant Nanodkar**

*This article discusses the controversial issue of secession as a mode of exercising the right to self-determination in the context of territorial integrity. This article also examines many aspects of self - determination like its history and evolution, current status under different international treaties and conventions and the different types of self - determination. The principle of self-determination is a *jus cogens* and has an *erga omnes* character. This right can be exercised in two ways – internal or external. Internal self-determination focuses on intra-state relations and giving autonomy to the people to pursue their economic, social and cultural development. External self-determination (ESD) gives the right to determine one's political status. Secession is the most controversial mode of exercising ESD. A claim to ESD equates a claim to a territory. Therefore the concept of territorial integrity comes into picture. The principle of territorial integrity appears to be in conflict with the principle of self-determination. This can be witnessed through State practice. However, after doing a close examination of the landmark case of Kosovo in the realm of international law and self - determination we come to a conclusion that the way the world community viewed the principle of self of determination has been changed.*

Keywords: Self-determination, autonomy, secession, territorial integrity, Kosovo.

INTRODUCTION

Self - determination is one of the most contested issues in international affairs. It is fast becoming one of the thorniest issues for the international community. Significant confusion and conflict have resulted not so much over the notion of the right to self - determination, as promulgated by the various covenants and the Helsinki Final Act, but over the definition of self - determination. The United Nations has unwaveringly defended and supported the right of people to self - determination as adumbrated in the UN Charter. However, the self - determination principle has been interpreted differently at various times and has been applied very inconsistently.

More than the right of people to decide their political and social status within the parent nation, the emphasis and all the discussion in the world community is about the people determining their status by breaking away from the parent state.

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As a result of rapid political, social and technological changes in the world, distinct national groups have started demanding separate states for themselves. These nationalist groups have used self - determination as a shield and a spring to boost their claims. But as this issue is very complex and a potentially explosive one, the frequent and common response of the international community has been to sidestep it.

People who are abnegated basic cultural, linguistic, and political rights by their rulers are more likely to resort to violence. Encouraging democracy and respect for human rights and granting local autonomy might be the answer to the self - determination struggles leading to separatists' demands.

EVOLUTION OF THE PRINCIPLE

Origin

The concept of self-determination finds its origin in the Declaration of Independence of the United States of America of 4 July 1776. During the 19th century and the beginning of the 20th century the principle of self-determination was constructed by nationalist movements as implying that each nation had the right to constitute an independent State and that only nationally homogeneous States were legit. Further, this principle provided the basis for the dismemberment of the Austro - Hungarian, Russian, and Ottoman Empires, at the end of WW I.

Incorporation into the Charter of the United Nations

Self-determination found its way into the Atlantic Charter, 1941. The principles of the Atlantic Charter were then ingeminated in the Declaration by United Nations 1942, in the Moscow Declaration of 1943.

The San Francisco Conference of 1945 was substantially molded by the Atlantic Charter of 1941, where the concept and principle of self - determination took shape and was incorporated into the UN Charter. The UN aims to develop friendly relations among nations based on the principle of self-determination.¹ The UN Charter also manifestly refers to the principle of self - determination in the part apropos colonies and other dependent territories.

Evaluating the legal implication of self – determination, it was realized that it did not become a legally binding principle of conventional international law by the mere fact of its incorporation into the UN Charter. Though the commissariat concerning non - self governing and trust territories entail binding international obligations, the general principle of self - determination is too wispy and too complex to entail specific rights and obligations. The UN Charter neither furnishes an answer to the question as to what constitutes a 'peoples' nor does it lay down the

¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 1(2) available at: <http://www.refworld.org/docid/3ae6b3930.html> (hereinafter as UN Charter).

circumstances in which self - determination can be attained. Thus due to all these shortcomings, it only holds a moral standing in the UN organs and international community.

Development through Implementation and Practice

The UN Charter advertises to self - determination in the context of international security and stability in Article 1 of the Charter and in the context of human rights in Article 55 and Article 56 of the Charter. The interpretation of the principle in the light of these Articles and other basic principles of international law unveils the purpose of self - determination to maintain and promote stability and justice in international relations.

The first substantial contribution made by the UN in developing self - determination was the UNGA Resolution 1514.² It proclaimed that "*all peoples have the rights to self - determination*". This Declaration has been regarded by some as constituting a binding interpretation of the Charter.³ However, under this declaration, "all peoples" only meant colonized people.

The various conventions, most notably the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Civil Rights (ICESCR), manifestly state the right of self - determination.

"All peoples have a right of self - determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."⁴

"The state parties to the present covenant, including those having responsibility for the administration of Non - Self - Governing and Trust Countries, shall promote the realization of the right of self - determination, and shall respect that right, in conformity with the provisions of the UN Charter".⁵

In the Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in accordance with the Charter of the United Nations, 1970, better known as Friendly Relations Declaration (1970), adopted by the UN General Assembly by Resolution 2625 (XXV) of 24th October 1970, the UN General Assembly ciphered the most

² General Assembly resolution 1514, *Declaration in the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514 (14 December 1960), available from undocs.org/A/RES/1514

³ O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (Martinus Nijhoff, 1966), in IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW(2008) 16.

⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 999, Article 1 Para. 1 and UN General Assembly *International Covenant of Economic, Social and Cultural Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 993, Article 1 Para. 1

⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 999, Article 1 Para. 3 and *International Covenant of Economic, Social and Cultural Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 993, Article 1 Para. 3

definitive and comprehensive formulation so far of the principle of self - determination. It further added that “the establishment of a sovereign and independent State, the free association or integration with an independent State, or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self – determination”⁶, thus accentuating, as the climactic issue, the methods of reaching the decision and not the result.

This declaration also points to the right of self determination in its Preamble. As this declaration was passed with no vote against it and therefore it was adopted with a wide consensus, it encompasses the norms of *jus cogens*.

Judicial Practice

Judicial discussion of the principle of self-determination has been relatively rare and is mainly based on the *Namibia*⁷ and *Western Sahara*⁸ advisory opinions by the International Court of Justice. In the *Namibia* case, the Court emphasized that the principle of self-determination is applicable to all non-self governing territories as enshrined in the UN Charter. This was reaffirmed in the *Western Sahara* case. Thus, it is clear that the Court regarded the principle of self-determination as a legal one in the context of such territories.

The Court moved one step further in the *East Timor (Portugal v. Australia)* case⁹. In this case, the Court emphasized that the right of peoples to self determination was ‘one of the essential principles of contemporary international law’¹⁰ and has an *erga omnes* character¹¹.

The issue of self-determination came before the Supreme Court of Canada in 1998 in the case *Reference Re secession of Quebec*,¹² where the Court decided whether there existed in international law a right to self-determination. The Court declared that the principle of self determination ‘has acquired a status beyond “convention” and is considered a general principle of international law.’¹³

TYPES OF SELF - DETERMINATION

As the concept of self - determination evolved through the years, there was a realization that there were two different types of self - determination, i.e. internal and external.

⁶ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), Principle 5.

⁷ ICJ Reports, 1971, 16; at 49

⁸ ICJ Reports, 1975, 12; at 59

⁹ ICJ Reports, 1995, 90 - 102.

¹⁰ Ibid.

¹¹ Ibid.

¹² 1998) 161 DLR (4th) 385

¹³ (1998) 161 DLR (4th) 434-5

Internal Self - determination

The right to self-determination has an internal aspect, i.e. the rights of peoples to pursue freely their economic, social and cultural development without outside interference. Governments are to represent the whole population without distinction as to race, colour and decent, national, or ethnic origins.¹⁴ In the domain of self - determination, more emphasis is given to intra - state relations and on the internal vistas of this principle.

External Self-determination (hereinafter referred to as ESD) provides that the peoples in question may freely determine their own political status. Such determination may result in independence(by way of secession), integration with a neighbouring state, free association with an independent state or any other political status freely decided upon by the people concerned.

Secession

Secession is the most controversial mode of exercising ESD. Secession is a withdrawal of a territory and its inhabitants from the existing political system and the jurisdiction of the existing governmental institutions.¹⁵ Secession comes in conflict with territorial integrity. Some scholars argue that territorial integrity merely safeguards the inviolability of international borders but does not regulate an internal affair such as secession.¹⁶ Others claim that territorial integrity prohibits secession because secession dismembers the territory of the state.¹⁷ Many scholars insist that a right to “remedial secession” exists, wherein international law provides a right to secession for peoples subject to extreme persecution or unable to internally realize their right to self-determination.¹⁸ This theory postulates that if groups fall victim to “serious breaches of fundamental human and civil rights” through the “abuse of sovereign power,” then international law recognizes the right of the afflicted group to secede from the offending state.¹⁹

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¹⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations; Treaty Series, Vol. 999, Article 27, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, Article 5 (c)

¹⁵ Aleksandar Pavković, *Secession, Majority Rule And Equal Rights: A Few Questions*, Vol 3 Macquarie Law Journal (2003) 73 at 75.

¹⁶ GEORGES ABI-SAAB, IN SECESSION: INTERNATIONAL LAW PERSPECTIVES, (Marcelo Kohen ed. Cambridge: Cambridge University Press, 2006), 473.

¹⁷ JAMES CRAWFORD, “STATE PRACTICE AND INTERNATIONAL LAW IN RELATION TO UNILATERAL SECESSION,” in Self-Determination in International Law: Quebec and Lessons Learned, ed. Anne Bayefsky (Cambridge: Kluwer Law International, 2000), 60

¹⁸ LEE BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (New Haven: Yale University Press, 1978), 220–223.

¹⁹ ANTONELLO TANCREDI, A NORMATIVE ‘DUE PROCESS’ IN THE CREATION OF STATES THROUGH SECESSION, *Secession: International Law Perspectives* (Marcelo Kohen ed. Cambridge: Cambridge University Press, 2006) 171-207, at 176. (hereinafter as TANCREDI)

Territorial Integrity: The Concept

A claim of ESD equates to a claim to a territory.²⁰ Therefore it is important to deal with the topic of territorial integrity in the context of exercising external self-determination.

According to Oppenheim, “the exclusive dominion of a State within its territory is basic to the international system.²¹ Oppenheim has also noted that, “a State without a territory is not possible”.²² Thus, territory is one of the most important elements of a state.

One of the core principles of international system is the need for stability and finality in boundary questions. The principle of territorial integrity is a mere reflection of this concept. In other words, territorial integrity provides stability to a state to exercise its sovereign control over its territory independently. This principle prohibits the interference within the domestic jurisdiction of states. The UN Charter embodies this principle of sovereignty and territorial integrity in Article 2(4).²³ This Article reflects the customary international law principle of the prohibition of the use of force and the territorial integrity of States.²⁴

Principle IV of the Declaration on Principles Guiding Relations between Participating States contained in the 1975 Helsinki Final Act states that:

“The participating States will respect the territorial integrity of each of the participating States.”

General Assembly resolution 2625 (XXV) of 24 October 1970 embodies the obligation to respect the territorial integrity of a State. The territorial integrity and political independence of the State are inviolable. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country”

The International Court of Justice clearly underlined in the *Corfu Channel* case, that, “*between independent States, respect for territorial sovereignty is an essential foundation of international relations*”²⁵ In the *Asylum* case, the ICJ noted that, “*derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.*”²⁶ Therefore the juridical requirement placed upon States is to respect the territorial integrity of other States. This was emphasized in the *Nicaragua* case reaffirming “*the duty of every State to respect the*

²⁰ L. Brilmayer, *Secession and Self-Determination: A Territorial Interpretation* 16, Yale Journal of International Law, 177, at 201 (1991).

²¹ L. OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW, VOL. 1 PEACE (R.Y. Jennings and A.D. Watts eds., 9th ed., Longman, 1996) at 564.

²² Ibid at 563.

²³ UN Charter *supra* note 1.

²⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) (Merits), I.C.J. Reports 1986, 99-101, ¶188-190 (27th June 1986) (hereinafter as *Nicaragua Case*).

²⁵ The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Reports 1949, at 35 (9th April 1949).

²⁶ Asylum Case (Columbia v. Peru), ICJ Reports 1950, 275 (20th November 1950).

*territorial sovereignty of others.*²⁷ Thus, the importance of this concept is that it serves to underline the principle that territorial change must be brought about by consent.

The principle of territorial integrity appears to be in conflict with the principle of self-determination. The principle of self-determination has usually been interpreted as referring to only the inhabitants of non-independent territories. The right to secede has not been supported by State practice.²⁸

The Situation in Somalia:

The issue of territorial integrity of Somalia has been a constant issue with the continuing civil war in Somalia, despite the secessionist pressures from “Somaliland” and “Puntland”. The Security Council resolution 1766 (2007) reaffirmed “the importance of the sovereignty, territorial integrity, political independence and unity of Somalia”. This was repeated in the Security Council Resolution 1772 (2007).

The Situation in the Democratic Republic of the Congo:

With regard to the continuing civil war in the Democratic Republic of the Congo, which has also seen numerous secessionist trends, the United Nations has been meticulous in reaffirming “its commitment to respect the sovereignty, territorial integrity and political independence” of that State. Security Council Resolution 1756 (2007) reaffirmed its commitment to respect the “sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo”. Further, Security Council resolution 1771 (2007) repeated its reaffirmation.

International practice thus indicates that as a general rule the principle of self-determination does not legitimize secession from independent States nor does it confer rights of secession upon groups, entities or peoples within such independent States.

Since 1945 no State which has been created by unilateral secession has been admitted to the UN against the declared wishes of the predecessor state.²⁹ It may, therefore, be concluded that international law does not recognize a right of secession from independent States.

THE KOSOVO CASE:

Kosovo is a province in southern Serbia that was granted partial autonomy in a Yugoslavian constitution in 1974, but was divested of that autonomy in September 1990. In 1999, when Serbian President Slobodan Milosevic suppressed the rebel of Kosovo Liberation Army with force, the UN Security Council intervened.

²⁷ Nicaragua Case, *supra* note 24, at 111, 213 and 128 ¶ 251-252

²⁸ JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW at 85, (2nd ed., 2013).

²⁹ Ibid at 390.

On June 10, 1999, the Security Council adopted Security Council Resolution 1244. SCR 1244 authorized the UN Secretary-General to establish an interim civil administration in Kosovo (UNMIK) that will transition into provisional democratic self-governing institutions.

On May 15, 2001, the UNMIK issued a Constitutional Framework for Provisional Self-Government, under which it was declared that, “the Provisional Institutions of Self-Government and their officials shall exercise their authorities consistent with the provisions of UNSCR 1244 and the terms set forth in this Constitutional Framework.”

Between February 20, 2006 and September 8, 2006, negotiations were held between Serbia and Kosovo. By March 2007, “the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status was exhausted. The conclusion was that the only viable option for Kosovo was independence, to be supervised by the international community.”

On November 17, 2007, elections were held for several democratic governing organizations in Kosovo. On February 17, 2008, the Assembly of Kosovo approved the Declaration of Independence, issued by “the democratically-elected leaders of the Kosovar people.”

On July 22, 2010, the ICJ issued its advisory opinion on the Kosovo UDI.

In its advisory opinion on Kosovo the ICJ stated that,

*The Court observes, however, that while the Security Council has condemned particular declarations of independence, in all of those instances it was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; it states that “the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”³⁰ and held that general international law contains no applicable prohibition of declarations of independence.³¹*

Territorial Integrity, for people or for states? – The Kosovo Findings

Secessionists argue that the principle of territorial integrity applies only to States and not to secessionist groups.

The correlative principle of stability of international borders, like the basic principle of sovereignty and territorial integrity, only applies as against forcible modification by other States. It does not protect a State against dissolution, but constitutes a useful means, under international

³⁰ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 403 (22nd July 2010) at 437 ¶ 38.

³¹ Ibid, at 438 ¶ 84.

law, to limit the breakup of a State to its own territory, without modifications of borders of neighbouring States.

Furthermore, whereas a State can complain to another State about the violation of its external frontiers, it cannot do so, under international law, against its own citizens. As long as no other State is injured, international law does not preclude the redistribution of the external borders between the preexisting State and the newly created State. Even if the principle of stability of international boarders were binding upon the authors of the Declaration of Independence, which is not the case, it is clear that this principle has not been infringed in any way.

Rather, the principle protects States against the coercive action and interference of other States. It does not preclude the issuance of a declaration of independence.

CONCLUSION

Exercising the right to self-determination through unilateral declaration of independence will be illegal only when the declaration is associated with the violation of any norm of international law such as racial discrimination, genocide etc. or if there is unlawful use of force. Territorial integrity properly understood accommodates the principle of self-determination.

Even after all the debate, there is no easy solution to the quandaries posed by self - determination movements in today's world. In the face of growing number of such movements, there is a need to establish a more concise and feasible definition of the term self - determination. Such a definition will not be easy to arrive at and even then, it would practically still be ambiguous. The urge to seek self - determination has multiple origins, including the denial of minority rights and other forms of government repression, territorial dispute, national ambitions and perceptions of economic and political viability.

AN IGNORED ASPECT: THE STATUS OF DIGITAL EVIDENCE IN INDIA

Pooja Ghosh* & Poonam Bera**

"In cyber -crimes, India is still in infancy. ATM frauds are increasing. Effective forensic investigation at the scene of crime can bring criminals to book. The importance of the knowledge of forensic evidences specially traces of hair, fibers etc. found at the site, have to be ingrained in the Officials dealing with cyber- crimes. "¹

Use often leads to popularity. And ultimately, popularity becomes a necessity to sustain in society. The cyber-space which is pacing in its reach to the most marginalized areas in 21st century is one of the major examples of popularity transforming into one of the most significant means of human sustenance. Humans have found ways of helping themselves with the use of the cyber-space. We use it for economic transactions, imparting social services like medical aid as well as education. We are so innovative with this particular means that we have even devised a way of committing theft through it, stalking someone on the net and even creating terror via it! This 'innovation' is rising at an alarming rate! The National Crime Records Bureau recorded a 350% leap of cyber-crimes in India in the last three years. The age- group which is apparently the workforce of India, (18-30) account for the highest percentage of these crimes!! With such increase, it is important that the issue is addressed at the earliest. And this exigency can only be met with effective use of digital evidence. It was further added by *Dr. JR Gaur that the lawyers and the police fail to adduce the digital evidence in such crimes due to lack of knowledge and expertise in this field.* The importance of digital evidence and the current issue of ineffective use of digital evidence by the cyber cells in India have been highlighted ending with suggestions to improve cyber-forensics in India. As it is not only cyber-crime which is in its infancy, it is also cyber-investigation.

Why digital evidence?

Following is an excerpt of importance of digital evidence in India as highlighted by Shubha Mangala Sunil, Founder Chairperson, Cyber Security Response Team^{2,3}:

*** Could you give us a few examples where social media proof was used in the court of law?**

'In many cases this year, we have seen people using digital evidence and magistrates have accepted this proof as secondary evidence...Divorce was granted in that case. In another case, when the Facebook account of a prominent celebrity was deleted immediately after her death, it was revealed that her boyfriend had deleted the account, lest her husband find out the comments they had been posting on each other's walls.'

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¹ Dr. J R Gaur, Principal Scientific Officer (Life Sciences), Bureau of Police Research and Development.

² <http://csrt.org.in/about/about-me-extended/> <as accessed on 21.02.2014>

³ <http://www.newindianexpress.com/cities/bengaluru/article599037.ece> <as accessed on 21.02.2014>

* Do legal professionals depend a lot on digital evidence?

'Many a time, legal professionals rely solely on digital evidence and it does help crack cases. Further, what works in their favor if they have managed to get their hands on digital evidence is the fact that they've studied the criminal even before they have tracked them down.'

Cyber forensics is an emerging field in India. Owing to this, the nature of investigation involved is synthesized poorly in India. Cyber forensics in simple words is application of computer science to aid the law regarding cyber-crimes and bringing the criminals to book. As forensics includes scientific application to the investigation of crimes, the analysis of evidence is the most important element of forensics. The same applies to cyber-forensics. For a successful investigation, the correct synthesis of electronic or digital evidence is significant. *Digital evidence is information stored or transmitted in binary form that may be relied on in court. It can be found on a computer hard drive, a mobile phone, a personal digital assistant (PDA), a CD, and a flash card in a digital camera, among other places.*⁴ Hence, for enabling efficiency in cyber-investigation digital evidence plays a significant role. To cope with the unique complexities with which cyber-crimes are increasing in India, it is important that the role of digital evidence should not be ignored and be relied upon only after credible authenticity of such evidence. It may come into play where serious crimes like extortion, fraud, child pornography or terrorism is committed by just a click of button. Not only this, but it should be kept in mind that particular crimes can only be committed online like identity theft and phishing which makes the role of digital evidence even more important. The main purpose of the computer forensics is to produce evidence in the court that can lead to the punishment of the actual. The forensic science is actually the process of utilizing the scientific knowledge for the purpose of collection, analysis, and most importantly the presentation of the evidence in the court of law. The word forensic itself means to bring to the court. Computer forensics has been efficiently used to track down the terrorists from the various parts of the world. The terrorists using the internet as the medium of communication can be tracked down and their plans can be known. For these reasons it can be said that the enforcement bodies should choose digital evidence and rely while dealing with the cases of such nature. It can make the investigation **speedier** and the observations of the investigation **more accurate**. Hence, the importance of digital evidence and cyber-forensics can be encapsulated as below:

- Produces evidence in court that is professional and easy to understand.
- Saves time of both the police and the Court when they have to deal with cyber-crimes

Scenario of Digital Evidence in India

The main purpose of the cyber-forensics is to search, preserve and analyze information on computer systems to find potential evidence for a trial. In a way, the role of cyber-forensics is

⁴ "Electronic Devices: Types, Description and Potential Evidence Electronic" in Crime Scene Investigation: A Guide for First Responders, Second Edition.

to present the evidence in such a manner that it aids the case and the court of law as much as possible.

These pieces of important evidence can be found in no. forms. Some of which are listed as follows (It may include more.): 1) Calendar, 2) Browser, 3) E-mails, 4) Databases, 5) Cookies, 6) Compressed archives including encrypted archives, 7) SMS, 8) System files, 9) IP Address of user and 10) Log files. The no. of evidence is immense, what matters, is the manner which the evidence is handled by the investigator. The nature of digital evidence is highly volatile and can be manipulated easily. Hence, cyber-forensic teams have to emphasize ***more on the preservation of the evidence***. Every law enforcement agency has a manner in updating its system to deal with the way the evidence is to be collected and analyzed. In India, the Intelligence Bureau and the CBI are two agencies which not only are responsible for evidence handling but also suggest ways in which such handling is updated with the latest technology.

The CBI Command Centre plays an integral role in the management of the technology used to analyze the electronic evidence and coordinating all such activities of CBI branches and units in various parts of the country. A major part of the Command Centre is the Cyber Forensics and Digital Analysis Centre. This is a joint venture between CBI and CFSL. Other three branches of the Command Centre are: 1) Network Monitoring Centre, 2) Computer Centre and 3) The Strategic Communication Centre. These branches of the Command Centre coordinate in the investigations with the law. The Cyber Forensics and Digital Analysis Centre is responsible for the collection and the analysis of digital forensics. The Centre uses the following tools available for disc forensics and digital image analysis:

- ENCASE
- DIBS
- DRAC
- Password Recovery Kit
- Other Forensic Supporting Software

The other tools which are important for investigation used in India include disk forensics, network forensics, mobile device forensics, live forensics, memory forensics, multimedia forensics and internet forensics.⁵ The Centre also provides assistance to Investigating Officers in investigation of Cybercrime cases and video/ audio identification. The facility is being used by the Scientists of CFSL for gathering/ providing the evidence in the seized discs/digital evidence. This Centre also provides technical support as well as manpower to the Investigating Officers of CBI in seizing and analyzing the discs and digital evidence.⁶

The Network Monitoring Committee monitors the internet with the help of the tools as present on their site. The Computer Committee manages the software modules used by the CBI and even generates reports every month like crime report, cases under investigation etc.

⁵ <http://www.cyberforensics.in/> <as accessed on 21.02.2014>

⁶ http://cbi.nic.in/aboutus/manuals/Chapter_26.pdf <as accessed on 23.02.2014>

The Command Centre also coordinates with outside private IT Companies and even NIC, IIT's for developing and updating the software.

Though, internet users in India has burgeoned enormously still due to the stagnant reluctance of officials to resort to cyber-experts and lack of awareness cyber-forensic is still not in a very good state in India. Failure in promoting training schemes for the law enforcement agencies and dearth of cyber-forensic experts in the country there has been a non-uniform development of in this field.

Legal position in India

In India, there was *sort of progress in digital evidence by the amendment brought by the Information Technology Act, 2000. This added Sec. 65-A⁷ and Sec.65-B to the Indian Evidence Act, 1872.* The second schedule of The Information Technology Act 2000 is India's only act dealing with computer crime, with an intension to introduce the concept of electronic evidence has added to the provisions of Indian Evidence Act, 1872 which had been drafted earlier keeping in mind only the physical world.⁸ Some of the important ones are:

Section 3(a) of the Indian Evidence Act added to the definition of "*Evidence*", for the words, "all documents produced for the inspection of the Court", the words "*all documents including electronic records produced for the inspection of the Court*" have been substituted;

Electronic evidence/electronic record⁹ now, is covered under documentary evidence¹⁰ under the Indian statute. **Sec. 65-A** states that electronic record is admissible and no further proof is required for its authenticity if the provisions under Sec. 65-B is complied with.

Sec-65-B of the Indian Evidence Act, explains at length how electronic records can be admitted in the Court of Law.

Sec. 65-B (2) of the Act highlights the conditions which have to be satisfied. The bare provision has been provided as below:

(2) *The conditions referred to in the Sub-section (1) in respect to the computer output shall be following, namely:*

(a) *The computer output containing the information was produced by computer during the period over which computer was used regularly to store or process information for the*

⁷ **65A. of Indian Evidence Act, 1872: Special provisions as to evidence relating to electronic record:**

The contents of electronic records may be proved in accordance with the provisions of section 65B.

⁸ <http://www.lsgalservicesindia.com/article/article/cyber-forensics-&electronic-evidences-challenges-in-enforcement-&their-admissibility-975-1.html> <as accessed on 21.02.2014>

⁹ The term '**electronic record**' as used in the above Section has been further defined by the Information Technology Act, 2000 as: '**Data, record or data generated, image or sound stored, received or sent in an electronic film or computer generated micro-fiche.'**'

¹⁰ **Sec. 3 of Indian Evidence Act, 1872: Documentary evidence defined as:**

Document means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording the matter.

purposes of any activities regularly carried on over that period by the person having lawful control over the use of computer.

(b) During the said period the information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.

(c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation for that part of the period, was not such to affect the electronic record or the accuracy of its contents.

(d) The information contained in the electronic record reproduces or is derived from such information fed into computer in ordinary course of said activities.

After section 22, **section 22A** of the Act has been inserted which says that “**Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.**”

Other sections that were added to the Act are **Sections 17, 34, 35, 39, 47A, 67A and 73A which deal with proof and verification of digital signature, 81A, 88A and 90A which deal with the presumption of the evidence and 131.** Such changes were added to the Indian Evidence Act by the IT Act to pave the way for use of digital evidence in cyber-forensics. These Amendments in a manner elaborated the procedure and the presumption to be followed by the Courts while adjudging such cases.

These amendments is just a reflection of the UNCITRAL Model Law of E-commerce which makes the law flexible when dealing with digital evidence and not exclude them just on the basis of the evidence being data or different from traditional evidence. Art. 9 of the Model Law states:

Article 9: Admissibility and evidential weight of data messages:

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

(a) On the sole ground that it is a data message; or,

(b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Judiciary of India and digital evidence: An overview

Without a uniform interpretation of the situation in the legislation, the law assumes no importance due to overlapping explanations and loopholes. The Supreme Court has always been on the forefront to give binding interpretations which are not only followed by implementing authorities but even the society. Hence, the role of Supreme Court in India is momentous. It does not let the letter of the law remain mere letters rather the Supreme Court helps reserve the spirit of that letter in reality.

In the light of its role, the Supreme Court has been active in the interpretation of the use of digital evidence in the courts. The Supreme Court for the first time analyzed the issue of physical presence of person in Court and held that adducing evidence could even be done through video conferencing. For the first time, the Supreme Court analyzed the Sec.65-A and 65-B in the case and allowed video-conferencing to be used as a medium.¹¹

The breakthrough judgment given by the Apex Court was in the *State v. Navjot Sandhu*¹²(Afzal Guru's case) where the Court held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65 of the Evidence Act, of an electronic record.¹³ This meant that compliance with Sec. 65-A and Sec. 65-B in the case of digital evidence (which is a copy of the original hence, secondary evidence) was not required. This judgment in some manner diverged from the set procedure in the same Act regarding digital evidence.

The Supreme Court recently overruled this judgment in *Anvar v. Basheer*¹⁴ by *applying the principle of generalia specialibus non derogant (special law will always prevail over the general law)*, held that the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same.¹⁵ In the light of this case, the Supreme Court once again has preserved the spirit of the law by giving out a uniform way in which both primary and secondary evidence shall be adduced before admissibility. Indirectly, Sec. 65-B has been made mandatory in each and every digital evidence irrespective of their nature i.e. primary evidence or secondary evidence. It even shows that the Supreme Court has responsibly dealt with the question of authenticity of evidence being submitted before the court and still is concerned with the same. Certificate in terms of Sec.65-B is a must and should thus, accompany the evidence. It can thus be concluded that both the law and the judiciary in India are successfully dealing with the promotion of usage of digital evidence in the country. Still, with the increasing complexities in the nature of crimes and the given fact that digital evidence can be manipulated easily, the law, enforcement bodies and the judiciary are required to remain updated which is a difficult task in a country like India where digital divide and ignorance towards usage of technology is widespread. India still needs better

¹¹ State of Maharashtra vs. Dr. Praful B Desai AIR 2003 SC 2053, Amitabh Bagchi vs. Ena Bagchi AIR 2005 Cal 11

¹² (2005) 11 SCC 600

¹³ <http://blog.sconline.com/post/2014/09/20/ruling-of-navjot-sandhu-case-to-the-extent-of-admissibility-of-electronic-evidence-as-secondary-evidence-overruled.aspx> <as accessed on 22.02.2014>

¹⁴ Anvar v. Basheer, Civil Appeal No. 4226 of 2012, decided on 18.09.2014

¹⁵ Ibid

cyber-forensics and better law-enforcement only then is the use of digital evidence would become meaningful.

What limits digital evidence in India?

Even though the importance of use of digital evidence and the mandatory application of the Information Technology Act has been elaborated by the Supreme Court in the recent cases, it has been silent about the current status of digital evidence in India. The laws and the judgment are not enough to provide a strategic improvement in the field of digital evidence. India is in a dwindling state of affairs considering the fact that the technological development in India is slow. With the alarming rise in the incidence of cyber-crimes it is important to address the current problems which limit digital evidence and its usage in India. The major problems in this field are:

- Lack of education in the field of cyber-technology limits the use and the extraction of digital evidence by the police and also the prosecution. Hence, the Courts and the enforcement bodies are not able to use it to their advantage.
- Outdated techniques for collection of evidence and lack of training about cyber-forensics to police officials.
- The method and content of data on crime collected and recorded varies from State to State. With cross border crime occurring frequently, tracing criminals is a challenge for any State police, in the absence of criminal data sharing and cooperation. The data collected and recorded by the National Crime Records Bureau (NCRB) is basic and data access at all levels is limited.
- Though the Supreme Court has emphasized time and again that digital evidence should be subject to an accurate and stringent test still, no clear test has been laid down as such to prove the authenticity of evidence being admitted in the Court. Courts still in India grapple with the problem of authentication of evidence. This requires to be addressed immediately as manipulation of evidence is quite easy. A framework laying down the procedure of the test is the necessity of the hour.
- There is no integrated approach of criminal investigation as there is no particular federal structure that governs a standardized investigation in India.
- Technology is not only limited to the investigation agencies but also corporate Inc. of India. Indian enterprises as such do not have the required IT skills and tools to deal with the increase in IT fraud. Hence, the problem of not having the awareness and the skills is multi-dimensional and even is a threat to the Indian trade and commerce.

Where do we go from here?- Immediate address required!

Over-dependence of people, big corporates and even governments on use of technology, cyber-threat is on the rise and has become easier. ASSOCHAM in accordance with the study that it conducted in 2014 predicted that the reporting of cyber-crimes would double up in the country in 2015. Hence, the immediate solution required is that the Police enforcements and the Courts are well-equipped to handle investigations and the digital evidence which

needs to be adduced correctly by the Courts. In keeping with the current scenario certain immediate changes and improvements are required to be opted by India.

International framework: Though India has signed Mutual Legal Assistance Treaty and is even a signatory to UN Convention against Transnational Organized Crime. Still, it is important that a harmonious framework is made between the national laws of India and the international law as cyber-crimes are generally trans-border. A Convention of Cyber-Crimes at least would provide a harmonious structure to the seizure, confiscation and production of electronic evidence in Courts and also cooperation between legal enforcement bodies of India and other countries while evidence is being handled. A Convention signed would at least bind all the signatory countries to cooperate and bring uniformity in the investigation framework.

The Indian Law: The current amendment in the Indian Evidence Act lays down a rather lengthy procedure which only restricts itself to the evidence as adduced from '*computer*', the term '*computer*' seems to be rather a narrow conjecture of the source of digital evidence. This term at least should be given a wider perspective as there are various sources of digital evidence. Hence, this term should be replaced.

It would even be appropriate if the admissibility of evidence is dealt not only by a general Act i.e. the Indian Evidence Act but, a specific Act which includes not only the procedure but also the jurisdiction, filing of complaint in the Tribunals etc. This specific Act can give a concise explanation to cyber-legal experts and even students. The Act can be complementary to the Indian Evidence Act. The Act should also provide for the minimum standards of the tools used during the investigations as manipulation of digital evidence is very easy. The system of authentication would only be sufficed if it meets the necessary standards.

The Indian enforcement bodies and court: Indian enforcements are grappling with the problem of lack of training to handle digital evidence. It is important that the field of cyber-forensics and better use of technology be given more importance by the Government. Regular workshops organized by State Governments to train the police, legal prosecution and even the students. It is also important that the judges as well as the police enforcements adopt and welcome technology in their work rather than flinching from it. This notion can only be changed with the rapid implementation of E-government and E-courts.

A specialized cell that specifically deals with cyber investigations should be constituted in corporate offices which can provide an immediate platform to report such cyber-crime incidences like fraud and phishing.

Due importance to digital evidence handling

Conclusively, it can be said that though India has laws to tackle cyber-crimes but it still struggles to deal with the admissibility of digital evidence in the Courts. Cyber-crimes can only be abated and prevented if due importance is given to the handling and management of digital evidence by not only the police but by the judiciary itself. With the *Anvar v. Basheer*¹⁶ judgment, the burden of adducing digital evidence has increased even more. In the wake of

¹⁶ *Supra* 13

digitalization in India, it is time that digital evidence is given more importance rather than just making laws on it.

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CONTROL UNDER THE INDIAN MERGER REGIME: A DETAILED ANALYSIS UNDER COMPETITION ACT, 2002 AND SEBI TAKEOVER CODE

Kanika Satyan* & Abhishek Mishra**

The recent times have witnessed an increased involvement of business entities in several commercial transactions essentially in the nature of mergers and acquisitions. The number of such transactions have thus increased manifold in the recent years. The foremost rationale behind any entity entering into such transactions is, in laymans terms to gain control over its operations and functions and profits. However the analysis of this term 'control' has not been an easy task and the intricacies in the same are still leading to a lot of confusion and controversy in this arena. Further, several definitions of the term have added to this uncertainty and blurred the understanding of it. This paper would thus look through the lens on the nature and scope of the word 'control' while highlighting the several existent definitions of the term; especially as defined under the Competition Act, 2002 and SEBI Takeover Code. The paper is also a humble effort to throw light upon the situation in India with regard to such transactions in the nature of gaining control and also compare the same with the interpretations in other jurisdictions.

Keywords: Control, Competition Act, 2002, Takeover Code, Merger, Acquisition

INTRODUCTION

Though India received its political independence in 1947 it took the country 44 more years to be economically independent with the adoption of the economic reform policy along with the liberalization privatization and the globalization policies. The adoption of these policies changed the entire economic scenario in the country paving way for more foreign investments, export and imports etc. The merger control regime was an area which had a huge impact as it lead to repealing of the merger provisions from the MRTP Act, 1969 and introduction of takeover regulations that came about in the subsequent years.

The Securities and Exchange Board of India (Substantial acquisition of shares and takeover) Regulations, 1997 commonly known as the Takeover Code, was the main regulation which was introduced to discuss in detail about mergers as a form of combination and its various facets like how can control be obtained, who can be termed as acquirer, technique and manner of takeovers,

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disclosures to be made etc. It was further updated in the year 2011 which is the latest regulations on the same .One of the key features of the Code was the definition provided by it for the concept of “control” and what level of shares or voting rights or other rights (negative, affirmative , veto) had to be acquired by an acquirer in a target company for it to be termed as ‘control’ and thus would necessitate the fulfillment of certain obligations like public announcement and open offer, that form a part of merger procedure.

That being clear and established, the ambiguity later arose due to introduction of several definitions provided in various other Indian legislations in specific the Competition Act, 2002 which lays down a complete different definition of the word “control” and different thresholds for being subject to the provisions of the Act. This continues to create uncertainty in the minds of various investors or acquirers, not only Indian but also cross border who enter into such transactions in India. The cases that fell under the jurisdiction of the traditional Indian Courts, Competition Commission of India and the SEBI like the Network 18 and the TV 18 case, *Ashwin Doshi v. SEBI* though provided effective ratios, they did not successfully contribute in removing the ambiguity that existed in this regard. A detailed discussion of the above mentioned aspects is done below.

‘CONTROL’ AS UNDER SEBI TAKEOVER CODE, 1997 and 2011

Regulation 2(1) (c) of the SEBI Takeover Code , 1997 and Section 2(1)(e) of SEBI Takeover Code ,2011 defines ‘control’ as a three point characteristic , which if fulfilled , in alternative or in addition could be termed as control . These are:

- a) Power to appoint majority of the directors.
- b) Power to control the management of the company.
- c) Power to make policy decisions.

Any of these powers are exercisable by a person or persons acting individually or in concert, directly or indirectly by the virtue of their shareholding or management rights or shareholding agreements or voting agreements or in any other manner.¹ In addition, the Takeover Code also provides specific numerical threshold limits, any acquisition over which is said to gain ‘control’ in a company. The Takeover Code , 2011 increased the earlier prescribed limit of 15 % to 25% and states that “*No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five percent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.*”²

¹ Section 2(c) , SEBI Takeover Code , 1997 and Section 2(e) ,SEBI Takeover Code ,2011

² Section 3(1) , SEBI Takeover Code , 2011

Thus, in short, if the acquisition results into entitlement of 25% or more voting rights in the target Company, the acquirer is required to make an open offer to acquire at least 26% shares from the existing public shareholders of the target company in terms of the Takeover Code (open offer obligation)³.

Thus fundamentally, the takeover code lays down two sets of factors, one being qualitative(as defined under Section 2(1)(c) and Section 2(1)(e)) and the other being quantitative in nature(initial threshold limit of 25%), that define control. For example, the uncertainty would precisely arise in a case where an acquirer could acquire less than the mandatory offer threshold of 25% and still be required to make an offer if it is said to be in control of the target company due to the application of the factors laid down in Section 2(1)(c) of the Code.⁴ Hence as a consequence of the same, it has been observed that due to the existence of this ambiguity, the investors/acquirers apply the definition in a subjective manner, suiting their needs and circumstances.

This ambiguity was dealt by the various Courts; however it resulted in divergent judicial decisions. In *Rhodia SA v. SEBI*⁵ SAT held the acquirer in question had control as it had veto rights on “major decisions on strategic and structural changes. This was also majorly dealt with, in the case of *Ashwin K. Doshi v. Securities and Exchange Board of India*⁶, where the Securities Appellate Tribunal held that the definition of control under Takeover Code ‘gives illustrative instances of exercise of control’ and that the term ‘control’ by its very nature is incapable of any standard definition and its determination would vary from case to case. The Tribunal also held that the expression ‘control’ would necessarily mean effective control, in other words, de facto control and not mere de jure control. Whether a certain right amounts to de facto control or not requires a fact-intensive analysis.⁷

This issue was further discussed in depth in the case of *M/s Subkham Ventures Pvt. Ltd v. SEBI*⁸, which fundamentally dealt with the controversial question of whether negative rights would constitute ‘control’. Dealing with Regulation 10 and 12 of SEBI Takeover Code , 1997 the SEBI held that in addition to an offer under Regulation 10⁹, an offer had to be made under

³ PWC, Takeover Code, Referencer on (Substantial acquisition of shares and takeover) Regulations, 2011. M & A Regulatory Services , October 2011

⁴ IndiaCorpLaw, Defining “Control” in takeover regulations, May 29 2013, available at <http://indiacorplaw.blogspot.in/2013/05/defining-control-in-takeover-regulations.html>

⁵ Appeal no.36/2001 , SAT Mumbai

⁶ 40 SCL 545 (SAT)

⁷ Swati Bajaj, *Acquisition of Minority Shareholding and Merger Control in India*, Competition Commission of India Internship Report , August 2013

⁸ Appeal no.8 of 2009 , Date of decision :15.1.2010

⁹ Regulation 10 of SEBI Takeover Code , 1997 states that “No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise [fifteen] per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.”

Regulation 12¹⁰ also. The appellant, M/s Subhkam Pvt. Ltd had acquired 24.26% stake in MSK Projects, by the way of a financial investment transaction. In furtherance of the same agreement, certain affirmative or veto rights are given to them. SEBI felt that many such clauses in the share subscription agreement like power of the appellant to appoint its nominee directors to the Board of the target company, right to amend articles , right to change share capital etc were in the nature of providing control to the Subhkam holdings and thus in excess of 15%¹¹ of voting rights, they were required to make an open offer for ‘acquisition of control’ under Regulation 12¹² .The appellants contended that these rights were not in the nature of demonstrating ‘control’ but were only in the nature of effectively safeguard the rights of the appellants.

When an appeal to the same was made to the Securities Appellate Tribunal, a 2 member bench in support to Subhkam’s contentions, held that such clauses did not entitle transfer of ‘control’ while stating that ‘control is not a proactive but not a reactive power’ and that ‘power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control’. Although SEBI appealed before the Supreme Court, the matter was disposed off by the Supreme Court without laying down any jurisprudence of the scope of definition of ‘control’.¹³ In specific it laid down that ‘keeping in view the above changed circumstances, it is in the interest of justice to dispose of the present appeal by keeping the question of law open and it is also clarified that the impugned order passed by the SAT will not be treated as a precedent.’

In the light of the SAT ruling in this case, the Takeover Regulations Advisory Committee (TRAC) emphasized on the need to revise the definition of ‘control’ to include the ability to appoint majority of the directors or to control the management or policy decisions of the target along with the right to do so. Such an inclusion intended to emphasize that the acquisition of de facto control should also trigger an open offer and not just acquisition of de jure control; a scheme that was already brought about in the *Ashwin Doshi case*¹⁴ SEBI elected to retain the earlier definition because the *Subhkam* case was pending before the Supreme Court at that stage .However, no clarification was provided later.

Since the decision of SAT was not held to be binding, in a similar case of acquisition of stake in Kamat Hotel Pvt Ltd by Clearwater Capital Partners, the SEBI again followed the same line of interpretation it had and clearly indicated its aversion to affirmative rights , veto rights and preemptive rights. It held that due to the existence of certain affirmative voting rights it

¹⁰Regulation 12 of SEBI Takeover Code, 1997 states that “Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations”

¹¹ According to Section Regulation 10 of Takeover Code ,1997

¹² Regulation 12 , Takeover Code ,2007

¹³ Amarchand & Mangaldas & Suresh A Shroff and Co, *Takeover Regulations –Some new judicial interpretations*, Insight Issue XXVII , December 5,2011

¹⁴ Nishith Desai Associates , *Public M & As in India :Takeover Code Dissected , A Detailed Analysis SEBI Takeover Code , 2011 , August 2013*

amounted to control. The company then filed an appeal against SEBI's decision in SAT. This prospective decision by SAT is highly awaited as could be a turning point as to how 'control' is perceived under the SEBI Takeover Code.

In the year 2014, SEBI in its order¹⁵ dealing with the acquisition of Jet airways by Etihad airways where the moot point was whether an investment by Etihad Airways in 24% shares of Jet Airways (India) Limited and the terms thereof amount to Etihad obtaining "control" in Jet so as to require Etihad to make a mandatory open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Regulations).¹⁶ In view of the facts that the effective control of 'Jet' remained with the Indian promoters and secondly that Etihad had the right to nominate only 2 out of 12 directors, the SEBI concluded that Etihad is not in "control" or "joint control" of Jet for the purposes of the Takeover Regulations and hence is not obligated to make an open offer to the shareholders of Jet.

Thus concluding, even with the existence of plethora of cases in this regard, 'control' as a concept is still interpreted subjectively under the Takeover Code. The Courts and quasi judicial authorities in the country have also not provided a conclusive definition to the same. Thus the uncertainty still exists.

'CONTROL' UNDER COMPETITION ACT, 2002

The concept of 'control' is a significant aspect in cases of merger .This is primarily because a merger can have several competitive and anti-competitive effects on the economy of a country. Thus, control has been carefully scrutinized as a part of the competition law regime in India. However, in spite of efforts by the Competition Commission and the other bodies, certain level of uncertainty has remained in this arena. A detailed discussion of the above has been done below:

Explanation (a) to Section 5 of the Competition Act, 2002 defines control and states that:

'control' includes controlling the affairs or management by:

- (i) *one or more enterprises, either jointly or singly, over another enterprise or group;*
- (ii) *one or more groups, either jointly or singly, over another group or enterprise*

¹⁵ WTM/RKA/CFD-DCR/17/2014

¹⁶ IndiaCorpLaw, SEBI order on 'Control' under Takeover Regulations , May 15 2014 , available at <http://indiacorplaw.blogspot.in/2014/05/sebi-order-on-control-under-takeover.html>

On a plain reading, this definition provided under the Act does not clearly indicate towards what could be fundamentally termed as control. The difficulty regarding this is removed under Schedule I Item I where it is stated that

*An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, **does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company**, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a share holders' agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.*

This is clearly indicative towards the fact that if a company acquired more than 25% of share capital or voting rights of a company they are deemed to have control.

In several cases in the past, CCI has examined this issue of ‘control’. The most landmark case in this regard was the takeover transaction between Reliance Industries and TV 18 group of companies. In this case, Reliance Industries Limited by the way of a trust created, Independent Media Trust (IMT) subscribed to convertible securities i.e Zero Coupon Optionally Convertible Debentures (ZOCDS) in the target company. The real debate arose when CCI observed that in the Investment Agreement, holder of each ZOCD had the option to convert the ZOCDS into equity shares of the target companies with voting rights at any time during a period of ten years from the date of subscription. Since the conversion option contained in each ZOCD entitles the holder to receive equity shares of the target companies, the ZOCDS are shares within the meaning of sub-clause (i) of clause (v) of Section 2 of the Act and the subscription to ZOCDS amounts to acquisition of shares of the target companies.¹⁷

Further, in the event of conversion of all the ZOCDS, IMT would hold more than 99.99 percent of the fully diluted equity share capital of each of the target companies. Acquisition of such a right to convert the ZOCDS into equity shares, at any time before the expiry of ten years from the date of subscription, confers on IMT the ability to exercise decisive influence over the management and affairs of each of the target companies and the same amounts to control for the purposes of the Act.

Considering these two clauses the CCI held that in the instant case, the subscription to the ZOCDS amounts to acquisition of control over the target companies for the purposes of the Act. Since control over the target companies is being acquired by IMT, the subscription to ZOCDS in-

¹⁷ Paragraph 14 of the CCI order No. C-2012/03/47; dated May 28, 2012.

turn would also result in indirect acquisition of control over Network18 and TV18 as these companies would be under the control of the target companies.¹⁸

This order of the CCI brought the question of importance of control in analyzing the competitive effects of a merger , into the limelight .Thus the combination of two independent profit making bodies into one common ownership structure , turning into a dominant business entity in the market was highlighted and since then debates and discussion in the topic increased.

In the same year, CCI examined the same issue in the case of acquisition of shares in Multi Screen Media Private Limited. In this case, two separate entities of the Sony group purchased collective shareholding to the extent of 32.39 percent. Approving the proposed combination, CCI acknowledged that joint control over an enterprise could arise due to contractual agreements between its shareholders and held that the present acquisition would transfer from joint to sole control.¹⁹ CCI specifically identified four types of rights which may be construed to confer ‘control’ over an enterprise by the investor(s).

These include veto rights with respect to (a) engaging in a new business or opening new locations/offices in other cities; (b) appointment and termination of key managerial personnel (including material terms of their employment); and (c) material terms of employee benefit plans. At the same time, CCI was careful in distinguishing rights resulting in a situation of joint control from mere investment protection rights. It qualified its decision by saying that an assessment of control would depend on the facts and circumstances of each case, with due consideration to the statutory and contractual rights of the shareholders.²⁰

CCI further elaborated on the concept of ‘control’ in a more recent decision pursuant to which the acquisition of joint control by Century Tokyo Leasing Corporation over the leasing division of Tata Capital Financial Services Limited was approved. In its order, CCI observed that veto rights could create a situation of control over the assets and operations of an enterprise when they pertain to –

- (a) approval of the business plan;
- (b) approval of annual operating plan (including budget);
- (c) discontinuing any existing line or commencing a new line of business; and
- (d) appointment of key managerial personnel and their compensation.²¹

¹⁸ Paragraph 15 of the CCI order No. C-2012/03/47; dated May 28, 2012.

¹⁹ Paragraph 12 of CCI order on Combination Registration No. C-2012/06/63 dated August 9,2012

²⁰ Aparna Mehra and Rahul Satyan, *India – Concept of Control under Competition Act,2002* , April 2013 , available at <http://www.conventuslaw.com/india-concept-of-control-under-the-competition-act-2002/>

²¹ Combination Registration No. C-2012/09/78 dated October 4,2012

Thus, as seen from the above discussion, CCI has done well to identify the broad contours of what may constitute control in the context of acquisition of minority stake in a company, the ultimate analysis would vary from case to case. Investors and the industry, on the other hand, must keep in mind that the accrual of rights which go beyond the traditional minority protection rights, in lieu of an investment, may trigger a notification requirement to CCI, subject to asset & turnover thresholds.

DIFFERENCE IN TREATMENT OF ‘CONTROL’ UNDER TAKEOVER CODE AND COMPETITION ACT, 2002

There is grave difference between how ‘control’ has been defined under the takeover regulations in comparison to the Competition Act,2002. While the essence of the definitions are similar, the ultimate objective which the definition serves is totally different. The Takeover Code fundamentally deals with ‘control’ only in a public listed company. On the other hand, the Competition Act, 2002 deals with acquisition of ‘control’ of public listed companies as well as unlisted companies.

As already mentioned above, the key rationale behind implementation of the Competition Act, 2002 was to prohibit abuse of dominant position of merged companies and the consequent ‘appreciable adverse effect’ that it would have on the competition in the market. Thus, while determining whether a particular transaction would lead to gaining of ‘control’ with respect to the Competition Act, 2002 and through the eyes of the Competition Commission of India the most vital aspect which is considered is whether the level of control acquired is of such extent as would enable the acquirer to have the ability to consistently determine the competitive behavior of an enterprise.²²On the other hand, the notion of ‘control’ under the Takeover Code focuses on a completely different aspect of fair and equal treatment to all shareholders in an acquisition or merger transaction.²³ Thus, it aims to provide an easy exit opportunity to the shareholders in case a new person acquires the control of the Company.

Another distinguishing factor is the most controversial question of negative rights. Negative rights allow a person to prevent certain actions, but can rarely confer the ability to control the behavior of an enterprise , so as to affect market dynamics on an ongoing basis in order to cause an ‘appreciable adverse effect’ in a particular market.²⁴On the other hand in the precedents laid down in reference to Takeover Code, negative rights have a vital role to play as acquisition of such rights(in SEBI’s views) are said to acquire control of the company.

²² Nandish Vyas and Praniti Ishwar , *The viewpoint -The Anatomy of Control* , Bar and Bench ,July 12,2012 , available at http://barandbench.com/content/212/viewpoint-anatomy-control#.VEIO7_mSx5q

²³ Swati Bajaj , *Acquisition of Minority Shareholding and Merger Control in India*, Competition Commission of India Internship Report , August 2013

²⁴Nandish Vyas and Praniti Ishwar , *The viewpoint -The Anatomy of Control* , Bar and Bench ,July 12,2012 , available at http://barandbench.com/content/212/viewpoint-anatomy-control#.VEIO7_mSx5q

In addition, the manner in which the control is said to be acquired is very much dissimilar in both. Under Takeover Code, control triggers the obligation to make an open offer .No such obligation is present under the Competition Act, 2002.

CONCLUSION

Though CCI and SEBI have taken numerous efforts to clear up this air of ambiguity around control in merger transactions with their respective laws and the several precedents laid down. However every new judgment passed by CCI and SEBI has led to a new controversy and debate. All our hope is now pending on the cases which are sub-judice in the CCI and SEBI. The ratio laid in them is likely to bring about certainty with regard to ‘control’ in merger transactions Even though there is no settled law in this arena, considering the rate at which CCI and SEBI are working towards the same, there is hope that they would soon lay down express and precise law with respect to the same which would prevent any confusion in this regard in the future.

RIGHT TO EDUCATION: MERE ADDITION TO THE CONSTITUTION OR A HARBINGER OF CHANGE?

Ms. Bhawana Chouhan*

“Even education is considered as one of the element for good democratic country because an educated person may choose better representative, to form a government.”¹ Education is considered as a way towards successful life of an individual as well as of the country, because it is a tool through which person can live with dignity and can help himself to achieve his goals.²

Education account as fundamental right as well as human right, education is imperative for living life with dignity and life with dignity is fundamental for every human being. For protecting this right of individual, government has made law “THE RIGHT OF EDUCATION TO FREE AND COMPULSORY EDUCATION (RTE), 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.”³ “There is a provision that children of age 6 to 14 will get free education”⁴, and state is making laws and provisions regarding this act but they fail to implement these laws properly because one of the main thing which stops proper implementation of this act is CHILD LABOUR.

Child labour is deleterious for education of children because it stops many children from availing this right which is made for them only, so that they can make their life successful. Children who work as domestic help are not aware of anything, even they don’t know how to write or read. This thing act as violation of right to education because one side state is providing laws for education of these children and on other side children who working not getting any help from this act or provision.

Keywords: Education, Child Labour, Poverty, Ineffective Implementation of Policies, Development

HOW CHILD LABOUR ACT AS HURDLE FOR RIGHT TO EDUCATION ACT?

“Education Is Their Right, So Against Child Labour We Must Fight”⁵

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¹ Prof Krishna Pal Malik, *Right to elementary education*, p.30.

² Prof Krishna Pal Malik, *Right to elementary education*, p.30.

³ <http://mhrd.gov.in/rt>.

⁴ Article 21A, Constitution of India

⁵ Anshuman, <http://shoutslogans.com/child-labor-slogans-and-sayings>.

Children are the citizens of future; they are the key to the success and development of any country. For any country it is necessary that its human resource i.e. children are well developed and well educated so that they can work for the welfare economic growth of the country. Children are the most valuable resource of a country and they are exploited then the growth and development of whole country will be hampered. Therefore the protection of child rights is very important. For this government has made laws to protect, develop and educate children like Right to Education is one of the best example of the laws. But there are many things which act as hurdle in the development of children; one of the major hurdles is child labour. This paper deals how Right to Education Act works and how child labour violates this act.

EDUCATION AS A RIGHT TO CHILDREN

“Education is the basic element for success as it provides human dignity to a person and a way through which he can work for the development of himself and also for the development of the country.”⁶ “The farmers of the constitution after realizing the importance of the education added Article 45 as one of the directive principle of the state policy which imposed duty on state to provide free education to the children until they complete the age of 14 years.”⁷ This provision failed to serve its purpose and was not able to achieve its requisite objective. Later, “parliament has made the fundamental right to education, free and compulsory for the children of the age 6 to 14 years by the 86th amendment act 2002 article 21A and clause (k) in Article 51A with the substitution of Article 45 of the constitution.”⁸ The benefit of inserting the Article 21 A was that earlier the provision of free education was not enforceable because of directive principle and now it is enforceable as it comes under fundamental rights. “The Hon’ble Supreme Court in a PIL issued notice to all state and union territories for the enforcement of the right to education act by abolishing the child labour in all the forms in the age group of the 6 to 14 years. The bench expressed the concern for the continuance of the child labour and said that “They have to be in school. It is the duty of the state to provide them schools. They said that after this provision of the education, there could not be child labours.”⁹

CHILD LABOUR- EVIL PRACTISE

Child labour, the social evil still exist in the society. State has made the laws regarding child labour like child labour (prohibition and regulation) Act, 1986. “There are many acts which prohibit the employment of children below 14 years and 15 years in certain specified employments.”¹⁰ This act defines everything regarding the working of the child; there is penalty for employing the child below age of the 14 years like in one case “M.C. Mehta v. State of Tamil Nadu, apex court held that offending employer has to pay compensation of Rs

⁶ Prof Krishna Pal Malik, *Right to elementary education*, Allahabad Law Agency, second edition, 2012, p.30.

⁷ Supra Note 2

⁸ Prof. Krishna Pal Malik, *Right to Elementary Education*, Allahabad Law Agency, second edition, 2012, p.38.

⁹ Supra Note 4

¹⁰ V.K.Dewan, *Child Labour A Socio-Legal Perspective*, Pentagon Press, First Indian Edition, 2009, p.582.

20,000/- for every child employed.”¹¹ “In this case M.C. Mehta filed the petition for the children as their fundamental rights were violating, in Tamil Nadu there is town sivakasi is famous for the factories of match and fireworks employing 27,338 work men and of whom 2941 were children.”¹² Childlabour is harmful not only for the children but for the country too because child labour impedes the development of the children, mental and physical growth. Children are future of a country because they will represent the country further and will work for development of a country that's why childlabour is dangerous for country. When the child needs the nourishment, protection, education and time for the growth we made them work in factories, household, agriculture etc.

REASONS FOR EXISTANCE OF CHILD LABOUR

“Child labourers are not only exploited mentally or physically but are completely deprived of the opportunities of the education”¹³ because of the child labour, children are not able to use the right to education act, which provide them free and compulsory education. There may be many reason of working of any child; one of the major reasons is poverty. Parents let their children to work or force them to work is because of their financial condition, they don't have enough money to eat, that's why they forced their children to work in order to support their income. “Parents are ignorant, illiterate and extremely poor or too over burdened with debts even to dream of such a thing as the rights of the child, they only think about the children capacity to earn.”¹⁴ “Many enjoy of the inhabitants in rural areas are landless, and not conscious enough towards proper development of their children and thus they do not hesitate to send their children in labour market.”¹⁵ And children are made to work in factories or in any household world then how will they enjoy their right of education and how they will develop themselves. If the condition of children in country will remain same then there is question mark on the future of the country” Even some time lethargic attitude and lack of awareness of the parents and guardians are also cause of child labour in our society and due to educational backwardness and ignorance, the parents do not send their children in school.”¹⁶ Such attitude of parents destroys the future and life of children. To deal with this situation state has to make programmes for awareness of parents especially in rural areas, so that they can know the importance of education.

INEFFECTIVE IMPLEMANTATIONS OF POLICIES - HURDLE IN DEVELOPMENT OF CHILDREN

For the failure of the right to education act not only child labour is responsible but also the state because making or drafting any law does not suffice the purpose, but proper implementation of law does. No doubt state has made many laws and even schemes of the education of the children but question is that whether they are properly implemented, whether

¹¹ Ibid at 585

¹² <http://www.rishabhdara.com/sc/view.php?case=13526>.

¹³ Usha Sharma, Child Labour in India, Mittal Publication, 1st Edition, 2006, p.140

¹⁴ Usha Sharma, Child Labour in India, Mittal Publication, first edition, 2006,p141 -142.

¹⁵ M.P. Shrivastav,Child Labour Laws In India, Law Publishing House, first edition,2006,pg.31.

¹⁶ M .P. Shrivastav,Child Labour Laws In India, Law Publishing House, first edition,2006,pg.33.

these schemes were successful. In India education comes under the concurrent list where state and centre government can make the laws regarding the education. "The centre and state has made many attractive schemes to send the poor children to the school like SarvaShikshaAbhiyan, Mid-day Meal, dress distribution etc. but all such effort made little efforts could make only little improvement. In such situation it is said that defect is within system, implementation and observation of schemes etc. to make this act successful it is necessary that all should play positive role without any greed at political, professional or at academic level."¹⁷ It is important that state should come with the effective policies and proper system to implement these policies. Role of state not ends after making the law, their role start from there like state made the law for the education but they were not able to implement the laws properly because of which still children are out of the reach of this provision of free and compulsory education. One of the major problem is implementation of laws, "the implementation of laws left with the interested local bodies therefore excluding the children belonging to the areas where local bodies are least interested."¹⁸ If this type of work is done by the state then how any law will become successful, if implementation of provision of free and compulsory education is based on the choices of the officers of the machinery whether they want to work for this or not, then there are very few chances that every children will get the education or the benefit of this precious provision. State should check whether the laws and provisions which are made to provide to education are implemented properly or not. There is a problem that schools lacks infrastructure, poor quality of education and even teachers are not available many times, these are the services which is required to provide the education but state gives no attention to these problems. These are the deficit of not implementing the policies properly because services which were to be provided for attracting the children for attending school rather the condition of the school de-motivates the parents to send their children to the school. If there is no teacher in a school then how can a school run, what type of education children will get. These things show how laws are implemented.

If state has to implement the right to education act properly then state has to do something with child labour, as well as has to make attractive schemes so that poor parents can send their children to the schools. State has to make policies very carefully such that it doesn't affect the education in any case. There is one example of wrong policy of Rajasthan government which led to the drop out of many students. This policy was regarding the merger of the government schools due to which many students were forced to leave schools. There were many parents who refused to send their children to the school because of the high fee of the new school or due to the distance of school from their homes. When government of Rajasthan made this policy they never considered or thought that how this policy will affect the children and their career. This policy resulted in drop out of many students from schools and the problem is that these children belongs to poor families and because of drop out parents may send their children for work as they need money for their survival and they will get one more person who can earn. Like there is one more example of law which is not implemented properly and because of which this law promotes child labour. "It may be noticed that the adult workers are not getting the living or even the minimum wages fixed

¹⁷ Prof Krishna Pal Malik, *Right to elementary education*, Allahabad Law Agency, second edition, 2012, p.55.

¹⁸ Usha Sharma, *Child Labour in India*, Mittal Publication, first edition, 2006 , p. 151.

under Minimum Wages Ac, 1948 due to lethargic attitude of enforcing agency compelling the poor parents to send their children in labour market to supplement their income instead of sending them to schools. So this is how this law also affected the future of children.

If government will continue to make this type of policies which indirectly or directly will affect the education of children then state is playing with the future of the children which in long run is harmful to our country. While making policies government should consider other things also so that policies which are made would not affect society.

SOME SCHEMES MADE BY GOVERNMENT FOR CHILDREN'S WELFARE

“Children of the nation are supremely important assets. Their nature and solicitude are our responsibility, children’s programme should find a prominent part in our national plans for the development of the human resources, so that our children grow up to become the robust citizens, physically fit, mentally alert, and morally healthy; endowed with the skills and motivations needed by the society.”¹⁹ There are many schemes which are made by the government in order to eradicate the illiteracy problem, there are also policies which are made for children’s education like SarvaShikshaAbhiyan, “this policy is made under the 86th amendment act 2002, it was programme of government of India in collaboration with the state government for the achieving the goal of the Universalization of the Elementary Education. Under this policy government has to provide new schools in the areas where there are no schools and all the other facilities which are needed for the education of the children.”²⁰ Another scheme is Mid-Day Meal, “One of the most popular scheme adopted to attract the students is the mid-day meal. This scheme was launched in 1995 to attract students, to retain the attendance in the school”²¹ This policy is effective because there are parents who are not able to afford the food so they send their children to the schools in order that they will get food to eat. But there is problem with is schemes also because of officers of government who are responsible for the implementation of this policy. Officer’s personal interest, greed and negligence come in role while performing their duty. There are many example of failure of this scheme like one example is of “Bihar Mid- Meal Poisoning incident, in which due to the negligence of the headmistress of the school, 22 students died. This primary school where children of age group 6 to 12 were studying is in the saran district of the Bihar. Students of the school complained that there was lizard in the food and due to which children fell ill and even cook also fell ill. Even it was reported that cook refused to use that container but head mistress Meena Devi made used of that container and because of one mistake of that teacher 22 children died and many fell ill.”²² This type of problems make policies effete and because of this parents lose their believe on the policies of the government.

¹⁹ Prof Krishna Pal Malik, *Right to elementary education*, Allahabad Law Agency, second edition, 2012, p.166.

²⁰ Ibid p 169.

²¹ Ibid 15.

²² <http://www.hindustantimes.com/india-news/served-death-bihar-mid-day-meal-tragedy-kills-22-kids/article1-1093700.aspx>.

Like this there are many examples of the schemes or policies made by the government but one thing we should consider is that why government need so many policies for the same problem, why they always has to come with new program to eradicate the same problem. There is example of one policy for which “the government made a committee for to make policy more effective with the Right To Education Act and the policy was SarvaShikshaAbhiyan.”²³ If state is so serious about this thing then they should make such a policy which has no lacuna and proper implementation at higher as well as lower level also, there should be no option for the officers whether they are interested or not to perform their duties, state should impose the penalties to the officers who are not performing their duties properly. This is the same problem with the child labour laws which are made with high objectives but never implemented properly; laws protect the child from this evil but never made the laws for their rehabilitation of these children.

CONCLUSION

Right to education Act is one of the most important laws which we need in our country for development and for successful future. This act is a way through which children can avail the facility of education and can achieve success in life. But this right is not easily available to children; child labour is one of major hurdle which stops the children to avail this right. Children who work whether in industries, household or agriculture etc. are not able to study. As poor children are forced to work for their survival and to support their parents earning so they are not able to avail this right. Even many children are not even aware that such kind of right is available to them or not and also their parents are not aware about this act. Poverty and lack awareness of parents is one of reasons which cause child labour.

Also working of child is also helpful for the employers because they are cheap labour and can easily adjusted to environment and are quick learner so these people support child labour and tries to get children as labour by giving money their parents. So because of child labour right to education fails to achieve its goals. State has made many laws to curb this evil practice but again there is problem of ineffective implementation of policies. Policies and laws made by state are great but the way these policies are implemented is wrong.” Effective implementation is not being done due to various known and unknown reasons specially due to indifferent attitudes of enforcing agencies, resulting increasing tendency to employ child labour without any fear and with utter disregard to the statutory provisions as well as to constitution mandate”²⁴. Even right to education act is one of good law but the implementation is not good like services which is provided by the government for the schools is not good (lack of infrastructure or good teachers). Sometimes ineffective implementation of other policies also affected the child labour and ultimately right of education like Rajasthan Merger Policy of schools.

Right to education can act well if child labour problem can be solved, there are many reasons which causes child labour, if we are able to remove these reasons which cause child labour

²³ Prof Krishna Pal Malik, *Right to elementary education*, Allahabad Law Agency, second edition, 2012, p.174.

²⁴ M.P. Shrivastav, *Child Labour Laws In India*, Law Publishing house, First edition, 2006, pg. 35

then we can also hope the successful life and good future of children. By solving the problem of child labour we can save our country's future and can work for the development of children. And when the agencies who act on behalf of state would work properly and implements the policies effectively then chances to get success will increase. If all these things will be corrected then the Right to Education Act will be the successful law which achieved all its goals. If these problems are solved then all children can avail this right and can have all the chances to make their life successful. Even exploitation of children would stop by solving the child labour problem. If the child labour is solved then our country can hope it can achieve best things through caliber of children.

FDI IN INSURANCE SECTOR: IRDA REFORM RUSH

*Etisha Khaneja**

This paper attempts to study the FDI in Insurance Sector in India focusing on the trend and pattern of FDI in insurance Sector, contribution of global partners, role played by IRDA in regulatory policies that have made a huge impact on the dynamics of this industry with special reference to the Insurance bill of 2014 that has seen the light of the day. To conclude the paper enlists the future prospects and suggestions with an analytical bent of mind as well as quantitative interpretation of the subject.

INTRODUCTION- INSURANCE INDUSTRY IN INDIA

Provision of adequate security to life and property is a fundamental duty of civilized society. The field of Insurance Law is a subject of immense public importance. Insurance offers security to individuals and transactions. It provides indemnification against losses arising from the happening of some events. It is a commercialized form of spreading risks. According to the Oxford Dictionary Insurance is defined as “An arrangement by which a company or the state undertakes to provide a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a specified premium”.

The Insurance business is broadly divided into life, health, and non-life insurance. It not only provides an opportunity to develop a sense of independence security and freedom from anxiety but also stimulates expansion of trade and commerce. It is thus the backbone of the risk management system of any nation. It influences growth and development of a nation in myriad ways like protection, security and even as a means of tax saving instrument. Therefore, an efficient and competitive insurance industry is important to empower a nation in the true sense of the term.

The insurance sector in India has come a full circle of 360 degrees from being an open competition market before Independence to Nationalisation and then back to Liberalisation. The evolution of the insurance industry is known to all and the metamorphosis in this sector is noteworthy.

FDI AND FDI IN INSURANCE

Foreign Direct Investment is a measure of foreign ownership of productive assets and can be used a measure of growing economic globalisation. India is regarded as one of the most preferred destination owing to availability of minerals, raw materials, cheap and skilled labour and a large English speaking population¹. Foreign Direct Investments are “usually preferred over other forms of external finance because they are non-debt creating, non-volatile and their returns depend on the performance of the projects financed by the investors.

* IVth BSL.LLB

¹ ASCL-Law relating to Foreign Direct Investment, published in 2009. www.als.edu.in

FDI also facilitates international trade and transfer of knowledge, skills and technology".² There is enough evidence to show that FDI in Insurance sector is and has been a hot bed of controversy in India, thanks to the regulatory reforms and political scenario.

In 1993, the Union Government set up a committee under the Chairmanship of R.N. Malhotra, former Governor of RBI, to propose recommendations for reforms in the Insurance Sector and thus in 1999 the Insurance Regulatory and Development Authority was constituted under the IRDA Act as the apex statutory insurance regulatory body to oversee all insurance-related activity. The IRDA in 2000 allowed foreign equity stake in domestic private Sector Insurance Companies to a maximum of 26 percent of the total paid-up capital.³

The Government constituted a special agency to deal with foreign investments in India known as Foreign Investment Promotion Board whose main objective was to encourage FDI in India.

Today, India's insurance sector is one of the largest in the world in terms of volumes of money involved with 52 companies in this sector, of which 28 are in non-life insurance business and 24 in life insurance. India's Life insurance sector is the biggest in the world with about 36 crore policies and is expected to increase at a compound annual growth rate (CAGR) of 12-15 per cent over the next five years.⁴

INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY (IRDA)

For India to reach its rightful place as a developed nation, it must financially empower its entire population. Insurance industry is an integral part of the financial system of a country thus influencing economic development and growth. Insurance is the one of a country's risk management that covers elements of life, disability and health. The inference is obvious. The role for IRDA is to protect the interests of holders of insurance policies, to regulate, promote and ensure orderly growth of the insurance industry and for matters connected therewith or incidental thereto.

The IRDA has done a very good job of ensuring a smooth and steady transition from a single player market to a competitive one. The process of reforms initiated some years ago has some achievements to its credit. It has enhanced competition, provided a choice to the customers, triggered innovative ways and means to carry out insurance activities, improved the efficiency level of the Industry, increased the coverage of insurance in terms of density and penetration, obligated the insurers to provide for the needs of social and rural sectors and

² Planning Commission of India,2002. Report of the Steering Group on Foreign Direct Investment: Foreign Investment India (Government Report). p 11, New Delhi: Planning Commission, Government of India. Accessed from http://planningcommission.nic.in/aboutus/committee/strgrp/stgp_fdi.pdf on 5th September,2008.

³ World Bank Economic Review, 2000

⁴ Indian Brand Equity Foundation-<http://www.ibef.org/industry/insurance-sector-india.aspx>

increased awareness about the necessity of insurance, to name a few.⁵ The following are the key changes in the regulatory environment that have substantially impacted the industry dynamics.

- a) 1999 → IRDA bill passed.

Effect -Foreign Collaboration and formation of an independent Regulator.

- b) 2001→IRDA issued Third party Administrator Regulations (TPAs); Foreign Players allowed to enter the Indian market up to a limit of 26 per cent.

Effect- Entry of TPAs focussed on servicing health insurance business;

2002→ IRDA Insurance Brokers and Licensing of Insurance & Corporate Agents.

Effect→ Focus on insurance distribution through corporate intermediaries.

- c) 2006→Entry of Standalone Health Insurance Players.

Effect- Served as a means to cater to the health needs of the customers better.

- d) 2007→ Creation of Indian Motor Third Party Insurance Pool \$ Price Detariffication.

- e) 2011→Scheme of Amalgamation (Mergers & Acquisitions) and Transfer of General Insurance Business

Effect- Enabled consolidation, inorganic transactions in the industry.

- f) 2012→ Introduction of Declined risk, Pool, TP premium increase.

- g) 2013→ Licensing of banks as Insurance Brokers.

Effect- Help reduce operational costs of insurance companies, due to marginal incremental expenditure by companies in setting up distribution chain. Also, spread insurance to uncovered areas say rural areas owing to entire bank branches network making the process of buying the life insurance product a simple process.

- h) 2014- IRDA increased FDI hike from 26% to 49%.

Effect- Huge capital investment from global partners would help expansion in several segments of the sector, deepened insurance penetration and empowering the customers also creating an environment for investment by the average middle class Indian &otherwise.

⁵ COLLOQUIUM ‘Insurance Industry in India: Structure, Performance, and Future Challenges’, Vikalpa, Volume 30, No 3, July, September 2005, pp. 93-119.

CONTRIBUTION OF GLOBAL PARTNERS

The sheer size of the Indian market has been the major attraction for foreign players. Most of the insurance companies in India have been formed by forming joint ventures with global partners. Whether it is the initiation of business or the development of procedures of regulations Indian Insurers owe a lot to the foreign partners.

Since 2001 there has been increase in penetration (from 2.3 % in FY01 to 3.4% in FY12), increased coverage of lives, substantial growth and increased competitiveness of the market (from four private players in FY01 to 23 private players in FY12).⁶

- a) The entry of private players has helped educate the customers on the need for adequate insurance coverage in terms of the potential risks they are exposed to. Another aspect would be the right distribution model to address the different underserved segments such as senior citizens and NRIs which is one of the levers for increasing insurance penetration.
- b) Enhanced competition.⁷
- c) There is enough evidence from developed markets that internet penetration and usage has a positive correlation with performance and activities of insurance companies at various levels- lower customer acquisition costs, improved access to information, product innovation that cater to the needs of the customers and enhance convenience.⁸
Foreign collaboration has brought in technical expertise that has comforted the internet users to conduct financial transactions online on one hand and facilitated developing and servicing of the market on the other. For example emails, ATMs, underwriting, fund management and actuary. This is indicative of the value which IT has added to this sector.
- d) Since insurance is a push product, consultation selling continues to dominate. Traditional agents were supplemented by other channels including the Internet and bank branches. These developments were instrumental in propelling business growth, in real terms, of 19% in life premiums and 11.1% in non-life premiums between 1999 and 2003.⁹
- e) Bancassurance Partnerships is a concept of French origin referring to selling of Insurance through a Bank's established distribution channels and was introduced in India by the global partners. It is expected to drive near term growth and holds a promise for the future.

Capital for expansion, wider scope for growth, job opportunities, infrastructure facilities, new risk management practices are the indirect benefits which foreign collaboration has given to India.

⁶ Handbook on Indian Insurance Statistics 2011-2012 published by IRDA.

⁷ Published in The Economic Times on November 17, 2014

http://articles.economictimes.indiatimes.com/2014-11-17/news/56174804_1_health-insurance-insurance-repository-life-insurance-corporation

⁸ KPMG: 'Insurance Industry-Road Ahead, Path for sustainable growth momentum and increased profitability', www.kpmg.com/in

⁹ Handbook on Indian Insurance Statistics published by IRDA.

IRDA REFORM RUSH

After a decade of strong growth, the Indian Insurance Industry was facing severe headwinds, grappling with slow growth, rising costs, deteriorating distribution and structure and stalled reforms. Faced with a persistent high inflation over the last few years and in turn, a high interest rate regime the economy seems to have lost some steam.¹⁰ In 2010, the Insurance penetration was 4.4% which further dipped to 3.17% in 2012-2013.¹¹ As of FY 13, the total market size of this sector was US\$ 66.4 billion and is expected to touch US\$ 350-400 billion by 2020.

After a long lull in the previous Government in power this time the new government is gung-ho in flooding the economy with path-breaking reforms that has revitalised this sector in terms of growth. Stakeholders, IRDA, and the government are making concrete efforts to help the sector overcome this catharsis:

- Relaxation of investment norms for insurance companies;
- Release more funds for the infrastructure sector;
- Taxation of life insurance policies;
- Revival of Unit Linked Insurance products;
- Faster regulatory approval for new products;
- Tax on pension Products;
- Open architecture on Bancassurance; and
- More relaxed licensing norms.¹²

New regulations and mature amendments in the recent past by IRDA and RBI have helped give maximum benefit to the consumers.

- a) E-policy has saved policy holders from preserving the physical copies of their insurance policies and hence reducing the cost of the insurers.
- b) From January 2014, only products that conform to the new guidelines announced by IRDA in the first half of 2013 have been allowed for sale leading the insurers to re-file their products for approval.
- c) IRDA health insurance regulations have been tabled to improve the service standards with a view to enhance customer focus.
- d) The IRDA has come up with a long-term motor third party insurance policy for two-wheelers with a three-year term. As per the regulatory body, the total premium for the third party coverage would be three times the yearly third-party premium for two-wheelers as decided by the Regulator.
- e) Export Credit Guarantee Corporation of India Ltd has signed a /Memorandum of Understanding (MoU) on cooperation with the Export Credit Insurance Agencies (ECA) of BRICS countries.¹³

¹⁰ Ernst & Young and CII, "Insurance Industry- Challenges, reforms and realignment".

¹¹ IRDA Annual Reports F.Y. 2000 to F.Y. 2013.

¹² Published on Moneycontrol.com, Available at:

http://www.moneycontrol.com/master_your_money/stocks_news_consumption.php?cat=insurance&autono=761571

- f) Owing to the Government's push for various financial sector reforms as part of larger efforts to bolster the country's economic growth, the Competition Commission of India in order to keep a tab on the possible unfair practices had initiated a study of the functional aspects of the country's growing financial sector, including banking and insurance segments.¹⁴
- g) The proposal to hike FDI in insurance was spending since 2008, introduced by the previous government but dint see the light of the day owing to opposition from several quarters. FM Arun Jaitley, as part of the gung-ho government proposed increasing the FDI limit to 49% from 26% in the Insurance sector. To this effect, in July 2014, the Cabinet Committee on Economic affairs (CCEA) approved 49% FDI in insurance with a view to revamp the insurance sector.
- h) "LIC has gained from competition, was challenged to innovate on products, bring in more technology, be more cost effective", says Usha Sangwan, MD, LIC.¹⁵
The insurers thus seek to increase their respective market shares and have started to be more service-oriented, cater to the needs with greater flexibility, offering practical solutions, making informed decisions in order to make long-term associations.
- i) "For long, the insurance sector has been waiting for adequate funds for its expansion. Increasing the FDI cap in this sector will definitely give it the much needed fillip," says Rajeev Saxena, Insurance sector expert, Mazars. "As the sector expands, it will also lead to job creation in the sector."¹⁶ More players would also mean strengthening the existing players, besides creating more jobs.
- j) If the FDI limit is raised in the insurance sector, it could result in inflows of Rs. 40,000 crore to Rs. 60,000 crore over time, says Ajay Bagga, Chairman of OPC Asset Solutions.¹⁷.
- k) The higher FDI limit would also be beneficial for the pension sector. The Pension Fund Regulatory Development Authority (PFRDA) Bill ties the FDI limit in pension sector to that of the insurance sector. If the pension bill is also passed, then the FDI limit could be at 49%. This means 49% ownership by foreign companies in domestic businesses selling pension plans.
- l) Typically investors invest in insurance and pension products on a long-term basis and this money could help fund infrastructure projects, which require long-term funding. The Reserve bank of India had recently allowed banks to raise 7-year bonds to fund infrastructure projects.¹⁸

¹³ Indian Brand Equity Foundation- <http://www.ibef.org/industry/insurance-sector-india.aspx>

¹⁴ Published in The Hindu on September 29, 2013

<http://www.thehindubusinessline.com/industry-and-economy/banking/banking-insurance-sectors-come-under-competition-watchdogs-scrutiny/article5181992.ece>,

¹⁵ *Supra* note 7.

¹⁶ Published on Moneycontrol.com on November 18, 2014

http://www.moneycontrol.com/news/features/how-increasing-fdi-cap-will-benefitinsurance-sector_1231408.html?utm_source=ref_article

¹⁷ Published in NDTV on July 24,2014. <http://profit.ndtv.com/news/cheat-sheet/article-how-higher-insurance-fdi-limit-could-benefit-you-593104>.

¹⁸ *Supra* note 17.

m) Life Insurance Penetration in India is about 3.2% of Gross Domestic Product in terms of total premiums underwritten in a year, much lower than more than 10 percent in Japan and nearly 6% in Australia. Higher FDI limit could help in deepening the Insurance Penetration.¹⁹

n) Help spreading risk among the Insurers.

The aspect which needs special mention is that the bill says that the management and controlling power will stay with the Indian Partner company only. Thus, eliminating the risk of global partners getting control over the sector.

The Insurance Business is a capital-intensive industry and India is investment starved. Higher FDI cap is a welcome and a mature move from the Government. Additional Capital will lead to reduced cost of capital along with improved operating efficiency which in turn will result in better services to the consumer. Strengthening solvency.

SUGGESTIONS AND CONCLUSION

A key catalyst in the Indian insurance market growth has been the renewed surge of green-flagging reforms by IRDA since 2000. With this policy change, there have not only been structural changes but also changes in basic and working principles. Notwithstanding the metamorphosis, much needs to be done for future growth & development. Government's renewed surge of consumer-friendly reforms in the financial sector send a strong message to the global economy about the growth aspects of India's economic growth and owing to country's demography and population there is untapped potential which this industry must live up to.

The balance between cost-effective distribution and product innovation is an important lever for the growth of the industry led with the regulatory changes which will provide the much needed impetus.

Formulation and implementation of guidelines and regulations, proving for adequate safeguards, monitoring and ensuring compliance will help a long way in sustainable growth.

Understanding the changing perspective of the consumers, offering practical solutions and efficient quality service suited to the customer's over all financial requirements will result in customer satisfaction, customer retention, customer acquisition, employee retention and cost reduction.

Bancassurance that has acted as a 'Change Catalyst' so far with mixed reviews and holds promise for the future requires nurturing of partnerships between the Insurance Companies and the banks as well as understanding the mechanism better.

Insurance is a long-gestation business and this sector builds its market on goodwill and access on distribution network Insurers must find new ways and methods to deliver its products to its customers with the aim of increasing their respective market shares and brand value.

¹⁹ IRDA Annual Reports.

Developments in the health insurance infrastructure have been lately introduced and must continue for better health service standards to the Indian population.

The industry workers and the regulator-IRDA must work in tandem and strive to take this industry to its next level of evolution impeding all odds and with such efforts being materialised the future of Indian Insurance Sector looks good.

INTELLECTUAL PROPERTY RIGHTS

*Aastha Singhal**

"Your ideas are your property and you have every right to benefit from it"

It is this 200gm brain that has given birth to variety of material objects ranging from a nail cutter to a submarine. There is no end to this. It is this agricultural land of mind that has yielded in numerous unthinkable, incredible and unimaginable material products. Therefore to allow the person to enjoy the benefits of its creation and equip him with legal protection a right is attached with it known as Intellectual property rights. Intellectual properties provide the innovator ownership over that property and prevent anybody else to have access to his innovation or have access with reasonable conditions imposed on them. With globalisation knocking at the door of India the intellectual property rights gained worldwide recognition. It acts as a catalyst to steer up economic development. This paper focuses on tools of IPR and protection given to them. Promotion of intellectual property increases the human capacity to create and innovate. Innovation is the foundation of IPR which enables an economy to stand in global competitive market. The author also highlights the role of WIPO in promotion of intellectual property rights universally.

INTRODUCTION

The first step is to know what intellectual property means creation of mind it may be an invention, literary work or artistic work and the term Intellectual property right means the legal rights granted with intent to guard the creations of the intellect.

The importance of intellectual property rights was first recognised in *Paris convention for the protection of Industrial property (1883)*. It is administered by World Intellectual Property Organisation (WIPO).

Another convention that recognised IPR was Berne Convention Adopted in 1886, the convention sets out to harmonize copyright protection at an international level India became a member in 1928 The Berne Convention requires member countries to offer the same level of copyright protection to authors from other member countries that it provides to its own nationals Sets out a common framework of protection, and specifies minimum protection levels required All works except photographic and cinematographic shall be copyrighted for at least 50 years after the author's death

THE LEGAL BLANKCET

The Trade and Merchandise Marks Act, 1958 ("TM Act, 1958") has been replaced by the Trade Marks Act, 1999, The Copyright Act, 1957 has been amended to guard computer

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programs as “literary work”; The Patent Act, 1970 has been amended by the Amendment Acts of 1999 and 2002 and 2005. The Designs Act of 1911 has been entirely replaced by the Designs Act of 2000.

The following laws have been enacted to shield newly recognized species of intellectual property in India:

The Geographical Indications of Goods (Registration and protection) Act, 1999;

- The Semiconductor Integrated Circuits Layout-Design Act, 2000;
- The Protection of Plants & Varieties and Farmers Rights Act, 2001; and
- The Biological Diversity Act, 2002

TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

It is the ideas and knowledge that have become a major part of the trade. Explaining this many of the movies have shined on the screen and have proved a major success not only because of the presence of a super Hollywood or bollywood actor but with the essential presence of innovation, creativity and the core concept that took the movie to the next level. Films, music books computer software are bought and sold because of the information and creativity they contain, not usually the plastic, metal or paper used to make them.

Creators are given the rights to prevent others from using their inventions, designs or other creations and to use that right to negotiate payment in return for others using them. These are INTELLECTUAL PROPERTY RIGHTS.

The extent of protection and enforcement of these rights varied widely round the world and as IPR became more important in trade these difference became a source of tension in international economic relations. New internationally agreed trade rules for IPR were seen as a way to introduce more order and predictability and for disputed to be settled systematically.

The world trade organisation’s TRIPS agreement is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the Intellectual property of fellow WTO members. In doing so it strikes a balance between the long term benefits and short term costs to society¹. Society benefits in the long term when intellectual property protection encourages creation and invention, especially when the period of protection expires and the creations and the inventions enter the public domain.

TYPES OF IPR COVERED BY TRIPS AGREEMENT

¹ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

**a. Patent**

Generally speaking, Patent is a monopoly grant and it enables the inventor to control the output and within the limits set by demand, the price of the patented products. Underlying economic and commercial justification for the patent system is that it acts as a stimulus to investment in the Industrial innovation. Innovative technology leads to the maintenance and increase in nations stock of valuable, tradable and industrial assets

It provides safeguard for the invention to the owner of the patent. The protection is granted for a limited period, i.e. 20 years. Patent protection means that the invention cannot be commercially made, used, distributed or sold without the patent owner's consent. A patent owner has the right to decide who may -or may not - use the patented invention for the period in which the invention is protected. The patent owner may give permission to, or license, other parties to use the invention on mutually agreed terms. The owner may also sell the right to the invention to someone else, who will then become the new owner of the patent. Once a patent expires, the protection ends, and an invention enters the public domain, that is, the owner no longer holds exclusive rights to the invention, which becomes available to commercial exploitation by others². All patent owners are gratified, in return for patent protection, to publicly unveil information on their invention in order to enhance the total body of technical knowledge in the whole world.

b. Trademarks:

A Trade Mark distinguishes the goods of one manufacturer or trader from similar goods of others and therefore, it seeks to protect the interest of the consumer as well as the trader. A trade mark may consist of a device depicting the picture of animals, human beings etc., words, letters, numerals, signatures or any combination thereof. Since a trade mark indicates relationship in the course of trade, between trader and goods, it serves as a useful medium of advertisement for the goods and their quality.

² <http://www.ipriindia.org/patent.html>

The current law of Trade Marks contained in the Trade Marks Act, 1999 is in harmony with two major international treaties on the subject, namely The Paris Convention for Protection of Industrial Property and TRIPS Agreement to both of which India is a signatory. The Trade Marks Act, 1999 and the Trade Marks Rules, 2002 govern the law relating to Trade Marks in India. Object of trademark law is to permit an enterprise by registering its trademark to obtain an exclusive right to use, share, or assign a mark. Closely related to trademarks are service marks which distinguish the services of an enterprise from the services of other enterprise³.

It helps customers identify and purchase a product or service for the reason that its unique trademark, meets their needs of required nature and quality. A registered trademark is *prima facie* evidence of its ownership giving statutory right to the owner. Trademark rights may be held in perpetuity. The preliminary term of registration is for 10 years; after that it may be renewed from time to time.

The Coca-Cola Company vs. Bisleri International Pvt. Ltd⁴

In this case Delhi High Court held that if the threat of infringement exists, then this court would certainly have jurisdiction to entertain the suit.

It was also held that the exporting of goods from a country is to be considered as sale within the country from where the goods are exported and the same amounts to infringement of trade mark.

In the present matter, the defendant, by a master agreement, had sold and assigned the trade mark MAAZA including formulation rights, know-how, intellectual property rights, goodwill etc for India only with respect to a mango fruit drink known as MAAZA.

In 2008, the defendant filed an application for registration of the trade mark MAAZA in Turkey and started exporting fruit drink under the trade mark MAAZA. The defendant sent a legal notice repudiating the agreement between the plaintiff and the defendant, leading to the present case. The plaintiff, the Coca Cola Company also claimed permanent injunction and damages for infringement of trade mark and passing off.

It was held by the court that the intention to use the trade mark besides direct or indirect use of the trade mark was sufficient to give jurisdiction to the court to decide on the issue. The court finally granted an interim injunction against the defendant (Bisleri) from using the trade mark MAAZA in India as well as for export market, which was held to be infringement of trade mark.

Functions performed by trademark

- It identifies the goods / or services and its origin.
- It guarantees its unchanged quality.

³ http://iprsi.blogspot.in/2012_05_01_archive.html

⁴ The Coca-Cola Company Vs. Bisleri International Pvt. Ltd Manu/DE/2698/2009

- It advertises the goods/services.
- It creates an image for the goods/ services

c. Copyrights and related rights:

Copyright is a legal term which describes rights given to its creators for their literary and artistic works. The various kinds of works covered by copyright take account of: literary works such as reference works, novels, poems, newspapers, plays, and computer programs; databases like musical compositions, films, and choreography; artistic works for instance , photographs, paintings, drawings and sculpture; architecture; and maps and technical drawings advertisements. Copyright subsists in a work by virtue of creation; consequently it's not obligatory to register. However, a registered copyright provides evidence that copyright subsists in the work & creator is the owner of the work. These Creators often sell the rights to their creation to individuals or companies who are best able to market their works in return for payment. The payments received are often made dependent on the actual use of the work, and are then referred to as royalties. These economic rights have a limited time period, (except photographs) is for life of author plus sixty years after creator's death⁵.

The Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. TRIPS agreement expressly specifies that, copyright protects the expressions and not the ideas. There is no copyright protection for ideas, procedures, and methods of operation or mathematical concepts as such.

Horlicks Limited and Ors. v. Kartick Sadhukan This case relates to the principle of infringement of trademark and copyright laws. HORLICKS Limited is a foreign company engaged in manufacturing of a wide range of food products,which includes foods for infants, children and invalids, malted milk, biscuits, toffees, etc. under the trademark HORLICKS, of which it claims to be the original registered owner. The trademark 'HORLICKS' was registered in India in relation to foods and milks for infants, children as early as 1943, for biscuits in 1961 and in relation to toffees in 1966. H is also the orginal owner of copyright of HORLICKS label and has exclusive right to reproduce and alter the character of the HORLICKS label in any material form as it deems fit.

Kartick Confectionery started manufacturing a replica of product, specifically, toffees under the trademark 'HORLIKS' violating the trademark rights enjoyed by 'HORLICKS'. Kartick also reproduced the label of Horlicks company in so doing amounting to the infringement of the copyright of its original owner i.e. Horlicks company.

Horlicks company contended that since the consumers of the product under the trademark HORLICKS made products for infants, children and adults and hence it was duty-bound to make sure that the quality and standard of the product met the agreed requirements under the law. They further argued that they ensured that the products made under the trademark

5 <http://copyright.gov.in/frmFAQ.aspx>

HORLICKS were prepared under strict hygienic conditions. so, if Kartick is allowed to use the trademark HORLIKS, the right of which was neither granted nor permitted by original Horlicks company. Hence they filed a suit for permanently restraining Kartick from infringing the Horlicks's trademark HORLICKS and also its copyrights which it only had the right to enjoy over the product.

A Single Judge Bench of the Delhi High Court comprising of Justice B Chaturvedi found out that Horlicks company was definitely the original registered owner of the trademark HORLICKS in relation to food for children, toffees , biscuits , malted milk, and all other products due to earlier marketing and registration. With regards to toffees it was duly registered in India in the year 1966. And the company carried out a range of advertisements of its products under the trademark HORLICKS and thereby enjoyed plenty goodwill and reputation for its products in India. The court observed that use of the label and trademark HORLIKS by Kartick in relation to toffees will cause confusion in the minds of general people. as a consequence will lead to deception, majorly due to act of kartick company of copying the trademark HORLICKS and its label as and how it appears on the products manufactured and marketed by horlicks company.

As a result the court restrained Kartick from manufacturing and selling toffees or other related goods under the trademark HORLIKS or under any other name that is similar in expression to H's trademark HORLICKS. Further the court barred Kartick confectionery from reproducing, printing or publishing any label which was a mere reproduction or imitation of original HORLICKS label, thereby protecting the latter's copyright to the label.⁶

d. Geographical Indications (GI):

Every region has its claim to fame. Each fame and reputation was carefully built up and maintained by the masters of that region, combining the best of man, nature, and traditionally handed over from one generation to the next for centuries. Geographical indication in relation to goods means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be⁷

Typically, such a name indicates an assurance of quality and uniqueness which is in essence attributable to the fact of its origin in that defined geographical region, area locality, or country.GI are signs used on goods that have a particular geographical origin and enjoy qualities or a reputation that are because of that place of origin. The best example is Agricultural products that have qualities which they derive from their place of production and

⁶ Horlicks Limited And Ors. vs Kartick Sadhukan, Delhi High Court 2002 (25) PTC 126 Del

⁷ Geographical indication Of Goods (registration and Protection) act, 1999

are influenced by specific factors, such as climate and soil. They may also draw attention to specific qualities of a product, which are due to human factors that can be found in the place of origin of the products, such as definite manufacturing skills and traditions. These geographical indication points to a specific place or region of production that determines the characteristic qualities of the product that originates therein. It is imperative that the product derives its reputation and qualities from that place. Place of origin can be a village city or town, a region or a country. Since it is an exclusive right given to a particular community hence the benefits of its registration are shared by the all members of the community. To make it more clear the example of GIs of goods are Kullu Shawls Chanderi Sarees,etc that have been recently registered. Taking into consideration the large diversity of traditional products stretching all over the country, the registration under GI will play an important role in future growth of the tribes /communities / skilled artisans connected in developing such products.

e. Industrial Designs:

Industrial designs refer to creative activity, which result in the ornamental or formal appearance of a product, and design right refers to a novel or original design that is accorded to the proprietor of a validly registered design. Industrial designs are an element of intellectual property. Under the TRIPS Agreement, minimum standards of protection of industrial designs have been provided for. As a developing country, India has already amended its national legislation to provide for these minimal standards. The essential purpose of design law is to promote and protect the design element of industrial production. It is also intended to promote innovative activity in the field of industries⁸. The active legislation on industrial designs in India is contained in the New Designs Act, 2000 and this Act will fulfil its objective well with the rapid changes in technology and international developments. India has also attained a mature status in the field of industrial designs and taking into consideration the globalization factor in the economy, the present legislation is in accordance with the changed technical and commercial state of affairs and made to conform to international trends in design administration. This replacement Act is also meant to perform a more in depth classification of design in order to conform to the international system and to take care of the production of design related activities in various fields.

f. Trade Secrets:

A trade secret can be best described as confidential business information that gives an enterprise a competitive edge. Generally these include manufacturing, industrial secrets or commercial secrets. These consist of sales methods, consumer profiles, distribution methods, lists of suppliers and clients, manufacturing processes and advertising strategies. The difference between patents and trade secrets is that they are protected without registration. Unlike other IPR trade secret can be protected for an unlimited period of time but the condition is that significant element of secrecy must exist, so that, by using proper means, there would be trouble in acquiring the confidential information..

⁸ <http://ipindia.nic.in/ipr/design/designs.htm>

g. Layout Design for Integrated Circuits:

Semiconductor Integrated Circuit means a product having transistors and other circuitry elements, which are inseparably formed on a semiconductor material or an insulating material or inside the semiconductor material and designed to perform an electronic circuitry function. The aim of the Semiconductor Integrated Circuits Layout-Design Act 2000 is to provide protection of Intellectual Property Right (IPR) in the area of Semiconductor Integrated Circuit Layout Designs and for matters connected therewith or incidental thereto⁹. The main attention of SICLD Act is to provide for routes and mechanism for protection of IPR in Chip Layout Designs created and matters related to it. The SICLD Act gives power to the registered owner of the layout-design an inherent right to use the layout-design, commercially make the most of it and acquire relief in case of any violation. Initially the term of registration is for 10 years; subsequently it may be renewed from time to time. To look after matters relating to this act Department of Information Technology Ministry of Communications and Information Technology is made the administrative ministry of this act.

h. Protection of New Plant Variety:

The Plant Variety Protection and Farmers Rights act 2001 was enacted in India to protect the New Plant Variety. The purpose of this act is to identify the role of farmers as cultivators and conservers and the contribution of traditional, rural and tribal communities to the country's agro biodiversity by rewarding them for their contribution and to stimulate investment for Research & Development for the development new plant varieties in order to facilitate the development of the seed industry. In the beginning 12 crop species have been identified for registration. i.e. Rice, Wheat, Maize, Sorghum, Pearl millet, Chickpea, Green gram, Black gram, Lentil, Kidney bean etc. India has opted for sui- generic system instead of patents for protecting new plant variety. The term sui generic was used in TRIPS agreement, there is no particular definition of this Latin word but if read in context of TRIPS agreement it can be clearly inferred that it is a special type of protection given which cover only plant varieties. Department of Agriculture and Cooperation is regarded as the administrative ministry which look after its matters.

CONCLUSION

The importance of IPR and their protection is acknowledged the world over as essential to business. In tune with the world set-up, India too has realised the importance of IP, this recognition has been time and again upheld by courts, legislators, and the industry. India is now a party to various IP treaties and conventions. This has helped India become more attuned to the world's approaches and attitudes towards IP protection. India has already taken steps to comply with its obligations under TRIPS, and the Indian IP law regime is almost at par with the regimes of many developed nations. Historically, the enforcement of IPRs in India was not so effective. However, latest judicial rulings and steps taken by various enforcement agencies demonstrate that India is gearing up for effective protection and

⁹ Semiconductor Integrated Circuit layout design act, 2000

enforcement of IPRs. The Indian police has established special IP cells where specially trained police officers have been appointed to monitor IP infringement and cyber crimes. Various Indian industries have also become more proactive in protecting their IPRs. For example, the Indian Music Industry, an association of music companies, which headed by a retired senior police official, has taken similar proactive steps to combat music piracy. All in all, India has taken many positive steps toward improving its IPR regime and is expected to do much more in the coming years to streamline itself with the best practices in the field of intellectual property rights.

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IS THE ‘\$1.5 MILLION MAID’ A SOLITARY CASE?

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Human rights laws have just begun to attend to the discriminations and inequalities that constitute the realm of domestic work. The habitual exclusions of employment law and social security granted to migrants has been long exploited against the precarious migration status and has, until the recent circumstances, attracted only limited attention. With the significant contribution of domestic workers to the global economy, including increased paid job opportunities and substantial income transfers within and between countries, the concerns about their abuse also rises rapidly. This article addresses the issue of the abuse of privilege over the human rights of domestic helps in the private households of diplomats. The authors argue the need for India to ratify essential treaties with respect to the protection of migrants or domestic workers outside its territory leaving them unprotected against the evils of diplomatic immunity. Lastly, broad policy recommendations have been prepared inter alia spreading awareness about the rights granted to domestic workers, irrespective of the protective diplomatic status of their employers.

Keywords: diplomatic immunity, domestic workers, exploitation, human rights, human trafficking, labour migrants.

BACKGROUND

The fundamental question raised in this paper is whether diplomatic immunities should prevail even where a violation of human rights has been established. Violation of rights experienced by migrant domestic workers in diplomats' households may seem to be a side issue only of the broader discourse on human trafficking and exploitation of labour migrants.¹ Upon further inspection its relevance as a human rights issue becomes clear in two respects: *First*, the violation of labour rights and exploitation in diplomatic households is a rooted shortcoming in the protection of diplomats' domestic workers that cannot be overlooked both in sending states and in host states.² *Second*, because of their employers' diplomatic immunity, the violation of rights and restrictions of freedom is aggravated which severely restricts, if not entirely bars, victims' access to justice.³

A broad definition of a foreign domestic worker as understood in the international community⁴ is a migrant workers who is a person to be engaged, is engaged, or has been

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¹ Angelika Kartusch, *Domestic Workers in Diplomats' Households Rights Violations and Access to Justice in the Context of Diplomatic Immunity*, 7, 9 (German Institute Of Human Rights, June 2011).

² Ryszard Cholewinski, The Human and Labor Rights of Migrants: Visions of Equality 177, 194, 196 (22 GEO. IMMIGR. L.J. (2008))

³ Angelika Kartusch, *supra* note 1 at 5.

⁴ A. MackIm, “*Foreign domestic worker: Surrogate housewife or mail order servant?*” 681 (McGill Law Journal, Vol. 37, No. 3, 1992).

engaged in a remunerated activity in a State of which he or she is not a national.⁵ The designation of 'migrant'⁶ also applies to forced migrants who do not qualify for special status under international law⁷, but nevertheless are forcibly displaced to, or are compelled to find refuge in the territory of another country.⁸ The term 'diplomat' is a person with diplomatic rank working in a state's diplomatic mission abroad (including bilateral embassies and permanent representations with international organizations). The denial of equal protection to migrants is widely acknowledged as a human rights issue and has been a subject of increasing concern.⁹ Their dissentient voices are muted¹⁰ and diplomatic immunity has interminably prevented any prosecution of foreign diplomats who bind domestic workers in their homes.¹¹ The vulnerabilities arise due to the legal status of many migrant domestic workers,¹² the influence of the relationship of power and dependency between domestic workers and their employers.¹³ In case after case, diplomats misused their exemption to thwart trafficking victims' efforts to use civil suits to obtain justice for exploitation.¹⁴ Cases of *Shanti Gurung*¹⁵ and *Devyan Khobragade*¹⁶ are not new to the international community in tackling this issue.¹⁷ Both cases reported of allegations which included ill treatment at the hands of the employees, non-returning the passports which were also illegally acquired and deficit in

⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, or the Migrant Workers Convention, adopted 18 December 1990 at the 45th session of the General Assembly of the United Nations, article 2(1). (India has not signed or ratified the Convention).

⁶ P.A. Taran, Human Rights of Migrants: Challenges of the New Decade, in THE HUMAN RIGHTS OF MIGRANTS 29 (International Organization of Migration 2001)

⁷ P. Weinert, *Foreign female domestic workers: Help wanted!*, World Employment Programme Working Paper No. 50 (Geneva, ILO, 1991)

⁸ James C. Hathaway, The Rights Of Refugees Under International Law 238–39 (Cambridge Univ. Press 2005); Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 476-479 (2nd Edn., N.P. Engel Publications, 2005).

⁹ Universal Declaration of Human Rights art. 30, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR], Art. 7; International Covenant on Civil and Political Rights, Mar. 23, 1976, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171[hereinafter ICCPR], Art. 26.

¹⁰ D. Kruse, *Employee Ownership, Employee Attitudes, And Firm Performance* (Cambridge, Massachusetts, National Bureau of Economic Research, Working Paper No. 5277, Sep. 2002).

¹¹ Amy Tai, *Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity*, 175, 178-79 (16 American Journal of Gender, Social Policy & the Law, 2007).

¹² Murphy Cliodhna, *Researching Barriers To Access To Justice For Migrant Domestic Workers In Diplomatic Households* 407 (ILJ, Oxford University Press, 2013); Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on Migrant Domestic Workers (23 Feb. 2011), U.N. Doc. CMW/C/GC/1 (2011) [CMW General Comm. No. 1].

¹³ Clíodhna Murphy, *The Enduring Vulnerability of Migrant Domestic Workers in Europe*, 599-624 (International and Comparative Law Quarterly, July 2013).

¹⁴ Tabion vs. Mufti, 73 F.3d 535 (4th Cir. 1996); Logan vs. Dupuis, 990 F. Supp 26 (D.D.C. 1997).

¹⁵ Shanti Gurung vs. Jogesh Malhotra And Neena Malhotra, 279 F.R.D. 215 (S.D.N.Y. 2011); Erwin de Leon, *Diplomat's Servant Exposes Modern Day Slavery in the U.S.*, The Huffington Post, Mar.6, 2012, available at http://www.huffingtonpost.com/erwin-de-leon/shanti-gurung-indian-maid-abuse_b_1321147.html?ir=India&adsSiteOverride=in;; Narayan Lakshman, *Indian diplomat asked to pay \$1.5 million to ex-maid*, The Hindu, Feb. 24, 2012, available at <http://www.thehindu.com/news/international/indian-diplomat-asked-to-pay-15-million-to-exmaid/article2925053.ece>.

¹⁶ Veenu Sandhu, *Devyan Khobragade: The woman who has chosen to speak out*, Business Standard, Jan. 3, 2015, available at http://www.business-standard.com/article/specials/devyan-khobragade-the-woman-who-has-chosen-to-speak-out-115010200813_1.html.

¹⁷ International Labour Office, *Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (Geneva: International Labour Office, 2013).

payment.¹⁸ With the growing demand for low-skilled, low-paying labour the need for foreign live-in servants to clean, cook, and care for children have only skyrocketed.¹⁹ This conundrum gets worse when the courts reject applications against deficit payments²⁰ and non-issuance of the work contract *inter alia* employment claims,²¹ on the grounds of unsubstantiated claim by an injured domestic worker²² or diplomatic immunity.²³

VIOLATION OF HUMAN RIGHTS BY DIPLOMATS

Victims during the course of their employment have experienced numerous violations of their human rights²⁴, this poses a potential collision course in international law, which can only be uncomplicated by studying the indispensable human rights as opposed to the immunities granted to government servants.²⁵ It is quintessential to examine whether human rights ought to be safeguarded even if it means the curtailment of diplomatic and consular immunities.

The right to just and favourable working conditions²⁶ are violated when the workers receive less than minimum wages and are forced to work over long periods without adequate rest or periodic holidays with pay.²⁷ The migrants ought to be provided access to medical care²⁸, social security²⁹, and an adequate standard of living, including food, clothing, and housing, in reality they are kept hungry and only given leftovers to eat³⁰.

‘Decent work deficit’³¹ suffered by domestic workers has been addressed internationally, with the adoption of the ILO Convention Concerning Decent Work for Domestic Workers in

¹⁸ Prabhu Dayal, *Fear and loathing in New York: Former diplomat Prabhu Dayal reveals how Indian envoys to the US can fall victim to maids pursuing their American dreams*, Daily Mail, Dec. 22, 2013, at 2.

¹⁹ Mohamed Mattar, *Trafficking in Persons, Especially Women and Children, in the Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 721–60 (Fordham International Law Journal 26, No. 3 (2003)).

²⁰ See Saroj Pathirana, Kuwait’s Abused Domestic Workers Have ‘Nowhere to Turn’, BBC News, 13 October 2010, <http://www.bbc.co.uk/news/world-south-asia-11444167>.

²¹ Wokuri vs. Kassam, [2012] EWHC 105 (Ch)

²² Maid Accuses Saudi Princess of Abuse, ABC NEWS, Jan. 18, 2002, available at <http://abcnews.go.com/2020/story?id=123950&page=1>.

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²⁴ Jose Maria Ramirez-Machado, *Domestic Work, Conditions of Work and Employment: A Legal Perspective* 8 (ILO Geneva, 2003)

²⁵ ICCPR, *supra* note 10 at Arts. 6, 7; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85 (signed by India on Oct 14, 1997 but not ratified yet.) [Hereinafter “CAT”] at Art. 7.

²⁶ International Covenant on Economic, Social and Cultural Rights art. 5, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3. 6 I.L.M. 360 [hereinafter ICESCR]. Art. 7.

²⁷ Angelika Kartusch, *supra* note 1 at 5.

²⁸ ICESCR, *supra* note 26 at Art. 12.

²⁹ ICESCR, *supra* note 26 at Art. 11.

³⁰ ICESCR, *General Comment No. 3: The Nature of States Parties’ Obligations*, para. 9, U.N. Doc. E/1991/23, annex III at 86 (Dec. 14, 1990), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 9 (2003); UDHR, *supra* note 10, Art. 25

³¹ A.S. Blinder, *Paying for productivity: A look at the evidence* (Washington, DC, Brookings Institution, 1990); ILO: Decent Work Report, 4 (Director-General, International Labour Conference, 87th Session, Geneva, 1999).

2011.³² Migrant domestic workers employed as private staff continue to be the most exploited class of workers when it comes to Labour classes, this is also due to the diplomatic immunity of their employer under the 1961 Vienna Convention on Diplomatic Relations³³ and Customary International Law.³⁴

The prohibition of slavery³⁵, servitude and forced labour³⁶ are also infringed by these employers³⁷ by isolating and abusing the workers, keeping them from the shields of legal protection.³⁸ Even if proper documentation of visas³⁹ and immigration⁴⁰ is carried out, this illegal trafficking is executed once the worker crosses international borders and is disabled to leave.⁴¹ These workers are then subjected to physical, sexual⁴² and psychological abuse⁴³, their passports are confiscated⁴⁴ among other immigration documents. No legal existence⁴⁵ and dependency on the employer amplified the degree of informality in respect of the immigration status of diplomatic workers preserves the ‘invisibility’ of this category of migrant domestic worker.⁴⁶

The right to privacy is affected when the domestic worker is not provided with a room for herself or himself, under Article 17 of the ICCPR⁴⁷. An unjustifiable interference with her rights to privacy and to family life would constitute to violation of privacy rights.⁴⁸ Repeated

³² ILO Convention Concerning Decent Work for Domestic Workers (C189), adopted at the 100th session of the International Labour Conference, Geneva, 2011, entered into force Sept. 5, 2013.(India has not ratified this convention); Blackett, *Introduction: Regulating Decent Work for Domestic Workers*, 23, (2011) Canadian Journal of Women and the Law; Human Rights Watch, “*Decent Work for Domestic Workers: The Case for Global Labor Standards: Human Rights Abuses, Best Practices, and Recommendations for an ILO Convention*,” 2007, 13, http://www.hrw.org/sites/default/files/related_material/HRW_ILO_brochure_lores.pdf.

³³ Vienna Convention on Diplomatic Relations (adopted 14 April 1961, entered into force 24 April 1964), 500 UNTS 95 (hereinafter, the ‘VCDR’)

³⁴ Castren, E.J.S., ‘Some Considerations upon the Conceptions, Development and Importance of Diplomatic Protection, 576 (11 Cambridge 1984); Report of the Special Rapporteur on *Contemporary forms of slavery, including its causes and consequences*, 57 of UN Doc A/HRC/15/20 (18 January 2010).

³⁵ Anti-Slavery International, Discussion Paper: Programme Consultation Meeting on the Protection of Domestic Workers Against the Threat of Forced Labour and Trafficking, 2003, at 16, 25-36.

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³⁷ UDHR, *supra* note 9, art. 23.

³⁸ A, Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 804, 824 (Pennsylvania State International Law Review, Issue 1, 2005)

³⁹ Parvathi Menon, ‘Tied’ visa rule worsens condition of migrant domestic workers in UK, The Hindu, Apr. 1, 2014, available at <http://www.thehindu.com/news/international/world/tied-visa-rule-worsens-condition-of-migrant-domestic-workers-in-uk/article5858634.ece>.

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⁴¹ Kevin Shawn, ‘Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude, 499-500 (Journal on Poverty and Policy, 14th Edn., Issue 3, 2007)

⁴² Angelika Kartusch, *supra* note 1 at 5.

⁴³ Satterthwaite Margaret, Modern Day Slavery: The Trafficking of Women to the United States, 11, 13 (Woman’s Law Journal, 4th Edn., Issue 1, 2000)

⁴⁴ Angelika Kartusch, *supra* note 1 at 7, 24, 30-34.

⁴⁵ Migrant Rights Centre of Ireland, Protections for Migrant Domestic Workers Employed by Foreign Diplomats in Ireland: Time for Reform, 47 (December 2010).

⁴⁶ UN, Committee on Migrant Workers 2011: *General Comment on Migrant Domestic Workers*, 49 (CMW/C/GC/1, 23 February 2011).

⁴⁷ ICCPR, *supra* note 9 at Art. 17.

⁴⁸ Osman vs. Denmark, App. No. 38058/09, Eur. Ct. H. R. (2011).

threatens of rape and physical abuse⁴⁹ has infringed their freedom of movement⁵⁰ and social security⁵¹. There is absence of laws specifically entitle domestic workers to maternity leave⁵² and/or protection from termination.

Powerful economic and legal forces have ensured that domestic workers remain exploited.⁵³ Domestic workers with A-3 or G-5 visas are obliged or tied to one employer no matter how abusive.⁵⁴ These workers are particularly vulnerable to misuse because domestic jobs are less visible, less formal, and subject to fewer legal protections.⁵⁵ Private servants working in diplomatic households are not in a position to negotiate favourable terms and conditions of employment or raise employment-related complaints through the employment tribunal system.⁵⁶ Neither are they authorized to change their employer, nor even within the domestic work sector.⁵⁷ According to their visa obligations if they leave their employment situation, they lose their immigration status and can be deported. This tool is abused the most by employers threatening their workers with deportation.⁵⁸

Even though it is well settled that when the exploitation of domestic workers amounts to slavery⁵⁹, the victims' human rights in those situations will precede over diplomatic immunity; the obligation to accord immunity foreign States does not essentially necessitate the suspension of access to justice with regards to the acts of torture involved.⁶⁰ Thus, there still lies a dire need to impose human rights on States to offer alternative ways to justice for victims, be it by making available alternative complaint mechanisms or by providing compensation to the victims.

LEGAL PROTECTION TO DIPLOMATS

Despite proper guarantees of legal safeguards, these workers frequently encounter difficulties in exercising their rights and in enforcing fair working conditions,⁶¹ while the availability of such vulnerable. When these victims seek justice, their employers' diplomatic immunity, acknowledged in VCDR⁶², comes into play, barring criminal, civil and administrative

⁴⁹ ICCPR, *supra* note 9 at Art. 12; Manfred Nowak, *supra* note 8, at 12.

⁵⁰ ICCPR, *supra* note 9 at Art. 9.; UDHR, *supra* note 11, Art. 1.

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⁵⁵ Manfred Nowak, *supra* note 8, at 3.

⁵⁶ Jose Maria Ramirez, *supra* note 24, at 44, 66.

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⁶⁰ CAT, *supra* note 26 at Art. 7.

⁶¹ Jennifer Gordon, *Transnational Labor Citizenship* 503, 553–56 (80 S. CAL. L. REV. (2007))

⁶² VCDR, *supra* note 34 at Art. 32.

jurisdiction as the enforcement of judgments in the host state. Despite diplomats' full immunity from criminal prosecution, receiving governments are not completely powerless to hold diplomats accountable. It is rather possible to hold diplomats criminally liable, but prosecution requires a waiver of immunity by the sending state. This has invited extensive criticism that host countries lack the courage to request waivers of immunities and declare abusive diplomats *personae non gratae*, rather than have continued to save their consulates and diplomats from jurisdictions.⁶³ India itself had refused the United States' request to waive the diplomatic immunity of senior diplomat Devyani Khobragade. The very nature of diplomatic immunity implies that diplomats are exempted from the jurisdiction of the host country's authorities.⁶⁴ That means a substantial restriction of the possibilities of private domestic workers to access justice against their employers. Nevertheless, it should be kept in mind that persons enjoying diplomatic privileges are not exempted from the duty to observe the host country's laws, but that merely legal proceedings are barred for the time immunity exists.⁶⁵ Further Article 31 of the VCDR⁶⁶ provides that diplomatic agents shall enjoy immunity from jurisdiction, i.e. criminal jurisdiction of the receiving State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in cases relating to private immovable property situated in the territory of the receiving State.⁶⁷ Article 31(1)(c)⁶⁸, is an exception to civil immunity, has been interpreted as excluding from its scope ordinary contracts 'incidental to life in the receiving state', such as a contract for domestic services.⁶⁹ Even if practical legal measures⁷⁰ have been undertaken in providing the right to a right to free counsel⁷¹ for those in need in criminal, but not civil cases⁷², has been granted to domestic workers, the immunity leaves them powerless without any legal recourse. These were regarded as failing to reflect the workers' entitlements to fend for themselves out of their slave like situations and the severity of rights violations experienced.⁷³

LEGAL DEVELOPMENTS TO PROTECT MIGRANT AND DOMESTIC WORKERS

At the level of the United Nations, CEDAW⁷⁴ has raised the issue of abuse, violence and other forms of discrimination against women migrant domestic workers perpetrated by

⁶³ UN Human Rights Council, Report of the Special Rapporteur on *Contemporary forms of slavery, including its causes and consequences*, 57, 58, 96 (Gulnara Shahinian, A/HRC/15/20, 18 June 2010).

⁶⁴ Emily Siedell, Swarna And Baoanan, *Unravelling The Diplomatic Immunity Defense To Domestic Worker Abuse*, 173, 177 (Maryland Journal of International Law, Issue 26, 2011)

⁶⁵ VCDR, *supra* note 34 at Art. 41 (1).

⁶⁶ VCDR, *supra* note 34 at Art. 31.

⁶⁷ *Id.*

⁶⁸ VCDR, *supra* note 34 at Art. 31.

⁶⁹ Malcolm M Shaw, *International Law*, 767 (Cambridge University Press, 6th Edn, 2008); Tabion vs. Mufti 73 F.3d 535

⁷⁰ ILO, Recommendation concerning Decent Work for Domestic Workers (R201), adopted 16 June 2011 (India has not ratified the convention).

⁷¹ United Nations, Int'l Human Rights Instruments, Human Rights Comm. Gen. Comment 13, Art. 14, UN Doc. HRI\GEN\1\Rev.1, at 14 (1994).

⁷² ICCPR, *supra* note 11 at Art. 14(3)(d).

⁷³ Raven Lidman, Civil Gideon: *A Human Right Elsewhere in the World*, 40 (Clearinghouse Review 288 (2006)).

⁷⁴ CEDAW, *supra* note 53, at Art. 12.

diplomats while enjoying diplomatic immunity as an obstacle to ensure women's access to justice.⁷⁵ Notwithstanding the adoption of the ILO Workers Convention in 2011⁷⁶, migrant domestic workers still remain particularly vulnerable to employment-related abuse and exploitation.⁷⁷ Nonetheless, India has repeatedly indicated that, because of the special situation of government servants, it is currently unable to consider ratification.⁷⁸ More recently, the UN Special Rapporteur on Contemporary Forms of Slavery⁷⁹ in the latest report to the Human Rights Council explored how the specificities of domestic work as an industry has put domestic workers at risk of economic exploitation, abuse and domestic subjugation.

Even in India the need for a law to enforce the human rights of domestic workers is being felt strongly. However, the attempts to implement such a law have been in vain.⁸⁰ The Domestic Workers Welfare and Social Security Act, 2010, highlighting the exploitative nature of domestic work by spurious placement agencies, addressing the working conditions of domestic workers, including their registration⁸¹ is yet to be passed. Moreover, India is yet to sign and ratify certain crucial conventions and treaties, the failure to which has resulted in exploitation by Indian diplomats in foreign land.⁸²

RECOMMENDATIONS AND CONCLUSION

It is true that an ideal state of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone, regardless of their statehood, enjoy economic, social, cultural, civil, and political rights. However with a few rights, little freedom, frequent abuse the global plight of domestic workers can only be curtailed with an adequate human rights protocol that will positively combat abuse, exploitation and trafficking of migrant workers of today.

Thus, in the absence of an appropriate statute, the authors recommend certain requisite policies which if implemented will be fruitful in order to curb this iniquity –

⁷⁵ CEDAW, *supra* note 53, at Arts. 15, 16.

⁷⁶ Convention Concerning Decent Work for Domestic Workers, (ILO No.189), adopted at the 100th session of the International Labour Conference, Geneva (2011).

⁷⁷ David Weissbrodt, *Protection of Non-Citizens in International Human Rights Law, International Migration Law: Developing Paradigms And Key Challenges* 221, 229 (Ryszard Cholewinski et al. eds., T.M.C. Asser Press 2007)

⁷⁸ ILO, Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection 52 (Geneva; ILO, 2013).

⁷⁹ Report of the Special Rapporteur on Contemporary forms of slavery, *supra* note 64, at 57; A. Rassam, *supra* note 39, at 816.

⁸⁰ G. S. Sampath, *Who will help India's domestic helps?* Wall Street Journal, Oct. 31, 2013, available at <http://www.livemint.com/Opinion/Bj0ZhynE5rIO3zF3KntzkL/Who-will-help-Indias-domestic-helps.html>

⁸¹ Smriti Singh, *No progress on law to protect domestic helps*, The Times Of India, Oct. 30, 2013 available at <http://timesofindia.indiatimes.com/city/delhi/No-progress-on-law-to-protect-domestic-helps/articleshow/24892532.cms>

⁸² The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 26; ILO Convention Concerning Decent Work for Domestic Workers, *supra* note 34; ILO, Recommendation concerning Decent Work for Domestic Workers, *supra* note 81; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, or the Migrant Workers Convention, *supra* note 5.

- 1) Bestowing citizenship and nationality rights within the migrants will encourage their naturalization into the state which will result in least arbitral interference of a sovereign state in such matters. This will be a measure to combat statelessness of the migrants and will consequently help them achieve full enjoyment of the social, political, cultural, labor, and other rights. This right should also include the right to hold property, so as to protect workers against unregulated sections of their employment.
- 2) Protection of their family rights is another aspect which has been ignored by the policymakers. The right to family is as important as the right to life with dignity and such biological ties and mutual dependencies cannot be curbed by hampering their movements. It is therefore necessary to recognize the significance of citizenship which does not prevent children from joining their parents in both the state of origin and the hosting state.
- 3) Labor rights coupled with the right to prosecute are the key to protection of vulnerable migrants from abusive working terms and conditions. This human right instrument if enforced will ensure vigilance and diligence on part of the State to address the issue of reinstating fair work environment. Domestic workers should also be allowed to switch within the diplomatic community. Also this right should be granted regardless of statehood.
- 4) Adequate counselling and access to support should be provided to those who have experienced human rights violations. Governments, in consultation and cooperation with relevant NGO's should ensure proper implementation of existing procedures to regulate the admission of domestic workers and the monitoring of employment relationships.
- 5) Equal protection of law in the host country itself would be highly advantageous in situations where discrimination and arbitrary detentions creep in. The right to be treated equally must be consistent for citizens as well as migrants. Therefore, the access to criminal and civil complaint mechanisms, and equal access to courts of law and administrative processes will be the direct consequences of such equality.

On a positive note, it is likely that the duty to provide access to court in respect of torture claims will gradually gain in weight and dictate the applicable rules in more and more cases. It is vital to put aside the apprehension of a shrinking political independence by increased access to justice against the responsible official or state. Hence, in the light of the above, if all the ambiguities and breaches of law are decisively clarified these concerns can be effectively notified.

THE JUVENILE JUSTICE ACT AMENDMENT: TRYING JUVENILES AS ADULTS

Saif Rasool Khan*

The Government of India has proposed certain amendments to the Juvenile Justice Act, 2000. Among the various proposed amendments, the one that is highlighted and is the cause of disagreement is the reduction in the age and to try juveniles aged 16-18 as adults. This change has been debated in the Parliament at length and has been consulted with necessary interested parties. However, there is no uniformity in the opinions and there is widespread disagreement on whether the change is for the better or for worse. The paper analyses the proposed amendments and explains the reasons given behind the said amendments. The paper elucidates the data provided by the concerned authorities on crime committed by juveniles. The paper also highlights the opinions of parliamentarians and civil society members to the modifications. The paper assesses the said amendments in light of the constitutional provisions and international conventions to ascertain the various issues involved in the changes proposed.

KEYWORDS: *Juvenile Justice Act, Amendments, Parliamentary Standing Committee, Constitution, United Nations Convention on the Rights of the Child*

INTRODUCTION

The Lok Sabha passed the Juvenile Justice (Care and Protection of Children) Act, 2014, which will allow children in the 16-18 age groups to be tried as adults if they commit heinous crimes. The Juvenile Justice (Care and Protection of Children) Act, 2000 has been amended twice: in 2006 and in 2011. The proposed legislation clearly defines and classifies offences as petty, serious and heinous, and defines differentiated processes for each category. However, according to the Bill, in no case the juvenile would be sentenced to death or life imprisonment. The trial of the juvenile, whether as an adult or child, would depend upon the opinion of the board, which would comprise of psychologists and social experts. The heinous crimes would include those offences under the Indian Penal Code, which attract imprisonment of over seven years. The Bill also lays down procedures in case of children in need of care and protection, their rehabilitation and social re-integration measures, adoption of orphans, abandoned and surrendered children and offences committed against them. It includes facilitating faster adoption of children and setting up foster care homes. The draft incorporates the principles of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption (1993) which was absent in the original Juvenile Justice Act, 2000.

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RATIONALE

The proposed amendment was brought about due to the 2012 Delhi gang rape. It was found that one of the accused was a few months away from being 18. Therefore, he was tried in a juvenile court and the juvenile court gave its verdict, sentencing the boy to 3 years in a reform home on 31 August 2013. In the aftermath of the 2012 incident, with street protesters at India Gate demanding that the law be changed with retrospective effect, the U.P.A. government started the process of looking afresh at the Act. There was, of course, no way to make it applicable to the juvenile who was the focus of the public anger. There were and continue to be many who advocated calm, and opposed change. It is in part because of the relentless push by these activists that Parliament remains split on the issue. The activists including prominent lawyers and people working with children in conflict with law hold that a child takes to crime because society has failed in its duty to take care of him or her.

The apex court in the public interest litigation decided on March 28, 2014, in *Dr. Subramanian Swamy and Ors. v. Raju and Anr.*, refused to read down the provisions of the Juvenile Justice Act, 2000, in order to account for the mental and intellectual competence of a juvenile offender. The Hon'ble Court refused to interfere with the age of a juvenile accused, in cases where juveniles were found guilty of heinous crimes. It was held by the Court that the provisions of the Act are in compliance with Constitutional directives and international conventions. The Court further stated that the classification of juveniles as a special class stood the test of Article 14 of the Constitution, and that the Court should restrict itself to the legitimacy and not certainty of the law.

REFERRAL TO THE PARLIAMENTARY STANDING COMMITTEE

The Bill was referred to the Parliamentary Standing Committee on Human Resource Development for its opinion. After extensive deliberations with stakeholders including NGOs, and considering data from the National Crime Records Bureau, the Committee rejected the Union Government's recommendation to treat accused in cases of rape and other heinous crimes, who are 16-18 years old, as adults. "*The drastic changes proposed need deep introspection and it is surprising the ministry ignored major stakeholders,*" the Committee said in its report. It is believed that the Government's decision to push ahead also is a result of order of the Supreme Court in *Gaurav Kumar v. State of Haryana*. The court observed that, "*When we said that we thought that there should be a rethinking by the legislature, it is apt to note here that there can be a situation where commission of an offence may be totally innocuous or emerging from a circumstance where a young boy is not aware of the consequences, but in cases of rape, dacoity, murder, which are heinous crimes, it is extremely difficult to conceive that the juvenile was not aware of the consequences*".

DATA OF NATIONAL CRIME RECORDS BUREAU

As per 2011 census data, juveniles between the ages of seven to 18 years constitute about 25% of the total population. According to the National Crime Records Bureau (N.C.R.B.),

the percentage of juvenile crimes as a proportion of total crimes has increased from 1% to 1.2% from 2003 to 2013. During the same period, 16-18 year olds accused of crimes as a percentage of all juveniles accused of crimes increased from 54% to 66 %. The types of crimes committed by juveniles in the 16-18 year age group vary as seen in Table 1.

Table 1: Juveniles between 16-18 years apprehended under IPC		
Crime	2003	2013
Burglary	1,160	2,117
Rape	293	1,388
Kidnapping/abduction	156	933
Robbery	165	880
Murder	328	845
Other offences	11,839	19,641
Total	13,941	25,804

Note: Other offences include cheating, rioting, etc.
Source: Juveniles in conflict with law, Crime in India 2013, National Crime Records Bureau.

According to the National Crime Records Bureau, the highest increase in incidents of crime committed by juveniles in 2013 was reported in these categories: assault on women with intent to outrage her modesty, 132.3%; insult to the modesty of women, 70.5%; and rape, 60.3%. Of the 43,506 juveniles arrested for different crimes in 2013, 66.3% were in the 16-18 age groups, and 50.2% came from poor families, with annual income of up to Rs. 25,000. Most were illiterate or had attended only primary school.

PROPOSED AMENDMENTS

The proposed Bill makes certain changes and amendments. The word ‘juvenile’ has been replaced with the word ‘child’ and the expression ‘juvenile in conflict with the law’ has been changed to ‘child in conflict with law.’ While in the Juvenile Justice Act, 2000, juveniles in conflict with the law are defined as the ‘accused’, the draft Bill identifies a ‘child in conflict with law’ to be one who has been found by the Juvenile Justice Board to have actually committed an offence. Juvenile Justice Boards will be constituted in each district to deal with children in conflict with law. They will consist of a Metropolitan or Judicial Magistrate and two social workers, including a woman. Offences committed by juveniles are categorized as: (i) heinous offences (those with minimum punishment of seven years of imprisonment under IPC or any other law), (ii) serious offences (three to seven years of imprisonment), and (iii) petty offences (below three years of imprisonment). Chapter Two is the most noteworthy characteristic of the proposed Bill, providing for ‘Fundamental Principles for Care, Protection, Rehabilitation and Justice for Children’. It incorporates internationally accepted principles of presumption of innocence, dignity and worth, family responsibility, non-stigmatising semantics, privacy and confidentiality, repatriation and restoration, equality and

non-discrimination, and diversion and natural justice, among others. Institutionalisation is suggested as a measure of last resort. A revamped Child Welfare Committee has been identified, empowered and has been given statutory functions. A child who is found to be in need of care and protection shall be brought before a C.W.C. within 24 hours. Subsequently, a Social Investigation Report is required to be prepared within 15 days. After assessing the report, the C.W.C. may recommend that the child be sent to a children's home or another facility for long term or temporary care, or declare the child as free for adoption or foster care. The state governments have been given power to set up Observation, shelter and special homes. Central Adoption Resource Authority, (CARA) has been made a statutory body vested with functions of in-country and inter-country adoptions. Section 58 of the draft Bill lays down special emphasis on inter-country adoptions, stating that all applications for adoption shall be filed before a Principal Magistrate of the concerned jurisdiction where the registered adoption agency is located. The Bill has provided for mandatory registration of childcare institutions. The proposed Bill also prohibits the media from disclosing the identity of children or propagating any such information which would lead to identifying them. All reports relating to children are to be treated as confidential. Corporal punishment and ragging, cruelty to children, employment of children for begging, adoption without proper procedure, and sale or procurement of children for any purpose are all acts that are punishable under the draft Bill.

The draft Bill therefore provides a comprehensive mechanism to deal with children in conflict with law as well as children who are in need of care and protection. However, only a stringent implementation can provide a meaningful disposition to make it a true letter of law.

CRITICISMS BY CIVIL SOCIETY

- Shashi Tharoor vehemently opposed the proposed Bill in the Parliamentary debates. He said that the justice system should focus on "*rehabilitation and not retribution*". He added that it would be "*emotionally, ethically and morally*" wrong to punish a child, who does not have access to basic facilities, like an adult. "*There is no scientific system of determining the age of a children and in certain cases it is done by looking at the child*", he said. He further added that the Bill violated the fundamental rights guaranteed under Article 14 and Article 15(3) of the Constitution and the 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985' or the 'Beijing Rules' which require a child or a young person accused of an offence to be treated differently from an adult.
- Supriya Sule cautioned the government against drafting the amendments out of emotion. "*The law comes in the backdrop of the gang rape. For one Nirbhaya rape, you cannot make a law out of emotion... You need to look into your international commitments as well,*" she said. "*We need to look into the psychology aspect. Every child, although he makes a mistake, deserves a second chance,*" she said.
- Vinod Kumar opposed the trial of juvenile between 16 to 18 years of age as adults, saying they need education and moral classes as most of them committing crimes come from economically backward families. Quoting data, he said crime committed

by juvenile as a percentage of total crime is just 1.2 percent. *"In present circumstances educating them and giving them moral classes will help control such crimes. But if he is tried like adults in the age of 16-18 years, it would have bad impact on their psychology,"* Kumar said.

- Dharamvir Gandhi said that lowering the age to 16 years for trial of juvenile would be injustice to the child as a child of that age is unable to comprehend a situation. *"The age should not be brought down. It will be gross injustice to the child and will be violation of international laws,"* he said.
- Badaruddoza Khan said the lowering of age of trial of juvenile for heinous crimes is not in accordance with the international laws. *"The amendment with regard to lowering of age is short-sighted, unjust and against public interest."*
- P. Joseph Victor Raj, of Campaign Against Child Labour (CACL), has called the bill a regressive step. He has said the bill is passed based on false assumption there has been a rise in crimes in the 16–18 group. He pointed out that these assumptions are based on National Crime Records Bureau (NCRB) data which noted filed reports not convictions. He also said that the government has ignored the opinion of the National Commission for Protection of Child Rights (NCPCR) and child rights activists. He also pointed out that the law is against the UN Convention on the Rights of the Child and India's National Plan of Action for Children, 2005.
- Amod Kanth, former Director General of Police of Goa and one of the drafters of the Juvenile Justice (Care and Protection of Children) Act, 2000, said that the role of the teenager in the 2012 had been blown up by the media. He also that the NCRB data quoted by Maneka Gandhi states reported cases, the actual cases are much lower.
- Sreedhar Mether, of Save the Children, said that most of the rape cases against juvenile boys were actually case of elopement. He also said that the new law which judges whether the accused's mind is childlike or adult-like is arbitrary.

RESERVATIONS OF PROPOSED AMENDMENTS

The reservations raised by the various sections of the civil society are relevant. There are certain issues with the Bill that need to be highlighted and clarified.

- The provision of trying a juvenile committing a serious or heinous offence as an adult could violate the Article 14 and Article 21. The provision also counters the spirit of Article 20(1) by according a higher penalty for the same offence, if the person is apprehended after 21 years of age.

Article 14 states that "*Every person shall be treated equally before law.*" It has been interpreted that unequal treatment may be permitted between different sets of people only if there is a clear public purpose sought to be achieved by such unequal treatment. The distinction made between two juvenile offenders committing the same offence based on the date of apprehension is in violation of the said purpose.

Article 21 states that "*No person can be deprived of their right to life or personal liberty, except according to procedure established by law*". Courts have interpreted this to say that any law or procedure established should be fair and reasonable. The segregation based on the date of apprehension may fail this standard. In 2005, a

Constitution Bench of the Supreme Court, while determining the age of a juvenile and the resulting penalty (under the 2000 Act and an earlier 1986 Act) decided that the date on which the offence is committed matters, and not the date of apprehension. The provision of the Bill mentioned above contradicts this ruling of the Constitution Bench, and considers the date of apprehension when deciding the penalty given to a juvenile.

Article 20(1) of the Constitution states that “*A person cannot be subjected to a penalty greater than what would have been applicable to him, under a law in force at the time of commission of the offence*”. Under the Bill, if a juvenile between the ages of 16-18 years commits an offence and is apprehended at a later date, he may face a higher penalty than what would be applicable to him if he had been apprehended at the time of commission of the offence. This provision does not directly contradict Article 20(1) as provisions of the Bill do not apply retrospectively. However, if the spirit of Article 20(1) is that a person should not get a penalty higher than what would be applicable at the time of commission of the offence, then this objective is not being met by the Bill.

- The United Nations Convention on the Rights of the Child (U.N.C.R.C.) requires all signatory countries to treat every child under the age of 18 years as equal. The U.N.C.R.C. states that signatory countries should “*treat every child under the age of 18 years in the same manner and not try them as adults*”. It recommends that those countries that treat or propose to treat 16-18 year olds as adult criminals, change their laws to align with the principle of non-discrimination towards children.
- Some penalties provided in the Bill are not in proportion to the gravity of the offence. For example, the penalty for selling a child is lower than that for offering intoxicating or psychotropic substances to a child.
- The Standing Committee examining the Bill observed that the Bill was based on misleading data regarding juvenile crimes and violated certain provisions of the Constitution. The Standing Committee opposed any amendments to the said Act and recommended that there should be a much better execution and uniform establishments of schemes and procedures.

CONCLUSION

In conclusion, it is observed that the unwarranted haste to move forward with these reforms in the face of democratic dissent is most fascinating. The whole rationale behind such separate legal system for juveniles was because it is believed that a juvenile lacks the understanding and maturity of his actions and thus needs to be protected. This amendment will turn over more than nine decades of thought on juvenile justice, developed through legislative debates and judicial decisions and opinions. Further, the amendments proposed are in total disregard to the recommendations of the Joint Parliamentary Committee, which had favored the continuation of the present laws. The amendments will also contravene the basic fundamental rights guaranteed to every citizen under the Constitution of India. Such changes will result in violation of commitments made to the United Nations, in particular, the Recommendations 79 and 80 of the United Nations Committee on the Rights of the Child.

There is no need for such hurriedness in passing of amendments that may be more harmful for the future prospects of juvenile offenders. The preamble reads as thus, “*An Act...proper care, protection and treatment, and by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their ultimate rehabilitation through processes provided, and...incidental thereto.*” If such drastic amendments result in total failure of the said purpose, then the existence of such laws is pointless. In cases of extreme brutality, such action can be justified that the victim should not suffer and be denied justice only because the perpetrator was not of a particular age. However, considering the complexities and issues involved in implementation of laws in the country, the possible violation of the rights of juveniles cannot be excluded. The proposed amendments need to be re-looked, keeping in mind the various participants of the society. The Parliamentarians, after due deliberations and debates should ascertain what is best for the juveniles.

NEED FOR ANTI-CONVERSION LAWS IN INDIA: BRAINSTORM OF A DEVIL'S ADVOCATE

Arpan Kamal*

“(And) if a change of religion could be justified for worldly betterment, I would advise it without hesitation. But religion is matter of heart. No physical inconvenience can warrant abandonment of one's own religion.”

- Mahatma Gandhi¹

*India has a long history of religious pluralism, and compulsions towards mutual respect and violent intolerance continue to exist in parallel. Religious thoughts and beliefs are the focal point in the day to day life; the right to freedom of conscience, practice, profession and propagation of religion are therefore, fundamental to the development of humans. The drafters of Indian Constitution had deliberately distanced itself from issues of religion but the law makers after two and half decade, having being evolved the conception of secularism by various judicial activism, incorporated it in the preamble. The Indian Constitution has enshrined right to freedom of religion as fundamental right running in parallel to that of Article 18 of the Universal Declaration on Human Rights. It is pertinent to provide here that in the Constituent Assembly debates on the scope of Article 25, it was recognized that this right must be subject to some limitations, so as to prevent forced conversions. Religious conversions have been debatable since time immemorial but has gained grave importance in modern day context when religion is getting more and more intrinsically mired in the lives of people in general as well as in the policy making process of nations. The source of Anti-Conversion Laws in India dates back to the colonial period incepting from The Raigarh State Conversion Act 1936, among others. Even in the Independent India there has been various attempts made to bind the issues of conversion by various state legislatures as freedom conferred to Ar. 25 (1) is subject to "public order, morality and health" which are State subjects.² Though there has been more criticism from the international media undermining the objective to protect religious adherents only from attempts to induce conversion by improper means, but it had failed to clearly define what makes a conversion improper bestows governments with unfettered discretion to accept or reject the legitimacy of religious conversions. The judiciary in the case of **Rev. Stainislaus v. State of Madhya Pradesh, AIR 1977 SC 908** validating the legislations provided that "in the name of propagation, no one has a right to convert a person to another religion under pressure or inducement". In the absence of judicial activism in this regard, this lead to a crossroad, either to relent before the issues of 'Gharwapsi' and enact a legislation as against conversions or let the right be dissolved in this process. But in a democracy, every law is a resultant of a parallelogram of forces.³.*

Key words: Conversion, Constitution, Fundamental Right, Religion, Propagation.

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¹ Young India, 27-10-20; (18:376)

² H.M. Seervai, *Constitutional Law of India*, (Vol. 3), Universal Law Publishing Co. Pvt. Ltd (4th Ed.)p.2534

³ V. P Sarthi, *Interpretation of Statutes*, 10 (Eastern Book Company, Lucknow, 4th edn, 2003).

INTRODUCTION

“Religion as it is generally taught all over the world is said to be based upon faith and belief and in most cases consists only of different sets of theories and that is the reason why we find all religions quarrelling with one another. These theories are again based upon faith and belief.”

Swami Vivekananda on Religion⁴

There never was a word, more responsible, in history, for causing such amount of disruption in society than ‘Religion’. Passion defies logic and emotion overpowers reason, when the subject of discourse is religion and when there is a question of conversion involved, the complexity and peculiarity of the situation gives the issue a dynamic character. “ Religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress.”⁵

In India, like most other orthodox societies, Religion has been the foundation of the society and whole of its machinery throughout all ages in the process of her transition to a democratic nation. It is pointed out that in India “If life can be likened to a pie, religion is not one piece of that pie alongside the pieces labeled politics, economics, social structure, education and law. Rather, religion is the fruit found in each and every piece of the pie.”⁶

However, despite the fact that the Constitution of India has been built on such secular edifice, it appears that the spirit of secularism could not displace the importance of religion the people of India give in their lives. The aggressive measures adopted by certain religious groups for proselytization of their faith have thrown up challenges to our polity. The issue of conversion from one religion to another – one of the major controversies associated with freedom of religion, leads to conflict of interest of inter religious groups and followers thereof.

Religious Conversion, in the sense we use, is not the dramatic religious experience that is so often equated with an intense state of emotionalism. Often these experiences occur within the framework of one particular religion; or intra-religious conversion experiences.⁷ To define, conversion is a “*break with a person’s past ideas, attitudes, values, or behavior, more generally all four of these, accompanied by intense feeling...*”⁸ Religious conversion has

⁴ <http://lawcommissionofindia.nic.in/reports/report235.pdf>, last accessed on 06.03.2015.

⁵ *The commissioner, Hindu religious endowments, Madras vs. Sri Shirur Mutt.,* (AIR 1954 SC 282), Para. 18.

⁶ Robert D Baird, *Religion and Law in India: Adjusting to the Sacred as Secular in Religion and Law in Independent India* (Ed.) Manohar 2005 p.7.

⁷ Joshua Russo, Religious Conversion as a Resolution of Cognitive Dissonance, *Brown University*, 2004.

⁸ W.H.Clark, Intense Religious Experience, pg. 531

become the focus of intense debate in modern India, surfacing in the realm of politics, the media and the judiciary.⁹

There are laws enacted by various states aimed at restricting religious conversions have become the subject of much dispute and scrutiny.¹⁰ On the one hand, there are those who advocate a restriction on conversion, so as to preserve peace and harmony in plural India. This view is common amongst various Hindu groups, who are averse to the proselytizing drive of minority Christian and Islamic communities. On the other hand, there are those who believe such a restriction results in an infringement of the Right to Freedom of Religion, as guaranteed by the Constitution of India.

The right to "propagate" enshrined under Constitution is subject to public order, morality and health and the politico-religious quagmires has resulted in another round of debate as to requirement of a nationwide legislation in this regard; as the creditability of enactments of various states under State subject of 'public order' has been doubted.

THE MELTING POT OF RELIGION AND LAW

1 OBLIGATION UNDER INTERNATIONAL LAW

India has made a commitment in its Constitution to international law, especially in regard to Human Rights. Article 51 of the Constitution states that India will "*foster respect for international law and treaty obligations.*"¹¹ India has acceded to the **United Nations International Covenant on Civil and Political Rights (ICCPR)**, and is therefore bound by its provisions. Article 18 stipulates that:

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

The Universal Declaration of Human Rights also provides in Article 18 for:

"the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

⁹ Sarah Claerhout, Jakob de Roover, The Question of Conversion in India, 40 *Economic and Political Weekly* 3048, 3048 (2005)

¹⁰ South Asia Human Rights Documentation Centre, *Anti-Conversion Laws: Challenges to Secularism and Fundamental Rights*, 43 *Economic and Political Weekly* 63, 63 (2008) available at <http://www.jstor.org/discover/10.2307/40276904?uid=2134&uid=2129&uid=2&uid=70&uid=4&sid=21101445849673> [accessed 2 March 2015]

¹¹ Susan L. Karamanian, India and International Law, Edited by Bimal N. Patel. Leiden: MartinusNijhoff Publishers, 2005, 101 AM. J. INT'L L. 538, 540 (2007)(book review).

Article 5 (d) (vii) of the International Convention on Elimination of Racial Discrimination (1966) recognized the “*right to freedom of thought, conscience and religion.*” Recognizing that the freedom of religion and belief, among other things, also contribute to the attainment of goals of world peace, social justice, friendship among people, the General Assembly of United Nations proclaimed in 1981 “The Declarationon the Elimination of all forms of Intolerance and of Discrimination based on Religion”.

2 CONSTITUTIONAL PRESCRIPTIONS

The principle of ‘equality of religion’, being an essential facet of egalitarianism, has, thus, found a place in the Constitution of India.¹² Religious tolerance and equal treatment of all religious groups are essential parts of secularism. Indian Constitution has been built, *inter alia*, on such secular edifice. Constitutionally, India is a secular nation with no preferred religion. However, over the years it has developed its own unique concept of secularism; one which is very different from the Americannotion of secularism, requiring complete separation of church and state, as also from the French model, where religion is relegated completely to the private sphere and has no place in the public one.¹³

Article 25 of the Indian Constitution provides for free practice and propagation of belief and religion, which the Freedom of Religion Acts violate as they restrict the right to propagate and ask to intimate all conversions or to seek prior permission. Article 26 concerns the freedom to manage religious affairs, which would include religious ceremonies such as baptism. Article 27 provides that no tax proceeds shall go towards thepromotion or maintenance of any particular religion. Moreover, Article 19 (1) (a) states that all citizens shall have the right to the freedom of speech and expression.

This right is violated by the Acts, which include divine displeasure in the definition of *force*. Besides, the mandatory furnishing of details of conversions sought by the Acts violate Article 19 (1)(b) and (c) which give every citizen the right to assemble peaceably...

In interpreting the scope of this provision, the Supreme Court of India has held in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* (1962) AIR SC 853, that while an individual’s right to hold religious beliefs is absolute, that is, no person can be compelled, against his own judgment and belief, to hold any particular creed or follow a set of religious practices. However, his actions are subject to public order, morality and health, restrictions enumerated in Article 25 itself. Therefore, any restrictions on an individual’s freedom to practice or propagate his religion must be made on these grounds.

¹²Dr. Furquan Ahmed, P. Puneeth, Vishnu Konoorayar K, A Study of Compatibility of Anti-Conversion Laws with Right to Freedom of Religion in India, The Indian Law Institute, New Delhi, 2009.

¹³ Tahir Mahmood, *Religion, Law and Judiciary in Modern India*, 1 Brigham Young University Law Review 755, 256 (2006)

The apex court, while dealing with the scope of Article 25, in **Ratilal Panachand Gandhi v. State of Bombay**¹⁴, has reiterated the wide amplitude of the provision and observed:

“...Subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgement or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others”.

These rights are not absolute and are restricted to public order, morality and health. As defined by Supreme Court of India in **Commr. H.R.E. v. L.T. Swaminar** (AIR 1954SC 282) “a religion has its basis in a “system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being”, but it is not correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion, and those forms and observances might extent even to matters of food and dress.¹⁵

The apex court, in **Digyatdarsan v. State of A.P.**¹⁶, answered the issue negatively by holding that the right to propagate one's religion means the right to communicate a person's beliefs to another person or to expose the tenets of that faith, but would not include the right to 'convert' another person to the former's faith. In **Rev. Stainislaus v. State of Madhya Pradesh**¹⁷, relying on dictionaries, the court has reiterated that: “what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets”.

Thus, the religious freedom is confined to religious belief, which binds spiritual nature of men to super-natural being. It includes worship, belief, faith, devotion, etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it.¹⁸

ANALYSIS OF ANTI-CONVERSION LAWS IN INDIA

In 1955, the Indian Parliament rejected an Indian Converts Bill, applicable to all of India, after members of the legislature warned of the harassment that would ensue because of the unfettered control local authorities would have gained.¹⁹ However, the desire to regulate conversion gained the support of state governmental officials by 1956. Anti-conversion laws prohibit attempts to convert any person from one religious faith to another by use of force,

¹⁴ AIR 1954 SC 388

¹⁵ Dr. J.N. Pandey, *Constitutional Law Of India*, Central Law Agency , 42nd ed,2005, 350.

¹⁶ AIR 1970 SC 181 (188)

¹⁷ AIR 1977 SC 908

¹⁸ *P.M.A. Metropolitan v. Moran Mar Marthoma*, AIR 1995 SC 2001 at. 2026

¹⁹ Chang Hwan Kim, "Freedom of Religion Legislation in India: The Hindu-Christian Debate on Religious Conversion, MISSION AND THEOLOGY", Vol. 9, Presbyterian College and Theological Seminary, June 2002, Available at <http://www.earticle.net/FileArticle/200707/633192048482031250.pdf>, pp.231-232

inducement, allurement, or any fraudulent means; aiding any person in such conversion is also prohibited.

As the ‘freedom of religion’ guaranteed under Article 25 is not absolute, it is made subject, *inter alia*, to public order, morality and health. Two relevant entries i.e., ‘public order’ and ‘public health’, to which the freedom of religion is subjected, have been enumerated, respectively, in entry 1 and entry 6 of List – II of Schedule VII. By virtue of Clause (2) of Article 246, as mentioned above, it is the State legislature, subject to clause (1) and (2), which has the exclusive power to make laws, either in the interest or for the maintenance of public order and public health.

Henceforth, in 1967-68, Orissa and Madhya Pradesh enacted local laws called the Orissa Freedom of Religion Act 1967 and the Madhya Pradesh Dharma Swatantraya Adhiniyam 1968. Along similar lines, the Arunachal Pradesh Freedom of Religion Act, 1978 was enacted to provide for prohibition of conversion from one religious faith to any other by use of force or inducement or by fraudulent means and for matters connected therewith. Similarly one was legislated in Gujarat in 2003; certain amendments were made to enactments of Madhya Pradesh, Chhattisgarh in 2006 and then in Himachal Pradesh in 2007.

These laws made forced conversion a cognizable offence under sections 295 A and 298 of the Indian Penal Code that stipulate that malice and deliberate intention to hurt the sentiments of others is a penal offence punishable by varying durations of imprisonment and fines. Before discussing the constitutionality and other nuances of the seven statutes created till that in this regard, which are euphemistically called “Freedom of Religion laws”, we shall first succinctly sift some historical background.

1 ANTI-CONVERSION LAWS OF PRE-INDEPENDENCE ERA

British India has had no anti-conversion laws probably because the British themselves professed a proselytizing religion.

However, many princely states had enacted such laws. Prominent among them were Rajgrah State Act, 1936, the Patna freedom of Religion Act, 1942, Surguja State Apostasy Act, 1945 and the Udaipur State Anti-Conversion Act 1946. Similar legislations were promulgated in Bikaner, Jodhpur, Klahanadi and Kota etc., Specifically against conversion to Christianity. The first anti conversion law was the Rajgrah State Conversion Act, which was enacted in 1936. This enactment banned the preaching of Christianity and prohibited the entry of Christian missionaries in the former Kingdom of Rajgrah, Jodhpur, Surguja etc. of Chhotanagpur areas. The Surguja State Apostasy Act, 1945 was the second enactment to prohibit conversion from Hinduism to Islam and Christianity by vesting the power to allow or disallow conversion in the Darbar of the Rajas under the guise of maintaining law and order and establishing public peace. Similarly the Udaipur State Conversion Act, 1946 required all conversions from Hindu religion to other faiths to be registered officially.

The basic purposes of all these laws were to insulate Hindus from the onslaught of Christian missionary activities. Most of these laws required individual converts to register their conversion with specified government agencies. Those who secured conversion of a person by fraud, misrepresentation, coercion, intimidation, undue influence or the like, were made liable to punishment. Minors could not have been converted and children of convert would not automatically get their parents new faith. Conversion to another religion was thus legally sought to be regulated by the Hindu rulers of princely states.²⁰

2 NUANCES OF ANTI CONVERSION LAWS OF VARIOUS STATES

Today, anti-conversion laws are in force in the states of Orissa, Madhya Pradesh, Chhattisgarh, Himachal Pradesh, Arunachal Pradesh and Gujarat as state of Tamil Nadu repealed its act so created. While these laws do not prohibit religious propagation, they aim to protect against ‘forcible conversion’²¹ using the following terms: ‘No person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by use of force or by inducement or by any fraudulent means, nor shall any person abet any such conversion.’ A major criticism of these Acts is the use of uncertain terminology; while the various terms used are statutorily defined, these definitions remain vague.²²

Force refers to ‘show of force or threat of injury or threat of divine displeasure or social ex-communication.’²³ The broad definition so provided delimits exchanges between a potential converts and propagators of a religion. Inducement is defined as inclusive of ‘*the offer of any gift or gratification, either in cash or in kind and shall also include the grant of any benefit, either pecuniary or otherwise.*’²⁴ Since charitable acts are a feature of numerous religions, this definition might cause an infringement upon followers in the practice of their religious beliefs. Further, as numerous missionaries engage in activities providing education and medical facilities among various others, may be construed as ‘temptations’ within the ambit of the above definition.

The broad terminology in these Acts delimits even legitimate methods of proselytizing and facilitates abuse of these laws by enforcement agencies, as it provides them with a wide margin of discretion in assessing whether or not a conversion is legitimate.²⁵ The Acts impose

²⁰ Faizan Mustafa’s, ‘Conversion: Constitutional and Legal Implications’, Kanishka Publishers, 2003, 108 & 109.

²¹ Li-Ann Thio, *Caesar, Conscience and Conversion: Constitutional Secularism and the Regulation of Religious Profession and Propagation in Asian States*, available at <http://www.juridicas.unam.mx/wccl/ponencias/11/357.pdf>, 20. [accessed 12 March, 2015]

²² *Supra*, note 21.

²³ Section 2(b), Himachal Pradesh Freedom of Religion Act, 2006; Section 2(b), Orissa Freedom of Religion Act, 1967; Section 2(c), Madhya Pradesh Freedom of Religion Act, 1968; Section 2(c), Gujarat Freedom of Religion Act, 2003; Section 2(d), Arunachal Pradesh Freedom of Religion Act, 1978

²⁴ Section 2(d), Himachal Pradesh Freedom of Religion Act, 2006; Section 2(d), Orissa Freedom of Religion Act, 1967; Section 2(f), Arunachal Pradesh Freedom of Religion Act, 1978.

²⁵ South Asia Human Rights Documentation Centre, *Anti-Conversion Laws: Challenges to Secularism and Fundamental Rights*, 43 Economic and Political Weekly 63, 65 (2008) available at

an onerous burden on converts and persons seeking to propagate their faith, in the sense that, some of them require persons carrying out conversion or potential converts to give prior or subsequent notice of conversion to an official.²⁶ The Gujarat Freedom of Religion Act goes so far as to explicitly require that ‘prior permission’ be sought from the District Magistrate, before conversion, by any person carrying out conversion ceremonies.²⁷ Further, these Acts mandate harsh penalties for persons found guilty of forcibly converting others, with some Acts imposing a maximum imprisonment period of up to three years and a fine up to twenty-five thousand rupees.²⁸ Failure to give notice of intended conversion is also punishable.²⁹

Another vague feature of some of these Acts is the exclusion of re-conversion to one’s native faith, from the definition of conversion. The Chhattisgarh Dharma Swatantraya Act specifically excludes ‘returning to one’s forefather’s religion or his original religion’ from the ambit of conversion.³⁰ Since Hindus constitute a majority of India’s population, it is reasonable to assume that the religion of one’s forefather would be Hinduism. Hence, while conversion is regulated, potential re-conversion, often into Hinduism, is acceptable which make the various ‘Ghar-Wapsi’ events within the legal prescriptions. In principal, induced reconversion should be prohibited in the same manner as induced conversion. The distinction between the two, is indicative of the fact that these Acts fails to employ a clear distinctions of various subjects, often ambiguous and also might be seen adopting an anti-secularist approach.

3 CONSTITUTIONALITY OF ANTI CONVERSION LAWS

Undoubtedly there is no ground justifying conversions brought about by violence or other illegitimate means of coercion. Also, there is no justification as regards the religious conversions for the purpose of escaping law or defrauding legal system. But on examining the statutes existing on the subject we realise their impropriety as the language adopted by these legislations goes far beyond the protection of this right and indeed, in no way appear to be motivated by the desire to protect the freedom of conscience.³¹

In the 1957 case of *Ratilal v. Bombay*³², the Supreme Court interpreted the ambit of Article 25 to include “the right to propagate one’s religious views for the edification of others”. The Constitutional validity of the Orissa Freedom of Religion Act, 1967 was challenged before the

<http://www.jstor.org/discover/10.2307/40276904?uid=2134&uid=2129&uid=2&uid=70&uid=4&sid=21101445849673> [accessed 2 March 2015]

²⁶ ibid.

²⁷ Section 5, Gujarat Freedom of Religion Act, 2003

²⁸ Section 3, Chhattisgarh Freedom of Religion (Amendment) Act, 2006; Section 4, Gujarat Freedom of Religion Act, 2003

²⁹ Section 4, Himachal Pradesh Freedom of Religion Act 2006; Section 5, Gujarat Freedom of Religion Act 2003; Section 5, Arunachal Pradesh Freedom of Religion Act 1978, Section 5, Madhya Pradesh Freedom of Religion Act 1968 .

³⁰ Proviso to Section 2(b), Chhattisgarh Freedom of Religion (Amendment) Act 2006.

³¹ Supra note at 25

³² *RatilalPanachand Gandhi v. The State of Bombay* 1954 AIR 388

High Court of Orissa in *Yulitha Hyde v. State of Orissa*³³ in the year 1969, wherein it was held to impinge upon many legitimate methods of proselytizing by reason of its overly vague nature and wide scope.

Twenty years later to the Ratilal Case³⁴, the same issues arose in the Supreme Court in the case of *Stainislaus v. State of Madhya Pradesh*³⁵, where the decision of Yulitha Hyde Case³⁶ was overruled and the Court upholding the validity of the Anti- Conversion Acts on the grounds that it guaranteed religious freedom to all, including those who are subject to conversions by ‘force, fraud and allurement’ observed that³⁷:

"What Article 25 (1) grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of Conscience" guaranteed to all the citizens of the country alike."

As regards the legislative competence of the state legislatures in this regard, the apex court has observed that:³⁸

"It is not in controversy that the Madhya Pradesh Act provides for the prohibition of conversion from one religion to another by use of force or allurement or by fraudulent means, and matters incidental thereto....

The expression "Public order" is of wide connotation. It must have the connotation which it is meant to provide as the very first Entry in List II....

The two Acts do not provide for the regulation of religion and do not find any justification for the argument that they fall under Entry 97 of List I of the Seventh Schedule."

The *Stainislaus Case* has been widely criticized. H.M Seervai, an Indian Constitutional law authority, agonized over the Supreme Court’s failure to consider the legislative history behind the drafting of Article 25, as well as its failure to analyze the importance of missionary activities in the Christian religion.³⁹ He argued that often, the purpose of religious propagation was not merely to spread knowledge of one’s religion but also, ‘to produce intellectual and moral conviction leading to action, namely, the adoption of that

³³ AIR 1973 Ori. 116

³⁴ Supra, note 32.

³⁵ AIR 1977 SC 908

³⁶ Supra, note 33

³⁷ Supra note 33, Para 19

³⁸ Ibid. Para 22 - 24

³⁹ M SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, 4th ed. 1991 , cited in V. Venkatesan, *Conversion Debate*, 25 Frontline (Sept. 2008), 1287.

*religion*⁴⁰ and that by propagating one's religion to another person with a view to its being accepted by the other person, one gives the other person an opportunity to exercise his freedom of choice of religion.

Seervai concluded by stating that the decision in the *Stanislaus case* is “*productive of the greatest public mischief and ought to be overruled.*”⁴¹

In another development, the High Court of Himachal Pradesh struck down portions of the Himachal Pradesh Freedom of Religion Act 2006 as violative of the Constitution of India.⁴² The World Evangelical Alliance Religious Liberty Commission challenged the validity of the Act, as well as the Himachal Pradesh Freedom of Religion Rules, 2007.⁴³ In its verdict delivered on August 30th, 2012, the Court struck down Sec. 4 of the Act, which made it compulsory for anyone seeking to convert from his/her religion to give a 30-day notice to the District Magistrate prior to conversion. The Bench observed that ‘*A person not only has a right of conscience, the right of belief, the right to change his belief, but also has the right to keep his beliefs secret.*’⁴⁴

NEED FOR ANTI-CONVERSION LAWS: ATTEMPTING PROPAGATION WITHOUT PROSELYTISATION

Religion in India is sensitive matter yet debatable though the concept has evolved eventually. Religion is out of reach and understanding of the masses since its portrayal nonetheless is incomprehensible and abstruse for a common man. The Anti conversion laws in India have a historical background but after Independence there was rather an aggressive approach of people towards the Anti-Conversion laws which were enacted by states leading to a socio-political uproar where the Supreme Court had to intervene and justify the laws in a Secular country like India.

Secularism to begin with, was never an inherent part of the Constitution of India prior the 42nd Amendment⁴⁵ since the drafters wanted to clear any misgivings that India was to adopt the western model of secular country. Indian concept of secularism was ‘*Neutrality and Impartiality towards all religion*’ which was founded on the concept of States concern with man to man relation and not man to God relation⁴⁶.

Now, the issue regarding whether Anti-Conversion laws in India is violative of Article 25(1) and that whether freedom of propagation of religion includes freedom to convert are still crucial point of debate

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² RavinderMakhaik, *HC partially strikes down Himachal's anti-conversion law* (31 Aug 2012) available at http://articles.timesofindia.indiatimes.com/2012-08-31/india/33520613_1_anti-conversion-law-subramanian-swamy-notice [accessed 12 March, 2015]

⁴³ *Evangelical Fellowship of India v. State of Himachal Pradesh* CWP No. 438 of 2011

⁴⁴ Ibid.

⁴⁵ Constitution (42nd Amendment) Act, 1976.

⁴⁶ Dr. Basu, Durga Das, “Introduction to the Constitution of India”, 19th Edition, Reprint 2004, Wadhwa and Co. Law Publishers, Nagpur, Pg-114.

which has been discussed previously where in the case of *Stainslaus v. State of Madhya Pradesh*⁴⁷, the Supreme Court deciding the case in the favour of State gave a remarkable judgement governing the laws and validating the anti-conversion Acts till date, distinguishing the freedom to propagate religion and right to convert. Court pointed out that where freedom of propagation of religion is a Fundamental Right, the latter is merely a component to the Fundamental Right and opposed to imposing of one's religious tenets on the other which would be equal to violation of right to *freedom of conscience*, one can merely transmit or spread ones religion by an exposition of its tenets giving others the choice to *purposefully undertake* conversion or not. And also provided that the definition of the term 'inducement' impinged legitimate means of proselytizing because of its ambiguous nature and wide scope⁴⁸.

Further, where the statutory backing is there for the protection of religion and its propagation, there are limitations to that propagation and practice too which is inclusive of not exercising ones Fundamental Rights vis-a-vis others. Converting to another religion willfully or voluntarily portrays presence of free conscience where one has the right of choice based on his ethics and any sort of allurement or inducement may that be for a better life, unsolved religious queries, better education, housing, lifetime facilities etc. does amount to affecting the free conscience which would then amount to violation of the Fundamental Right to practice a religion of one's own choice. Hence, the state's interference, where conversion is done by any form (Force, Fraud, Inducement or Allurement), authorized under the Anti-Conversion laws is the most effective mechanism for protecting Secularism.

Right to convert should be a subject of freewill and any limitation to conversion in this sense should amount to violation of Human Rights. Nonetheless where this freewill too is manipulated by any sort of inducement, allurement, force, the forces of state shall play the role of protector of religion and religious beliefs and not let them succumb to opposite forces at play. Further where the Anti-Conversion laws are said to be violative under the International Charters in freedom to convert must look through Article 18(1) and Article 18(2) on the International Covenants on Civil and Political Rights, 1966, according to which impairment of freedom of religion by any form of Coercion i.e., force, fraud, inducement or allurement would amount to not free resultant choice of religion, the freedom of which is the right of all, so such contention overall is at an uneven ground.

Also we see that International Charters have been specifically complied with by the Indian Statutory provisions, thus proving anti conversion laws are not an extra imposition rather the need of the hour since protecting religion in a country which itself has no religion is a heavy burden which must be borne by the bearer in compliance of the legal bindings imposed under the Preamble.

And to further state religion is a matter of uproar in not just India but countries across the globe and as per a recent survey laws restricting apostasy and blasphemy are most common in the Middle East and North Africa, where 14 of the 20 countries criminalize blasphemy and 12 out of 20 Countries criminalize Apostasy. The liberals would most critically provide that the such contentions are inadequate as the nation-states are either having a State religion or is not a democracy like ours. But the argument ends up to the cross-roads as to where the nation would like to end up. The politico-

⁴⁷ *Stainslaus v. State of Madhya Pradesh* 1977 (1) SCC 677.

⁴⁸ Correa, Preethi Maria, "Anti-Conversion Laws in India and their Conflict with Freedom of Religion", UNILU Centre for Comparative Constitutional Law and Religion, Working Paper Series, 2013, Pg-6-8.

religious quagmires has resulted in a great social imbalances and if an effective instrument such as this not devised could lead to detrimental effect in a country like ours as here the things are needed to be thronged upon as a legislation to inculcate a social change. Hence Anti-Conversion laws in India like other countries is essential to protect the Secular nature of our Constitution.

CONCLUSION WITH SUGGESTIONS

It is said that “*a person cannot choose if he doesn't know what choices are open to him*”⁴⁹ and this perfectly applies in cases of religion too. However, choice of religion cannot be equated with that of a choice between political and other kinds of opinions. Taking into consideration reasons of individual converts for adopting and manifesting a specific belief it may literally be a choice between heaven and hell. Right to choose is implicit in the freedom of conscience. As humans, we are born free with a natural right of choice; nevertheless none is able to exercise this right freely due to various reasons. It may be one's compelling surroundings, ignorance as to the comparative tenets of the various religious faiths or lack of availability of free and fair opportunity.⁵⁰ Hardly anybody is adequately informed as to the exercise of his rights relating to freedom of choice of religion.

It is clear that in this environment of politico-religious quagmires, as they stand, pose a serious threat to the pluralistic nature of Indian society as well as the secularism, which forms the bedrock of the Indian constitution. As an increasing number of state governments continue to deliberate on the passing of these laws creating another rounds of debates, it is the need of the hour for either the legislative or the judiciary to intervene, in order to ensure that the India Constitution and its principles of secularism, tolerance and equality are upheld.

On the matters such as these it's the thoughts of Father of our Nation which needs to be revisited who believed in **Sarva Dharma Sambhav** and provided that “*Religion is not like house or cloak which can be changed at will*” and that conversion for fear greed or any compulsion cannot be a conversion at all.

- Remedial legal measures need to be taken by the Union Government
- As in a democracy, every law is a resultant of a parallelogram of forces., the executive and legislature, both have to be sensitive to these forces
- Legislations had failed to provide guidance as to how such should be constructed which need to be incorporated
- A law need to be created which would curb not only forced conversions but also issues of religious aggressions.

⁴⁹ H.M. Seervai, *Constitutional Law of India*, Universal Law Publishing Co. Pvt. Ltd., New Delhi, 4th ed., 2005.

⁵⁰ Bimal Kumar Chatterjee, “Proslaytisation and Indian Constitution” in B.K. Chatterjee (ed.), *Law is not an Ass and Other Essays*, Eastern Law House, New Delhi, 2006, 93.

LAWS GOVERNING NAVIGATIONAL RIGHTS AND SOVERIGN IMMUNITY OF WARSHIPS

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The evolution of the law of the sea has been shaped largely by two notions, namely, freedom of navigation on the one hand, and restricted access on the other hand. The interaction between these two opposing notions has led to the acceptance of two compromise concepts, namely, the territorial sea and the right of innocent passage. These concepts have now been codified in the 1982 United Nations Convention on the Law of the Sea. This research paper examines the rights of warships to traverse maritime areas subject to the sovereignty of the coastal state. The issue of military activities in the sea will continue to be a complex subject, without clear definitions in the nature and scope of permissible activity. The ARA Libertad Case (Argentina v. Ghana) is the first instance where the International Tribunal for the Law of the Sea (ITLOS), Hamburg, Germany considered the issue of the release of a warship which was detained in a foreign port contrary to the principles of sovereign immunity of warships. This article examines the ITLOS order at the backdrop of warship rights and duties under the International Law of the Sea. It concludes that states should create dialogues and form agreements to help clarify the contours of military activity in the sea, focusing on mutual interests, interdependence, and coexistence rather than perceiving the ocean as a zero-sum resource.

Keywords: Warships, ITLOS, Navigation, Rights, Immunities

INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) defines the rights and responsibilities of nations with respect to their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. Articles 29-32, as laid down in Part II of UNCLOS, specifically deal with the rules applicable to warships and other government ships operated for non-commercial purposes.¹

It is noted that any assessment of the navigational rights of warships is closely connected to the rights and duties held by the coastal states. The right of warships to traverse maritime areas subject to the sovereignty of the coastal state has been recognized as a legitimate derogation on that state's sovereignty.²

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¹ Part II(Territorial Sea and Contiguous Zone); Section 3(C) Rules Applicable To Warships And Other Government Ships Operated For Non-Commercial Purposes

² This right is also accorded to commercial and other non-governmental vessels, but the discussion here is focused on warships.

The International Tribunal for the Law of the Sea (ITLOS) is an intergovernmental organization created by the mandate of the UNCLOS, and has the power to settle disputes between party states.³ The ARA Libertad Case (Argentina v. Ghana) is the first instance where the ITLOS (Hamburg, Germany) considered the issue of the release of a warship, which was detained in a foreign port contrary to the principles of sovereign immunity of warships. It is a dispute about whether sovereign immunity of warships can be waived, and if so, and under what circumstances.

WARSHIPS⁴

Article 29 of UNCLOS III states: ‘For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the Government of the state and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.’ Though this definition occurs in Section 3 of Part II, (concerning Innocent Passage) of UNCLOS III, the wording ‘For the purposes of this Convention’ make it clear that this definition applies to the entire Convention.⁵

A vessel would, however, cease to be ‘warship’ (a state organ) if shipwrecked and abandoned, or under the control of mutinous crew.⁶ An act of piracy committed by a warship, under the control of a mutinous crew would thus be treated as an act committed by a private ship [Article 102]. Fleet auxiliaries, who are deployed on various duties related to navies, cannot be treated as warships, unless and until they are commissioned.⁷ However, a Coast Guard vessel is considered to be a warship.⁸

RIGHTS AND DUTIES

Under UNCLOS III, warships can only perform the following functions, *inter alia*:

- (a) A seizure on account of piracy [Article 107],
- (b) On the high seas, the right to visit when the ship is:

³ Section 5, Part XI, UNCLOS

⁴ According to Oppenheim, a warship is distinguishable ‘by its outward appearance’ since it ‘flies the war flag and the pendant of its state’. They are ‘state organs’, and form a part of the armed forces of a state so long as they are manned by the crew, subject to Naval Laws, commanded by a commissioned naval officer, and are in the service of a country. See L. Oppenheim, *International Law: A Treatise Peace*, Vol. I—Peace, pp. 851–52 [eighth edition edited by Sir HerschLauterpacht], and C.J. Columbus, *The International Law of the Sea*, Longmans, 1967, p. 259.

⁵ Oxman, Bernard H., ‘The Regime of Warships under the United Nations Convention on the Law of Sea’, *Virginia Journal of International Law*, Vol. 24, p. 812

⁶ Ibid., p. 818. According to Bernard H. Oxman, the word ‘exception’ is ill suited here because ‘immunity from enforcement jurisdiction of the coastal state does not excuse a warship from the duty to respect the provisions of the convention regarding the regulation of innocent passage’.

⁷ Oxman, Bernard H., ‘The Regime of Warships under the United Nations Convention on the Law of Sea’, *Virginia Journal of International Law*, Vol. 24, p. 812

⁸ Ibid. A warship under the control of a mutinous crew would deem to lose its status as a warship. Once the state regains control, its status would revert back to that of being a warship.

- (i) Engaged in piracy,
 - (ii) Engaged in the slave trade,
 - (iii) Engaged in unauthorised broadcasting,
 - (iv) without nationality,
 - (v) Of the nationality as that of the warship but flying a foreign flag or refusing to show its flag [Article 110].
- (c) To exercise the right of hot pursuit [Article 111(5)].
- (d) To exercise the power of enforcement as regards protection and preservation of the marine environment [Article 224].

IMMUNITIES

Articles 32, 95 and 236⁹ of UNCLOS III deal with warship immunities. Article 32 is an adaptation of Article 22 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, while Article 95 is a reproduction of Article 8, Para 1 of the 1958 Geneva Convention on the High Seas.

The phrase ‘nothing in this Convention’ occurring in Article 32 seems to convey that Article 32 is in contrast to Article 95 because it also applies to the whole Convention, including Exclusive Economic Zones (EEZs) and the high seas to which Article 95 applies. However, this is not the case as the two Articles operate in different spheres.¹⁰ Article 32 does not apply to those regions, which are covered by Article 95. This change in the phraseology of Article 32 was necessitated because of the separate parts of UNCLOS III dealing with ‘strait passage’ and ‘archipelagos’ to which Article 32 also applies.¹¹

The immunities under this article are not absolute. It is subject to the following two exceptions¹²:

- (i) While exercising the right of innocent passage through the territorial sea, warships are required ‘to comply with the laws and regulations of the coastal state concerning passage through the territorial sea’, and if there is any violation or disregard, the coastal state may require the warship ‘to leave the territorial sea immediately’ [Article 30].
- (ii) The flag state would bear responsibility for any loss and damage resulting to a coastal

⁹ Columbus, *The International Law of the Sea*, n. 4, p. 507.

¹⁰ Dimri, BM., “The Arrest of Argentine Warship ‘ARA Libertad’ Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles”, *Journal of Defence Studies*, Vol. 7, No. 3, July–September 2013, pp. 97–124

¹¹ Dimri, Brij M., ‘The Regime of Warships Contemporary Naval Missions and Activities and Emerging Law of the Sea: Part I,’ *Indian Defence Review*, Vol. 6, No. 3, July 1992, p. 80.

¹² The predecessor of this article is Article 3, ‘International Convention for the Prevention of Pollution from Ships’, November 1973.

state due to non-compliance with the coastal state laws concerning passage through the territorial sea or with the provisions of the Convention or other international laws by a warship [Article 31].

NAVIGATIONAL RIGHTS AND PASSAGE REGIMES OF WARSHIPS

Coastal nations exercise the same jurisdiction and control over their internal waters as they do over their land territory.¹³ Warships and auxiliaries require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded.¹⁴

The right of innocent passage in the Territorial Sea

International law provides that ships of all nations enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea¹⁵ or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation, or as rendered necessary by force majeure or by distress.¹⁶ Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal nation.¹⁷ All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis. As stated by the Court in the *Corfu Channel Case*¹⁸, “it is generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation …without the previous authorization of a coastal state, provided that the passage is innocent.”

Transit passage in International Straits

Transit passage applies in respect of straits used for international navigation that lie between one part of the high seas or an EEZ and another part of the high seas or an EEZ.¹⁹ In establishing a regime of transit passage in UNCLOS, there was an effort on the part of the more militarily powerful states to ensure that the restriction associated with the passage of warships under the regime of innocent passage would not apply in vital traffic routes. As with innocent passage, transit passage requires ships and aircraft to proceed without delay.²⁰ Rather than prohibiting a series of acts that may be prejudicial to the peace, good order or security of the coastal state, transit passage requires that warships refrain from any threat or use of force against the territorial integrity or political independence of the littoral state.²¹

¹³ 1982 LOS Convention Article 8

¹⁴ Thomas, A.R., and Duncan James. C., “International Status and Navigation of Warships and Military Aircraft”, *International Law studies*, Vol. 73, p. 7

¹⁵ UNCLOS Article 17

¹⁶ Territorial Sea Convention, Article 14(2), (3) & (6); 1982 LOS Convention, Article 18

¹⁷ A.R Thomas and James C Duncan (eds), “International Status and Navigation of Warships and Military Aircraft”, *International Law studies*, Vol. 73

¹⁸ *Corfu Channel Case*(UK v Albania) [1949] ICJ Rep 4, 28

¹⁹ UNCLOS Article 37

²⁰ UNCLOS Article 39(1)(a)

²¹ UNCLOS Article 39(1)(b); See Larson, DL., “Security Issues and the Law of the Sea: A General Framework”, *ODIL*, Vol. 15, 1985, No. 2, p. 116

Vessels in transit passage, including warships, must also refrain from activities' other than those incident to their normal modes of continuous and expeditious transit' in their exercise of the freedom of the navigation.²² Compared to innocent passage, transit passage allows for greater surface navigation rights. Transiting warships are permitted to perform activities that are incidental to passage through the strait and consistent with the security of the unit (such as the use of radar, sonar, and air cover).²³ The manner of the passage, rather than the purpose of the passage, is again the important consideration in determining whether passage rights have been violated.²⁴

The reference to 'normal mode' has been considered as opening up the possibility of a wide range of activities being undertaken by different types of military vessels. Whether a particular activity falls within the scope of the normal mode of a particular warship will be a matter for interpretation in any given situation. Much will depend on how broadly the reference to 'freedom of navigation and overflight' is to be understood in the context of transit passage.²⁵ In considering the debates as to whether transit passage is more like innocent passage or the freedom of navigation on the high seas, Reisman has noted that some limitation had to be imposed on the traditional freedom of navigation to prevent overt military exercises and weapons testing, surveillance and intelligence gathering, and refueling, in international straits.²⁶

Archipelagic sea-lanes passage

UNCLOS creates a regime for the legal recognition of archipelagic states,²⁷ whereby these states are entitled to enclose their outermost islands with straight baselines, transforming the legal status of the waters within those lines into archipelagic waters over which sovereignty is exercised.²⁸ Within archipelagic waters, the right of innocent passage exists for the ships of all states,²⁹ except where the archipelagic state has designated sea-lanes and air routes there above in which the right of 'archipelagic sea lanes passage' applies.³⁰ In the event that such designation has not occurred, then 'the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.'³¹ This provision has

²² UNCLOS Article 39(1)(c)

²³ Rear Admiral Harlow B., "UNCLOS III and Conflict Management in Straits", *ODIL*, Vol. 15, 1985, p. 197, 201

²⁴ See A.V. Lowe, '*The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*' in Horace B. Robertson Jr (ed), *64 International Law Studies: The Law of Naval Operations* (William S. Hein and Co, Inc, New York 1991) 111, 126

²⁵ UNCLOS Article 38(2) refers to the meaning of transit passage as 'the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait...'

²⁶ Reisman, WM., "The Regime of Straits and National Security: An Appraisal of International Lawmaking", *American Journal of International Law*, Vol. 74, 1980, p. 72

²⁷ The definition of 'archipelago' is 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, water and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such'. UNCLOS Article 46(b)

²⁸ UNCLOS Articles 47 and 49

²⁹ UNCLOS Article 52 (noting this is subject to Article 53)

³⁰ UNCLOS Article 53

³¹ UNCLOS Article 53 (12)

been described as supplying ‘the lowest common denominator or “safety valve” which enabled the maritime states to accept the concept of archipelagic sea lanes passage’.³² All ships including warships enjoy the right of archipelagic sea-lanes passage while transiting through, under or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation. This means that submarines may transit while submerged and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft.³³

The right of archipelagic sea-lanes passage is substantially identical to the right of transit passage through international straits. There are nonetheless differences between the passage regimes, as archipelagic sea-lanes passage is deemed a right,³⁴ as opposed to a freedom as is the case with transit passage.³⁵ Archipelagic sea-lanes passage is also more restricted because vessels must stay within the designated sea-lanes,³⁶ whereas transit passage does not require vessels to stay within specific boundaries while traversing straits.

SOVEREIGN IMMUNITY OF WARSHIPS: AN ITLOS ORDER

On December 15, 2012, the International Tribunal for the Law of the Sea ordered Ghana to resupply and, upon payment of security, to refuel and release the Argentine naval frigate ARA Libertad, which was being held by authorities in the Ghanaian port of Tema.³⁷ The Tribunal ordered release of the vessel in response to Argentina’s request for provisional measures under Article 290(5) of the United Nations Convention on the Law of the Sea. The Tribunal accepted Argentina’s *prima facie* showing that the Libertad, a tall, three-masted sailing ship commissioned in the Argentine Navy being used as a training vessel for officer cadets, qualifies as a “warship” under Article 29 of UNCLOS, and was therefore entitled to immunity and release to avoid irreparable harm to Argentina pending the final outcome of the case.³⁸

The dispute between the two states had its roots in Argentina’s 2001 default on roughly \$100 billion in sovereign debt. NML Capital Investments (a U.S. Judgment Creditor) had a right to execute its judgment against Argentina’s assets in the U.K, a decision extensively relied on by agents for Ghana during oral argument at the ITLOS.³⁹

³² Bernhardt, P.A., “The Right of Archipelagic Sea Lanes Passage: A Primer” 35 *Virginia JIL*, 1995, p 719

³³ Thomas, A.R., and Duncan James. C., “International Status and Navigation of Warships and Military Aircraft”, *International Law studies*, Vol. 73, p. 19

³⁴ UNCLOS Article 53(2)

³⁵ See UNCLOS Article 28(2)

³⁶ UNCLOS Article 53(5) setting forth the ‘10 percent rule’.

³⁷ The “ARA Libertad” Case (Argentina v. Ghana), Case.No.20, Request for the Prescription of Provisional Measures, para. 108 (ITLOS December 15, 2012) retrieved on August 16, 2014, from http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf

³⁸ Kraska, J., “A Report on the Case of the ARA Libertad (Argentina v. Ghana), International Tribunal for the Law of the Sea, Case No. 20, Provisional Measures”, *American Journal of International Law*, Vol. 107, 2013, p. 1

³⁹ NML Capital Ltd v Republic of Argentina, [2010] EWCA Civ. 41

This particular dispute before the ITLOS between Argentina and Ghana arose on October 2, 2012, during the ARA Libertad's October 1-4 port visit to Tema, an industrial port east of Ghana's capital, Accra. The Libertad carried 330 navy cadets and crew at the time. A local Ghanaian court granted NML's application for an injunction, which prevented the vessel from taking on the fuel she needed before departure until Argentina posted \$20 million with the court, in partial satisfaction of NML's judgment.⁴⁰

Ghana and Argentina are both parties to the 1982 U.N. Convention on the Law of the Sea. On October 30, 2012, Argentina instituted dispute settlement proceedings under Annex VII of that Convention. On November 14th, after waiting the required two weeks, Argentina filed its application in ITLOS for provisional measures under article 290 of the Convention, pending constitution of the Annex VII arbitral tribunal. ITLOS heard two days of oral arguments on November 29-30 and issued its order on December 15, 2012. The decision of the judges to order the vessel's release was unanimous; however, five judges issued separate declarations or opinions.⁴¹

The gravamen of Argentina's complaint was that Ghana had violated its international obligation to respect the immunity of the ship from jurisdiction and execution, which is enjoyed by warships pursuant to Article 32 of UNCLOS, Article 3 of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels, and customary international law.⁴² Article 32 of UNCLOS is derived from Article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.⁴³

Argentina argued that the Libertad met the definition of a warship in UNCLOS Article 29⁴⁴ and accordingly was immune from the jurisdiction of any state under UNCLOS Article 32. Article 32 states that "nothing in this Convention affects the immunities of warships." Ghana countered that Article 32 applied only to the territorial sea, whereas the ship lay in Ghana's internal waters. The Tribunal noted, however, that the immunity of warships applies in internal waters as well under general international law. Although "most of the provisions" in Part II relate to the territorial sea, some provisions, such as the definition of warships in

⁴⁰ Allen, C., "Law of the Sea Tribunal Resoundingly Affirms the Sovereign Immunity of Warships and Orders Ghana to Release Argentine Tall Ship ARA Libertad", *Opinio Juris* (2014) retrieved on August 19, 2014, from <http://opiniojuris.org/2012/12/15/law-of-the-sea-tribunal-resoundingly-affirms-the-sovereign-immunity-of-warships-and-orders-ghana-to-release-argentine-tall-ship-ara-libertad/>

⁴¹ Dimri, BM., "The Arrest of Argentine Warship 'ARA Libertad' Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles", *Journal of Defence Studies*, Vol. 7, No. 3, July–September 2013, pp. 97–124

⁴² Kraska, J., "A Report on the Case of the ARA Libertad (Argentina v. Ghana), International Tribunal for the Law of the Sea, Case No. 20, Provisional Measures", *American Journal of International Law*, Vol. 107, 2013, p. 3

⁴³ Geneva Convention on the Territorial Sea and the Contiguous Zone, Art.22, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205. The relevant provision of the 1958 Convention states that "nothing in these articles affects" the immunities of government ships operated for noncommercial purposes.

⁴⁴ The definition in Article 29 is drawn almost verbatim from Article 8(2) of the Geneva Convention on the High Seas, April 29, 1958, 13 UST 2312, 450 UNTS 82.

Article 29, “may be applicable to all maritime areas” (para. 64).⁴⁵ ITLOS therefore affirmed that a dispute existed between the parties over the applicability of Article 32 that “affords a basis on which *prima facie* jurisdiction of the Annex VII arbitral tribunal might be founded” (para. 66).

Argentina also claimed that Ghana was precluding the Libertad from exercising its right to enjoy innocent passage in the territorial sea according to Articles 17 and 18(1)(b) of UNCLOS; freedom of navigation and related internationally lawful uses of the sea reflected in Articles 56(2) and 58 of UNCLOS; and the right to exercise high seas freedoms set forth in Articles 87 and 90 of the Convention, by preventing the vessel from getting under way. Professor Gerhard Hafner, co-agent for Argentina, argued that the exercise of navigational rights directly depends upon the ability to make departure from port. He referred to the International Court of Justice’s declaration on the merits in Military and Paramilitary Activities in and Against Nicaragua:

In order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; article 18, paragraph 1(b), of [UNCLOS] does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters . . . , it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for maritime navigation.⁴⁶

Ghana countered that the dispute between the two parties was one of general international law, rather than the interpretation or application of specific provisions of UNCLOS, and was therefore not justifiable under the Convention. Provisional measures were granted to defuse the tense standoff. The Tribunal’s order states, “Any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States”. Interlocutory relief was awarded to Argentina to avoid an urgent risk of irreparable harm, since the Libertad was deemed a tangible expression of the flag state’s sovereignty. The unanimous decision was joined by Judge ad hoc Thomas Mensah, who served as the first president of ITLOS and in this case was appointed by Ghana.

The Tribunal ordered Ghana to release the frigate, its commander, and its crew by December 22, and to ensure that the vessel was “resupplied toward that end”. Ghana complied with the provisional order. The vessel departed from Ghana on December 19 and was welcomed back in Argentina on January 9, 2013.

The order is important for upholding the immunity of a warship broadly and inclusively defined- as a tall sailing ship used for training by the Argentine Navy. ITLOS found that “in accordance with general international law, a warship enjoys immunity”. Perhaps even more

⁴⁵ The “ARA Libertad” Case (Argentina v. Ghana), Case.No.20, Request for the Prescription of Provisional Measures, para. 64 (ITLOS December 15, 2012) retrieved on August 16, 2014, from http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf

⁴⁶ The “Military and Paramilitary Activities in and Against Nicaragua” Case, (Nicar. v. U.S.), 1986 ICJ REP. 14, para 214

important, the order applied sovereign immunity as a general principle of international law to the internal waters (port) of Ghana, even though Article 32 on sovereign immunity is contained in Part II of UNCLOS on the territorial sea. This finding raises interesting questions about the scope of ITLOS's jurisdiction beyond the specific provisions of the text of the Convention.

CONCLUSION

While the protection of sovereignty and national interests remain fundamental to maritime security and the law of the sea, there is increasing acceptance of a common interest that exists among states when seeking to respond to a variety of modern maritime security threats.⁴⁷ An inclusive interest in promoting maritime security should be the primary focus in case of conflicting claims between different states. Without an effective dispute settlement mechanism in the international legal system, a treaty/convention will not be of much avail. For exercising maritime rights at sea, an orderly mechanism to regulate these rights is a necessary requirement. A maritime dispute cannot be resolved every time by resorting to force.

Lastly, the preservation of sovereign immunity for warships in the ITLOS order, even for an unconventional training ship and even only as a *prima facie* showing during an interlocutory appeal, is an encouraging precedent for stability of expectations and the rule of law at sea and in port.

⁴⁷ Klein, N., *Maritime Security and The Law of the Sea*, United Kingdom, Oxford University Press, 2011, p 24

RIGHT TO DIE: CRITICAL ANALYSIS UNDER ARTICLE 21

SauroBroto Dutta* & Gargi Agarwal**

We live a million lives and die once. Alas! Some are not fortunate enough. They die a million deaths before their souls can rest in peace and body be relieved of agony. Our constitution has provided us with Right to Life and Personal Liberties as one of the fundamental rights. Tracing the development of Indian Judiciary, we find that the concept of Life and Personal Liberties has gone through very many interpretations and its scope has been widened as and when time has demanded to do so. Today a major question arises among that 'Will it be wise to say that Right to Die is also included under Right to Life and Personal Liberties'? Amongst the mist of this question, the keywords explaining the aim and the objective of our article are: Article 21, Personal Liberties, Right to Die, Euthanasia, Forced Life, Critical Analysis.

WHAT IS ARTICLE 21?

"A great man's greatest good luck is to die at the right time."

Eric Hoffer.

Protection of life and personal liberty: No person should be deprived of his life and personal liberty except according to the procedure established by law.

SCOPE OF ARTICLE 21

Article 21, if read literally, is a colorless article and would be satisfied, the moment it is established by the State that there is a law that provides a procedure which has been followed by the impugned action. But the expression 'procedure established by law' in article 21 has been judicially construed as meaning a procedure that is reasonable, fair and just. If it is read with Article 39A, it would further imply that legal aid being made available to the indigent accused and a prisoner. The concept of fairness, so evolved, has been imported into article 22(3) also, so that a prison regulation which arbitrarily deprives a detenu of opportunity to interview his relatives or friends or a lawyer is invalid. The following cases explain the scope of article 21:

1. **Maneka Gandhi v. Union of India**¹
2. **Gopalanachari v. Administrator , State of Kerela**²
3. **Francis Coralie Mullin v. Union Territory of Delhi**³
4. **Olga Tellis v. Bombay Municipal Corporation**⁴

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¹ AIR 1978 SC 597

² AIR 1981 SC 674

³ AIR 1981 SC 746

The right to life and right to personal liberty in India have been guaranteed by a constitutional provision, which has received the widest possible interpretation. Under the canopy of Article 21 of the constitution, so many rights have found shelter, growth and nourishment. An intelligent citizen would like to be aware of the developments in this regard, as they have enrolled from judicial decisions. Article 21, lays down that no person shall be deprived of life and personal liberty, except according to the procedure established by law. “Life” under Article 21 is not merely the physical act of breathing; **Samatha v. State of Andhra Pradesh⁵**.

ABOUT ARTICLE 21

Prior to **Maneka Gandhi’s** decision, Article 21 guaranteed the right to life and personal liberty to the citizens only against arbitrary actions of the executive, and not from legislative actions. The state could not interfere with the liberty of the citizens if it could not support its action by a valid law. But after the **Maneka Gandhi’s** decision Article 21 now protects the right of life and personal liberty of the citizens not only from the Executive action but also from the Legislative action. A person can be deprived of his life and personal liberty if two conditions are complied with, first there must be a law and secondly, there must be a procedure prescribed by that law, provided that procedure is just fair and reasonable.

PERSONAL LIBERTY: MEANING AND SCOPE

Prior to **Maneka Gandhi’s** Decision – The meaning of the words “personal liberty came up for consideration of the Supreme Court for the first time in **A.K. Gopalan v. Union of India⁶**. In that case the petitioner , A.K. Gopalan , a communist leader was detained under the Prevention Detention Act , 1950 . The petitioner challenged the validity of his detention under the Act on the ground that it is violative of his right to freedom of movement under Art.19 (1) (d) which is the very essence of personal liberty guaranteed by Art.21 of the Constitution. He argued that the words “personal liberty” include the freedom of movement also and therefore the Preventive Detection Act, 1950 must also satisfy the requirement of Art.19 (5). In other words the restrictions imposed by the detention law on the freedom of movement must be reasonable under Art.1 (5) of the Constitution. It was argued that Art. 19 (1) and Art.21 should be read together because Art. 19(1) dealt with substantive rights and Art. 21 dealt with procedural rights. It was said that reference in Art. 21 to “procedure established by law” meant “due process of law” of the American Constitution which includes the principles of natural justice and since the impugned law does not satisfy the requirement of due process it is invalid. Rejecting both the contentions, Supreme Court by the majority held that the ‘personal liberty’ in Art. 21 means nothing more than the liberty of the physical body, that is freedom from arrest and detention without the authority of law. This was the definition of the phrase ‘personal liberty’ given by **Prof. Dicey**, according to whom personal liberty means freedom from physical restraint and coercion which is not authorized by law.

⁴ AIR 1986 SC 180

⁵ AIR 1997 SC 3297

⁶ AIR 1978 SC 597

The word liberty is a very comprehensive word and if interpreted it is capable of including the rights mentioned in Art. 19. But by qualifying the word ‘liberty’ the court said , the import of the word ‘personal liberty’ us narrowed down to the meaning given in English Law to the expression ‘liberty of the person’ . The majority took the view that the Art. 19 and 21 deal with different aspects of ‘liberty’. Art. 21 is guarantee against deprivation (total loss) of personal liberty while Art. 19 afford protection against unreasonable restrictions (which is only partial control) on the right of movement. Freedom guaranteed by Art. 19 can be enjoyed by a citizen only when he is a free man and not if his personal liberties are deprived under the valid law.

In **Gopalan** the Supreme Court interpreted the ‘law’ as “state made law” and rejected the plea that by the term ‘law’ in Art. 21 meant not the state made law but jus natural or the principles of natural justice. **Fazal Ali, J.**, however, in his dissenting judgment held that the Act was liable to be challenged as violating the provisions of Art. 19. He gave a wide and comprehensive meaning to the words ‘personal liberty’ as consisting of freedom of movement and locomotion. Therefore any law which deprives a person of his personal liberty must satisfy the requirements of Art.19 and 21 both.

But this restrictive interpretation of the expression ‘personal liberty’ in **Gopalan’s** case has not been followed by the Supreme Court in its later decisions. In **Kharak Singh v State of U.P.**⁷, it was held that ‘personal liberty’ was not only limited to bodily restraint or confinement to prisons only , but was used as a compendious term including within itself all varieties of rights which go to make up personal liberty of a man other than those dealt with in Art. 19(1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom. Personal liberty in Article 21 takes in and comprises the residue.

Finally, in **Maneka Gandhi v Union of India**⁸, the Supreme Court has not only overruled **Gopalan’s** case but has widen the scope of the words ‘personal liberty’ considerably . **Bhagwati , J.** observed :

“The expression ‘personal liberty’ in Art.21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under 19 ”.

The court lays down great stress on the on the procedural safe guards. The procedure must satisfy the requirement of natural justice, i.e. it must be just, fair and reasonable.

In **Sanwat Singh v. Assistant Passport Officer, New Delhi**,⁹the Supreme Court further extended the scope of this Article and held that the “right to travel abroad” was a part of a person’s ‘personal liberty’ within the meaning of Art.21 of the Constitution. In the light of these decisions coined by the Supreme Court itself, raises a question in our mind, as to

⁷ AIR 1963 SC 1295

⁸ AIR 1978 SC 597

⁹ AIR 1967 SC 1836

‘whether Right to Die can become essentially a part of Right to Life and Personal Liberties under Art.21 of our constitution?’

WHAT IS RIGHT TO DIE

The Right to die is an ethical or institutional entitlement of any individual to commit suicide or to undergo voluntary euthanasia. Possession of this right is often understood to mean that a person with a terminal illness should be allowed to commit suicide or assisted suicide or to decline life-prolonging treatment, where a disease would otherwise prolong their suffering to an identical result. The question of who, if anyone, should be empowered to make these decisions is often central to debate. The right to die is sometimes associated with the idea that one’s body and one’s life are one’s own, to dispose of as one sees fit. However, a legitimate state interest in preventing irrational suicides is sometimes argued.

RIGHT TO DIE UNDER ARTICLE 21

The question whether the right to die is included is included in Art. 21 of the constitution came for consideration for the first time before the **Bombay High Court in State of Maharashtra v Maruty Sripati Dubal**.¹⁰ The Bombay High Court held that the right of life guaranteed by Art. 21 includes a right to die, and consequently the court struck down Section 309IPC which provides punishment for attempt to commit suicide by a person as unconstitutional. The judges felt that the desire to die is not unnatural but merely abnormal and uncommon. They listed several circumstances in which people may wish to end their lives, including disease, cruel or unbearable condition of life, a sense of shame or disenchantment with life. They held that everyone should have the freedom to dispose of his life as and when he desires .In this case a **Bombay Police Constable** who was mentally deranged was refused permission to set up a shop and earn a living. Out of frustration he tried to set himself on fire in corporation’s office room.

On the other hand, the Andhra Pradesh High Court in **Chenna Jagadeeswar v. State of A.P.**¹¹, held that the right to die is not a fundamental right within the meaning of Art. 21 and hence Section 309, IPC is not unconstitutional.

In **P. Rathinam v. Union of India**,¹² a two judge bench of the Supreme Court took cognizance of relationship/contradiction between Section 309 of IPC and Art. 21. The court ruled that the right to life embodied in Art.21 also embodied in it a “right not to live” a forced life , to his detriment , disadvantage or disliking .

This view constituted an authority for the proposition that an individual has the right to do as he pleases with his life and to end it if he so pleases. “*A person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking.*” The Court argued that the word ‘life’

¹⁰ AIR 1990 SC 752

¹¹ 1987 Cr LJ 549

¹² AIR 1994 SC 1844 : (1994) 3 SCC 394

in Art 21 means right to live with human dignity and “**the same does not merely connote continued drudger.**” Thus the court concluded that the “**right to live of which Art. 21 speaks of can be said to bring in its trial the right not live a forced life.**”

The Bench even called for the deletion of Section 309 IPC, labeling it as cruel, irrational which results actually in punishing an individual twice. Section 309 IPC, according to the court , violates Art.21 and therefore void. This is necessary to humanize the law. In the opinion of the Court, attempted suicides are a medical and social problem and are best dealt with by non – customary measures. The Court emphasized that attempt to commit suicide is in reality a cry for help and not for punishment.¹³

The above was a radical view and could not last for long. The **Rathinam** ruling came to be reviewed by a full bench of the Court in **Gian Kaur v. State of Punjab**¹⁴. The question arose that if attempt to commit suicide is not regarded as penal then what happens to someone who abets suicide.

Abetment to commit suicide is made punishable in Section 306 of IPC. But then, if the principal offence of attempting to commit suicide is void as being unconstitutional vis-à-vis Art. 21, then how abetment thereof could be punishable logically speaking.

The faculty setting in **Gian Kaur** was as follows: Gian Kaur and her husband were convicted under Section 306, IPC for abetting the commission of suicide by Kulwant, their daughter in-law. It was argued that Section 306, IPC was unconstitutional as Section 309 of IPC had already been declared unconstitutional in case of **P. Rathinam**. *It was argued that the ‘right to die’ having been included in Art. 21 (Rathinam), and Section 309 having been declared unconstitutional, any person abetting the commission of suicide by another is merely assisting in the enforcement of his Fundamental Right under Art. 21. This argument led to the reconsideration of the Rathinam ruling and its eventual overruling.*

The Court has rule in**Gian Kaur** that Art. 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in “protection of life.” The court has observed further:¹⁵

“Right to Life is a natural right embodied in Art. 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of Right to Life. ”

The court thus has ruled that Section 309 of IPC is not unconstitutional. Accordingly, Section 306, IPC has also been held to be constitutional.

The Constitution Bench of the Supreme Court has upheld the constitutional validity of Section 309, IPC in **Lokendra Singh v. State of Madhya Pradesh**.¹⁶This provision does not

¹³ The Law Commission in its 42nd Report (1971) has recommended deletion of Section 309 of IPC

¹⁴ AIR 1996 SC 946 : (1996) 2 SCC 648

¹⁵ AIR 1996 SC at 952

offend Art.14 because there is inbuilt flexibility therein. It gives discretion to the Court to award suitable punishment commensurate with the gravity of offence against compulsion of giving disproportionately harsh punishment in all cases of offence of attempt to commit suicide. This flexibility protects Section 309, IPC from the vice of being unconscionably harsh. In an appropriate case, the court can even impose fine.

In **Gian Kaur**, the Supreme Court has distinguished between euthanasia and attempt to commit suicide. Euthanasia is termination of life of a person who is terminally ill, or in a persistent vegetative state. In such a case, death due to termination of natural life is certain and imminent. The process of natural death has commenced; it is only reducing the period of suffering during the process of natural death. This is not a case of extinguishing life but only of accelerating conclusion of the process of natural death which has already begun. This may fall within the concept of right to live with human dignity upto the end of natural life. This may include the right of a dying man to die with dignity when his life is ebbing out. But this cannot be equated with the right to die an unnatural death curtailing the natural span of life.

CONCLUSION

Every person shall have the right to die with dignity; this right shall include the right to choose the time of one's death and to receive medical and pharmaceutical assistance to die painlessly. No physician, nurse or pharmacist shall be held criminally or civilly liable for assisting a person in the free exercise of this right.”¹⁷ Many patients on respirators are not conscious and so cannot say whether they want to live or die.

Almost everyone would agree that life is the most precious gift that human beings have been given. Just the chance to be alive on this earth and play a part in the grand scheme of God’s eternal plan is a privilege indeed.

Yet, despite this, there are times when life becomes so difficult or unbearable that many have, at one time or another wished they were dead or had never been born. For some, these feelings linger—and if they linger long enough, suicide seems to be the only escape. Under jurisdiction of living world the right to life is regarded as most prominent right among all the basic rights. India is not exception to it. Under the Indian constitution right to life is regarded as most important fundamental right that no derogation from it is permitted even in the time when the country is suffering from emergency.¹⁸ It is equally true that howsoever important the right to life may be it is the death which is the end of the process. One cannot ignore this fact. Therefore the question arises that ‘Does the right to life include the right to die’? If the death is an integral part of life, should the individual’s decision to die, its time and manner, be protected from state intrusion? This question is still unsettled despite a long term debate and discussion on this issue, going on at the judicial and extra judicial review regime.

¹⁶ (1996) 2 SCC 648 : AIR 1996 SC 946 and 1257

¹⁷ International Herald Tribune

¹⁸ Part XVIII of Indian Constitution (Art. 352 to 360)

The issue of ‘right to die’ first came before a two judge bench of the Supreme Court of India in the case of **P. Rathinam v. Union of India**.¹⁹ In this case, section 309 IPC which penalizes attempt to suicide was held to be unconstitutional and violative of Article 21. In P.Rathinam’s case, the scope of life was broadened. It was held that ‘right to life and liberty’ under Article 21 also includes ‘right to die’. However, the debates over the issues didn’t stop. The question again came up for consideration before the Supreme Court in the case of **Gian Kaur v. State of Punjab**.

According to Vedantic philosophy, the Parma Brahma created the human being. God is present in the soul of the human being. God is the material cause and instrumentality of all joys, happiness, woes, sorrows, deeds and karmas of humanity. Just as he gave life to us, he takes it away from us as well. He is the creator as well as the doer and the destroyer of this body. Committing suicide one never gained anything in life. Committing suicide was an offence as per Bhagavad Gita. Our soul atman after death of mortal body in present life (resulted from committing suicide) again manifests a lower life form than present. What of sin incurred by committing suicide? By committing suicide we again suffered in life as our soul atman would manifest a lower form of life in next manifestation.

Section 309 of IPC deserves to be effaced from the Statute book to humanize our penal laws. It is a cruel and irrational provision and it may result in punishing a person again who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Hon’ble Supreme Court has also expressed similar view in **Aruna Ramchandra Shanbaug v. Union of India & Ors.**²⁰ An act of suicide cannot be said to be against religion. Morality or public policy, and an act of attempted suicide have no baneful effect on society. Further, suicide or attempt to commit suicide causes no harm to others; therefore the state’s interference with the personal liberty of the concerned persons is not called for. Thus section 309 violates Article 21, and so void.

If a person has right to live Article 21 of the Constitution, the question is whether he has a right not to live. Logically, it must follow that the right to live will include the right not to live, say, the right to die or to terminate one’s life, Right to live of which art 21 speaks of can be said to bring in its trail the right not to live a forced life. If a person, because of family discord, distraction, loss of a dear relation or other cause of a like nature overcomes the instinct of self-preservation and decides to take his life, he should not be held for an attempt to suicide. In such case the unfortunate man deserves indulgence, sympathy and consolation instead of punishment.²¹

Morality has no define boundary and it would be too hazardous to make a bold and bald statement that commission of suicide is per se an immoral act. “*If the purpose of the prescribed punishment is to prevent the prospective suicides by deterrence, it is difficult to*

¹⁹(1994) 3 SCC 394

²⁰(2011) 4 SCC 454

²¹DwarkaPoonja v. Emperor (1912) 14 Bom L.R 146

*understand how the same can be achieved by punishing those who have made the attempts. Those who make the suicide attempt on account of mental disorder requires psychiatric treatment and not confinement in the prison cells where their condition is bound to be worsen leading to further mental derangement. Those on the other hand, who makes a suicide attempt on account of actual physical ailments, incurable disease, torture (broken down by illness), and deceit physical state induced by old age or disablement, need nursing home and not prison to prevent them from making the attempts again. No deterrence is going to hold back those who want to die for a special or political cause or to leave the world either because of the loss of interest in life or for self-deliverance. Thus in no case does the punishment serve the purpose and in some cases it is bound to prove self-defeating and counterproductive.*²²

The question is whether the scope of Article 21 also includes the right to die? When a man commits suicide, he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to or be included within the protection of the right to life under Article 21. The significant aspect of sanctity of life is also not being overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in the protection of life. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, the court reiterated that it is difficult to construe Article 21 to include within it the right to die as a part of fundamental right guaranteed therein. Right to life is a natural right embodied in Part III of constitution, but suicide is an unnatural termination or extinction of life and therefore, incompatible and inconsistent with the concept of right to life. Section 306 enacts a distinct offence, which is capable of existence independent of section 309 IPC. Section 306 prescribes punishment for abetment to suicide, while section 309 punishes attempt to commit suicide. Abetment of attempt to commit suicide is outside the preview of section 306 and is punishable only under section 309 read with section 107, IPC. In certain other jurisdictions, even though attempt to commit suicide is not a penal offence, yet the abettor is made punishable. The provision there provides for the punishment of abetment of suicide as well as abetment of attempt to commit suicide. Thus, even where the punishment for attempt to commit suicide is not considered desirable, its abetment is made a penal offence. In other words, assisted suicide and assisted attempt to commit suicide are made punishable for cogent reasons in the interest of society.

The Indian constitution under Article 21 confers the right to Life as the fundamental right of every citizen. The Right to Life enriched in Article 21 have been liberally interpreted so as to mean something more than mere survival and mere animal existence. The Supreme Court has asserted that Article 21 is the heart of the fundamental Rights provided under part III of the constitution.²³ The Supreme Court has clearly stated that in order to treat a right as a fundamental it is not mandatory that it should be expressly stated as a fundamental right.²⁴

²²P.B. Sawant J. in MarutiShripati Dubai v. State of Maharashtra, 1987 Cr. LJ 743 (Bom.)

²³Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178

²⁴Maneka Gandhi v. Union of India AIR 1978 SC 597

‘The right to life’ under Article 21 of the Constitution has received the widest possible interpretation under the able hands of the judiciary and rightly so. On the grounds as mentioned, Article 21 does not have a restrictive meaning and needs to be interpreted broadly. This affirms that if Article 21 confers on a person the right to live a dignified life, it should bestow the “Right to Die” also, but the inclusion of Right to die under Article 21 contradict the provision of Indian Penal Code under Section 309. As according to Section 309 of the Indian Penal Code ‘Whoever attempts to commit suicide and does any act toward the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year (or with fine, or with both)’. This section is based on the principle that lives of men are not only valuable to them but also to the state which protects them. By considering both the laws the provision of IPC under section 309 is contradictory to the fundamental right guaranteed under Article 21 of the Indian Constitution. The state’s power under section 309, IPC to punish a man for attempt to commit a suicide is questioned not only on the grounds of morality, but also on the constitutionality of the said provision. A lot of conflicting opinions have been given on desirability of retaining or abolishing section 309 of Indian Penal Code because of some contrasting judgement given by various courts.

So for the applicability of Section 309 as this issue is concerned, the Law Commission of India has given opinion that once a competent patient decides not to take medicines and allows the nature to take its own course, the doctor has to obey the instructions of the patients, since this omission of this doctor is based on the patients direction, therefore, it is not an offence under Section 306 of IPC.

On the basis of above discussion it can be inferred that since the withholding or withdrawal of life supporting equipment (which amounts to euthanasia) has been permitted by the Court in cases where a patient is in persistent vegetative state, doing so is neither illegal criminal in India.

Motive of laws are to facilitate and regulate the life on planet. Laws are made for the people and it should change to meet the aims and aspiration of the changing society. Legislation is duty bound to walk with the society.

THE ROLE OF JUDICIARY IN PROTECTING THE RIGHT OF WOMEN IN INDIA: A CRITICAL ANALYSIS

Aarzoo Thareja* & Sana Sharma**

The hue and cry of the innocent and dilapidated women can no more be left unheard. Hence there is acute necessity to rethink and re-look at the Constitutional provisions for the protection of women's right. All these situations of violence creates a huge and fascinating area to research. The main focus of this article is to examine the constitutional provision embedded in the Indian Constitution as well as the great judicial work interpreting and widening the scope of such provision in favors of women's right. The article highlights the day to day problems faced by women in every front of their life which gives them physical and mental set-back. The article emphasize for the personal and social growth of women.

Keywords: Rights, Judiciary, Elimination of Discrimination, Inadmissibility

INTRODUCTION

As once said by Mahatama Gandhi that difference regarding sex and physical forms denotes no difference, that means the gender or physical appurtenance in no way discriminates or differentiate a person from other. Women are the ones who compliment men and are not the ones to be counted as inferior. As per bible woman came out of the ribs of men and not from his feet or head that is, women are meant to be treated equal. Men and women are equal and play an important and equal role in development of their families as well as society at large. Men and women are the wheels of a single vehicle without anyone of which the vehicle is of no use or functionless. Despite of all these facts the legal equality in the status of women all over the world is a major battle these days. Although Indian history reveals the fact that during a point of time women were given equal opportunity and status as to men and even there had been a culture of upnayan sanskar in the society for women as well as men. Women were given rights in their ancestral property same as men had. But, with the pace of time things changed for the worse and now women have to fight for their rights and equal status in the society. Thus, the first task of post-independent India was to provide a constitution to the people of India that could guarantee them rights being the citizen without any such discrimination.

Jurisprudence has placed the judiciary in the position where it has extended its power to go beyond the statutory framework and limit set by it and, to provide better and conniving justice to all. Judiciary acts as a watchdog in granting justice and scrutinizing the fact that no one is actually deprived of their rights guaranteed to them by the constitution of India and that they are satisfactorily safeguarded. This can be better termed as judicial activism that is

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the judiciary keeping watch everywhere and taking action and initiative on its own motion sometimes to protect and deliver the safeguard of law where necessary.

Article 14 of the Indian constitution envisages within itself the twin concept of equality before law and equal protection before the law; it guarantees this right to all. On the other hand article 15 of the Indian constitution further in support to article 14 declares that there shall be no discrimination against any citizen of the country based on sex. In addition to this article 15(1) ensures the equality in opportunity as to employment.

In Rajesh Kumar Gupta v. State of Uttar Pradesh¹ the apex court held that reserving 50% of the total seats in favor of women are not arbitrary. Article 39-A and 39a respectively anticipates in them the provisions duty binding state to ensure free legal aid and equal justice to all without any discrimination. The state has a duty to ensure that legal system is operating to promote and provide equal opportunity and free legal aid. Under various of its decisions apex court has very clearly and particularly held that legal aid and right to speedy trial has with the passage of time has raised to a standard whereby it has to be considered as fundamental right. Article 21 of the constitution through various Supreme Court judgements ensures a pauper the right that he will definitely be provided with a legal representative to ensure that he is getting opportunity to represent the case.

Pursuant to article 39(d), the parliament has enacted Equal Remuneration Act, 1976. The doctrine contained in this article and the act passed thereto can be judicially enforceable by the court. In Randhir Singh V. Union of India supreme court has held that the principle of equal pay for equal work though not a fundamental right is certainly a constitutional goal and therefore is applicable and enforceable through article 32 of Indian constitution. The credo of equal pay for equal work is equally applicable to the people employed on daily wage basis. Eight years later also apex court delivered other landmark judgement Daily Rates Casual Labour V. Union of India² embossing the same as held in Randhir Singh's³ case that the doctrine of equal pay for equal work as held earlier is equally and without doubt applicable on those receiving daily wages. Article 39(e) puts responsibility on the government of country to ensure health and strength of the worker class including the protection of men, women and children who are underage. Article 42 ensures that all the humans will be treated just and equally as well as maternity relief to the women. Article 51-A(a) provides that it shall be the duty of every citizen of India to abide by the constitution and its mandate as well as to respect the ideals enshrined in it similarly article 51A(e) puts the mandate on every citizen of India that being the citizen it shall endeavor to promote and maintain the common brotherhood and harmony as well as peace full cohabitation with the other members of the society. And shall not practice or shall do anything that will be derogatory to the dignity of women-hood.

REVIEW OF LITERATURE

¹ AIR (1982) SC 1555

² 1987 AIR 2342, 1988 SCR (1) 598.

³ 1982 AIR 879, 1982 SCR (3) 298.

Time has witnessed that for a very long time and for many centuries women were subjected to mental and physical torture and harassment within the four walls of their home. The offences such as dowry demand, child infanticide, and sati-pratha are all such forms of violence against the women. It is considered that silence, self-sacrifice are the ornaments of women which they are expected to wear without uttering a word of complaint. With the turn towards the new era, new thoughts emerged in regard to women and every child of human species who has known women to be a inferior gender started to think it differently as women started to raise voice for reliasation of their rights, despite of the fact that such raises were quashed innumerable times. Indian society is a semi-feudal type of society where women are treated as secondary citizens with several bondages in day to day life. This disgraceful treatment were not only confined into the four walls of house but when women steeped into the outer world to work and take the economic stand of their own they were subjected to new sorts of harassment by their co-workers, supervisors and many other people with whom they interacted in outer world. The framers of the Indian constitution at the time of independence were well aware about the plight of women in society and therefore, they made certain provisions in constitution to secure and guarantee them the rights they needed. Despite of the fact that women's right were secured by the constitution makers by embedding them in basic legal book of the country in absence of any proper machinery to put these rights into fruitful implication these provisions remained far away from achieving their goals. To quote it almost took a period of twenty six years to implement the constitutional provision of equal pay for equal work for both men and women. On the other hand the problem is that most of such rights of women have been provided under the chapter of directive principles of state policy which are not having any time frame moreover; these are not justifiable in nature thus the problem for their implication remain as it is.

Many can dent this fact but the latest census of 2011 revels the correct position and thinking of the society. According to the census of 2011 there are 940 women over 1000 males that show that mind of Indian people are still prigs and stuck to the old orthodox concepts. 2001 was declared as the women's empowerment years will the huge promises to achieve the constitutional objective of equality without discrimination as to gender, but they remained far away from being fulfilled. There is no doubt about the fact that Indian constitution does not lacks the rights and duties guaranteed to the state for implementation of such rights the basic problem in every field in our country is the lack of executive framework to implement those rights guaranteed by our grundnorm. Hence its essential to re-examine these constitutional rights full of opportunities and infinite chambers of thoughts to be researched on.

OBJECTIVES

The objective of this research is to study and indentify the provisions embedded in the Indian constitution for securing women's rights and to identify the problems faced by them in lack of implementation of such rights. This research also notes the roles played by the Indian judiciary as well as the National Women's Right Commission in order to secure these rights and try to put them into actual implementation and realization.

LIMITATION

Under the article the basic focus is to study the existing legislation regarding women and their rights secured by such legislatures and the protection available to them under constitutional provisions and the complimenting role played by the judiciary with regard to rights of women working. The study is also limited to the secondary available source of India.

METHODOLOGY

Despite of the fact that the statutes such as the equal remuneration act 1986, the sexual harassment act of 2013 has been passed, the problems regarding women and the crimes against them are proliferating at a large pace. As per the report of National Crime Record Bureau⁴ the crimes against women in 2012 increased by 6.4% as compared to its previous year 2011. The cases between the years 2008 to 2012 has rapidly increased with a faster pace. In year 2008 the total crimes recorded and reported against the women were 1,95,856 following 2,03,804 in year 2009, 21,585 cases in year 2010, 2,28,650 cases in 2011 and 2,44,270 cases in year 2012 thus a rapid and constant increase in crimes against women can be clearly seen. Year 2012 reported 24,923 rape cases against women. The statics provided here are only based on the cases which were reported. It is very easy to confer that there are thousands of cases which remain unreported every year and they might be of more heinous in nature but the sad plight of the nation is that they go unreported. The cases also remains unreported due to fear of defamation to the victims and the family such problems are deep rooted in the culture that it would take a long time to discrete such thinking from the cultural and traditional mind set of the society.

Since the formation of United Nations organization its primary focus enshrined in its preamble is to bring and maintain dignity for human rights and achieve the international goal of gender equality. The very first article of the UN charter proclaims to achieve and promote respect for human rights and freedom of people without ant discrimination as to gender. India was also the member state which rectifies the CEDAW (1979) on July 9th, 1993. The convention lay down on each state who agreed to the convention a duty to oblige by it. The convention secures the enjoyment of rights to women irrespective of their marital status, in economic, social, cultural and civil front.

Apparel export Promotion Council v. A.K Chopra⁵, It is the first case in which the supreme court apply the law laid down in case of Vishakha v. State of Rajasthan⁶ and upheld the dismissal from service of a superior office of the Delhi based apparel export promotion council who was found guilty of sexual harassment of a subordinate female employee at the work place on the ground that it violated her fundamental right guaranteed by article 21 of Indian constitution. The apex court also held that the international instruments such as

⁴ Indian government agency responsible for collecting and analysing crime data

⁵ AIR 1980 SC 1535

⁶ (1997) 6 SCC 241, AIR 1997SC. 3011, (1998) BHRC 261, (1997) 3 LRC 361

CEDAW⁷ and Beijing declaration⁸ directs all state parties and give a message loud and clear for maintain and respecting honor and dignity of women. These international instruments put an obligation on member state as well as India for gender sensitization and the message as well as the duty cast upon the nations by these international instruments is to be put to implication and not allowed to be drowned.

Madhu Dishwar v. State of Bihar⁹, the apex court held that international instruments namely CEDAW and Beijing declaration are integral scheme and complementing part of international rules in regard to fundamental rights and directive principles enshrined in part 3 and part 4 respectively of Indian constitution.

Article 2(e) of CEDAW impose duties on state parties to put the bone marrow in dry bones of their constitution to make them strong and not hollow as well as to prevent and stop gender based discrimination on economic social and cultural front . Article 2(f) read with articles 3, 14, 15 of international conventions of CEDAW makes an integral scheme collateral to Indian constitution and protection of human right

Great judicial work has been reflected in Vishakha v. State of Rajasthan where Supreme Court has laid exhaustive guidelines to prevent sexual harassment of working women in places where they work for financial gains, this was a step forward reflecting judicial activism which laid down guidelines until legislation is enacted for the same purpose. the petition was filed by a social worker by the way of public interest litigation putting light for the enforcements of rights of working women at their work places under articles 14 19 and 21 of the constitution and requested the judiciary to find suitable methods for realization of true meaning of concept of gender equality. Gender equality includes protection from sexual harassment and a right to work with dignity which is universally recognized as basic human rights. International conventions and norms are of great importance in the formulation of the guidelines to achieve this purpose. later, on the guidelines of Vishaka v. State of Rajasthan parliament brought criminal law amendment act in 2013 as well as new statute for the same purpose Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 , the basic aim of the act is to ensure protection of women irrespective of their age at all work places and covered under its ambit both public and private sectors where organized or unorganized for prevention of such incidents to look into an investigate into complaints of sexual harassment .

The supreme court of India has interpreted several human rights addressing women by putting it with the framework of fundamental rights enshrined in part 3 of the constitution of India. These interpretations has left and gone the American bills of right much beyond. Indian judiciary by their interpretation has remarkably tried to avoid and eliminate the vacuum created by few conditions and feeling such vacuum between municipal law and given situation by applying international conventions whenever necessary. In enumerable cases the

⁷ International convention securing women's right, adopted in 1979 by UN general assembly.

⁸ Resolution adopted by UN on rights of women.

⁹ AIR 1996 5 SCC

Supreme Court has done positively commendable work in setting remarkable standards of gender equality and realization of human rights in regard to women.

Ranghubans Saudagor Singh v. state of Punjab and Haryana¹⁰, the Indian constitution prohibits discrimination on ground of sex alone but when the peculiarities of sex is taken along with other facts and consideration establishing a reasonable nexus in regard to the object of classification then the bar embedded by constitution under articles 15 and 16(2) cannot be attracted

Air India v. Nargesh Mirza¹¹ , Supreme court struck down the air India and Indian airlines regulation on the retirement and pregnancy bar on the services of air hostesses as unconstitutional on the very ground that the conditions which has been laid down therein were entirely non justifiable, unreasonable and arbitrary . The condition that the services of air hostess would be terminated on first pregnancy was most unreasonable and arbitrary and liable to be stroked down and therefore clearly violative of article 14 of Indian constitution.

Mumbai High Court in Pragati Vargheese v. C. George Vargheese¹² has stuck down section 10 of the Indian Divorce Act, 1869 under which a Christian wife has to prove adultery along with cruelty or desertion while seeking the divorce on the ground that it violates the fundamental rights of Christian women guaranteed under Articles 21, 15 and 14 of the Indian Constitution. The court also struck down sections 17 and 20 of the act which stipulated that an annulment or divorce passed by the District Court has to be confirmed by the 3 judges bench of High Court. The apex court in several cases has rejected the plea of husband and any other person who demanded the virginity test on the women to prove her chastity on the very ground that its violative of article 21 of the constitution.

Sarla Moudgil v. Union of India¹³ the court held in this particular case that if a person just with the intention to do the second marriage adopts Islam that marriage cannot be termed as legal on the ground that husband being a Muslim has right to do the second marriage and escape the responsibility. Court further in Noor Saba Khatoon V. Mohd. Quasim¹⁴ allowed the divorced wife who was unable to maintain herself financially even after the expiration of the period of iddat till the time she gets re-married or is able to maintain herself financially.

CONCLUSION

There can be innumerable incidents were women has brought pride and honor for the country as well as it cannot be denied that women has made position on economic, social and cultural front shoulder to shoulder with men. In fact they are leading in every field and creating milestones hard to compete with. However, despite of all these facts the reality is harsh with regard to Indian society that is they are still subjected to various forms of

¹⁰ AIR 1972 Punjab and Haryana

¹¹ AIR 1981 SC 1868

¹² AIR 1997 Bom 349

¹³ 2000 (2) ALD Cri 686

¹⁴ 2003 (3) JKJ 184

discriminations in day to day life. Sexual violence has been one of the leading factors threatening women and creating hindrance in their freedom. The inequality is the theme of the main battle to be fought in the present era. The constitutional provisions in addition to the legislative provision have provided enough of the law to fight this battle and create positive discrimination favoring women of the country. In India within democratic-polity framework various programs have been aimed at their empowerment and elevation in different life spheres. We could find that if we scrutinize the series of decision by the Indian judiciary at all the levels it has taken a sympathetic and serious attitude towards providing appropriate justice to the women been subjected to various crimes against them. The court's work has never been limited only up to providing them the decision granting relief but courts have laid down in various judgments the guidelines on various points of fact and law where it found necessary for protecting the rights of women in addition awarding huge amounts as compensation to them. The women subjected to crimes do deserve a liberal attitude legally and socially as they are already and always have been the victim in society.

HUMAN RIGHTS EXPLOITATION IN HUMAN CLINICAL TRIALS – STUDY ON NON-COMPLIANT CLINICAL TRIALS

*Josephine Shreela. G**

The following short comments article focuses on the existing system of human clinical trials in India, the current regulatory framework and the practices involved in the selection of trial subjects adjudged according to its impact on human rights.

INTRODUCTION

India for a long period has been the testing ground for multinational drug companies of highly developed countries and its many factors have proved to be an advantage for them and a curse to the citizens of our country. Large population, lack of regulating factors, low cost are few of the many factors that has turned this country to the “most desirable testing hub”. Human clinical trials has been defined by WHO “Any research project that prospectively assigns human participants or groups to one or more health related interventions to evaluate the effects on health outcomes.” Human clinical trials are not be completely dreaded in fact proper regulation of such trials is encouraged to develop the health industry and to generate significant revenue from multinationals but harmful usage/misuse of such drugs due to improper regulation is what has become the rising concern of the day.

Shocking Revelation: In the recent years over 2,500 Indians have died during the course of human clinical trials, government figures reveal. The health ministry admitted that 2,644 people died during the clinical trials of 475 drugs from 2005 to 2012. Apart from the figures being daunting enough, the unbelievable aspect of all this brutality is the way the “consent” is obtained from the participants of such trials, human clinical trials are usually done amongst poor people who obtain medical services either freely or in the form of support in the form of special government funds, thereby making them vulnerable to exploitation. They are dismayed by doctors who give them expensive foreign drugs and make them feel as though they are blessed to receive such drugs which under normal circumstances they will not be able to afford but in the midst of this act little is known to the consumers of the drug that they are in fact being tested and these drugs have little or no effect to the disease for which they originally approached the doctor. The consent forms are either in English or improperly translated in the local language thereby making it impossible for the locals to fully understand the content and thereby giving a consent which is not valid on any grounds. One of the clear indications that the drug is a clinical drug is that in most cases the particular drug in question will not be available in the ,local easily accessible pharmaceutical stores and most only with the doctors.¹

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¹ Sue Lloyd-Roberts , “Have India’s poor become human guinea pigs” BBC Newsnight [1 November 2012]

Bhopal- the place where the most horrific industrial tragedies in the history of mankind has taken place is also one of the blooming places for human clinical trials. After the horrific incident took place,

The Bhopal Memorial Hospital was set up as per the directive by the Supreme court of India to provide advanced treatment to the victims of the gas leak tragedy and the public at large, but in reality the patients visiting the hospital most of which are the gas leak victims have to been exposed to harmful human clinical trials worsening their conditions. All these incidents have alarmed and given rise to many petitions and awareness by Ngo's and other social activists bring these atrocities to the limelight.

Human Rights v. Blooming Economy: All these issues and concerns have resulted in a mixed response, many doctors are against the allegations and stand firm to their belief that human clinical trials are not being tried out to harm the poor people. But why are poor people the participants of such trials?, the responses have not been satisfactory. Some argue that no standard protocol had been followed and to say that all deaths are due to human clinical trials is exaggeration of facts. The revenue that is being generated due to human clinical trials should be of significant importance for it is said that this industry is likely to generate \$1billion by 2016 , where it had generated about \$485 million. The question of regulating the human clinical trials has raised concerns about the impact of such regulation on the development of this promising industry, development of the quality of health care. In the battle between human rights and increasing money, human rights should never be compromised.

CURRENT REGULATORY MEASURES

THE DRUGS AND COSMETICS ACT 1940

Schedule Y of the Drugs and Cosmetics Rules, 1945 made under the Drugs and Cosmetics act 1940 is of fundamental importance. It lays down the requirements and guidelines for the conduct of such clinical trials in India. Rule 122 DA (Permission to conduct trials), Rule 122 DAA (Definition of Clinical Trials), R122DAB (Compensation in case of trial related injury or death), Rule 122DAC (Conditions of Clinical trial permission and inspection), Rule 122DD (Regulation of Ethics Committee), Rule 122E (Definition of New Drugs). Though the act is comprehensive in its nature as it includes the responsibilities of the sponsor of the trial who includes an individual or institution who undertakes to manage, initiate or finance the trial without engaging into the actual conduct of the trial and the act also lays down the responsibilities of the investigator who oversees the conduct of the entire trial, definition of informed consent and also the nature of drugs to be tested in forms of phases of trials. The act also has a special provision with regard to clinical trial participant who is a pregnant woman and lays down special safeguards in that regard. These guidelines and requirements though seem holistic in its approach are not free from criticisms.

Role of Ethics Committees

In understanding the present regulatory framework to comprehend the effect of clinical trials regulation in India the role of ethics committee is of fundamental importance. The Ethics Committee which was set up as per the regulations issued by the Indian council of Medical Research in 1980. The prime responsibility of these ethics committees is the general regulation of the clinical trials along with the government's regulatory authority- The Drug Controller General Of India (DCGI)² Though the objective and the laid down functions of these clinical trials has the potentiality of ensuring integrity and protection of human rights in these clinical trials, however the reality is far from the desired outcome. It has been nearly 30 years since the establishment of these ethics committees but even today they are suffering from basic issues like inadequate or no standard operating procedures (SOPs) and noncompliance with the Schedule Y recommendations. The EC has the prime responsibility of regulating clinical research and safeguarding the rights and safety of research participants, however, the institutions and hospitals that focus on enhancing their research facilities tend to ignore the EC, which approves their research. ECs have to deal with basic issues such as lack of trained manpower, heavy workload, inadequate space allocated for EC operations, lack of administrative support, and inadequate remuneration offered to members serving on EC boards. These issues culminate into reluctance of trained individuals to serve as members of the EC³.

Informed Consent

Schedule Y of the drugs and Cosmetics rules, 1945 defines informed consent as that in all trials a **freely given, informed written consent** is required from the trial subject. The Investigator must provide information about the study verbally as well as supplying patient information sheet in a language that is non-technical and easily understandable by the trial subject. The Subject's consent must be in writing using an "informed consent form". In case the subject is unable to give informed consent, such should be provided by a legal representative on behalf of the trial subject. In practice however this process of obtaining informed consent has been vitiated by fraud and manipulation of trial subjects and the victims of this exploitation are vulnerable groups.

A resolute stand was taken by the apex court in 2013 in questioning the approval of 162 global clinical trials by the health ministry⁴. The Drugs and Cosmetic Rules,1945 was amended in 2013. According to the amended act, it imposes complete and ultimate liability on the sponsor of the clinical trials to reimburse any cost incurred by the trial subjects for the medical treatment of 'any injury' suffered by trial subject and financial compensation for injury or death [previously prior to the amendment compensation had to be provided only in the case of death], failure to do so would lead to cancellation of license of the sponsor by the licensing authorities and can even enable them to be debarred from conducting future clinical trials in India and in the case of serious adverse event (an untoward medical occurrence

² Rashmi Kadam, Shashikant Karandikar "Ethics Committee Facing Challenges", Indian Society of Clinical Research

³ Thatte U, Bavedkar S. "Clinical Research In India- Great Expectations?", J Postgrad Med

⁴ The Supreme Court's direction came following a PIL filed by an NGO Swasthya Adhikar Manch

during a clinical trial which is associated with death) reporting of such event should be made within 24 hours to the licensing authority, sponsor and ethics committee.⁵

The constant amendments to regulate the evolving evil practices provides hope and confidence that the brutality in human clinical trials will be reduced in the near future and safety and protection of human rights will triumph over exploitation and inhumane acts.

⁵ Karwa M, Arora S, Agrawal SG (2013) Recent Regulatory Amendment in Schedule Y: Impact on Bioequivalence Studies Conducted In India. J Bioequiv Availab 5: 174-176

CASE COMMENTARY ON: SHREYA SINGHAL v. UNION OF INDIA

Siddhi Suman* & Nalini chandrakar**

FREE SPEECH: UNCONSTITUTIONALITY OF SECTION 66A

Liberty of thought and expression is one of the core values of our democracy, which was reinforced by the Supreme Court in its landmark judgment of *Shreya Singhal vs. Union of India*, by striking down the infamous S.66 A of the Information technology Act, 2000 in March this year.

The criminal writ filed before the apex court in 2012, challenged the constitutional validity of section 66 A¹, which criminalized any information transferred online which is inconvenient, annoying or is offensive, on the grounds of being vague, and violative of the fundamental right to speech and expression, and the apex court obliged the petitioners by rendering unconstitutional the aforementioned section of the act.

The basis of the petition were the various arrests made in different regions of the country of people who had used social media networks and the internet to voice their dissenting opinions, and made caricatures about political leaders, the petition challenged the unbridled powers to the police to arrest anyone who disagrees with a view and posts it on a social website under the section, which expressly provides for a jail term of upto three years and a fine for any person for sending any information that is grossly offensive or has menacing character, orwhich he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device, the section was brought about by the government as a measure to prevent the rapidly increasing crimes using the internet like the publishing of sexually explicit material, video voyeurism and breach of confidentiality and leakage of data by intermediary, e- commerce frauds through communication services. Even though the objective was novel the resultant was a blanket provision under which anyone could be arrested for expressing any dissenting opinion, this was in gross violation of the fundamental right to free speech and expression.

The section is constitutionally wrong on two fronts, the vagueness of the language used and the over breadth, both these are universally acknowledged principles of the free speech jurisprudence, the detailed judgment dealt with both these issues and it was held that it was vague meaning thereby, that persons of ordinary intelligence have no reasonable opportunity to know what is prohibited, and what is not, further, over breadth potentially includes within its prohibitions both speech that it is entitled to prohibit, and speech that it is not. The section if maintained would lead to a chilling effect, referring to a situation where, faced with

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¹ Brought about by the amendment of 2007.

uncertainly defined boundaries of the legal and the illegal, citizens exercise abundant caution and steer so well clear of the illegal zone, that they end up self-censoring even when it comes to legal and legitimate conduct.

The court while extensively referring to the free speech jurisprudence both in the USA and in our nation, examined the main issue of whether the section was unconstitutional and violated the right to free speech and expression under article 19 (1) (a), proclaimed by the constitution of India to every citizen, granted under the reasonable restrictions on eight specific subjects given in article 19(2), including public order, morality and decency especially on these three particular grounds, on the demand of the defendants and coming to conclude that the section was unconstitutional and could not be saved.

The detailed and well-reasoned judgment firstly examined all the factors that affect the right of free speech, the basic fundamental right is not absolute, giving the citizen to express and even advocate his ideas on any public platform but not incite; it is at this level that free speech is restricted and the government gets the authority to curb it on the grounds of maintaining public order, decency or morality, and defamation. The two judge bench analyzed the difference between advocacy of ideas and incitement in the context of public order and opined that advocacy of ideas however unpopular and undesirable, could not be held criminal; however incitement could be regulated, restricted or curbed to protect public order. The judges relied on the precedents of the US courts to define public order as signifying “a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.”

The Supreme Court reiterated that ‘public order’ embraced more of the community than the concept of ‘law and order’, holding that in this particular matter, the section, which is inclusive and does not refer to content rather focusing on the medium, did not establish any proximate relationship between the speech complained of and the speech reasonably restricted for the maintenance of public order and thus could not be held to be disruptive of public tranquility and order.

The court then dealt with the question of information that was “grossly offensive”, “annoying and inconvenient”, the court held that both these phrases were vague and could not be brought into definition on certain and specific terms by bringing the obscenity argument which was referred to by the defendants; the court held that any information that is ‘grossly offensive’ or ‘annoying’ need not be ‘obscene’ and reasoned that the word ‘obscene’ was conspicuous by its absence from the provision, and it could not be construed to be present and thus these phrases could not be simply read down as was being asked for by the defendants and the entire section did not pass the critical test of not being vague. A vague law creates uncertainty and also gives wide discretionary powers in the hands of the implementation authorities, and thereby is impermissible; this becomes all the more important when there is a question of fundamental rights concerned, as it is not merely a question of law but rather of protection of the first condition of liberty.

The over breadth of the provision was also noted and it was held that due to the wide scope of the language used, the provision could easily be used to cover the situations that did not fall within the ambit of the law. The vagueness and over breadth of the provision were also held to have a chilling effect, and thereby reducing the free flow of ideas and public discourse, the essentials of the right to free speech and expression.

The two judge bench sought to define the circumstances in which freedom of speech and expression could be legitimately curtailed under the Indian Constitution. The Supreme Court while recognizing the two mediums, i.e., the traditional media and the online mode as different emphasized that similar level of constitutional scrutiny shall be applied to determine the constitutionality of the provisions, while ruling out the demand for a relaxed test of reasonableness for internet speech².

Concluding that the section was unconstitutional and further reading down section 79 of the Information Technology Act on intermediary liability, the court said that the provision must now be read as providing for intermediary liability only where an intermediary has received actual knowledge from a court order or on being notified by Government that unlawful acts related to Article 19(2) are going to be committed, and that intermediary had failed to expeditiously remove or disable access to such information, and in a relief to the government upheld the constitutionality of section 69 A, which was also challenged in the same petition.

The court's decision, in conformity with the constitutional guarantees and in furtherance of the fundamental rights, comes as welcome step in protection of unlawful arrests made in the name of public order, and comes at a time when there are various contours of freedom of speech and expression, in trying to clearly define and understand the scope of every aspect involved, the decision will set a precedent not only for further policies of the government in this regard but also will set a precedent that would be the benchmark of free speech jurisprudence in India.

² Gautam Bhatia '*Free Speech under the Indian Information Technology Act: The Supreme Court's Recent Judgment*' (OXHRH, 27 March 2015)<http://ohrh.law.ox.ac.uk/?p=16969> [21st May, 2015].

BEYOND THE REFUGEE CONVENTION: A LOOK INTO THE RIGHTS OF REFUGEES

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The most widely accepted definition of a Refugee is a person who 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. Apart from the Refugee Convention there are various other International Instruments that are referred to while determining the rights of refugees. This project seeks to analyze the rights of refugees critically and examine these rights keeping in mind the evolving changes in the International Legal System and requirement of a broader definition for Refugees.

Key Words: Refugee, Refugee Convention, Non-Refoulement, Rights, United Nations

INTRODUCTION

International law provides a narrow definition of the term refugee¹. Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees², a refugee is defined as person “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.” The Refugee Convention provides a broad range of rights in the country of asylum to the refugees.³ However, as argued by many there is a necessity for them to be present “lawfully” in the country of refuge.⁴ Unlike international human rights law which applies to all human beings, except where explicitly stated otherwise, international refugee law, notably the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, provides different gradations of treatment which is consequential to a person’s legal status.⁵ Goodwin-Gill gives

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¹ Walter Kalin and Jorg Kunzli, *The Law Of Human Rights Protection*, Oxford: Oxford University Press 2009.

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> [accessed 26 February 2013]

³ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; The Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]

⁴ Guy S. Goodwin-Gill, *The Refugee In International Law*, 2d ed. 1996, pp. 298-99 [hereinafter Goodwin-Gill]

⁵ UNHCR, “*Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*”, Global Consultations on International Protection, 3rd Meeting, UN Doc. EC/GC/01/17, 4 September 2001, ¶3.

a framework of four kinds of rights on the basis of which rights may vary. These categories include ‘simple presence’, ‘lawful presence’, ‘lawful residence’, and ‘habitual residence’.⁶ UNHCR we see that has agreed with such practice. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum seekers.⁷ Most other rights are contingent upon status as a refugee or some other legal status. The question of what amounts to ‘lawful residence’ versus ‘lawful presence’ is unsettled. In principle, the term “lawfully in” could imply admission in accordance with the applicable immigration law for a temporary purpose, and should, therefore, apply to asylum-seekers who have been admitted into the asylum procedure. J.C. Hathaway⁸, argues that it cannot be reasonably concluded that refugees who submit to a refugee status determination procedure are not ‘lawfully present’. According to Grahl-Madsen, ‘lawful stay’ is equivalent to ‘lawful presence’ of three months or longer.⁹ Goodwin-Gill¹⁰, argues that refugees lawfully staying ‘must show something more than mere lawful presence’, such as ‘permanent, indefinite or unrestricted or other residence status, recognition as a refugee, issue of a travel document, [or] grant of re-entry visa.’ A person who is a refugee has a number of important rights under the Refugee

Convention, including the right to seek asylum in a country outside their country of origin which has agreed to be bound by the Refugee Convention; the right not to be returned to the country where they have a well-founded fear of persecution; the right not to be discriminated against or penalised because they are a refugee; the right to equal access to the courts; freedom of religion and movement; the right to education and employment; and access to travel documents.¹¹

REFUGEE CONVENTION AND THE RIGHT OF NON- REFOULMENT

With its origins in refugee law,¹² the principle of non-refoulement prescribes that no person may be returned to any country where he or she is likely to face persecution or torture.¹³ To the extent that it relates to a risk of torture, the principle has attained the status of *jus cogens*¹⁴ according to some. The ECHR¹⁵ as well as the UN CRC¹⁶ have stated that the principle of non-refoulement flows directly from the prohibition of torture. Under the ICCPR, states may not in any manner ‘remove a person from their territory where there are substantial grounds

⁶ G. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press, 2nd ed., 1996, reprinted 1998, pp. 305- 307

⁷ UNHCR, “Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems”, Global Consultations on International Protection, 3rd Meeting, UN Doc. EC/GC/01/17, 4 September 2001, at p.1, referring to ExCom Conclusion No. 82 (XLVIII) - 1997 on Safeguarding Asylum.

⁸ J.C. Hathaway, *The Rights of Refugees under International Law*, Ch.3.1.2

⁹ A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (A.W. Sijthoff-Leyden, 1972), p.374

¹⁰ Goodwin-Gill, pp. 309

¹¹ http://www.alhr.asn.au/refugeekit/downloads/chapter_2.pdf

¹² Refugee Convention, Article 31

¹³ Goodwin-Gill, pp. 324

¹⁴ UNHCR Executive Committee, General conclusion on international protection, Concl. No.25, (1982), ¶ (b); Concl. No. 79, (1996) ¶(d)

¹⁵ Soering v. The United Kingdom, Series A No. 161 ECHR (1989), ¶ 91

¹⁶ Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, U.N.Doc. CRC/GC/2005/16, (2005), ¶ 27–28

for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'.¹⁷ It must be verified that the country to which the asylum seeker is being expelled that he will enjoy treatment consonant with accepted international standards in the destination country.¹⁸ The right of non-refoulement is termed as the "corner-stone" of refugee law.¹⁹

The underlying criterion is that of effective control over the individual: if effective control over the individual changes from one state to another, the principle applies²⁰. The central provision for this purpose appears in Article 3 of the Convention against Torture and Cruel, Inhuman or Humiliating Treatment or Punishment²¹. The non-refoulement principle is a fundamental component of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment²².

Indeed, the UN Human Rights Committee has stated that states parties to the International Covenant on Civil and Political Rights (ICCPR) may not in any manner 'remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'²³. The European Court of Human Rights (ECtHR) has also deemed the non-refoulement prohibition to flow directly from the prohibition of torture and cruel and inhuman treatment in Article 3 of the European Convention on Human Rights (ECHR)²⁴. The UN Committee on the Rights of the Child has taken a similar position²⁵.

RIGHT AGAINST DISCRIMINATION

Since international and regional human rights instruments embrace both citizens and non-citizens, they extend protections to refugees and asylum seekers²⁶. Important International

¹⁷ HRC, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, U.N.Doc. CCPR/C/21/Rev.1/Add 13, 12 (2004)

¹⁸ UNHCR: ExCom, No. 58 (XL) (1989)

¹⁹ James C. Hathaway & John A. Dent, *Refugee Rights: Report On A Comparative Survey* 25, 31 (1995)

²⁰ Committee against Torture (CAT), Conclusions and Recommendations : United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, ¶4(b) and ¶5(e).

²¹CCPR General Comment No. 20, ¶9, 10/3/92 found at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c112563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c112563ed004c8ae5?Opendocument); Chahal v United Kingdom, 108 ILR 385, at ¶75.

²² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004 ¶28

²³ Human Rights Committee, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, UN Doc. CCPR/C/21/Rev.1/Add 13, 26 May 2004, ¶12

²⁴ European Court of Human Rights (ECtHR), Soering v. The United Kingdom, Judgment of 7 July 1989, Series A No. 161, ¶91

²⁵ Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/16, 1 September 2005, ¶27–28.

²⁶ Ryszard Cholewinski, "Economic And Social Rights Of Refugees And Asylum Seekers In Europe", 14 Geo. Immigr. L.J. 709 1999-2000

Legal Instruments such as the International Covenant on Civil and Political Rights (ICCPR)²⁷ and the ECHR, apply to both nationals and non-nationals though they have a few exceptions.²⁸ The use of language such as "everyone," "all persons," and "no one" substantiate the point.²⁹ Their non-discrimination clauses require each state party to respect and ensure ("secure") the rights recognized therein to all individuals ("everyone") within its territory ("jurisdiction") without distinction ("discrimination") of any kind ("on any ground") such as race, color, sex, language, religion, political or other opinion, national or social origin ("association with a national minority"), property, birth or other status.³⁰

The Human Rights Committee (HRC) in its General Comment 15/17 on the Position of Aliens under the Covenant, the HRC asserted that: "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike"³¹

Rights are applicable on entry into the State.³² The ICCPR also contains a separate substantive equality clause in Article 26,³³ which is not restricted to the rights enumerated in the ICCPR and may therefore be applied to combat discrimination in areas outside the immediate scope of its provisions, including economic and social rights. Although there is no state obligation under the ICCPR to introduce social measures, the HRC has confirmed in a number of views that existing measures must be applied in a non-discriminatory fashion,³⁴ a position confirmed in a subsequent General Comment.³⁵ Article 26 extends also non-discrimination protection to socio- economic rights of non-nationals. The HRC found that unjustified differences in treatment on the basis of nationality in respect of pension rights constituted an infringement of the substantive equality clause.³⁶

²⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302

²⁸ ICCPR, Article 25; ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR] as amended by Protocol No. 11, May 11, 1994, Europ. T.S. No. 155., at 14, Article 16

²⁹ ECHR, Article 1; ICCPR, Article 10(1)

³⁰ ICCPR, Article 2(1); ECHR, Article 14

³¹ General Comment 15/27 on the Position of Aliens under the Covenant, U.N. GAOR, Hum. Rts. Comm., 41st Sess., Supp. No. 40, Annex VI, ¶1, 2, at 117, U.N. Doc. A/41/40 (1986) [hereinafter General Comment 15/27]. Manfred Nowak, *U.N. Covenant On Civil And Political Rights: Ccpr Commentary*, ¶21, at xxiv (1993)

³² *Ibid.* ¶5-6, at 117.

³³ ICCPR, Article 26.

³⁴ Communication No. 172/1984, *Broeks v. Netherlands*, U.N. GAOR, Hum. Rts. Comm., 29th Sess., U.N. Doc. CCPR/C/29/D/172/1984 (1987)

³⁵ General Comment 18/37 on Non-discrimination, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Annex VI, para. 12, at 175, U.N. Doc. A/45/40 (1990) [hereinafter General Comment 18/37].

³⁶ Communication No. 196/1985, *Gueye v. France*, Hum. Rts. Comm. (1985)

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁷, there is no express provision for non-discrimination. However, Article 2(2) ICESCR is held to contain a non- discriminatory clause which is not exhaustive.³⁸ The provision reads: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*" In its concluding observations regarding Belgium's initial report, the ESC issued a recommendation that, "In view of the non-discrimination clauses contained in article 2(2) of the [ICESCR], the Committee strongly urges the Government to fully ensure that persons belonging to ethnic minorities, *refugees and asylum seekers* are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector."³⁹

CIVIL AND POLITICAL RIGHTS

Right to Life

The right to life is an internationally recognized right.⁴⁰ The ICCPR describes it as an "inherent" right, giving it the status of customary international law.⁴¹ Some even argue that it has attained the status of a *jus cogens* norm.⁴² Article 6(1) of the ICCPR reads that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Also, Article 2(1) of the ECHR declares that "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The Human Rights Committee has emphasized that the right to life "is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."⁴³ The HRC has made a broad interpretation of the right to life as, [T]he right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connexion [sic], the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.⁴⁴ "A broad and liberal understanding of

³⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]

³⁸ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 43rd Sess., Annex, Provisional Agenda Items 8 & 18, at 1, U.N. Doc. E/CN.4/1987/17 (1987), reprinted in 9 HUM. RTs. Q. 122 (1987),

³⁹ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium*, U.N. ESCOR, 10th Sess., 27th mtg. at para. 14, U.N. Doc. E/C.12/1994/7 (1994)

⁴⁰ B. G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in *The Right To Life In international Law* 1, 2 (B. G. Ramcharan ed., 1985)

⁴¹ Halok A. Kabaalioglu, "The Obligations to 'Respect' and to 'Ensure' the Right to Life", in *The Right To Life In International Law* at 160, 161

⁴² B. G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in *The Right To Life In international Law* 1, 2 (B. G. Ramcharan ed., 1985)

⁴³ *General Comment 6(16) d/ article6*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40, Annex V, para. 1, at 93, U.N. Doc. A/37/40 (1982).

⁴⁴ Ibid.

the right to life, therefore, envisages the taking of positive action by States parties to the ICCPR in the economic and social spheres.”⁴⁵ Concurrently, it also constitutes a significant step in the direction of realizing the principle of interdependence of civil and political rights with economic and social rights. Craig Scott, argues, in the light of this principle, that certain rights in the ICESCR should be able to “permeate” the ICCPR. Scott emphasizes the importance of the right to life in realizing interdependence between these two categories of rights: “[T]he ultimate test of interdependence is the interpretation placed on the right to life in ICCPR6(l). Does it remain a classic negative right or is there a more modern conception to appeal to? Can the Human Rights Committee foster an evolution of the concept to include the right to live with basic human dignity... Can such rights as the right to health, the right to food, or the right to shelter be interpreted into the ICCPR?”⁴⁶

Right against Torture and Inhumane, Degrading Treatment

Article 2 of the Convention against Torture⁴⁷ requires a State to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. Under the Convention against Torture, the term 'torture' is defined in Article 1 as, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions”.

The relevance of the Convention against Torture and the work of the CAT in relation to refugee protection have not been lost on UNHCR as the Office issued an internal memorandum on the CAT in 1998. The memorandum summarises UNHCR's interest in this international human rights mechanism as follows: “As a rule, UNHCR's interaction with the human rights mechanisms generally, and the torture provisions in particular, should be linked to its mandate to protect from *refoulement*, all *bonafide* refugees and other individuals 'of concern' to the Office. Where the treaty mechanisms and the torture provisions can be used to prevent the *refoulement* of *bonafide* refugees or other cases of concern, then UNHCR will have a legitimate interest in those alternative and parallel systems”.⁴⁸ The case of *Tapia Paez v. Sweden*⁴⁹ concerned a Peruvian national and active member of the militant group *Sendero Luminoso* ('the Shining Path'), who was excluded from the grant of refugee status by the

⁴⁵ Ryszard Cholewinski, “Economic And Social Rights Of Refugees And Asylum Seekers In Europe”, 14 Geo. Immigr. L.J. 709 1999-2000

⁴⁶ Craig Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights”, 27 OSGOODE HALL L.J. 769, 875 (1989)

⁴⁷ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> [accessed 8 March 2013]

⁴⁸ IOMIFOM Nos. 57/98 and 61/98 of 28 August 1998, at para. 1.9

⁴⁹ Communication No. 39/1996.

Swedish authorities pursuant to Article IF of the 1951 Refugee Convention as he had been armed and engaged in crimes during his political activities in Peru. The Committee found that notwithstanding Mr. Tapia Paez's militant activities in his country of origin he fell under the protection of Article 3 as there were substantial grounds for believing he would be tortured if returned to Peru. In reaching this conclusion, the Committee noted that the nature of the acts in which the person engaged is not a relevant consideration in the taking of a decision in accordance with Article 3 of the Convention against Torture.

In *East African Asians v. United Kingdom*⁵⁰, the European Commission of Human Rights defined “degrading treatment” as, “degrading treatment in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action which lowers a person in rank, position, reputation or character, can only be regarded as degrading treatment in the sense of Article 3 where it reaches a certain level of severity.”⁵¹ It had also opined in an earlier case as to what constitutes degrading treatment as, “Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.”⁵²

Right to Liberty

Article 31(1) provides that States “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Article 31(1) of the 1951 Convention has also been taken to mean that the act of entering a country for the purposes of seeking asylum should not be considered an unlawful act. Article 31 of the 1951 Convention applies to asylum seekers. The term penalty has a wide application.⁵³ Thus detention without proper justification may attract penalty.⁵⁴ Although article 31(2) of the 1951 Convention does not identify in what circumstances restrictions on movement would be necessary, this provision must be read in light of article 12(3) of the ICCPR, which sets out the conditions in which the host State may limit the freedom of movement of those lawfully in the country. Article 26, provides that “[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within the territory subject to any

⁵⁰ *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 4422170, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 & 4526/70-4530/70 (joined), 78-A Eur. Comm'n H.R. Dec. & Rep. 5 (1994) (adopted by the Commission on Dec. 14, 1973).

⁵¹ *East African Asians*, 78-A Eur. Comm'n H.R. Dec. & Rep. at 55.

⁵² *The Greek Case*, 1969 Y.B. Eur. Conv.on H.R. 1, 186 (Eur. Comm'n on H.R.)

⁵³ Cholewinski, ‘Enforced Destitution of Asylum Seekers in the United Kingdom’ (1998) 10 IJRL 3; G. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in Feller, Türk & Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), 185; A. Edwards, “Tampering with Asylum: The Case of Australia” (2003) 15(3) IJRL 192.

⁵⁴ G. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in Feller, Türk & Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), 185.

regulations applicable to aliens generally in the same circumstances.” Many States have made specific reservations to this article. Some States reserve the right to designate places of residence, generally or on grounds of national security, public order (ordre public), or the public interest.⁵⁵ In line with the gradations of treatment framework underlying the 1951 Convention, it is clear that this provision applies to recognised refugees, but it may also apply to asylum seekers who are lawfully within the territory, that is, those who have applied for asylum regardless of whether they entered the territory with or without authorisation. In sum, for those persons lawfully in the territory, restrictions on their choice of residence are not permitted.⁵⁶ Article 9 of the ICCPR protects individuals against arbitrary deprivation of liberty, whereas article 12 applies to restrictions on movement short of deprivation of liberty. In accordance with article 4 of the ICCPR, a State party may take measures derogating from its obligations under article 9 in time of public emergency. However, it may do so only to the extent ‘strictly required by the exigencies of the situation’ and ‘provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’⁵⁷ Any restrictions must be limited to the needs of the situation and cease as soon as the state of emergency no longer exists. Moreover, any derogation must not interfere with other non-derogable rights in the Covenant, such as the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR. In addition, the State party must inform other States parties to the ICCPR immediately of any such derogation.⁵⁸ In practice, detaining refugees and/or asylum seekers is rarely declared to be for reasons of public emergency.⁵⁹

Socio-Economic Rights

An interpretation of the ICESCR⁶⁰ shows the applicability to refugees and asylum seekers in certain cases.⁶¹ Even though there may be no clarity, we see that core obligations enshrined in the ICESCR are applicable.⁶² Many that argue it the economic and social rights with respect to refugees are progressive in nature unlike civil and political rights, which have an immediate application.⁶³ But we see that Article 2(1) of the ICESCR requires to “take steps”

⁵⁵ *Ibid.*

⁵⁶ Ophelia Field, Legal And Protection Policy Research Series: Alternatives To Detention Of Asylum Seekers And Refugees, Protection Operations And Legal Advice Section (Polas) DIVISION OF International Protection Services United Nations High Commissioner For Refugees.

⁵⁷ HRC General Comment No. 29 (2001) on Article 4: Derogations during a state of emergency, 31 August 2001 (adopted at 1950th meeting on 24 July 2001), CCPR/C/21/Rev.1/Add.11.

⁵⁸ Article 4(3), ICCPR

⁵⁹ Ophelia Field, Legal And Protection Policy Research Series: Alternatives To Detention Of Asylum Seekers And Refugees, Protection Operations And Legal Advice Section (Polas) DIVISION OF International Protection Services United Nations High Commissioner For Refugees.

⁶⁰ ICESCR

⁶¹ This was reiterated by the Executive Committee in its Conclusion No. 82: “... the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.”

⁶² Matthew C. R. Craven, *The International Covenant On Economic, Social And Cultural Rights: A Perspective On Its Development* 170, 173-74 (1995).

⁶³ Ryszard Cholewinski, “Economic And Social Rights Of Refugees And Asylum Seekers In Europe”, 14 Geo. Immigr. L.J. 709 1999-2000

which is immediate in nature.⁶⁴ It reads "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Article 2 (1) vests upon parties the requirement to take necessary steps "to the maximum of its available resources." In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁶⁵ The phrase in Article 2(1) "to the maximum of its available resources" was "intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance." "Deliberately retrogressive measures," such as, for example⁶⁶, the reduction of social assistance payments to asylum seekers and refugees, or a move away from cash support to support in kind, "would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."⁶⁷ We also see that the "non-discrimination" provision embodied in Article 2(2) of the ICESCR has immediate application.⁶⁸

A few economic and social rights enshrined in the ICESCR, such as the right to an adequate standard of living, which encompasses rights to adequate food and housing⁶⁹ and the right to social security,⁷⁰ have also been characterized as containing various levels of obligation, including the state obligation to "be the provider." Craig Scott argues that there is an "organic interdependence" between this right and the right to life in Article 6(1) ICCPR in that the latter can be interpreted to include the former.⁷¹ This interpretation generates an "implicit overlap" between the two provisions. Article 11 (1) reads, "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" and Article 9 reads, "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance". It is of importance to refugees and asylum seekers because, "Asylum seekers, refugees and displaced persons do not have the same opportunity as others to achieve an adequate standard of living on the basis of their own efforts. They therefore require, to a larger extent than the

⁶⁴ *Ibid.*

⁶⁵ General Comment 3, *The Nature of States Parties Obligations* (Art.2, para.1 of the Covenant), U.N. Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at para. 2, U.N. Doc. E/1991/23 (1991).

⁶⁶ Ryszard Cholewinski, "Economic And Social Rights Of Refugees And Asylum Seekers In Europe", 14 Geo. Immigr. L.J. 709 1999-2000

⁶⁷ *Justice, Immigration And Asylum: Human Rights Impact Assessment* 8-9 (1998).

⁶⁸ General Comment 3, *The Nature of States Parties Obligations* (Art.2, para.1 of the Covenant), U.N. Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at para. 2, U.N. Doc. E/1991/23 (1991).

⁶⁹ ICESCR, Article 11(1)

⁷⁰ ICESCR, Article 9

⁷¹ Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", 27 Osgoode Hall L.J. 769, 852-59 (1989) at 780-81

ordinary public, direct provisions, until conditions are established in which they can obtain their own entitlements".⁷² Article 9 in a narrow sense talks about social security.⁷³ According to Scheinin, Article 11(1) emphasizes, "social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate resources."⁷⁴ A right to social assistance is provided to those "lawfully within" the territories of a state under the European Social Charter⁷⁵, which is also applicable to asylum seekers.⁷⁶

CONCLUSION

The Refugee Convention is one of the cornerstones of the larger human rights system for protecting vulnerable persons and yet it is also a very narrow instrument, protecting a very specific group of persons. This duality is reflected in refugee protection generally where, on the one hand, states appear to believe in a moral, humanitarian imperative to protect individuals seeking refuge, yet, on the other hand, they are reluctant to permit entry to all those persons falling under their responsibility. When we consider the contemporary definition of refugee, and how customary international law may supplement the definition of refugee, we see this same division of interests. If we were motivated strictly by human-centered interests, we would find a broadening of the definition, although perhaps with limited state compliance. If we were motivated strictly by state-centered interests, we might find a narrowing of the definition, although perhaps abandoning desperate individuals truly in need.⁷⁷ The Refugee Convention has not been amended either explicitly or through practice to provide for a revised definition of refugee; however, customarily it is interpreted in an expansive fashion, relying heavily on its object and purpose. The qualification as a refugee may have been supplemented beyond the express terms of the Convention.⁷⁸

It has been argued that the definition of refugee does not exist under customary International law but only under treaty law.⁷⁹ Most scholars of international refugee law have concluded as much. In particular, as far as the European Union is concerned, Kay Hail bronner has concluded, "The assumption of an international legal obligation to grant protection to victims of war, civil war and general violence must still be considered as "wishful legal thinking".⁸⁰ Similarly, the American Society of International Law has concluded that there is no customary international law obliging states to provide protection to individuals who fall

⁷² Asbjorn Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in Economic, Social And Cultural Rights: A Textbook 89, 105 (Asbjom Eide et al. eds., 1995).

⁷³ Martin Scheinin, *The Right to Social Security*, In Economic, Social And Cultural Rights: A Textbook, at 159, 159.

⁷⁴ Ibid. at 163

⁷⁵ The European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35

⁷⁶ Committee Of Independent Experts, European Social Charter, Conclusions XII-4, at 62 (1996)

⁷⁷ William Thomas Worster, "The Evolving Definition of the Refugee In Contemporary International Law", 30 Berkeley J. Int'l L. 94, 2012

⁷⁸ Ibid.

⁷⁹ Memorandum from the U.N. Secretariat on Expulsion of Aliens, U.N. Doc.A/CN.4/565 (July 10, 2006) (citing The Movement of Persons across Borders, 23 Stud. Transnat'l L. Pol'y § 13.02, 100 (Louis B. Sohn & T. Buerenthal, eds., 1992)); Richard Plender, International Migration Law 393 (rev. 2d ed. 1988)).

⁸⁰ Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention? 13 (D. Bouteillet-Paquet ed., 2002); Pirrko Kourula, Broadening the Edges: Refugee Definition and International Protection Revisited 287 (1997).

outside the strict terms of the Refugee Convention.⁸¹ Hence we see that there is no strict uniformity with respect to the refugees. Apart from the Refugee Convention, other international legal instruments are required to be considered as well while dealing with refugees. We also see an increasing requirement to expand the definition of the term ‘refugee’ to include in its ambit the new developments and thereby a closer nexus with human rights.

⁸¹ Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, Thursday, April 18: Morning, Amer. Soc'y of Int'l L. Proc. Apr. 17-20, 1991, 90 Am. Soc'y Int'l L. Proc. 545.

JOINT VENTURES IN INDIA: A COMPARATIVE ANALYSIS WITH LAWS OF OTHER COUNTRIES AND REFORMS

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Joint Ventures are generally entered into by countries of more than one nation, to facilitate trade and exchange of services between them. India is a country which does not possess any specific law on Joint Ventures; therefore it places great reliance on other laws to draw out governing principles for Joint Ventures. Reliance is placed on Indian Partnership Act, Arbitration Act etc. However, every country has different laws for governing Joint Ventures. This paper aims to analyse the provisions of different countries regarding Joint Ventures and provide suitable remedies and suggestions which can be applied in Indian context.

Introduction

A Joint Venture (hereinafter JV) may be defined as a contractual agreement or a business relationship between two or more people for the purpose of executing a particular business undertaking. A person for this purpose can even be a corporate entity i.e. something just having a legal existence.¹ In a joint venture, all parties agree to share in the profits and losses of the enterprise. Despite this being a common practice in the corporate world today, joint ventures have never received a concrete definition.² The Hon'ble Supreme Court tried to define the term Joint Venture in the case of *Faqir Chand Gulati vs. Uppal Agencies Pvt. Ltd. and Anr.*,³ where it held that expression "joint venture" connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. Therefore, the use of the words 'joint venture' or 'collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses.

JV are everyday gaining importance due to the immense potential it provides to the parties involved. Establishing a JV with an ideal partner provides a fast way to bank upon the resources available with the other partner, and share each other's' capabilities, access new markets, strengthen position in the current markets, or diversify into new businesses. It also allows better exploitation of skills and strengths of an enterprise. Be it commercial, financial, technical, managerial, manufacturing, marketing or research skills.⁴ Further, Joint Ventures have contributed in keeping with the modern tempo, by the discovery and development of

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¹ Maharashtra Agricultural Universities Amendment Act, 2003, section 2(b), (India).

² Gvprel-Mee vs Government Of Andhra Pradesh, (2005) 5 A.L.D. 450 (India).

³ Faqir Chand Gulati vs. Uppal Agencies Pvt. Ltd. and Anr. III (2008) CPJ 48 (SC).

⁴ K.R. SAMPATH, LAW AND PROCEDURE ON CORPORATE RESTRUCTURE LEADING TO MERGERS, AMALGAMATIONS, TAKEOVERS, JOINT VENTURES LLPs AND CORPORATE RESTRUCTURE, 667, (7th e.d., 2011).

fissionable materials and the construction and operation of power reactors and atomic furnaces.⁵

Joint Ventures are witnessing a boom in India because it is a tough task for Indian companies to achieve expected levels of global presence with deficiencies in terms of product quality, technology, infrastructure and even management processes. Further, these deficiencies can be negated by way of an alliance with a foreign counterpart who is strategically fit. Alliances between those possessing varying expertise and capabilities in technology, marketing and distribution, etc. are necessary to meet the growing needs of modern business.

The test to determine whether a contractual relation amounts to a joint venture was propounded by the Hon'ble Court in the case of *New Horizons Ltd. v. Union of India*,⁶ wherein it was held that when apart from having equity participation, the two parties pool together their resources and all the constituents of the company, contribute assets, share risks and have a community of interest, it amounts to a joint venture.

Types of Joint Ventures-

Joint ventures are classified into two major fields' i.e.

- a) Equity Joint Ventures
- b) Contractual Joint Ventures

Equity Joint Ventures are the one wherein two or more partners create a Joint Venture and each one owns a share of equity.⁷ Equity joint ventures are most common for ventures involving foreign investment in developing countries. They occasionally involve participation of partners in the equity capital of an existing company, but much more frequently in the incorporation of a new company. The latter may be the more practicable method, because it is often more convenient to obtain new documents of incorporation with the desired provisions than to adapt an existing structure to the new way of doing business.⁸

Contractual joint ventures are often entered into in the countries where the law does not recognise the concept of private ownership of property i.e. countries with centrally planned economies.⁹ Due to their less permanent nature, contractual joint ventures are sometimes used as a preliminary to equity joint ventures i.e. in periods of engagement preceding the culmination of the Joint Company. In such a period Contractual arrangements can be made for the supply of capital, equipment, industrial property, technical assistance and know-how by the foreign partner to the Government or local partner in return for royalties, which may depend on production, sales, profits etc. However, despite being similar in various parameters there exists a basic difference amongst the two i.e. of the legal entity. An equity joint venture

⁵ Joint Ventures: Origin, Nature and Development by Walter H. E. Jaeger, American University Law Review, Vol. 9, (1960).

⁶ New Horizons Ltd. v. Union of India (1995) 1 S.C.C. 478 (India).

⁷ East India Hotels Limited and Anr. v. Union of India (UOI) and Anr. (2008) 104 D.R.J. 430 (India).

⁸ Industrial Joint-Venture Agreements with Specimen Clauses of Model Forms, cl. 2.

⁹ *Ibid*

creates a separate legal entity for the parties to it, like the Cipla and BioFarm joint venture. Whereas under a contractual joint venture a separate legal entity isn't set up.

Joint Venture and Partnership-

Joint venture and partnership might appear similar in nature but despite the similar appearance both have major difference too. A Joint venture is an agreement wherein two companies come together, for a specific purpose. Whereas, a partnership is wherein two or more individuals come together to enter into a venture to earn profits. Second, the major purpose of a Partnership is to earn profits whereas it is not the case in Joint Ventures as there it is not just the profit that binds the people.¹⁰ A partnership is generally for many years or as the going concern principal says it is expected to go on for eternity. But a Joint Venture exists generally for specific years only. Further, under a Partnership if one of the partners resigns or quits, the firm is reconstituted,¹¹ whereas under a Joint Venture, the venture still continues.¹² The last major difference the two have, is of the situations to follow after the dissolution of the entity. A registered partnership firm under Partnership Act may still have certain obligations, rights and liabilities even after dissolution by virtue of Section 45¹³, 46¹⁴, and 47¹⁵ whereas the contrary is in the case of joint ventures.

Joint Ventures in India

Joint Venture agreements are very broad in nature and involve various components in them. However, the core elements of how Joint Ventures operate in India are discussed below.

Rights of Parties to Joint Ventures-

The Hon'ble Court in *Asia Foundations and Constructions Ltd. v. State of Gujarat*,¹⁶ held that the rights, duties and liabilities of joint ventures are similar or analogous to those which govern the corresponding rights, duties and liabilities of a partner. Therefore, unless expressly laid down, an analogy for the same has to be drawn from the Indian Partnership Act.

Section 17 of Indian Partnership Act, lays down two situations regarding rights and duties of a partner i.e. after the change in a firm the mutual rights and duties of the partners remain the same as they were immediately before the change. Second, if the firm after the expiration of the final term the firm continues to carry on its functions, the rights and duties remain same

¹⁰ Robert Wallace, Strategic Partnership: An Entrepreneur's Guide to Joint Ventures and Alliances 89 (1st e.d., 2004).

¹¹ Indian Partnership Act, 1932, Section 32(2) (India).

¹² Chahal Engg and Construction Co. v. State of Gujarat (1987) 1 Comp. LJ 1 (India)

¹³ Indian Partnership Act, 1932, Section 45 (India).

¹⁴ Indian Partnership Act, 1932, Section 46 (India).

¹⁵ Indian Partnership Act, 1932, Section 47, (India).

¹⁶ *Ibid.*

as they were before such expiry.¹⁷ However, what needs to be kept in mind is that there should not be anything more than a want of evidence to the contrary.¹⁸

Dissolution of a Joint Ventures-

In India, the common customary practice provides for dissolution by 3 major ways which are-

- a) Differences between mutual evaluations and actual situations:

The first situation wherein a Joint Venture can be dissolved is wherein the evaluation of a partner at the time of negotiation goes wrong. It is a situation wherein the ability of a partner company is considerably lower than that assumed at the time of negotiating a joint venture. Another, situation being wherein the partner is unable to obtain a strong commitment (degree of involvement) from a partner leading to waning of the enthusiasm for operating a joint venture.

- b) Change in the positioning of a joint venture business:

Another way wherein a Joint Venture can be terminated is when the position of the business undergoes a major change. A situation wherein an Indian operation is turned into a manufacturing base for the global market. In such case the Joint Venture can be terminated as it is going against the core purpose for its establishment.

Further, another reason might be that with declining profit, the business might become a non-core business as compared to other businesses, therefore resulting in the importance of the said joint venture business declining. Therefore, a company might want to reduce its commitment by selling its equity stake.

- c) Disagreement over management policy¹⁹:

A Joint Venture comes to end in cases wherein the Joint Venture undergoes a major change in its management policy. One such change is a change of a partner's president. In situations wherein the President of a partner company changes and the new President is inclined to seek accomplishments in a short time in terms of the profitability of joint venture business. Further, the new president regards the joint venture business as non-core business.

Another, method wherein Joint Venture can come to an end is due to a disagreement over strategies. For example, if the company wants to maintain existing prices by introducing new products and a partner company wants to sell existing products at lower prices. Another situation is where a partner company becomes a competitor or a partner company starts manufacturing products at its factories that compete with a company's products.

FDI and Joint Ventures-

¹⁷ Indian Partnership Act, 1932, Section 17(b) (India).

¹⁸ POLLOCK AND MULLAH, THE INDIAN PARTNERSHIP ACT, 108, (7th ed., 2011).

¹⁹ Issues Related to the Negotiation and Establishment of Joint Ventures with Indian Companies by Wataru Kadobayashi and others., Nomura Research Institute, NRI Paper No. 189 (2013).

Joint Ventures are a kind of arrangements which are followed both domestically and internationally by countries. India follows a very participative and encouraging Foreign Investment policy. Under the said policy an investor can start a Joint Venture in India by two means, they being-

a) Automatic Route:

The first situation wherein a foreign company can invest in India is using the automatic route. Under such route FDI is allowed without prior approval either of the Government or the Reserve Bank of India in all activities/sectors as specified in the consolidated FDI Policy, issued by the Government of India from time to time. Here, the only requirement is a notification to the concerned regional office of RBI within 30 days of receipt of inward remittances.²⁰

b) Government Route:

In cases where the automatic route is not allowed then in those cases prior approval of the Foreign Investment Promotion Board is required. This route includes restricted sectors wherein a previous Joint Venture in the same or allied field existed. Further, any company which has received FDI either under the Automatic route or the Government route is required to comply with provisions of the FDI policy including reporting the FDI to the Reserve Bank.

Dispute Resolution in India-

A dispute is defined as an assertion of a claim by one party and denial by the other.²¹ Further, to ascertain whether a dispute has arisen or not the facts and circumstances of the case need to be determined from.²² While entering into a Joint Venture the parties reasonable expect disputes to arise, in areas like legal contractual relationships concerning rights and obligations of the parties, funding of joint ventures, new investments, exploring new markets, business reorganisation, appointment of managerial personnel etc.²³ While negotiating and formulating the terms of the JV the parties may provide various means of dispute resolution like mutual negotiation, mediation, arbitration etc.

Arbitration-

Arbitration law in India is mentioned under the Arbitration and Conciliation Act 1996. Since, there is no specific law for Joint Ventures in India, a great reliance is placed on the Arbitration law with respect to dispute resolution. Regarding the jurisdiction of an arbitrator under the law it is said that dispute should be the subject of arbitration agreement i.e. the

²⁰ *Foreign Investments in India*, (Mar. 5, 2015, 8:30:45 pm),
<http://www.rbi.org.in/scripts/FAQView.aspx?Id=26>

²¹ *Gujarat State Co-op Land Development Bank v. PR Mankad*, (1979) 3 S.C.C. 123 (India).

²² *Inder Singh Rekhi v. Delhi Development Authority* (1988) 2 S.C.C. 338 (India).

²³ *SETH DUA AND ASSOCIATES, JOINT VENTURES AND MERGERS ACQUISITIONS IN INDIA*, 184, (1st e.d., 2006).

authority of the arbitrators to decide the dispute in question which means that the dispute should be arbitrable. If it is not, then it cannot be arbitrated.²⁴

Further, the governing law of the arbitration is same as the governing law of the contract. The parties have the freedom to choose which ever law they want themselves to abide to. The Hon'ble Court has held that if the parties have specifically chosen the law governing the contract, the arbitration proceedings will continue in that manner, however if such is not the case then the procedural aspect of the conduct of arbitration will be determined by the law of the place.²⁵ Another option the parties have is to choose International Commerce Chamber Rules to govern their conduct and actions.

Conciliation-

Another method of dispute resolution followed in Joint Ventures in India is Conciliation. Conciliation is a process wherein the conciliator does not give a decision but encourages the parties to come to a settlement themselves. The judgement of the conciliator is not binding but persuasive unlike the arbitrator.

Joint ventures in other Countries-

The definition of the term Joint Venture varies from country to country. Canada, defines it as an association of two or more persons or entities, where the relationship among those associated persons or entities does not, under the laws in force in Canada, constitute a corporation, a partnership or a trust and where, in the case of an investment to which this Act applies, all the undivided ownership interests in the assets of the Canadian business or in the voting interests of the entity that is the subject of the investment are or will be owned by all the persons or entities that are so associated.²⁶ Further, to understand the concept of Joint Venture an analysis has been drawn by comparing laws on Joint Ventures of three countries which are-

England:

England is a country that is a part of the United Kingdom.²⁷ The Joint Venture policy of England is very different from that of India. The first major difference which the two countries have is that of a Partnership and a Joint Venture.

Unlike India, England does not differentiate between a Partnership and a JV. Under, the England policies, a Partnership is one form of entering a Joint Venture. Therefore, a JV in England can be set up by various means they being-

²⁴ Haryana Telecom Ltd. v. Sterlite Industries (1999) 5 S.C.C. 688 (India).

²⁵ National Thermal Power Corpn v. The Singer Company A.I.R. 1993 SC 998 (India).

²⁶ Investment Canada Act, Section 3(c) (Canada). Available at <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home>.

²⁷ *United Kingdom Statistics*, (Mar. 6, 2015, 7:30:49)
statistics.gov.uk

- a) A limited liability company;
- b) A partnership organised under the Partnership Act 1890 (a "general partnership");
- c) A limited partnership organised under the Limited Partnerships Act
- d) A limited liability partnership organised under the Limited Liability Partnerships Act
- e) A European Economic Interest Grouping ("EEIG");
- f) An unlimited company;
- g) An overseas entity.²⁸

One major difference that emerges out of this comparison is that it would not be wrong to say that the law governing Joint Ventures in Britain, is in a way a codified one due to the ways that it propounds. Due to the existence of various Partnership Acts indirectly there do exists law on the said matter.

Further, General Partnership under the Britain laws has unlimited liability which is just like the Indian laws wherein the liability is unlimited unless it is a Limited Liability Partnership.

Further, Joint Venture allows that when there has been a change of control of a party, the Joint Venture can be terminated.

USA-

The laws of USA are very similar to the laws of the UK as they allow a Joint Venture as a Partnership too. The history behind such a reason is that earlier Domestic and Foreign Partnerships were different entities.²⁹ The former was subject to Partnership Act and the latter to the section 1491 on excise tax. Further, faced with a United States company's desire to use a partnership as a joint venture vehicle, the Joint Venture via Partnership was introduced.

In USA, the dissolution and termination of a joint venture are governed by partnership law relating to dissolution and termination. If there is any written agreement made by the joint venture parties to the contrary, then such written agreement would determine a joint venture's dissolution.³⁰

A joint venture can be terminated in the following situations:

- if there is an agreement between joint venture parties to terminate a joint venture³¹
- if it is apparent that a joint venture is not profitable³²
- On death of a joint venture member if service offered by such joint venture member cannot be substituted by another person.

²⁸ Joint Ventures in England and Wales by Ashurst, International Investor Series No. 6, (2014).

²⁹ LOWELL, UNITED STATES INTERNATIONAL TAXATION: AGREEMENTS, CHECKLISTS, AND COMMENTARY, 1 (12th e.d., 2011).

³⁰ Costa v. Borges, 145 Idaho 353 (Idaho 2008).

³¹ N. River Ins. Co. v. Spain Oil Corp., 135 Misc. 480 (N.Y. Sup. Ct. 1987).

³² Gundry v. Scrimger, 235 Mich. 62 (Mich. 1926).

Further, a joint venture can also be dissolved by judicial dissolution. A court can grant a judicial dissolution on the following grounds- Under the Act, a court can grant a judicial dissolution on the following grounds,³³

- if a joint venture member is shown to be of unsound mind;
- if there is disharmony and dissension among parties to a joint venture;
- if a joint venture member becomes in any other way incapable of performing his/her part of a joint venture contract;
- if a joint venture member has been guilty of any conduct that may in turn be prejudicial to a joint venture business;
- if a joint venture member wilfully or persistently commits a breach of a joint venture agreement;
- if a joint venture business can only be carried on at a loss and
- on other circumstances that render a dissolution equitable.

But the general trend that has been witnessed in cases of termination and dissolution is negative. The courts in the past have never been inclined to dissolve a Joint Venture. In the International Chamber of Commerce Arbitration Award,³⁴ the arbitrator refused to dissolve the JV wherein it thought that such a dissolution would have an impact on the third parties. Similar was the situation in the case of *Best Floor Sanding Ltd v Skyer Australia Ltd*.³⁵

China-

International Joint Ventures in China also bear similarities with that of India. In China there are two types of Joint Ventures, which are-

- a) Equity Joint Ventures
- b) Cooperative Joint Ventures

Under the Equity JV, prior approval of the China Government is required which makes it like the Government Route of entry in India. Further, the Chinese Government only allows at least 25% of entire registered capital in form of cash, trade property rights etc. Further, the profits under Equity JV is shared according to the investments made by various stake holders.

However, under Cooperative JV no minimum foreign capital requirement exists and it includes not just monetary but also contribution of labour, technical know-how etc.³⁶

³³ BPR Group Ltd. P'ship v. Bendetson, 453 Mass. 853 (Mass. 2009).

³⁴ International Chamber of Commerce Arbitration Award no 11090, 2002.

³⁵ Best Floor Sanding Ltd v Skyer Australia Ltd, (1999) V.S.C 170 (U.S.A).

³⁶ *Investment in China*, (Mar.7, 2015, 6:30:23 pm)

Reforms

India is a country with very well defined norms and laws on almost every aspect. However, a grey area still remains i.e. Joint Ventures. India is a country that does not have any law on Joint Ventures. Therefore, the first and the most important reform that needs to be formulated is codifying a law for the Joint Ventures. Countries like England and USA despite not having a specific legislation for Joint Ventures rely on the Partnership Acts for solving disputes and queries as there Joint Ventures and Partnerships are not separate entities. However, in India though reliance is placed on Partnership Acts but it is not concrete as the two are different entities altogether.

Another reform can be with respect to Foreign Direct Investment i.e. the routes for the FDI. Despite, the Indian Foreign Policy being very participative and encouraging for the investors, a new policy with its reliance more on the automatic route should be formulated which will not only result in more investment and Joint Ventures but also will be less burdensome of a task. Further, the practicability and smooth functioning of this reform is contingent on the first reform of having a legislation. Having a legislation in the first place will enable the Government to keep a check on any bogus joint venture being formulated and will ensure that no frauds are committed.

Dispute Resolution is another area where India might need reformation, as Arbitration seems to be the only popular recourse that seems available. Conciliation as a dispute resolution mechanism should be promoted more by the companies as it is a less cumbersome and cost effective mechanism wherein it is just the parties deciding what is best for them. Such a mechanism allows a decision which is best suited for the parties as they are the judge in the cause. Government can set up their independent dispute conciliators to benefit the investors so as to garner more investments.

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HUMAN RIGHTS OF TRANSGENDER COMMUNITY: TRANSCENDING SPACE OF TRANSGENDER LAW

Ragisha Soni* & Siddharth A. Trivedi**

Using “Transgender” as a noun is never acceptable; it’s an adjective. For example, a woman who was assigned male at birth and later transitioned is a transgender woman not “a transgender,” and not a “transgendered” woman. “Transgendered” is not a word. Likewise, we were not “born as men” or “born as women.” We were born as babies.

This paper discuss about their right to have “Right to livelihood”, which includes health care, housing, vocational education employment and right to privacy, so they can live with physical integrity. Transgender people in India are frequently publicly ridiculed and excluded from general society. Many transgender have no option but to either beg or engage in sex work. In the landmark judgment of NALSA v. Union of India the apex court ruled by providing third gender as well as special benefit in education and jobs.

The word “Human Right” does not see gender but provide right to “Humans”. India is a secular country. “We the People” accept, respect and live in different type of culture, but we are excluding them from the economy, society, family and also political participation. On one hand we find their blessing special but rest of the time we consider them aliens. Section 375 of IPC should be amended and comprehensive sexual assault law should be enacted. The failure to investigate can itself give rise to a separate breach of international law. There should be “Right to Livelihood” for this people.

Keywords: Sexual assault law, Education, Jobs, Humans, Right to Privacy, Right to basic Livelihood.

Introduction

Venus to Mars: “I’m afraid, Mars, that I may have fallen in love with you. Mars doesn’t know what to say, so Venus says it for him: I’m a man. I am a man having woman qualities. And that’s exactly where I’m supposed to be. It’s the criss-cross that I’ve come to know. I don’t want the surgery. I don’t want to undo what God has given me. I know how beautiful I am.”

Transgender around the world face the violence, torture and inequality for who they are and whom they love. No one is born LGBT but it is our internal aspect which should never lead to harm of dignity of any human being. There should be proper law and policies which protect the rights of this people. The Yogyakarta Principles on the Application of

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International Human Rights Law in Relation to Sexual Orientation and Gender Identity developed in 2006 by a group of LGBT experts in Yogyakarta.¹

The key issue this gender face is **Right to livelihood**, which includes health care, housing, vocational education employment and **Right to privacy**. In India, transgender people are frequently publicly ridiculed and excluded from general society. Many transgender have no option but to either beg or engage in sex work. All human being are born free and equality before law is entitled by everyone.

“The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgender) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.”²

Transgender Rights

Right to Livelihood

India has achieved significant growth and development as it has improved on crucial human development indices such as levels of literacy, education and health. Among these, the transgender community, in the country is seriously lagging behind on human development index including education. Majority of the population is uneducated or undereducated, so they find themselves excluded in participating in social, cultural, political and economic activities. Because of this transgender community faces poverty, discrimination, violence as these are some of the important factors which can be attributed to the poor participation of transgender persons in educational activities.

Transgender are deprived of social and cultural participation, it is shocking to know that their family and society are shamed from them as a result they are the people who suffers and gets restricted to excess right to education, health services and public spaces, they even restricted rights to marry, right to contest elections, right to vote, employment and livelihood opportunities. In legal aspect we can say from Article 14, 15, 16 and 21 of the Constitution of India. For fulfilling their primary needs Trans forces themselves for sex work .We should protest against a society that forces them to violate stigma and oppression.

Lack of opportunity and education limits their proper livelihood facilities. Lack of livelihood is the key option for any transgender to get into the sex work, which again increases the health-risk. If employment opportunities are the community has option to live their livelihood.

¹ <http://www.amnestyusa.org/our-work/issues/lgbt-rights/about-lgbt-human-rights>

² “Rights of Transgender People – Sensitising Officers to Provide Access to Justice” by Hon’ble Mr. Justice P. Sathasivam, then Judge, Supreme Court of India (presently Chief Justice)

"At regular places of employment people harass and tease us. But in sex work, it's give and take. I give my body, and the client gives me money. "³

27 year old transgender from Madhurai

The government efforts is remarkable in providing free compulsory education to children, as it has now become constitutional obligation for the state to provide free education this all sections are commonly applicable even transgender can take advantage of it. Also, reservation for transgender in government jobs as well as private companies can be made applicable. Recruiting transgender in certain sectors like traffic police, health worker, and lecturer will enhance the livelihood as well as will make them feel as part of the society. The best illustration is the '***Seat Belt Gang***'.

Right to Privacy

The Constitution of India under Article 21:-

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

The article starts with the word "No person" but still there is discrimination among various gender and class of people. All human have right to privacy. There are many thing human needs to keep private.

Right to choose ones gender is an integral to the right of life and liberty under Article 21 of Indian constitution and that is all private. The spirit of the constitution is to provide equal opportunity to every citizen irrespective of caste, gender, or religion.

Gerety⁴ defines privacy as "an autonomy or control over the intimacies of personal identity".

Article 12: Universal Declaration of Human Rights (1948):

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Privacy is a broader terms means even they even should not be bound disclose their transgender status. In Kharak Singh v. State of U.P⁵ where it was held by Supreme Court that right privacy is a part of right of protection of life and liberty. In Naz Foundation Case, the High Court of Delhi gave the landmark decision on consensual homosexuality, where S. 377 IPC and Articles 14, 19 & 21 were examined. Right to privacy held to protect a "*private space in which man may become and remain himself*".

³ Intersectionality Framework to track Budgets for Transgender Communities in Tamil Nadu by Praxis May 2013

⁴ Gerety, fn 2 at 236, http://www.ebc-india.com/lawyer/articles/2006_3_31.htm

⁵ AIR 1963 SC 1295

Article 17 of the International Covenant on Civil and Political Rights, 1966 states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation and that everyone has the right to protection of law against such interference or attacks.⁶

The Supreme Court of the State of Illinois in the *City of Chicago v. Wilson et al*⁷ struck down the municipal law prohibiting cross-dressing, and held as follows:

"The notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with "values of privacy, self-identity, autonomy and personal integrity that the Constitution was designed to protect."

Lacking the privacy of home, the gender many times this people are mostly prone to attack not only by the police but also by the local goondas who take the advantage of the vulnerability. It appears that the police instead investigating in the matter, they extort, assault and wrongful confine them.

Exclusions

Lack of Opportunity

The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. Equality plays a very keen role in providing equal opportunities to the citizen of the country. Article 16 speaks '*Equality of opportunity in matters of public employment.*'

The concept of Justice, social, economic and political; Equality of status and of opportunity for the individual has been incorporated in the Preamble which the basic essential right of the entire citizen. Opportunity allows every citizen to reach the highest level of its positional. The court while recognizing the third center has said that transgender are also citizens of India and they must also be provided equal opportunity as providing equal opportunity is the spirit of Indian constitution which is equally duty of the states directed under Article 42⁸ of Indian constitution.

Lack of education and opportunity does not allow them to get off the drainages of sex worker. Due to social discrimination they are forced to get indulge in the sex work.

The transgender community experts also argue that there is an urgent need for addressing the community concerns in education sector in a holistic way—that implies giving attention to the Four core issue of *Access*⁹, *Equity*¹⁰, *Enabling Environment*¹¹ and *Employment*¹². These four

⁶ Nalsar v. UOI

⁷ 75 Ill.2d 525 (1978)

⁸ The State to make provision for ensuring just and humane conditions

⁹ Accessibility indicates that the educational system is non- discriminatory and accessible to all, and that positive steps are taken to include the transgender persons.

pillars are the bases for getting the opportunity in any sector to get employed. Lack of education and social force them to survive in worst economic condition. Providing awareness, vocational skill and basic education will help them to get equal wage job and exploit the opportunities.

According to the World Policy Institute implementation of new law is solely lacking, preventing hijaras from getting driver's license and enjoying social welfare.¹³ The United Nations Development Program has also criticized India for failing to provide Hirjas with equal job and educational opportunities.¹⁴

Social Exclusion and Health Issue

In the 2004 Joint Report on Social Inclusion, the European Commission and European Council defined social exclusion as a "process whereby certain individuals are pushed to the edge of society and prevented from participating fully by virtue of their poverty, or lack of basic competencies and lifelong learning opportunities, or as a result of discrimination".¹⁵

The HIV Sentinel Surveillance (HSS) for 2010–2011 found that transgender people had the highest HIV prevalence among all surveyed populations in the country, with 8.8% estimated HIV prevalence nationally, compared with 0.3% among the general population. Transgender population lives on the extreme margin.¹⁶ This people demonstrate high rate of diseases like HIV, Mental stress, Gender Dysphoria etc. which can hardly be curried. Globally an estimated 19% of the women are living in HIV.¹⁷

Legal identity has provided relief to this people but still society is pedantic towards them and today also society envisage this people as in humans which end up with lethal consequences. This is *classism*, which is *racisms cousin*. It is very important to be accepted who we are, and we are all humans. There should be no limits for these people; there life should be beyond the core value of gender identity. There is no doubt to the point that all the transgender feels them socially excluded or oppressed.

They are excluded from civil rights like getting married and to the parenthood. Relationship with the family faces difficulties even with their parents. Society still is living in

¹⁰ Equity looks into the dimensions of disadvantage, social exclusion, gender disparity, and special needs for marginalized section like Transgender persons and other neglected groups. It focuses on gaps in enrolment, infrastructural provisioning, management, and governance issues social groups (teachers, students), training, and motivation and so on.

¹¹ Enabling Environment refers to supportive environment that harmonize policies with laws, reduce harassment, violence, stigma, remove structural barriers to the use of services.

¹² Approach Paper on Education and Employment opportunities & Challenges for Transgender, National Expert Committee on Issues of Trans gender Persons Ministry of Social Justice and Empowerment, Government of India.

¹³ <http://www.worldpolicy.org/blog/2014/01/29/hijras-battle-equality>

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¹⁶ <http://www.unaids.org/en/resources/presscentre/featurestories/2014/may/20140516india>

¹⁷ GAT Report 2014

Transphobia. Transphobia, defined here as the fear of and stigmatization of transgender people, is at the root of the problems that many transgender people experience. This occurs at the individual level, because most people are afraid of people who are 'different', or gender ambiguous, particularly when this is linked with sexuality.¹⁸

International law on Tran respect

In the **European Union**, a 1996 decision of the European Court of Justice in *P v S and Cornwall County Council*¹⁹ provided protections from employment discrimination related to "gender reassignment." The **United Kingdom** formalized this EU decision when it passed the 1999 Sex Discrimination Regulations. This law provides protections for transgender people "intending to undergo, undergoing or having undergone gender reassignment," and applies to any stage of employment. The European Court of Human Rights has continued to uphold and require protections for transgender people, and both the U.K. and **Spain** also have laws that allow transgender people to change their name and gender on official documents without needing to undergo surgery.

Also Article 21 in the **Charter of Fundamental Rights of the European Union** states that discrimination on grounds of sexual orientation is prohibited. Outside of Europe, countries like South Africa and many states and territories of Australia also prohibit discrimination against transgender people. Businesses that operate in these countries are prohibited, and could be held liable for, discrimination against or harassment of transgender employees.²⁰

The Yogyakarta Principles is a document drafted by an international group of legal experts who met in Yogyakarta, Indonesia in 2006 under the guidance of the International Commission of Jurists and the International Service for Human Rights. The Principles, launched in 2007, bring together in one document and affirm binding international human rights legal standards applicable to issues of sexual orientation and gender identity.²¹

In recent years, many countries have started putting their efforts to strengthen human right protection for transgender people. Except India in other countries new laws has started adopting like banning of discrimination in the society, making easy for transgender individuals to obtain official documents that reflect their preferred gender. In India it is difficult for transgender to recognize their position in society, law is helping transgender to have their identity in society but meanwhile our Indian society is not ready to accept transgender as a third gender. In the United States, international transgender issues are rapidly evolving. Even there is a seat for transgender in parliament.

Some authors' view, which International law requires to take in order to safeguard their rights of transgender people:

¹⁸ <http://www.gender.org.uk/gendys/2001/13surya.htm>

¹⁹ Case C-13/94, 1996 ECR

²⁰ <http://www.hrc.org/resources/entry/international-laws-protecting-transgender-workers>

²¹ Global Commission on HIV & Law, UNDP (HIV, Health & Development) 2014

- To protect them from torture and cruel inhuman treatment done by the society, provide a perfect system for victims.
- To ensure not to detained transgender on the basis of their sexual orientation or gender identity and are not subjected to any degrading physical examinations intended to determine their sexual orientation.
- To provide education and training to prevent discrimination of transgender from the society.
- To safeguard freedom of expression, association and peaceful assembly for all transgender people.

Conclusion

Transgender suffer social banishment from the society. It's a serious issue that we had created and the one that we can, together, fight against. Our society needs to know that transgender aren't people to be afraid of, or people to be looked down upon. We, as a human society, should be accommodating, not just in letter but also in spirit, to these people, to a world where they too belong, by not just granting them a legal recognition, but more importantly, a social one as well. More than 60% of the transgender people have thought about committing suicide for non-acceptance and discrimination in family and the society. I think problem with our society is that we are obsessed with merging things. We want to categorize things in simple order like in case of gender we try to fit all humans in two category like male and female. But truth is that all these categories are human constructed so why can't we broaden our view by recognizing them. It's nice to see that transgender getting some respect. In a country where their only livelihood is in making fools of themselves, and forceful begging, the very fact that they are shown as a medium of boon and blessings is beautiful. For all who call themselves modern and forward, it is time to start discriminating them. They are human beings and deserve to be treated with respect like any other human being. When we are posing as a democracy with theories of equality for all, than transgender also has right to enjoy their gender as everyone is *Born Free and Equal*.

HUMAN TRAFFICKING: THEY ARE NOT FOR SALE

Priyank Kumar Saxena*

Human Rights are one of the most serious organized crimes of the day, transcending cultures, geography and time. Trafficking in human beings is a global phenomenon that has gained momentum in recent years. It is the modern equivalent of slavery. Human trafficking is the third form of organized crime after arms trafficking and drugs (UNODC, 2000). No wonder, vulnerable sections have become more prone to trafficking. The series of incidents reported in different parts of the country, where thousands of children remain untraced, is a symptom of the serious dimension of trafficking. This research aims to provide an analytical framework for the design of more effective laws against trafficking in human beings. The paper in the first place, examines the human trafficking operations in India and the efforts of the Indian government, nongovernmental organizations, and international organizations to put an end to trafficking by prosecuting traffickers and providing assistance to the victims of trafficking. The second section examines the causes of human trafficking that make India both a source and destination of human trafficking, as it continues to grow globally. There is a need to empower law enforcement agencies, including the police, prosecutors, judicial, correctional administrators, development directors and the social activists and the media so that they are fully empowered with knowledge, skills and the right attitude. The legal protection regimes human rights and dignity of women and children in the Indian context and the efforts that the government should take to eradicate this evil are suggested. This research is a purely theoretical work and consists of a simple search to find a particular statement of law or a more complex analysis and depth of legal reasoning.

Keyword: Human trafficking, Prostitution, Children, Labour, Poverty

Introduction

Trafficking in women and children is the most abominable human rights violation. Perhaps not many crimes are as horrific as trade in human misery. Human rights that are guaranteed by the Constitution of India are inalienable, non-negotiable and universal. Trafficking in women and children is a violation of several human rights, including the right to life, the right to freedom and human dignity, and security of person, the right to freedom from torture or cruel, inhuman or degrading treatment, the right to a home and family, the right to education and adequate employment, the right to health care and everything that makes for a decent life.

A detailed definition of trafficking is available in the Goa Children's Act 2003. Though it is focused on child trafficking, the definition is comprehensive. Under section 2 (z), "*child trafficking*" means "*the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power*

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or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise”.

Trafficking in women and children is increasing. And yet, redressed mechanisms are woefully inadequate and the way several governmental agencies have addressed this serious violation of human rights has left much be desired. This dichotomy requires a deep understanding of the dimensions of trafficking in India as well as the need to create a database of authentic data, helping to design appropriate measures to protect human rights more vigorously.

The investigation revealed the multidimensional nature of the problem, loopholes, and gaps in law enforcement, the involvement of organized mafia and the agony of the victims. Also it revealed that India serves as a source, transit and destination, where thousands of women and children are exploited every day. It also reveals that trafficking network is efficient coordination of what appears to be a fragmented process.

The three elements are clearly involved: firstly an intended action, secondly the means and finally the purposes. Therefore, if a person is trafficked or not is indicated by whether if he or she has been subjected to the means mentioned above.

The common understanding of trafficking as something like ‘prostitution’ was one of the main reasons for violations of human rights inherent to trafficking were never understood. The complexity of the phenomenon, its multidimensional character, its rapid spread and the confusion surrounding the concept made the need for deeper understanding of trafficking a priority. The reasons for their persistence and proliferation were not very clear. Therefore, there is an urgent need for greater understanding of the various aspects.

There was a strong indication of the available information that women and children were becoming vulnerable to trafficking because they were not able to survive with dignity for lack of livelihood options. Lack of awareness of human rights, economic and social private people at the grassroots level have become easy to trade trafficking. Migration populations have become more vulnerable to exploitation by traffickers. The fact that despite this harsh reality, such grave violations of human rights remains a low priority area of law enforcement, make it imperative that this area need to be investigated.

Human trafficking differs from people smuggling, which involves asking a person voluntarily or hiring another person to smuggle them across an international border, usually because the person smuggling was refused entry into a country through legal channels. Although illegal, there can be no deception or coercion. After the entry into the country and on arrival at their final destination, the smuggled person is usually free to find their own way. According to the International Centre for Migration Policy Development (ICMPD), human smuggling is a violation of national immigration laws of the destination country. The victims of trafficking are held against their will through acts of coercion, and forced to work or provide services to the trafficker or others. Labour or services may include something bonded labour or forced commercial sexual exploitation. Trafficking in human beings, on the other hand, is a crime

against a person because of the violation of victims' rights through coercion and exploitation. Unlike most cases of people smuggling, victims of human trafficking are not allowed to leave for their destination.

The most common form of human trafficking that results in bondage is the recruitment and transportation of persons in the international sex industry. Sexual slavery involves men and women, adults and children, and is about 58 percent of all trafficking activities. It consists of various types of servitude, including forced prostitution, pornography, child sex rings, and occupations related to sexuality such as nude dancing and modelling. Forced prostitution is a very old form of slavery, and recruiting in this way of life is often a booming business for commercial sex providers. Victims of sexual slavery are often manipulated to believe they are relocated to work in legitimate forms of employment. Those who enter the sex industry as prostitutes are exposed to inhuman conditions and life-threatening, especially with the prevalence of HIV / AIDS. In addition, some countries, including India, Nepal, and Ghana, have a form of human trafficking as a known ritual (religion-based) Slavery, in which young girls are provided as sex slaves to atone for the family members of sins. Around, 40 per cent of the persons investigated for trafficking in persons in India were females¹.

Children are often sold or sent to areas with the promise of a better life but face various forms of exploitation. Domestic servitude places children 'extra' (children too big families) in domestic service, often for extended periods of time. Other children are trafficked in entertainment industry and often forced sex work in small-scale cottage industries, manufacturing operations, and they are often called to work for excessive periods in extremely hazardous working conditions and little or even no pay. Sometimes they become "street children" and are used for prostitution, theft, begging or drug dealing. Children are sometimes trafficked into military service as soldiers and armed combat experience at a very young age.

Another recent and very controversial event involving human trafficking is kidnapping or deceit resulting in the involuntary removal of body organs for transplantation. For years, there have been reports from China that human organs were taken from executed prisoners without consent of family members and sold to transplant recipients in different countries. In addition, there were allegations that poor people sell organs such as kidneys for money or collateral. Although there were some human foetuses trafficking allegations for use in the cosmetics and medicine industry, these reports are not supported. In recent years the Internet has been used as a way for donors and recipients of organ trafficking.

International laws, like the Convention for Elimination of all Forms of Discrimination against Women (CEDAW), Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others², have brought a positive change in the definition of prostitution. Prostitution, now, is 'sexual exploitation or abuse of persons for commercial purposes'. Thus, hiring the body of any person is not considered as an offence but only the

¹ Global report on trafficking in persons, 2014

² <http://www.ohchr.org/Documents/ProfessionalInterest/traffickingpersons.pdf>.

exploitation of it. If a woman puts her own body for hire, for promiscuous sexual relationship and another person exploits her, she is not a prostitute. The person who exploits her is engaged in prostitution. However, due to aberration caused due to the inadvertence in not amending the corresponding provisions of the act, has caused a commotion, even in judicial interpretations.

Research Motive

The research motive is to provide an analytical framework for the design of more effective laws against trafficking in human beings. Human trafficking is a modern-day equivalent of slavery. It is a phenomenon that is growing and is now the third largest form of organized crime, after arms trafficking and drugs.³ Although the crime of trafficking in human beings for both under-recorded and under-reported, (TIP) report estimated at less than 600,000 to 800,000 women and children are trafficked across International borders each year, most of them were trafficked into commercial sexual exploitation.⁴

This article examines the causes of trafficking in human beings deep makes India, both a source and destination of trafficking in persons as it continues to grow globally. Human beings are trafficked for various services such as forced labour, removal of organs and sex. Women and children have been described as the most vulnerable to this curse mainly due to ignorance, harmful traditional and cultural practices, greed, poverty and discrimination. This paper is a piece of empirical research aimed at in-depth analysis of trafficking and the legal perspectives to it.

NCRB (National Crime Records Bureau) data in India shows the high incidence of trafficking in the states of Tamil Nadu, Andhra Pradesh, Karnataka, Maharashtra, Kerala and Delhi. This article examines the interrelationship between human rights and laws and attempts to understand aspects of human rights jurisprudence in India, where there is a disparity in each step. The legal protection regimes human rights and dignity of women and children in the Indian context and the efforts that the government should take to eradicate this evil are suggested.

Causes and Effects

The causes of trafficking are various and often vary from country to country. Trafficking is a complex phenomenon that is often motivated or influenced by social, economic, cultural and other factors. Many of these factors are specific to individual traffic models and the state in which they occur. There are, however, many factors that tend to be common to trafficking in general or found in a wide range of different regions, units or case. Trafficking in humans is done primarily to fulfil the purposes of forced labour, bonded labour, sex work and trafficking organs. Of these, human trafficking for sexual purposes known as sex trafficking,

³ United Nations Office on Drugs and Crime

⁴ US Department of Health and Human Services [US DHHS], Human trafficking fact sheet: Trafficking Victims Protection Act of 2000.

is the largest subset⁵. Trafficking in persons, a global phenomenon thrives on the weakness and vulnerability of persons. Vulnerability arises due to poor economic conditions, existence of gender-based violence and political instability (wars, internal disturbances, etc.). Conflict-ridden areas have actual war or the mere presence of military bases create demand. These areas are characterized by the presence of sex workers and child soldiers.

Economic and social circumstances like poverty and the social and cultural exclusion that poverty can cause, is a major problem. Income, poverty, unemployment, hunger, disease and illiteracy are rampant and widespread. Employment, education, vocational training and economic opportunities are in chronic shortage. As a result, school dropouts and unemployed youths are reduced to vulnerability and thereby become easy targets to human traffickers. More vulnerable are those who migrate from rural areas where opportunities are even rare to urban areas in search of employment for various opportunities.

The increased globalization of the world economy means clustering that high volumes of people, goods and services are crossing international borders, both legally and illegally. Operatives of organized crime internationally have positioned themselves to exploit such situations. People want to migrate for different reasons (to seek refuge or better employment opportunities) but are restricted for various reasons as immigration procedures have become more stringent. The decision to immigrate illegally puts them at an increased risk to be exploited. Therefore, the causes can be divided into three categories: economic, socio-cultural and legal and political.

We see that victims of trafficking are usually come from poor countries where the lack of employment opportunities and perpetual poverty are crucial issues. These people are easily convinced that they are given an opportunity to move forward in life. Another cause of trafficking is the removal of human organs or cheap labour used in plantations. Lack of literacy and awareness makes it impossible for victims to reasonably assess what they agree. Several reports show that girls from poor economic backgrounds are brought to metropolitan cities to be forced into prostitution.

Bonded labour is a treacherous way to capture free labour. A debt or a bond is used to control working poor and to keep them in service. Work is launched for repayment of this obligation. Thus, the worker receives no compensation for a very long period of time. If a worker is unable to pay his debts to his children are forced to work to the creditor for repayment. Thus, children are born and grow up in debt only to repay this debt. There is no possibility for them to escape as most of them are illiterate and unaware of their rights and relief organizations. They believe it is their duty to serve the customary owners of upper/employers castes. This servitude continues for generations. Physical and sexual abuses are common means threatening workers and forcing them to continue working. Rich people are usually the perpetrators of these atrocities. Children are more sensitive to debt bondage as they have no means of escape.

⁵ Hodge, D.R. (2008). Sexual trafficking in the United States: A domestic problem with transnational dimensions. *Social Work*, 53(2), 143-152

The societal preference for boys over girls and the general view of men being superior to women leads to the exploitation of women. The lack of satisfactory legislation, administrative apparatus is working properly and an effective judicial system are the most obvious causes of trafficking in human beings. Women are considered culturally subordinate to men in some societies. This is derogatory to women treating the root cause of men using culture as a tool to prove their superiority to oppress and exploit women. Many countries show huge disparities in the level of literacy, education opportunities, employment opportunities, inheritance and poverty. When it comes to issues like sex trafficking and prostitution of women are again oppressed and controlled by men to help them acquire capital. Men buy women in the same way they buy goods or labour, own and control every day.

In India, a large number of children are trafficked not only for sex "trade" but also for other forms of non-gender based operating that includes bondage of various types, such as industrial labour, domestic work, agricultural work, trade of begging organs and fake marriage. Child trafficking is increasing, and nearly 60% of trafficking victims are under 18 years old.

Therefore, the sectors most vulnerable to trafficking are poor, marginalized and uneducated people who are less aware that there is a danger of being trafficked. Many people simply do not have access to information and have not been made aware of the phenomenon. These people do not have access to information and technology or it is limited. People do not know the complex, specialized and organized crime of human trafficking nor are they aware of their rights and the various laws available to protect them. They therefore do not know whom to contact and where to go when the problem surfaces.

Laws for Trafficking

The Indian Constitution, the supreme law of the land from which all legislation originates guarantees equality and freedom of all citizens under the fundamental right. Traffic is explicitly prohibited, because it is opposed to these basic principles of the Constitution. Article 23 (1) of the Indian Constitution explicitly prohibits trafficking in human beings, beggar (a form of forced labour) and all other forms of forced labour. Furthermore, Article 24 prohibits the employment of children under 14 in factories, mines and other hazardous work. These constitutional guarantees have been implemented through several central and state laws.

The Immoral Traffic (Prevention) Act, 1956 (ITPA) [23], originally enacted as the '*Suppression of Immoral Traffic in Women and Girls Act, 1956*', is the most important part of legislation to prevent and combat trafficking in human beings in India. However, till date, its key aim has been to inhibit / abolish trafficking in women and girls with the intention of forcing them into prostitution as a means of earning a living. The provisions of ITPA is criminalizing people who acquire, traffic and gains from trade, but does not provide a clear definition of 'trafficking' per se in humans. India enacted the Immoral Traffic (Prevention) Act (ITPA) in 1956, to ratify the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (signed in New York on May 9, 1950).

Before ITPA, several state laws existed which were, however, neither sufficient nor uniform in their approach to the tip. Therefore, the need for strict and uniform central law of nature rose. The ITPA provisions provide punishment for immoral trafficking, punish traffickers, punish people keep a brothel (Section 3), punishing people who live off the income of a woman (Section 4), and provides measures being focused towards rehabilitation of sex workers. The emphasis is on punishment for owner's clients / pimps / brothels, etc., and not the commercial sex workers. It notes that in the case of *Sushila v. State of Tamil Nadu*⁶ the Madras High Court held that an instance of isolation of prostitution in a place not somewhere a brothel.

The Criminal Law (Amendment) Act 2013⁷, was approved by both houses of Parliament in March 2013. The amendment of the Indian Penal Code, Evidence Act and the Code of Criminal Procedure on related laws are expected to offense sex. Section 370A of the Indian Penal Code, which criminalizes trafficking, is added. The definition provided in the new section is not limited to prostitution, but also includes other forms of trafficking. This is evident in the use of the word 'exploitation' instead of 'prostitution' section. Thus, the scope of the section has been expanded. The strictest punishment has been under the amendment. A traffic offense shall be punished with imprisonment for a term of at least seven years but which may extend to ten years and shall also be liable to fine. When the offense involves trafficking more than one person, it shall be punished by imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and may also be subject to a fine.

Buying and selling of minors for prostitution i.e. trafficking is a serious offense under the Indian Penal Code (IPC) sections 372 (sale of minors for prostitution, etc.) and 373 (buying juvenile prostitution), and merits maximum punishment of 10 years. The same quantum of the sentence is granted under section 366 which deals with the abduction of a woman to compel her to marry or is forced to illicit sexual relations. Sections 342, 352, 360, 362, 365 368 and 506 deal with punishment for wrongful confinement, punishment for assault or criminal force otherwise than on grave provocation, removal of India, kidnapping legal guardianship, abduction, kidnapping or abducting with intent secretly and wrongfully confine person wrongly hide or detain the person and the penalty removed or removed for criminal intimidation respectively, and can be invoked in the case of human trafficking. The amendment in 2013 provides for a more severe penalty for minors. When a minor is victim, trafficker faces imprisonment of at least ten years to life.

In the case of *Prerana v. State of Maharashtra*⁸, the Bombay High Court said that cases relating to sex trafficking must be disposed of quickly. Trial courts should take the victim's statement in the month and complete the trial within six months of the charge sheet is filed. India has a fairly wide range of prohibition and protection laws against trafficking. Some of them are listed below.

⁶ 1982 Madras 702

⁷ <http://mha.nic.in/pdfs/TheCriminalLaw030413.pdf>.

⁸ (2003) 2 BOMLR 562

- Section 21 of the Indian Constitution guarantees the right to live in dignity.
- Article 23 of the Constitution guarantees the right against exploitation. It prohibits trafficking in human beings and forced labour, and makes it convenient punishable by law.
- Article 24 of the Constitution prohibits the employment of children under 14 in factories, mines and other hazardous employment.
- Under the Indian Penal Code, twenty-five provisions are related to trafficking. Important among these are:
 - Section 366A: purchase of an underage girl (under 18) of part of the country to another is punishable.
 - Section 366B: importing a girl under 21 is punishable.
 - Article 374 establishes penalties for any person to work against his will.

Conclusion

Human Trafficking touches every country and countless industries worldwide, and while there are many individuals and organisations working globally to combat this problem, it may take time before it is fully realized just how huge this issue is. The issues of human trafficking are an issue of humanities generally happens in backward countries where the poor are involved exploited by those who initially promised income if accepted to the workplace and according to the sector and the living and the narrowness needed. The poor often have complex financial problems, and this makes them willing to be placed anywhere without investigating the background and basic information that will be his work. Moreover, they are also the lack of knowledge, because ignorance of their rights and the importance of understanding how to defend themselves deceived because they are unable to leave when hit by this problem. At the same time also, they are the lack of exposure and are more easily deceived. Therefore, it measures the best solution is integral, especially the involvement of governments in the formulation and development of laws that can protect people from falling prey to problems. Moreover, the involvement of NGOs to help the government solve this problem is timely and appropriate because NGOs can perform the functions that cannot be undertaken by the Government. Projects where employing the use of contemporary artists to bring the attention of taboo subjects to the forefront of society, helps put pressure on governments to instil the better infrastructures and economic opportunities needed, along with making changes to laws, enabling the prosecution of perpetrators and provision of aid to victims.

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